PUBLIC HEARING

BEFORE THE SUPREME COURT RULES COMMITTEE

STATE OF ILLINOIS

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Michael A. Bilandic Building

160 North LaSalle Street

Room C-500

Chicago, Illinois

STENOGRAPHIC REPORT OF PROCEEDINGS

before the Illinois Supreme Court Rules Committee at the Michael A. Bilandic Building, 160 North LaSalle Street, Room C-500, Chicago, Illinois, the Hon. John C. Anderson, presiding.

Reported by: Tracy Jones, CSR, RPR, CLR

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ATTENDEES:

HON. JOHN C. ANDERSON, Chair

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HON. WILLIAM H. HOOKS

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STEVE H. KIM, ESQUIRE

JEROME E. McDONALD, ESQUIRE

MICHAEL I. ROTHSTEIN, ESQUIRE

STEVEN M. RUFFALO, ESQUIRE

JONATHAN M. THOMAS, ESQUIRE

STANLEY L. TUCKER, ESQUIRE

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(Call to order, 10:31 a.m.)

JUDGE ANDERSON: Good morning, everybody. This is the Supreme Court Rules Committee hearing. We're going to hear from a number of speakers this morning, and I wanted to let you know in advance that Justice Kilbride could not be here this morning. Unfortunately, the Peoria County State's Attorney, Jerry Brady, passed away, and he is at the services for Mr. Brady today.

Our first speaker is Seth Horvath from the Appellate Lawyers Association.

And you're going to comment on 16-08, 18-04, 18-12, and 19-02; is that right?

MR. HORVATH: That is correct, your Honor.

Thank you very much, and good morning to all of you, and thank you for allowing me to present this morning. I'm here on behalf of the Appellate Lawyers Association. We are always very enthusiastic to present our proposals to the Committee. And in the interest of time -- I only have ten minutes -- I'll give you a brief overview of the four proposals that are pending. Two of them have two different parts.

Proposal 16-08 involves proposed

modifications to Rules 306 and 308 regarding petitions for leave to appeal to the Appellate Court, and we have proposed a rule modification that would require the Appellate Court to determine or decide those petitions within 30 days, with the exception of good cause.

Proposal 18-04 involves Rule 345 pertaining to amicus briefs. We have proposed allowing the filing of amicus briefs in support of and in opposition to petitions for leave to appeal filed before the Illinois Supreme Court.

Proposal 18-12 has two parts, both of which pertain to Supreme Court Rule 315. 315(d) is the section of 315 involving page and word counts for petitions for leave to appeal. We have proposed a clarifying amendment that indicates that certain material will be excluded from the page and word count under 315(d).

315(h), the second component of Proposal 18-12, involves page and time limits for briefing in which arguments are raised regarding cross relief before the Supreme Court. We propose modifications to the timing and page limits under that Rule, which I'll go into in a bit more

detail.

And by way of overview, Proposal 19-02 is a proposal regarding Illinois Supreme Court Rule 342 that would allow an appellant to file a supplementary appendix in support of a reply brief as a matter of right.

I'll circle back to Proposal 16-08, which addresses Rules 306 and 308. Obviously, I will address any questions the Committee may have as I walk through these various proposals in a bit more detail.

The current structure of Rules 306 and 308 is such that there is no mandatory deadline for the Appellate Court to determine whether it's going to take permissive appeals under Rule 306 and permissive appeals by certified question under Rule 308, both of which are initiated by petitions to the Appellate Court. And so in the interest of expediting determinations by the Appellate Court on the question of whether the appeals are going to be taken, on the threshold question, we have proposed a 30-day time frame for the Appellate Court to adjudicate those petitions unless there is good cause for not doing so. We felt it was

prudent to include a good cause pressure valve because obviously cases arise in which a 30-day time line may not be able to be met.

There is an analog to this procedure in terms of a mandatory time frame for determining a petition or resolving a matter under Rule 307(d). That's the Rule that pertains to appeals from the entry or denial or modification or dissolution of a temporary restraining order. The Appellate Court is currently required to resolve those matters within five business days of the completion of briefing on the underlying issues. And that aspect of 307 we feel provides some support for the proposed time frames that we would suggest would help expedite matters under Rules 306 and 308.

That brings me to Proposal 18-04 regarding amicus briefs in support of and in opposition to petitions for leave to appeal. The Rules currently do not prohibit the filing of such amicus briefs. However, it is our understanding, and the appellate bar's understanding, that the Supreme Court's general practice is not to allow the filing of amicus briefs in support of and in

opposition to petitions for leave to appeal. We would ask the Committee to consider modifying the Rule to allow that type of briefing. It's our position that amicus briefs can be constructive in identifying important matters and would provide the Court with further guidance from the bar and from certain interest groups knowledgeable in certain areas of the law about cases that may have far-reaching implications and cases the Court may want to pay particular attention to. So we would ask for specific recognition in Rule 345 that amicus briefs be allowed in support of and in opposition to petitions for leave to appeal.

Moving on to Proposal 18-12, the 315(d) component of that proposal is simply a clarifying amendment regarding the matter that is included in page limits for petitions for leave to appeal. I think it's fair to say that the -- the appellate bar is very familiar with this Rule and familiar with what is excluded and what is included. I would submit that this amendment is more for general practitioners who may not do a substantial amount of appellate work and who may be confronted with some confusion when they file petitions for

leave to appeal.

As the Committee well knows, petitions for leave to appeal are not only filed by people who specialize in appellate practice, they're filed by lawyers who practice in all different areas and have all different specialties. So this amendment would be designed to clarify the matter that is subject to the Rule 315(d) page limit in a petition for leave to appeal.

The 315(h) proposal is a proposal regarding cross relief requested in Supreme Court briefing. That proposal is limited to briefing in the Illinois Supreme Court. Currently, an appellant has 14 days to respond to cross relief that is requested by an appellee. But an appellee doesn't get additional pages for its request for cross relief, and the appellant doesn't get additional pages to respond to the request for cross relief or additional time to respond to the request for cross relief. So there's a lack of clarity in the time frame and in the page limits applicable to requests for cross relief under Rule 315(h).

Under our proposal, we would ask the

Committee to add extra pages explicitly for the appellee to include in the appellee's request for cross relief and then extra time and extra pages for the appellant to respond to the appellee's request for cross relief. In addition to that, as already recognized by the Rule, the appellee who makes the request for cross relief would have time and pages to reply. We feel that modifying the rule in that way would provide a more -- more instructive roadmap for litigants who are involved in Supreme Court briefing where requests for cross relief arise.

I see I'm reaching the end of my ten minutes, so I'll briefly comment on Proposal 19-02 subject to any questions by the Committee. Proposal 19-02 pertains to Illinois Supreme Court Rule 342, and that is the Rule that governs appendices to briefs. The Rule is currently set up so that after an appellant files an appendix in support of the appellant's brief, the appellee may, as of right, file an appendix in support of the appellee's brief. There are, however, circumstances that have come to our attention where there is a need for the appellant in

submitting the reply brief to add additional material to the appendix for the Court's consideration. This would not involve allowing the appellant to insert non-record material into the appellate record. This would simply be a mechanism for the appellant to take material that's already in the record and include that material in an appendix in support of a reply brief as needed. And so that is the justification that we are offering up for the amendment to Rule 342.

If any Committee members have any questions, I'm happy to do my best to address those. Thank you very much.

Yes?

MR. ROTHSTEIN: I guess I'm just a little bit concerned about the proposal regarding filings in support of or in opposition to a petition for leave to appeal. It's just going to be adding, at least one of the public comments suggested, it's just adding additional paper for the Court to review. Maybe it slows down, marginally at least, the process of resolving. And if the Court decides to accept the case, then he'll have an

opportunity to petition to file an amicus brief at that time. So why does the benefit justify the extra burden?

MR. HORVATH: I acknowledge that additional paperwork would likely be filed, and the Court would have to decide more motions for leave to file amicus briefs. However, in our reflection over this proposal, it was our very strong belief that by giving members of the bar an additional opportunity to share their experience, particularly in specific industries or in specific areas of subject matter expertise, the added benefit to the Court would outweigh any administrative burden that is created by the Court having to rule on additional motions for leave.

Obviously, because this is structured in such a way that it would allow the motion to be filed for leave to submit the amicus brief, if the Court were to find the requests uninstructive or unhelpful, it could always deny the motions. And so though this may add to additional filings, it seemed to us that the -- allowing members of the bar the opportunity to highlight particularly important matters to the Court would be a useful

addition to the Rules.

VICE CHAIR ROMANUCCI: So kind of along those lines, Mr. Horvath, how do you see this as being efficient in terms -- Tell me a little bit more about the efficiency value that you see here. Because I don't quite see it yet.

MR. HORVATH: I think that part of the analysis here is in acknowledging that this will involve additional paperwork for the Court. However, I look at it as -- I look at the focal point of this analysis as the added benefit for the Court in being able to consider additional briefing on issues of importance. So undoubtedly, the court will be required to review more motions. I would -- I would submit the court already has a healthy motion practice. I don't know that the burden, the incremental burden added by amending the Rule in this way would have such a drag on the court's ability to address its motion docket that it would slow things down in a substantial way. I'm not convinced that by amending the Rule in this way it would have a meaningful negative effect on the court's ability to address motions that have been filed.

It's not our contemplation or understanding that these motions would be filed as a matter of due course. I think they would be isolated to matters that were identified as matters of high importance to the bar, and the motion practice would be more limited in nature.

VICE CHAIR ROMANUCCI: So I guess let me ask this in follow-up, because I do acknowledge what Mr. Rothstein said about one of the public comments. One of the other public comments was that this would be an improvement in appellate practice without giving any example at all. Can you share in any way how this would be an improvement in appellate practice?

MR. HORVATH: I believe the current statistics on the Illinois Supreme Court's docket show that the court takes between 2 and a half percent and 5 percent of civil matters that are put before it and between 2 and a half to 5 percent of the criminal matters that are put before it. And I would submit that the court is already very selective in the types of cases it takes. And there may be other cases that are worthy of the court's consideration that are somehow being

missed. And this proposal is designed to create a situation offering the bar an opportunity to further assist the court in identifying matters of public importance that the bar feels strongly ought to be resolved by the court. And the incremental addition of cases taken as a result of this type of advocacy I think would outweigh any incremental burden in the motion practice of the court.

PROFESSOR BEYLER: Do you have any rough estimate of the numbers that we would be looking at; that is, however many PLAs, petitions there are per year, what percentage of them would lead to requests for leave to file an amicus brief?

And, second, how long would these amicus briefs be? I mean, I -- In a way, I sort of thought, well, in terms of workload, you could just say you've got two pages to tell me why this is important, and if you can't tell me in two pages, it probably isn't important. I mean, we could reduce the court's load by being extremely restrictive on how long you've got. But if there isn't a restriction, what could the court expect?

MR. HORVATH: To your second point, Professor,

the current proposal, the page limits would be the same as the page limits for petitions for leave to appeal and answers to petitions for leave to appeal --

PROFESSOR BEYLER: Which is a lot more than two pages.

MR. HORVATH: 20 pages. Ten times as much.

PROFESSOR BEYLER: That's why I'm wondering. Granted, are you typically going to be looking at 18 to 20 pages? And, if so, what percentage -- I know all you can do is roughly estimate -- of their petitions are going to generate these sorts of requests?

MR. HORVATH: It's difficult for me to do a statistical estimate. I don't have the data to do that. If I were to do some back-of-the-napkin math as I stand here right now, if we estimate that the court accepts 5 percent of its petitions for leave to appeal, I think we can assume that those are 5 percent of matters that are important to the court. I think it would be safe to assume that at least 5 percent of the matters before the court would end up generating some type of amicus briefing at the petition for leave to appeal

stage. And I think it's safe to say that the percentage would end up being something above and beyond 5 percent as other matters were identified that were of importance. But that's purely -- purely a speculative estimate on my part.

I would be willing to say somewhere above 5 percent would generate this type of briefing, but I can't be more specific than that.

CHAIRMAN ANDERSON: Any other questions from anyone on the Committee?

MR. TUCKER: I have a question.

On the mechanics of this, do I understand correctly the amicus request is due at the time the petition for leave to appeal is due?

MR. HORVATH: That is correct. I believe that is how we structured this proposal. It would be identical.

MR. TUCKER: So the Amicus Committee is going to have to be following the cases in the Appellate Court and then inquire whether or not a petition for leave is going to be filed?

MR. HORVATH: That is accurate. And I think that actually lends to some self selection of what cases are important for consideration. If the

case is truly one that rises to the level of importance that warrants an amicus in support of or in opposition to a petition for leave to appeal, I think it does stand to reason that the bar would be following the case along with the deadline for the amicus brief.

CHAIRMAN ANDERSON: Thank you, Mr. Horvath.

MR. HORVATH: Thank you.

CHAIRMAN ANDERSON: Our next speaker is the most esteemed Timothy Eaton, and he'll also be speaking on Proposal 16-08, 18-04, and 19-02.

Good morning, Mr. Eaton.

MR. EATON: Good morning, Judge Anderson. Good morning, members of the Committee. I guess you become most esteemed when you get older.

I'm here to address actually two Rules, one which you've just discussed and had a number of questions on. On behalf of the Chicago Bar Association, we strongly support the amendment to Supreme Court Rule 345 which would allow amicus briefs. And then I also am going to address the other proposal dealing with the ability to file appendices to reply briefs. And I think that deals with 342.

Let me respond to some of the questions in terms of the workload and burden on the court if they are allowed to have amicus briefs filed in support of PLAs. First of all, in terms of the burden and workload, I had the privilege almost 30 years ago to start reviewing the Illinois Supreme Court opinions in the civil area both with the Bar Journal and now through presentations we make every year to the Appellate Lawyers Association. When I started that in about 1992, there were over 70 civil opinions that we had to analyze and review and write about. This year, we're looking at civil opinions in the Illinois Supreme Court, there were 20. And that's where we added a couple of juvenile cases to round out the number. There's been a significant decline in the number of civil cases that have been taken by the court, and I attribute that to several things. First of all, one obvious factor is there's fewer filings in the Circuit Court. And those filings are being made increasingly by self-represented litigants, which is also going to cut down on the number of appeals to the Appellate Court. And as a result, there are fewer Appellate Court

opinions. So there's naturally been some decline.

But I also attribute the decline in the Illinois Supreme Court to perhaps the fault of some of us in the appellate bar in not making our case as to why this is an important case for them to take. Not that the Appellate Court got it wrong in terms of whether or not it should be reversed or affirmed, but whether or not the Supreme Court of the state should weigh in on that particular topic when it affects title companies, real estate companies. I don't think the burden is going to be increased significantly at all. I think there will be fewer cases.

I agree with Mr. Horvath that there probably would be just a slight percentage. But they are missing cases, in my opinion, having followed the court for years. The number of PLAs, Professor Beyler, have decreased significantly as well. It used to be that if you filed your PLA and they already reached 500, that it rolled over. I think now there are around 200. So that rule is no longer in effect.

In the March term of the Illinois Supreme Court this year, I think they had four cases

total. It used to be when I was there a number of years ago, we would have four a day on Tuesday through Friday. And for three weeks now, we have one week, four cases.

And I'm not being critical of the court. I think what I'm suggesting is that in my opinion, they need to take more cases of issues of importance to the public where there's conflicts in the Appellate Court, because the Appellate Court sometimes disagree with one another, the various districts. And those cases are not being taken. I have -- I'm not going to name cases that I've been involved in where I was very surprised the court didn't take it, but I think we have failed in our ability to persuade them why it's important. And I think this amicus brief process would really enhance our ability to suggest to them, look, this doesn't just affect my client. I believe I'm pretty good in convincing them as to why my client was wronged. But I'm not so good in suggesting to them why the public or a certain industry has been affected.

Now, the court may resist any proposal by this Committee to do it, but I think it's worth

making.

And, by the way, the rule does not say they will not take amicus briefs on PLAs. But just in general, in about 2003, I believe, in the Northern denying a motion for leave to file an amicus brief, made it clear that the court was no longer going to be taking them on PLAs, even though the rule was never amended. And I personally have had a number of cases over those years where I've sought to have amicus briefs filed in a PLA, and they have said, Wait. We don't deny it, but wait until the case is accepted.

The U.S. Supreme Court, I think if you talk to any U.S. Supreme Court practitioner -- and I'm certainly not one of them; from what I've read -- that's the most important part of the process is signing petitions for leave of certiorari, and that's where the amicus brief is filed. Not that they don't get filed later, but they really tell the Court why this is so important to so many different people. And without that additional information, I think the Court is not able to really fully determine what

cases should be taken.

So I feel very strongly that it would not impose too much of a burden. If it's a little bit more burden, just look at the number of cases they're considering now and the number of PLAs in terms of the decline. This may add a few more, Professor, in terms of the page line. As we all know, petitions for leave to appeal are not to suggest why the court -- the Appellate Court, rather, got it right or wrong; it's why this court should take it. Could it be done in ten pages? Absolutely. If you wanted to set a limit, the court does require you to spend a few pages on who you are and why you're filing; but on the merits, I think ten pages would be fine. But I think the court needs to have this additional information.

I'd be happy to answer any questions on that.

With respect to Supreme Court Rule 19-02 [sic], I'll be very brief on this. This just simply allows one to file an appendix with the reply brief. Currently, if you try that, your brief is rejected both when it used to be in nonelectronic form and now. And sometimes a

particular point in the record is raised by the appellee that you've not focused on that would be helpful to the court that you actually have that pleading or that document attached in the appendix in the reply brief. Increasingly, more of us are relying on judicial notice of things that are happening at a rapid pace out in the public, and we want the court to consider something else in addition to something that's not in the record, and they can take judicial notice. And you have to then attach what you're asking them to take judicial notice of to an appendix. According to the way it works now, you can't do that in a reply brief. And sometimes those points, since the appellate brief was originally filed, arise a couple of days before your brief is due, and you can't use that option. So I think it's very important to at least give us, and hopefully give the courts, more information to decide the case. And I don't think this should be refused. And actually, I think it started as a court-made rule. So I think appendices should be filed.

CHAIRMAN ANDERSON: Is there enough room in the existing Supreme Court Rules anywhere to file

a motion for a supplemental appendix? And wouldn't those kinds of motions be generally granted?

MR. EATON: You would think. But the way it is now, your Honor, and I know it hasn't been all that long since you've practiced in the Appellate Court, usually if your reply brief is due in 14 days, you have to think about filing a motion for leave to file an appendix within that first week. And, generally speaking, you're not focusing on it until the 12th, 13th, 14th day to file. So as a practical matter, what you'd have to do is attach it and then perhaps file a motion for leave to file the reply brief instanter with the appendix, or file the reply brief and then file a motion for leave to file the appendix later, and then amend your brief. I just don't see the reason why you can't be able to include something in a short appendix. It doesn't have to be very long. I think we all know the courts are not going to be -- shouldn't be burdened by a lot of material. But if it's important enough to include in the appendix, I think we ought to do it.

CHAIRMAN ANDERSON: But generally, everything that goes into the record is what you're talking about putting in the appendix, typically.

MR. EATON: Yes.

CHAIRMAN ANDERSON: And I can pull up an entire record now on my computer. So if I were on the Supreme Court -- which I'm not -- but if I were, I could pull up whatever document you reference in your brief.

I'm an analog man in a digital world. I get it. So I would rather see it attached to my brief as an appendix. But it's out there now, is it not?

MR. EATON: It is, but not necessarily, though, if you were going to be taking judicial notice of an occurrence, a document, an article that's not part of the record now. And that's a legitimate purpose for doing it.

Sometimes I think it's just a matter of convenience for the court. If they have a hard copy right there that they can look at, it's a pleading or something they can read, it's much easier than having to pull it up on the computer.

VICE CHAIR ROMANUCCI: Mr. Eaton, thank you

for your explanation. That was helpful.

Kind of picking up a little bit on what Professor Beyler was saying, I like empirical studies. I like to be able to compare and contrast. Are there other states that you can cite to that have this type of rule that you're proposing under 18-04, and is there a percentage difference that you can compare Illinois Supreme Court and the number of PLAs that they accept versus another state that accepts the amicus briefs at the PLA level? As you said, the United States Supreme Court, they rely on these. Anything that we can balance this with?

MR. EATON: Unfortunately, my answer is going to be more anecdotal than it is going to be empirical. In other states that I've practiced in, to my knowledge, we're the only one that does not allow these types of amicus briefs to be filed at the discretionary stage, at the PLA stage. I can name maybe two or three jurisdictions where that has been the case.

And, by the way, speaking of Illinois, it hasn't been all that long since this so-called de facto rule, I guess, took place. I remember in

the early '90s before Justice Fitzgerald's admonition that they would not take it as part of the PLA that we were doing it here. I'm not sure why the change; but I also know at that time, they had a very, very busy caseload, and that may have been the reason. All I can say is it's clear that that's not the case now. And I think they would have the opportunity to review more briefs in making decisions as to which cases to take.

MR. TUCKER: What are the current statistics on the criminal caseload, Mr. Eaton? I haven't looked at them recently, and they're usually two or three years behind. But they do -- compared to the civil, they do an enormous number of criminal opinions.

MR. EATON: They do.

MR. TUCKER: Isn't that correct?

MR. EATON: Yes.

MR. TUCKER: Is that perhaps a factor in the limited number of civil opinions that they can actually do?

MR. EATON: It is true that there were criminal cases that they can take in most of the discretionary -- well, I should say all

discretionary, unless there's a constitutional issue involved. It's not that much higher than the civil cases. Their overall opinions are down dramatically from where they used to be.

And the other thing that's changed that has had a, I hate to use the word dramatic, but I think it's true, that's affected their workload has been the elimination of the death penalty in Illinois. Those death penalty cases used to take months, years, obviously. Someone's life is at stake. And the court no longer has that burden. And at the time when, as I recall, when they had death penalty cases, they were still allowing some briefs in support of PLAs until the early 2000s.

MR. TUCKER: In connection with the supplementary appendix on the reply brief, in thinking about the waiver the appellant is making when he files his brief of all other theories, do you see any opportunity for mischief if the supplemental appendix with the reply brief is available, just uniformly available?

MR. EATON: You know, I can't say that there may not be somebody sometime that would take advantage of that. But for the most part, I would

say no because I know a lot of my friends that practice in the appellate bar I think are aware of the fact that the court doesn't want a lot of volume of paper or hard copies. So I think we all respect the fact that we would have to be judicious in what we would put in the appendix. But I do think it would be helpful.

MR. TUCKER: Thank you.

CHAIRMAN ANDERSON: Any other questions for Mr. Eaton?

(No response.)

MR. EATON: Thank you very much.

CHAIRMAN ANDERSON: Thank you.

Our next speaker is Bruce Pfaff. I hope I pronounced it properly. He will be speaking on Proposal 17-03, 18-01, and 18-04.

Good morning, sir.

MR. PFAFF: Good day. Thank you for understanding that I am significantly younger than Mr. Eaton.

CHAIRMAN ANDERSON: I think we all are.

I love Mr. Eaton. He knows that.

MR. PFAFF: As do I. He deserves the honor.

I'm Bruce Pfaff, and I'm here as an

individual, although I continue to chair ITLA's Amicus Curiae Committee and have chaired it for 26 years. I have authored more than 40 amicus briefs. I know at least one of the members of our panel, of your Committee, has also authored briefs that I have read that are excellent amicus briefs.

The role of amicus is important. However, I do not support 18-04. I think Mr. Eaton's statistic helps prove the point, if the Court was issuing 70 civil opinions years ago, and now they're issuing 20, I think they're overburdened. I don't know why. But adding to the burden of deciding motions that will not really decide the merits of the case is not going to help the output of the court. It's not going to help the court.

Many times, we become aware as a committee of an important appellate opinion that comes down. And we're certainly available to speak with the plaintiff's counsel to say, This is an important issue, here's an argument you want to put in your PLA, or, You're authorized to state in your PLA that the Illinois Trial Lawyers feels that this is an important issue and respectfully

asks the court to take it. And we will seek -- And the association would seek leave of court to file an amicus brief if the PLA is granted. So that's not adding to the burden of the court, and I think it serves the same purpose.

I hate for us to do anything to add to the burden of the court because we do have low output opinions.

17-03 is important for a couple of reasons, one of which is it recognizes that the Illinois Rules of Evidence are more recent than Rule 212 that, unfortunately, uses the language about admissions of parties can be admissible when they come from a discovery deposition. Illinois Rule of Evidence 801(d) makes it clear that former statements of a party are not hearsay and are admissible if relevant. We can try to split hairs of is an admission of a party different than a former statement of a party. But they're not.

The Illinois Rules of Evidence make it clear that if a party says something at another place and time, it is not hearsay, and it can be used by his or her opponent at trial. So what the proposed rule does is to update 212 to match

801(d), and it is appropriate, and I would strongly support this change be adopted.

The other part deals with Rule 206. We have been permitted to take video depositions for years. However, we have never had the right to use those at trial. It's always been subject to the court's discretion. Many of us who try cases like to make video clips of dumb things your opponent says in deposition. There might be ten things that this witness said in deposition that you would want to make sure the jury heard. You can make a video clip of this that you can show to the jury in 30 seconds and have the witness on screen saying pigs can fly. That's far more effective than reading the discovery deposition where the witness said pigs can fly. Most judges allow that practice. If it's impeachment, you can use it. Many judges will simply say play the video. The video always has the scrolling words under it. It's very effective impeachment.

However, there are some judges who say, Oh, just read the deposition. I think it's -- I've seen the comment, I think it's too prejudicial to play the video of the witness

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

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

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

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

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

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

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

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

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

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

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

It's an important problem. I think the

Committee is the right body to address it. I think the language of 18-01 is not the right vehicle.

VICE CHAIR ROMANUCCI: Mr. Pfaff, I appreciate you coming here as an individual, and I would like you to wear your individual hat as opposed to any other hat. One of the comments came from the Illinois State Bar Association. Did you happen to read their proposal on 18-01?

MR. PFAFF: I did. But there are so many juggling in my head right now, you might need to refresh me.

VICE CHAIR ROMANUCCI: So to summarize the Illinois State Bar Association, and I'm in agreement, I've talked to so many people about the HIPAA issue, the HIPAA orders. It's just all over the place, the comments and everything. But I think people do agree that there needs to be some direction here because we're running into a whole different world with electronic medical records and exposure of medical records.

The Illinois State Bar Association, their conclusion was, again, that the rules -- that because of the complexity of this issue and the

divergent views on it, the ISBA suggested that the Rules Committee postpone its consideration of this proposal and establish a committee or working group of stakeholders who can craft a potentially more widely accepted uniform order, et cetera. Is that something, as an individual, that you see would be worthwhile?

MR. PFAFF: Absolutely. Because if this Committee rejects 18-01, which I would respectfully request that they do, in the form it is, then there is an absence, and you'll have a county by county discrepancy. And I think some counties do it better than others. And I would submit that having a statewide group or statewide committee of people with knowledge and interest in the subject would be a good solution.

VICE CHAIR ROMANUCCI: Because clearly, there's been a tremendous amount of work put into the Cook County order, not over a months-long period but years-long period. And I think the intent is exceptional. And we need -- Is it something that we need statewide uniformity on as opposed to just countywide?

MR. PFAFF: I think that's preferable.

I don't know what lawyers who practice -- Many of us practice in more than one county, and there are different orders governing them. And I think when you're dealing with something like PHI, which is a federal law that's protected and how you should use it, I think we should have a statewide standard. The idea of having one statewide authorization for the release of garden-variety medical records is something that is also a good idea so the plaintiff would be tendering the signature for the release of certain medical records, and that could be tendered by the other side.

I think the intent -- The defense somehow has to get the plaintiff's medical records.

VICE CHAIR ROMANUCCI: Of course it has to.

MR. PFAFF: And they're going to need some form of authorization. So we need to have a good authorization that we can all accept that protects the patient's rights. And we can recognize that the patient may say, "I'm not going to authorize those Resurrection records," and then you have a hearing, and the judge can decide if they are relevant and if there's going to be a sanction.

That's up to a judge. But the language that is so prefatory in 18-01 about if you sign this, your case can be dismissed, I think is offensive to the average patient and the average patient's lawyer.

PROFESSOR BEYLER: I did not practice in this area, so I have some basic things that I hope you can help me with.

I cannot understand why the plaintiff's signature as opposed to the judge's signature is required on anything. It seems as though by filing the lawsuit, you've waived, at least as to relevance, and the judge ought to be able to sign an order directing the hospital to produce records; and that order should not require the plaintiff's signature under protest or not -- shouldn't require it at all, and the hospital should not be free to disobey it. But it sounds as though, from what you said, that the hospitals, even in the face of a judge-signed order, will refuse without the patient's signature. Am I right in understanding you?

MR. PFAFF: I don't think that's right. But I think we're a little apples and oranges. The form HIPAA order that's entered in many counties

doesn't call for the production of records. It simply says when protected health information is produced, it shall be dealt with in this way.

What you're describing, let's say there's a dispute in the case, and the defense wants the Resurrection records, and I don't think they're relevant. If the judge orders Resurrection records should be produced, that order will be followed by Resurrection. But it's in 90 percent of the cases, 95 percent of the cases where there's no dispute as to these five providers, judges don't want to be signing those orders. It's silly to bring motions in that respect. And what's the right solution? Do you have plaintiffs sign blank authorizations? No. You've got a couple of problems, and that's bad. But do you have the defense and the plaintiff sign a release for medical information for those providers, and the plaintiff sign it on the back? Maybe that's the best solution. But simply signing a subpoena without an order or a signed authorization will not work and should not work.

There are situations where the subpoena goes out, and lo and behold, the plaintiff's

lawyer doesn't get them. We have to avoid that. It's a big problem.

CHAIRMAN ANDERSON: Would you mind supplementing your comments today by providing the Peoria form that you ...

MR. PFAFF: I shall. Actually, I'll give full credit. Actually, it's Tazewell County, next town over.

CHAIRMAN ANDERSON: Thank you.

Any other questions?

(No response.)

CHAIRMAN ANDERSON: Thank you.

(Whereupon, a discussion was had off the record.)

CHAIRMAN ANDERSON: Next we have Steve Phillips from the Illinois Trial Lawyers Association to comment on 17-03.

Good afternoon.

MR. PHILLIPS: Steve Phillips. I am a former president of the Illinois Trial Lawyers Association, and I'm here to speak with regard to 17-03. And Mr. Pfaff didn't tell me that he was going to basically take away my entire talk. But I would just like to emphasize a few things.

The Supreme Court of the United States made a very candid and telling comment related to this proposal, and that is that a credibility determination cannot be accurately made by simply referring to a cold paper record. And I think that's very telling.

With technology 20 years ago, many of us, both the plaintiff and defense, started videotaping important depositions. And as you all know, the credibility, the sincerity, and the method and manner in which a witness answers a question at trial is ultimately left to the jury. And it goes to credibility. And the same thing holds true in deposition. So we started taping depositions, and it goes both ways. There are a handful of judges in Illinois that are not allowing it or making us jump through hoops before we can use it. And I think both sides, if they're being candid with you, will tell you that this is an incredible tool for the jury to make an accurate assessment of credibility because the way a witness answers a question, is there a long pause, is there looking around the room, is there looking at their lawyer, or if they flat out change their answer, which

we've seen, yes goes to say no, or, "I misunderstood the question," it's a valuable tool for the jury to understand and assess the credibility of a witness.

How many times have we all seen someone take the cold, neutered paper record what we believe is impeachment of a witness with a yes, when previously the answer was no, and the jury is looking at us going, What was all that about? What does that mean?

So we just want the technology to keep up with the practice, or the practice to keep up with technology. And this is literally for the jury, to give a better understanding. We want the jury to understand it. Again, I think that's pretty neutral. I think the defense bar doesn't have a problem. We've cringed at things our clients have said at deposition too that we wish they hadn't, they had explained it. But it goes both ways.

The second thing is the comment about the old law was the admission, we just want Rule 212(a)(2) to catch up with the Rule that we adopted in Illinois in 2011. I think just that the code was left behind, and it's just literally

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

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

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

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

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

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

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

MR. HANSEN: I have not dealt with that.

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

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

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

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

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

CHAIRMAN ANDERSON: Any other questions?

(No response.)

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

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

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

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

the right that we're conferring with this is no greater than the right you would have to read the depositions. And that's -- that's the only change we would propose to the Rule. Otherwise, we are in support of it.

If there are any questions, I would be happy to answer them. Otherwise, that's all I have.

JUDGE McBRIDE: I have a question. If you have this Rule subject to the restrictions of 212, then aren't you limiting it to only those depositions? Or are we talking about something else? I'm not sure what you mean.

MR. McVISK: Well, I think Supreme Court Rule 212 allows depositions in more than just those situations. And basically, Rule 212 talks about any time depositions can be used. 212(a) says purposes for which discovery depositions may be used: as a former statement, as impeaching, et cetera. So all we're saying is that's fine. We just -- And it may be because this was coming up in the context of an effort to abandon the distinction between discovery and evidence depositions, which we definitely did not support.

And basically, our position is Rule 212 is there; it should be followed. And any time you can read the deposition, you can -- you can use the videotape. But I think Rule 212 pretty much sets out when you should be allowed to use deposition testimony.

CHAIRMAN ANDERSON: Any other questions?

MR. TUCKER: Mr. McVisk, this isn't the subject on which you spoke today. But in connection with the amicus work, you're the president of the Illinois Defense Counsel?

MR. McVISK: Right. Or will be in two weeks.

MR. TUCKER: You're familiar with the Amicus Committee?

MR. McVISK: Yes.

MR. TUCKER: I'm just wondering, for the Illinois Defense Counsels, are the attorneys who do the amicus paid, or are they volunteer?

MR. McVISK: They're all volunteer.

CHAIRMAN ANDERSON: Thank you, sir.

Our next speaker is Keith Hebeisen. Again, I'm not good with names.

MR. HEBEISEN: No worries.

CHAIRMAN ANDERSON: At least I'm connecting

the right name on the right line.

Also with the Illinois Trial Lawyers Association, commenting on proposal 18-01.

MR. HEBEISEN: Yes. Thank you.

Good morning, everyone. My name is Keith Hebeisen. I'm a past president of the Illinois Trial Lawyers also. I'm also a long serving member of the Executive Committee, and I was involved in the constitutional challenge involving Section 2-1002 that culminated in the Kunkel and Best opinions. So I'm certainly very familiar with the genesis of that and what I believe is the importance of it.

I've practiced over 35 years, and as well intentioned as this proposal is, with all due respect to Judge Ehrlich, and I adopt a lot of the comments made by Mr. Pfaff, I share his feel for this and our thoughts about this and trying to figure out a way to do it in a way that's fair to plaintiffs and defendants. But there's a fatal flaw in this proposal, one that I want to address, and it relates to the interplay with the Kunkel opinion. The proposal requires a specific order be entered in every case involving injury in the

state of Illinois. It's more been instituted in Cook County, I don't know if it was a year ago or whatever. But the leadership of ITLA was never directly consulted before this order was first instituted, and our answer would have been the same as it is today.

There was a HIPAA order in Cook County at least a decade before that. To my knowledge, I was not aware of any significant problems with that. It was user friendly for everybody to obtain records. I'm sure there's a hospital here or there a doctor that just doesn't follow through and do what they're supposed to do. But my experience was that things ran pretty smoothly for the most part.

The problems with the order, if you look at the order that is proposed, according to the proposal that exists in Cook County now, it says that the plaintiff has waived his right to privacy, period. It doesn't -- It doesn't put any limitation on the disclosures or what the plaintiff -- what the plaintiff has put at issue. There's no provision in the thing to have a 201(k) conference to work this out. It just says it's

waived. There's nothing in here that requires a subpoena to issue with notice to the plaintiff before the records are requested. And Bruce mentioned, I think, the situation where sometimes the defendant ends up getting records before that the plaintiff doesn't see before they get them, and they don't have an opportunity to object.

It doesn't say anywhere in here this is subject to the Code of Civil Procedure or any other Rule of the Supreme Court regarding relevancy. And in a situation involving sanctions against a covered entity, that's against the covered entity that's producing records.

The proponent suggests that this can be read -- all these things could be read into the order, just as the proponents of 2-1003 in the Kunkel case argued that unsuccessfully in the Supreme Court. The language was not there.

This order says dismissal is a sanction if you don't sign it. In Kunkel, if you didn't sign the authorization, dismissal was a sanction. That's a distinction without a difference.

I commend all of you who haven't recently read Kunkel to read it, because I think if you

read Kunkel, and I'm going to go through a little bit of it real quickly and then take any questions you have, is that the defect in Kunkel was that the -- there was no limitation whatever on the scope of what the plaintiff had to sign off on. And the only difference was this was an authorization.

Here, we're talking about an order. An example, one of the examples we put in our position was if a woman, 52-year-old woman has a back surgery, back injury, back surgery in an automobile accident case, this order does not preclude the defendants from subpoenaing her gynecological records, which obviously would have nothing to do with the case on the face of it. There's nothing to prevent that once this order is entered. And if there's no notice of a subpoena going out, they could get the records before you have an opportunity to quash it. That's just a simple example of how you have to -- every case is different, and the discovery has to be tailored in a different way.

The Kunkel court talked about the fact that the defense were saying, well, you know, the

court can do this, the court can do that. But that's not the way it read, and that's not the way this order reads. The court says you have waived your right to privacy, and the plaintiff has signed a document, now signed off on by the court, making that finding, with no limitation, no protection, with no issue of relevancy, no limitation to scope. And the Kunkel court specifically held conditioning a plaintiff's right to proceed with a lawsuit upon unlimited waiver of her privacy privilege was unconstitutional. The order referred to in this proposal suffers from the identical constitutional defect. And the suggestion that this order is highly efficient and an effective discovery tool, as I've heard in support of it, does not trump the constitutional issues here. And there has to be a better way to deal with this.

And again, I would allude back to Mr. Pfaff's comments, who I think was very sensible, and I hope you will take those into account as well.

So if anyone has any questions .

CHAIRMAN ANDERSON: Are there any questions?

VICE CHAIR ROMANUCCI: Is there anywhere -- Maybe if you cannot answer, maybe somebody can answer; I know Judge Ehrlich is going to be speaking as well, but maybe I missed it. Is personal health information defined in the order? In other words, do we know what PHI specifically refers to?

MR. HEBEISEN: I don't believe it's defined, per se. It makes reference to the HIPAA Act and 45 CFR whatever, whatever.

VICE CHAIR ROMANUCCI: So it refers back to HIPAA?

MR. HEBEISEN: Yeah, but it doesn't specifically define PHI, as far as I'm looking at it right now, and I don't really see it. If I missed it --

VICE CHAIR ROMANUCCI: In other words, what I'm asking is, is there anywhere where PHI in the HIPAA order that's being proposed is defined as relevant medical records to the litigation? Or do we have to relate it back to HIPAA?

MR. HEBEISEN: I don't think PHI, which is a term of art that comes out of the federal statute, deals with relevancy at all. It per se covers all

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

CHAIRMAN ANDERSON: Any other questions?

(No response.)

CHAIRMAN ANDERSON: Thank you, sir.

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

The next is Robert Fink.

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

One of the things that I notice as kind

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

came out of Lake County.

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

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

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

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

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

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

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

However, paragraph 3 of the proposed order does not do that. It is a -- pretty much a blanket waiver. It requires entities to disclose a party's protected health information for use in a litigation without separate disclosure authorization. Personally, I'm a fan of including in some order that the specific additional disclosure and authorization is not required; that a specific health HIPAA order is sufficient. But HIPAA requires that a court, in issuing a HIPAA order, expressly authorize the protected health information to be disclosed. And that's under the permitted disclosures section of 164.512(e)(1)(i).

If this order is adopted, it does not make any reference to the specific or expressly authorized materials. It blankets --

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

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

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

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

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

who will, but only if it is by an agreement of the parties. So paragraph 3 of the protective order is a very general authorization -- requires a general authorization.

And then, of course, the third reason is even if a subsequent order limiting the time and scope to the relevant records is subsequently entered, it certainly doesn't cure the defect in the proposed order.

In response to a couple of the questions I heard earlier and a couple of things -- comments that I had heard from other speakers, one of the issues with the subpoenas being sent out prior to a plaintiff seeking records, that is also a very real world problem. And it actually happened at my firm recently where those records included records I didn't even know existed because they were from multiple years ago. And I have, to this day, no meaningful response as to how the defense even knew to subpoena those records. And it was a subpoena for years' worth of records from a long time ago that had nothing to do with the incident or the bodily injuries complained of, but those are, again, situations which are occurring and

will continue to occur under this order.

And I am fully in support of the ISBA's suggestion. And I believe Mr. Romanucci, you had questioned a prior speaker on this as to some sort of working group or some sort of committee to put together a proper order that is going -- with all of the stakeholders that are going to protect plaintiffs, individuals' privacy rights, yet still allow defendants meaningful access to the relevant records in order to defend their case.

CHAIRMAN ANDERSON: Any questions for Mr. Fink?

PROFESSOR BEYLER: Yes. Since you were involved in the Lake County litigation, I have sort of two questions. It really bothered me in terms of knowing how to proceed. It seems as though there are two legal questions that have to be answered in order to know what to do. Number one, does the Insurance Code and the regulations issued under it really require insurance companies to keep all of this information they get, and kind of need in order to decide whether to settle, does it really require them to keep it for seven years and not destroy it at the end? Number one. I

haven't seen any citation to a recent Appellate Court case or even in a statement by the relevant department about what their position is on that question.

MR. FINK: Absolutely.

PROFESSOR BEYLER: So assuming that it does require it, then it is preempted by HIPAA? I guess we have the Lake County trial court ruling, but we don't have anyone citing any Appellate Court decision, at least in Illinois, on whether the -- they're right, or, I assume, implicitly the Cook County Court has decided that question in any way.

MR. FINK: Sure.

PROFESSOR BEYLER: And I don't see how we can have a working group, or anyone, for that matter, come up with an order, at least that's anything other than it might be right and it might not be, until that question is answered. Is there any way, out of the Lake County litigation or anything else, that someone can get those questions up to an Appellate Court so that we know? Because normally, we advise on policy. But these are not policy decisions. This is just what is the law on

those two points.

MR. FINK: Yes. Relative to the question of whether or not an insurance company is required to maintain records, it is my opinion that in order to reach that conclusion, you have to take a fairly tortured reading of the code to do so. There is not, that I'm aware of, an appellate decision addressing that specific issue. However, I can tell you that as part of the briefing in Lake County in response to FOIA requests, the Governor's office, the Department of Insurance, and others all responded that they were unaware of any rule or regulation which required them to maintain a -- and specifically, this is for casualty companies, not health insurance companies and other things like that; but, for example, this was specific to State Farm, these two cases -- that they were not aware of any rule, regulation, or any other requirement that they maintain personal health information past the termination of litigation in response to FOIA. Those were attached to the briefs. Those are now part of -- to answer the second question -- part of the record on appeal that was just this past week

filed by State Farm in those cases.

Relative to whether a working committee can come to a resolution on this, I don't know the answer to that. I think that at the end of the day, HIPAA quite clearly says that in order to be a HIPAA order, A and B have to be included in the HIPAA order. B is the destruction provision. So any HIPAA order, in order to be a HIPAA order, must include those two things. So whether or not State Farm needs those records really and needs to maintain those records is really totally and utterly irrelevant to what the HIPAA order needs to say to be a HIPAA order.

Do I agree that State Farm needs, and other insurance companies need to have access to those records? Of course. They're obviously an integral role in any litigation, personal injury litigation. And there's certainly instances not involving a personal injury in which a HIPAA order may still be necessary as well. Do I think that it is possible to come up with language that can address that which allows the insurance company to obtain and utilize the information, as HIPAA says, for that litigation? I think that's -- there is.

And, in fact, I don't think that it was attached to my comments, but there actually are other proposals, and I would be happy to share those as well, that I think address many of those issues.

Part of that might be adopting what was previously stated in allowing the parties to kind of work this out, having a HIPAA protective order that says if the parties can't agree to it, the judge is going to make the ruling on what is relevant and what is expressly authorized. But if the parties can agree to it and not involve the court, and they can fill it out themselves and walk it in as an agreed motion, that's going to be the case, in my experience, almost all the time. It's very rare not to be in that situation where the parties aren't going to agree on what the injuries are and what kind of records are going to be relevant. The birth records and -- records are not relevant to somebody who had no lifelong injury to their cervical spine and got rear-ended. Those just aren't, and they're easily removed from the scenario.

So my suggestion would be yes, a statewide HIPAA order that either allows the judge

to make the ruling if the parties do not agree, or allows the parties to fill in that portion of the order themselves by agreement.

CHAIRMAN ANDERSON: Anyone else have a question for Mr. Fink?

(No response.)

CHAIRMAN ANDERSON: Thank you, sir.

Next we have Sofia Zneimer.

MS. ZNEIMER: Good morning. My name is Sofia Zneimer. I practice in Cook County. I'm an attorney. I practice in two areas, immigration and personal injury. So I'm somewhat familiar with the federal procedures mentioned. I was involved in drafting an article that was published. I agree with all the commenters who are opposing the change. I just wanted to stress again that when I -- I most recently reviewed the Constitution this morning, and it's under the Bill of Rights in Illinois, and I saw the right to privacy is in paragraph 6, and the right to remedy is under paragraph 12.

Requiring a victim of a random act, a personal injury, someone else's negligence, to weigh one constitutional right in order to be able

to exercise a constitutional right to a remedy is unconscionable, it's unconstitutional, and it should not be approved.

With regard to the question of Mr.- -- Professor Beyler with regard to whether or not the Illinois Department of Insurance actually requires medical records, I actually sent a series of Freedom of Information Acts to the Illinois Department of Insurance. I have them here. They're not part of my comments that I submitted. I sent a request to the Illinois Department of Insurance to ask them whether or not -- and I'm happy to submit them electronically, the information -- but they said that:

Question, I asked for any and all statistical information, graphics, or similar documentation for casualty and property for any and all insurance coverage for the last five years for which the Illinois Department of Insurance required protected health information.

Answer: The Department does not require or need protected health information, so there are no responsive documents for these records.

To all my questions, the Illinois

Department of Insurance has responded they do not specifically require protected health information. What the insurance company is trying to do is they most certainly need relevant medical information during the litigation. However, they really do not need it at the end of the litigation for any purpose that the Illinois Department of Insurance -- if they have medical information in their claims file, that's what they're saying, Oh, we need to keep it because we may be penalized. According to Illinois Department of Insurance, no insurance company has ever been penalized for not having these records.

With regard to whether or not they need it, let's assume they need it. The rules under the Illinois Department of Insurance are preempted by HIPAA. This I agree with the comments of Judge Ortiz. I also agree with the Cook County decision that it's preempted by HIPAA. There has been -- An issue of preemption has been raised in Georgia. The State of Georgia has been dealing with this. There are two decisions from Georgia, subsequently in the Supreme Court. One is called Northlake -- it's Northlake Medical Center, LLC, v. Queen. And

it involved the -- the cite is 280 Ga. App. 510, 2006. And then the subsequent Supreme Court it's called Allen v. Wright, 282 Ga. 9, Supreme Court from May 14, 2007. The issue in Georgia was that if you file a medical malpractice action, to the complaint you have to attach a medical authorization. The medical authorization was not signed by the plaintiff because it was very broad and did not comply.

There are certain things that we're missing from this. If the Committee contemplates making also a comprehensive authorization, bear in mind that the valid authorization is also authorized by HIPAA. It's also -- It also preempts the type of authorizations the State may require. It's under 45 164.506. It explains what kind of -- how an authorization has to look like.

And one of the issues in the Georgia court was it didn't provide for notice, and it didn't advise the plaintiff they can revoke. So that was found to be preempted by HIPAA.

Not only is the authorization preempted by HIPAA, and as Mr. Fink and some of the other commenters stated, not only is it preempted by

HIPAA, but there's one more thing that is preempted by HIPAA. I practice immigration. So if a client is going to be deported, I cannot just go to a Cook County judge and say, Can you please reverse the deportation? No. There is an administrative procedure that you have to go through. And HIPAA has an administrative process for any state that needs to use -- needs to decrease the privacy to go to the Illinois Department of -- to the Federal Department of Public Health to explain the valid reason and to request that they are permitted to go below the floor that HIPAA sets for privacy. The regulation is under 45 CFR 160.204.

I sent the Freedom of Information Act request to the Illinois Department of Health, to the Illinois Department of Insurance, and to the Federal Department of Health and Human Services to find out if anybody has requested or whether the federal agency has granted such a waiver. And I have here a response from the Governor's office, former Governor, that they have never requested such an exemption. Illinois Department of Insurance never requested such an exemption. And

I have a response to my Freedom of Information Act from the federal FOIA as well saying that they did not have any such a request from the State of Illinois. Therefore it is true, and I know you're going to hear from others most likely, because I read their comments, that they need to keep that for whatever reason. I have my opinion what they are looking for. I know that a lot of insurance companies are checking our information, and they are trying to feed our health information into their algorithms, and they're trying right now, they have all these data programs and are combining regulated data like health and finance with unregulated, and social media to make their algorithms smart and harass us to death. And perhaps at one point, we're going to have the social system that China has right now. But I urge the Committee to refuse to adopt this. If you're going to be -- a comprehensive order, it has to be fair. It has to comply with the right to privacy.

If anybody has any questions.

CHAIRMAN ANDERSON: Thank you very much.

Next we have Paul McMahon, also

commenting on Proposal 18-01.

MR. McMAHON: Pronounced exactly correctly. Good morning. Thanks for your time.

I haven't done this before, making a Committee comment before. But this issue particularly upset me because of some of the personal experiences I've had working as a personal injury lawyer in Chicago for 25 plus years.

As a young attorney doing personal injury work and interviewing your clients, one of the things that would come up very frequently when you hear about automobile accident cases and things like that, they say, "You know, I'm afraid now to drive in my car. I'm afraid to go across the street since I got hit as a pedestrian. Can I bring a claim for that?" And the conversation we have, and almost universally that we ultimately have the clients tell us that they don't want to pursue it is we say, "Listen, you could bring a claim for your emotional distress, but you will open up all of your privacy. You will open up your marital difficulties and your counselor's records. You'll open up your psychologist's

records." And almost universally, those clients will tell you, "I don't want anything to do with that. Can we prevent that from happening?"

I'm saying this. I completely agree with everything Mr. Pfaff was saying. I want you to just know what's at stake. And I can -- That's kind of the thing that I can tell you from personal experience of meeting with these people for many years, what's at stake.

I've had these claims. I've brought ten claims that were involving sexual abuse, psychiatrists molesting his patient, where everything was opened up. We waive all of your privacy where all of these records come out. And they're brutal. Those cases are brutal. A 2nd grader molested by a priest, he had to list in his interrogatories every single sexual contact he had ever had in his whole life. And we know -- When we're bringing those cases, we know that's what's going to happen. But when he got to the point after his deposition that they started subpoenaing all these other people, he was suicidal himself. Told me, "Take whatever you get, give it to my kid." I had to resolve that

case immediately.

I take it to heart myself when I hear from doctors, when doctors are talking about do no harm. As a personal injury lawyer, I don't want to do harm to these people who have already been hurt. And I'm sorry. I'm actually upset because I'm thinking of this kid shaking in his deposition when he was talking about this stuff.

So this is why I say, Judge Ehrlich, I have tremendous respect for his intellect and what he's trying to accomplish here. I think what Mr. Pfaff was saying, we need a better method here that's going to protect these privacy rights that has to be implemented, even another committee. Let's talk about this as a state before we go down this road.

Another example that I'd just like to give you, and I'll end my comments, is a 13-year-old girl gets her foot run over by a car. We get the medical records. And one of the things that's wonderful about HIPAA is the cooperation and professionalism that I've seen in the defense bar since HIPAA has come around. These defense lawyers take the responsibility of people's

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

"Thank you so much, Counsel. We've got to get all of that out of there."

That's how it's working out right now. I put in my comment, what is the problem that we're trying to solve by having an order being entered waiving your privacy rights? And it could very well be the case that there won't be a problem. But what about that 13-year-old kid? What's she waiving? Isn't it her mom who's signing this? And for what? So the insurance industry can do some statistical methods? Where is the balance there? There isn't any. It's not even close in protecting that kid's privacy. It's not even close from having their statistical methods and things that I saw in that order.

That's what I really wanted to share with you is kind of really what's at stake. There couldn't be anything more important than people feeling comfortable going to get the treatment that they need for psychiatric issues, for mental health issues. And I believe that this order is glomming together things that shouldn't be that have already been sorted out in many years doing this, haven't had problems.

People need records, we get them authorizations. Then we know about it, we know it's going on, we know what subpoenas are going out, we're informed, we get a copy of those records beforehand. We can go through them. If there's an issue, you have an in camera inspection. It's worked for many years. And protecting the privacy, it's extra work. But it's worthwhile extra work and important.

Thank you.

CHAIRMAN ANDERSON: Okay. Thank you.

Dan Kirchner also on 18-01.

MR. KIRCHNER: Thank you very much, Mr. Chairman.

I'm here not because I want to be. I'm here because I felt compelled. I was the attorney on Mark Ellis -- Mark Shull v. Ellis, which is the case that this order came out of. And I'm here for a couple of reasons. One, I want to say that Judge Ehrlich, throughout the two years we worked on this issue, really did a concerted and phenomenal job trying to get it right. He knows what I think because I have a brief in opposition to it. But I'm here, one, because I think he's

been unfairly maligned in this process. He really did a phenomenal job in putting this together.

But here's what I want to address. I agree with many of the remarks about the necessity for a statewide order and not just because we have one county doing this and another county doing that, and not just as lawyers, we're transient, but our cases are transient. We have cases that get filed here and get transferred for forum non conveniens, for lack of venue, personal jurisdiction. And we have cases that may be multi jurisdictional in the state, because we still have personal jurisdiction over our corporate defendant in Cook County, but we don't over other defendants. So it's important that we have uniformity for that purpose.

I will tell you one of the ways in which I think Judge Ehrlich has been maligned in this case is I don't think the way this order has been enforced and interpreted is the way that he intended it throughout this process, which is this -- And I served on the Rules Committee for nine years; good to see you again, Professor.

Rule 201(c) is one of my favorite go-to

rules in the book because it is the sword and the shield that we as lawyers have to protect our clients from undue abuse and embarrassment, and there's nothing in this order that precludes the trial court from using this order in conjunction with the Supreme Court Rules they're required to follow in exercising their discretion under 201(c) to curb abuse and embarrassment. The problem is in practice, that's not happening. And the problem is that the trial courts think they can't do that.

You have the luxury that Judge Ehrlich did not, which is to have notes on use and comments and to say, Hey, Trial Court, 201(c) is still alive and well. If the plaintiff's counsel comes to you with a motion and says, Okay, part and parcel to this HIPAA order, you need to have a second protective order in place, or, Before I let any subpoenas go out on a HIPAA order, they need to be returnable to the court or returnable to me or the third party copy company for the plaintiff's attorney to review first before they get sent. The problem is that's not what's happening in practice.

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

My thoughts on the requirements of insurance companies to maintain and keep the records, I never quite saw that argument through the course of this. I read the code provisions, and everything that seemed to relate to it had to do with financial audits, but nothing to do specifically with maintaining protected health information. And at the end of the day, while it's certainly helpful to them to assess their claim in having these records, they're not required to have them. They have counsel that they've hired to distill this information for them and report back to them what they should do. And there are ways in which they can view records and not take them into possession and say now we've got these, we have to keep them forever.

And we do face, there is this cross pollination between claims files within insurance companies. I have a case right now, a State Farm case, where I went in on a deposition of my plaintiff. And I knew what records they had because I gave them to them. And we're sitting in my client's dep, and the defense attorney starts asking questions with a stack of records like this

(indicating). And I knew he didn't send out any subpoenas. So I say, "What do you have there?"

"The records you gave me."

"No, no. These are the records I gave you. What do you have there?"

"I don't know where this came from."

It came from Claims. And I still to this day don't know how they got them. And what I suspect is, and I talked to my client about this, she said she had a prior claim with a State Farm insured. And that other claim file that they had got passed on for their use in this case. It wasn't disclosed to me; it wasn't produced to me. But I don't trust for a second the manner in which insurance companies use protected health information. I don't trust for a second the way they say they need to preserve them. So I think that is a fallacy.

So those are my comments.

And I will also say in response to all the comments, I did not draft a different order.

PROFESSOR BEYLER: How would you modify that order that you say you didn't think was ever intended, but which in fact is occurring?

MR. KIRCHNER: I think it needs to be more -- One, I think it needs to be more forcefully directed at the doctors and the hospitals to make sure they don't turn over what's not required.

Again, to regurgitate prior comments, I do think that the requirement that all records be destroyed is universal, regardless. I think certainly it's the onus on us as the plaintiff's lawyer, I do this in my cases where I take my client and have them sign the current order. And I explain to them what it is, and I say, "Hey, tell me right now what skeletons are in the closet. Tell me what I need to know about before they go and get them, what concerns you have, because then I can protect you." I can use 201(c) and go in on a motion. I can't do that if I don't know about it. So I have that conversation with my clients. So I'm proactive in that sense.

The onus is on us, but I certainly echo all the sentiments that there need to be further restrictions honing in on relevancy. 201(a), which talks about discovery, it talks about broad discovery of relevant matters in litigation. So there's no reason why there shouldn't be date

restrictions or restrictions to parts of the body or whatever makes sense in the context of that case. Because no case -- there are no two cases that are alike. They're individual cases, so I think they need to be treated like individual cases and individual rights with respect to privacy.

CHAIRMAN ANDERSON: Thank you very much, Mr. Kirchner.

Next we have Mariam Hafezi.

MS. HAFEZI: Good afternoon. I'm a plaintiff's personal injury lawyer. I'm doing it for over eight years.

I think to answer the professor's question, I think that the prior standard HIPAA order from Cook County was well done. It put the onus on the defense to seek it be answered if they so needed it.

And to deal with the issue of alleged compliance with these insurance codes, if you do read it that way, then we can simply add a line that says at the conclusion of litigation, these can be stored for five years or seven years or whatever the alleged time frame is, stored for

compliance with whatever that code is. And that's it. Nothing more, nothing less.

And what, unfortunately, the proposed order asks for is not just to keep them, but to use them in whatever ways they can come up with. And that's really the problem here with the HIPAA order as proposed.

And I have my labor and delivery record. And in my labor and delivery record, in the first five pages, you can find out all of my past procedures, any medications I've ever been on, any allergies that I have, my social history. And you can find out on page 5 about my mother, my father, my sister, my grandparents on both sides. And that's what they want to keep and use for whatever databasing they can do. And that's the problem. That's why HIPAA requires destruction at the conclusion of the case. You use it for what it's needed for to settle a claim, and then you destroy it. And that's to protect everybody involved. So within the context of litigation, you can share with experts, you can share with attorneys, whatever you need to do to get it done, that's what's done. And I think that's where I have an

issue with the HIPAA order that's proposed.

So that's what I would propose would be a better HIPAA going forward. But I do think that the concept of a standard statewide HIPAA would be great. So I don't have anything else in addition to what everybody has already said.

CHAIRMAN ANDERSON: Any questions?

(No response.)

CHAIRMAN ANDERSON: Thank you.

Next we have Glen Amundsen.

MR. AMUNDSEN: Good afternoon, everyone. Thank you for allowing me to address you, and I know it's been a long hearing already, but I think I'm the first person to speak on behalf of this proposal. So I hope that I'll be saying something new here from what we've heard.

I bring my testimony privately, but I want to inform this group that I was counsel for State Farm in the Cook County matter that generated this. So I'm a counterpart of Mr. Kirchner, who spent two years working very hard with Judge Ehrlich to handle the matter that resulted in the present Cook County procedures. Also, I've litigated this issue around the state

of Illinois in many other counties. And I think the one thing I've heard in this room that I endorse that I think is common to us all is there is a need for a common procedure and a rule to be issued on the subject. Because there are important issues of the legitimate rights of privacy that litigants have, but also of the other very significant rights and responsibilities that are involved in the Insurance Code and other issues. There's a confluence of many issues of law that come into this subject. It's not an easy one to address. But it is best addressed.

I'm also the counsel who is handling the appeal of the Lake County matter, and I will answer Professor Beyler's question further in a moment that you raised earlier, sir. But I just wanted this Committee to know where I come from as I'm addressing you.

So without going into all the details -- I've already filed a comment with you -- I would say a couple of things that I've heard here that need to be pointed out and addressed. First, since at least when the Kunkel case was decided, which is back in the 1995, 1996 era, since the

time of Kunkel, at a minimum, it's been the common law of Illinois that when an injured person puts -- brings a claim and files a suit in an adversarial proceeding, they are implicitly waiving their right of constitutional privacy. That's been in the Constitution since 1970. And our Supreme Court said in that case that full disclosure of all relevant records is required.

And further, in that case, it said that the relevancy requirements and proportionality are the protections that make it not an unreasonable thing to require those records to be produced.

So there have been a number of people here who have commented to this Committee about -- and rightly so, emotionally -- about the impact of privacy on the issue of personal injury. And we all understand that on both sides of the bar. We all want our clients to be protected, including sometimes defendants who get medical records produced as well, by the way. So we all want that to be protected. But the common law of Illinois has required a waiver. And, by the way, the order that is proposed with Proposal 18-01 doesn't say that it's a blanket waiver, or you can get any

records, or by signing this, you've waived your entire rights to privacy. What it says is, it's got a case caption and a case number. In this case, you are waiving your right to privacy.

Judge Ehrlich will address you; but having been in those proceedings, I can -- I will say that in part, the reason for that is so that it is clear. Not all lawyers may be like Mr. Kirchner or others who inform their clients of what it means to file a lawsuit. And so for the court to say we're trying to make this open and completely -- this whole process open for you to understand what these records are going to be used for and how the filing of the suit before those records are being obtained, this is what you're agreeing to do, so there's nothing offensive about that. In fact, it's completely consistent with the rule of law that has been in place since Kunkel.

I have to respectfully disagree with my colleague, Mr. Hebeisen. The Kunkel case is not like this matter whatsoever, because in the Kunkel case, we were dealing with a statute that required the production of all prior medical records with

no limitation of relevancy. That was the point of the Supreme Court in that case. The order that is submitted with 18-01 simply says that any records that aren't produced have to be done under a certain process. The order doesn't say what records should be produced. And part of the reason for that is with the volume of cases in Cook County, it's -- for the court to constantly, in every case, say these records can be produced and these can't be, is not a reasonable way to efficiently get records produced.

99 percent of the time, the lawyers know what records need to be produced. There are some people who try to abuse it, and that's what Rule 201 is for, specifically, 201(c). And, in fact, this order says outright, you cannot -- I think the court was very sensitive, the judges of the Circuit Court of Cook County were very sensitive to say, by the way, we're reminding you that you cannot use any means that is not lawfully, you know, other Supreme Court Rules, other -- that is not authorized by the Supreme Court Rules or the law of Illinois to get these records. Don't -- In fact, it expressly says you

cannot use this order to get records in any other means, by any other means, nor can this order be viewed as a blanket permission to get any records or contact counsel of treating professionals. These are all things that have been put in the comments, and that's just not the case. I think those are emotional things that people are concerned about, but it's a misapprehension of what is in this order.

And frankly, if there are violations of this sort, judges know exactly what to do, and so do counsel for their clients to protect them when those bad things happen. They know exactly what to do, and there are sanctions in place in the Rules that address them.

As far as the scope and the means of discovery, I would point out that in paragraph 6, the order expressly says what means can be used. And the order as proposed also expressly indicates that no laws of the State of Illinois that deal with special records or privacy in mental health context, et cetera, are -- can be violated or obviated by the use of this order.

I think it's important also to say as a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

authorization for the records of Northwestern Hospital. That complies with HIPAA. An order -- Even without an order, a party can subpoena with a proof of service the records of Northwestern Hospital. That complies with HIPAA. None of those methods I just described limits or requires the destruction of the records or that you can't use it for other purposes.

There's a reason that Congress and Health and Human Services didn't regulate insurance companies on this, and that's because insurance companies are subject to a robust and very explicit process for the handling of private information. There is, in Illinois, a whole chapter of the Insurance Code that talks about private information and what insurance companies can and can't do with it, and that includes medical records. So Congress and HHS expressly said they didn't want to take jurisdiction over this.

But what we have is the plaintiff's attorney arguing, or the plaintiff arguing that because I want to have a QPO used, even though there are multiple other ways the records could be

obtained without a QPO, because I elect to use a QPO, that means that I can require you to contravene the Illinois Insurance Code and the Illinois Insurance Department regulations about what you can do with the records.

So the Lake County court, I have great respect for them. I practiced there many years. I respectfully submit that that ruling is incorrect because P and C insurers are not covered by HIPAA. The fact that they get medical records or that the plaintiff wants to use in a protective order the terminology of a so-called qualified protective order doesn't make it possible for an individual who's been injured to say well, the Insurance Code of Illinois is -- you know, can be obviated, it can be circumvented.

And the bottom line is, the conflict is not between Illinois law and HIPAA. The conflict is between courts who attempt to apply the limitations of a QPO to insurance companies who are expressly exempt from those requirements. And one of the things the Lake County Court said was, well, if -- I can certainly require litigants and attorneys to destroy the records. Isn't that

right? I can do that. Absolutely, you can, your Honor. Why can't I then do it with respect to insurance companies? Well, the difference is that the litigants, the experts, the attorneys, they aren't subject to a host of regulatory scrutiny and a complete regulatory scheme that was established by the legislature. They're not subject to those things. The insurance industry is. And, by the way, if they violate them, they're subject to penalties and fines.

And I noted I heard here somebody raised a concern about a particular case, and that should be reported to the Department of Insurance. That's what their role and responsibility is. If there's a violation of privacy -- I'm not suggesting -- I don't know the facts of it -- but if there's an alleged problem with an insurance company violating the privacy rules of the State of Illinois and the Insurance Code, then there is a process under the law for that to be addressed.

What the Court needs -- The bottom line is this is not the order of the individual. This protective order is not being -- shouldn't be dictated by the injured party. It should be

dictated by the court. It's the court's order to determine how the records should be handled, and it is the court -- Of course, all trial judges I know are sensitive to not entering court orders that are in direct contravention of other statutes and regulations that would put the litigants in the unhappy position of either violating their order or violating the law. And that, ladies and gentlemen, that's what was at the core of the Cook County case. That's why we filed it.

The prior order inadvertently applied HIPAA to insurance companies when they are not subject to those regulations. That's what Judge Ehrlich found, and we submit that's what the Appellate Court in the Second District will find.

So the problem, there's no conflict between HIPAA and Illinois law. There's a conflict between well-meaning orders by courts that try to limit the possession and use of records for insurance companies just the way they do with litigants and lawyers, who are not subject to the Illinois Insurance Code. So that is the problem.

CHAIRMAN ANDERSON: Does anyone have any

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

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

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

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

legislatively address that issue to clarify that records that are gathered for a particular case should be used only for that case and no other purposes and may be destroyed after the conclusion of the case?

MR. AMUNDSEN: The answer is no, I'm not aware of that personally. And it's one of the issues, though, that I think is appropriately -- we're dealing with the common law of Illinois or potentially a Rule of the Supreme Court of Illinois. And the question of what the public policy of the State of Illinois is for the purposes of having a healthy and vibrant insurance agency, what they need or don't need, that goes directly to your question, sir. And that's a different question, what the legislature thinks is required or not required for insurance companies to conduct their business.

But we're dealing with the existing set of laws. And I'll reiterate what I said earlier. I'm not aware of any judge, trial judge, who so far ruled that those -- that it is -- that you can restrict or limit under the Insurance Code the use or retention of records that we've been discussing.

But you're right. It could be addressed by the legislature. I'm not aware of it being -- that presently being before the legislature.

CHAIRMAN ANDERSON: Any other questions for Mr. Amundsen?

(No response.)

CHAIRMAN ANDERSON: Thank you, sir.

We have Steve Grossi.

MR. GROSSI: Thanks very much, your Honor.

Just to introduce myself briefly, I'm an attorney with Bruce Farrel Dorn & Associates, which is the State Farm staff counsel handling cases in Cook County. I'm a director elected to IDC, and I'm also a member of the ISBA. I'm here speaking in my individual capacity today, so the views and opinions that I express today do not necessarily reflect the views of State Farm Insurance or any other person or entity.

I do want to thank the Committee for taking on this important issue. I want to thank my fellow commenters, who obviously put a lot of time and effort into their thoughts. I'd like to thank Judge Ehrlich for all of his efforts in getting this order and this important issue before

the Committee.

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

Illinois, and I'll address a technical reason why there is a problem.

So the Illinois Insurance Code 919.30 requires insurers to maintain claim data for two years after the close of a claim. This claim data includes detailed documentation. And if you go to 919.40, detailed documentation is specifically defined as including bills. Bills are unequivocally PHI. So if an insurer gets sent a medical bill, which really they should, they can't just require defense counsels to provide a summary, because honestly, diligence by the insurer is sometimes looking over what defense counsel is doing and making sure they're doing the right things, they're providing the right bills. So getting the bills themselves is a necessary act for an insurer to do. And once they have those bills, if they receive them subject to an order that requires them to destroy it, they simply cannot comply with the plain language of the administrative code. If it's enforced or not by the Director of Insurance, I cannot and do not speak to that in any way. But I'm a simple person who just reads these regulations, and the

regulation says you have to keep them for at least two years behind the time the claim is closed. I don't see how an insurer could look at that and not comply.

PROFESSOR BEYLER: I saw that in your papers in terms of bills, but I didn't see anything else about any X-rays or any of the thousands of different kinds of items that could come. Is there any other regulation that addresses items that would be protected health care information?

MR. GROSSI: Well, that same regulation essentially says that if an inspection is to occur, whoever is inspecting has to come in and be able to recreate what was happening when this claim was evaluated. So if it includes bills, it very likely includes records and X-rays. So they can come in and say, Are you evaluating this claim appropriately? If you have no health information, how can they say whether or not this claim was evaluated appropriately versus someone was paid short due to bargaining disadvantage or otherwise if they have no information as to the injuries claimed? Even if you just have the bills, that doesn't tell you if the X-ray showed a fracture or

no fracture at all. So how could we tell in an inspection if one is appropriately paying on $7,000 in bills if they don't have the X-ray saying this is a fracture or not? So I think that same regulation does require more than just bills; detailed documentation is required more broadly.

PROFESSOR BEYLER: I'm wondering, in terms of claim evaluation, when you get the medical records, do you have people on your staff who basically are medical experts who go into it and go through and, if you will, write memos and other things evaluating that claim?

MR. GROSSI: Our office has no doctors or nurses or anything on staff, just the attorneys and the expertise, or the paralegals and the expertise they have in reviewing those records. Again, just specific to our office, which only handles claims that have proceeded to litigation, not presuit.

JUDGE VALDERAMMA: If I can ask a question. Does the code -- and I don't know, so I'm asking the question -- from your perspective, anyway, does the code govern both, in relation to the claim, insurer and the insured, and claims that

are brought by the insured against -- Let me start again.

Claims that are being brought against the insured of an insurer company in the sense that, for example, someone saying, I was involved in an accident, they're making a direct claim against the party that, let's say it was an automobile accident, who struck that individual. They are then being represented, meaning that defendant is being represented by presumably an attorney from the insurance company. Versus a claim where someone is actually insured, making a claim against their insurance company, and they're asking for the insurance company to make them whole. Do you see the difference?

MR. GROSSI: I think you're asking whether first-party and third-party claims are both covered under the administrative code here.

JUDGE VALDERRAMMA: Yes.

MR. GROSSI: I don't have a specific cite for you. My understanding is it covers both first-party and third-party claims.

JUDGE VALDERRAMMA: And the reason I ask is, and I know the question that was asked earlier, on

the issue of bills, the insurance company in the case of a third party is making a business decision on whether or not it's going to pay out a claim. In other words, if a plaintiff in an injury case is saying, I've made a demand of $50,000, the insurance company, whether the bills are 3,000 or 25,000, is making a decision based upon, presumably, the evaluation from their experts as to the value of the claim as well as their defense counsel in terms of what the liability and damages are in that claim. So the insurance company may very well in a case of, I won't say minimal dollars, in a case where there's not a lot of medical bills, pay very little; and in a case where there is slightly more, pay more. But it may be a difference in terms of the evaluation of the medical damages.

MR. GROSSI: I can tell you the Department of Insurance certainly regulates both first-party and third-party claims. And if that's a concern, it's all the more reason why we do need proper regulation from the Department of Insurance to be insured, which is what proposal 18-01 does.

Something I'd like to address is the

separate methods by which information is provided to or obtained by an insurer. And I'll just try and highlight them briefly. The first is a specific court order that is markedly different from a HIPAA QPO or qualified protective order, which would be the second method.

The third method is a subpoena with satisfactory assurance of notice to the individual. You can also have assurance of seeking a QPO, but I'm going to kind of lump that into the prior one.

So a subpoena with satisfactory assurance of notice to the individual and a time period to object, and no objection being filed, that is a method to obtain records with no order and with no authorization. In fact, 164.512 of the Code of Federal Regulations specifically says these are the uses for which an opportunity to object is not required.

So what Proposal 18-01 actually does is it streamlines the method to obtain these records. They can be obtained without a court order. They can be obtained without an authorization if you send a proper subpoena with satisfactory

assurance. And typically, the language of the subpoena itself will be sufficient for satisfactory assurance, according to HHS.gov in the Frequently Asked Questions for Professionals. So at that point, if you get the information through satisfactory assurance, the insurer is not subject to destroying; it is not subject to any use requirements. In fact, when this Proposal 18-01 says you can only get records through the discovery process when you're using this order, there is more protection for privacy than there is in the event that someone obtains the records through a subpoena with satisfactory assurance. And I'm not sure that point has really been made.

Lastly, there's a HIPAA authorization, which is the fourth method to obtain records.

Fifth, records are routinely provided by claimants before and during litigation, either through discovery or just presuit to try and settle it. Those aren't protected by HIPAA in any way. They can be used, and they can be destroyed consistent with the laws that are applicable.

So as far as a technical analysis of this, looking to whether Proposal 18-01 is a court

order under HIPAA, there are two different methods. A court order and a HIPAA QPO, they are equals. One is not subordinate to the other. They are alternatives to comply with HIPAA. And all HIPAA does, the HIPAA privacy rule does, is allow covered entities to produce these records in response to a court order, subpoena, or other proper request.

So what are examples of a valid court order? Well, if it's a defendant hospital and they are directly ordered to produce records from this date identified as such, that's an example of a court order directing someone to produce those records.

Another example is a compelling order against a nonparty hospital to comply with the subpoena. And there, the records are just what is detailed in the subpoena. What Proposal 18-01 does is essentially says the same thing as that latter example, but says the subpoena is yet to issue. And I'm going to address that a little bit more at a later point.

So there's no requirement that expressly authorizes a court order to comply with the

definition of a HIPAA QPO. It shouldn't be read in; rather, the purpose of that section, a court order, was to allow the states to regulate what will be allowed, not to impose a federal regulation on the definition of a court order.

The second point I'd like --

CHAIRMAN ANDERSON: Mr. Grossi, I'm going to give you another two minutes. It's ten minutes a person.

MR. GROSSI: I apologize. I will go as quickly as I can.

For preemption analysis, it's improper to compare the HIPAA QPO to the court order. An authorization doesn't have to comply with the definition of a QPO, and an authorization is not preempted. A subpoena with satisfactory assurance does not have to comply with the HIPAA QPO definition; it's not preemptive. They're all equal, so there's no preemption. And, in fact, the court order here explicitly complies with HIPAA. So how could it be preempted if it complies with HIPAA?

The impact on the constitutional right to privacy has to be viewed in light of what the

right to privacy is. There's no physician-patient privilege, and all relevant information is not protected by the right to privacy.

As far as alternatives, if you look at using an authorization, I can tell you that my office issues somewhere in the range of 5,000 record requests in the context that they use. So there would be no way that the court could look through 5,000 specific recommendations to say is there a time, is there a scope, that type of thing. It's properly addressed with a subpoena that is objected to if there is some improper request. The time and scope limitations would be very difficult because sometimes a permanent back injury from 25 years ago is still relevant now. Sometimes if you have a foot claim, it can be explained by a back injury. And sometimes a permanent injury from 40 years ago explains why you don't have a normal life now. So time and scope really has to be addressed on a specific basis.

Last thing, I just want to say I believe the proposal is a viable option as written. If not recommended as written, I suggest that the

Committee consider a few alternatives, or an alternative version with just slight modifications. And I'll address those very briefly.

The first I would suggest is a title change to a HIPAA Court Order because it's not a qualified protective order under HIPAA. It doesn't meet that definition. It is a HIPAA court order.

The second thing I would say is to amend perhaps the language in Rule 18 per the order to require compliance with satisfactory assurance. So you could say something, for example, of a provider shouldn't provide these until ten days have elapsed and there's been no objection or no notice of objection. And if there is an objection, they shouldn't provide these until the objection has been ruled upon and addressed. That would -- and require notice to any patient in writing if their records are going to potentially be obtained.

And finally, just as to paragraph 2(c) of the order, "for the use by the parties and their agents," I think you can amend that specific

paragraph to have it match the HIPAA protective order, or HIPAA qualified protective order definition, it's just to limit the use to the parties and their agents just to something that's relevant to this litigation, just like the definition of the HIPAA QPO, again, just for the parties and their agents.

And additional points made today to make clear that the mental health records need a specific order in addition to this one or to state that this is explicitly bound by Rule 201 and the other Illinois Supreme Court Rules related to discovery.

This framework is good. It could be tweaked, if you believe, in that manner; it's viable as it is. But really, it's something that should be looking at tweaks rather than a complete overhaul. Because if you were to take away what the insurance companies could do with that, again, that is only for insurance companies to comply with laws and rules and regulations that apply to them. Those are the only uses allowed by the order. They can't keep them for any other use.

So what we take away, we can say they

don't have to comply with the laws related to record retention or something like that. That wouldn't be proper. And again, I think it's tailored appropriately for the right to privacy.

If there are any questions, I'll address them. If not, thank you again.

VICE CHAIR ROMANUCCI: Very, very quickly. You talked about subpoenas. Do you feel that there's any conflict in the "any and all" language that's used in subpoenas with the qualified protective order? Is there a conflict?

MR. GROSSI: I certainly see the concerns that any and all records could be subject to be obtained. But again, the relevance and the reasonableness requirements in 201 on a case-by-case basis are appropriate to address that. If it's an OB-GYN, any and all may not, depending on the context of it, be appropriate. If it's an orthopedic doctor, it may. The trouble is the insurer or the defense attorney doesn't know what's in the records until we get them. We have no idea. Family doctor records go back 20 years. You don't know what could possibly be in there until we see those records. So it's very

difficult to try and speculate as to what could or might be in there, especially because the frequency with which some of these things are not reported, visits are not reported, conditions are not reported. It's far too regular to just wholesale accept some kind of limitation as noted in the Supreme Court Rule as opposed to on a case-by-case basis.

So I definitely see that concern. I think it has to be addressed on a case-by-case basis because most subpoenas are not objected to. The vast, vast majority are just left alone by plaintiffs and their counsel. It's a rare, rare instance where you get a subpoena objection. I personally have never seen one with an objection to the right to privacy being a reason to not produce those records. I've seen some with relevant time limitations, and I think judges have addressed those appropriately. The Supreme Court in Kunkel and Appellate Court in Shull, both had faith in the judges to address and protect the right to privacy appropriately. I share that same faith.

Thank you for your time.

CHAIRMAN ANDERSON: Any other questions?

(No response.)

CHAIRMAN ANDERSON: Thank you.

Finally, we have Judge Ehrlich. Good afternoon, sir.

JUDGE EHRLICH: I want to thank the Committee for allowing me to speak today. I specifically asked to speak last today because I wanted the Committee to appreciate in excruciating detail that no good deed goes unpunished.

VICE CHAIR ROMANUCCI: We agree to that already. And by the way, I don't know that you're so much misaligned. I think that's what happens, and I think we all appreciate that.

JUDGE EHRLICH: But I would like to, if I could with the Committee's agreement, is I'd like to get through my statement first, what I'd like to present. I know there are probably lots of questions, but I think I will address some of them as I go through my notes. And I'd be happy to take your questions at the end.

Just by way of introduction, I'd like to make some comments with regard to HIPAA. I started to get involved with HIPAA in 2000, which

was two years prior to the effective date of the statute. I did that as Chief Assistant Corporation Counsel for the City of Chicago. I was the person designated to implement HIPAA with regard to all the City's documentation, particularly that in the Law Department. I then became the City's HIPAA privacy officer in my role as Deputy Corporation Counsel when I headed the City's Torts Division. So I like to think I have more than a passing knowledge of the statute and the regulations. I'm certainly not the be-all and end-all with regard to the statute and the regulations, but I think I have a fairly good grasp of the issues involved in the statute.

So what I'd like to do is address essentially four areas, and this will be relatively quick. First, some legal issues; second, some practical issues; third, issues of scope, which have been addressed by many of the persons here today; and finally, some additional recommendations perhaps for language changes to this order as well as to the QPO.

Starting first with legal questions, let me be clear. Neither HIPAA nor its regulations in

any way mandates any specific type of language that must be included in the protective order. It simply does not. You can look at the DHS website, which plainly states exactly that fact. So what goes into a court order is up to a particular court. That's important because HIPAA also specifically authorizes the disclosure of protected health information pursuant to subpoena and other forms of court process. That is particularly important, and it's one of the practical issues that I'm going to address as to how we use that here in Cook County. But just so you know, there is nothing that mandates any particular type of language to be contained in the HIPAA order.

Second legal issue, HIPAA does not address in any way constitutional rights to privacy. As I indicated in my opinion in Shull v. Ellis, there are only ten states that have explicit constitutional rights to privacy. Illinois is one of them. That is one of the reasons we had to take into consideration the Constitution when we addressed the issue here.

I will let you know just as one side

point, the prior HIPAA order that was in effect was under Judge Maddux's auspices, which was something I drafted when I was at the Corporation Counsel's Office, because I drafted that order, sent it to Judge Evans, and Judge Maddux eventually put it into effect. It's only because I didn't have to deal with insurance issues at the Corporation Counsel's Office that I didn't see all the ramifications that a HIPAA order requires in Illinois, the things as I indicated, the insurance issues, the constitutional issues, the HIPAA issues, which is something I only began to appreciate once I became a judge. So again, just to give you a little background on that.

But the reason that that's important is because we know that -- and this goes to Professor Beyler's question earlier -- simply filing a lawsuit does not waive one's constitutional right to privacy. That is one of the reasons we had to include a specific waiver in the HIPAA order so that we can get around that hurdle that's imposed by the Constitution.

I would just also make a note with regard to some of the other opinions from County judges

as well as Judge Hoffman's proposed HIPAA order that he attached to one of his opinions, one of the fundamental problems with those opinions is they fail to distinguish between what is protected health information and what are medical records. They seem to conflate those two things. And they are plainly not.

Protected health information is explicitly defined in the statutes and regulations. It is the data that is contained within the records, whether it's medical bills, medical records, employment records, any other sort of information that contains any one of the 19 personal identifiers that HIPAA lists as being information that is subject to protection under the statute and regulations.

For such a fundamental issue to be misunderstood is critical to what we have tried to achieve with the HIPAA order here, because we've distinguished between the types of information that are contained in medical records, bills, those sorts of things, from the medical records and the documents themselves. That goes also to the tension issue that Mr. Hebeisen spoke about,

what insurance companies are required to do under the Insurance Code and regulations.

Second area, practical issues. I do want to let the Committee know that the drafting of this did take more than two years. With regard to a statement by Mr. Hebeisen, I have to disagree with him. The Illinois Trial Lawyers Association was involved because in fact the president of it was sitting at the table when we went through the final iteration of the language, as was Mr. Pfaff, as was Mr. Kirchner, as was Hebeisen, Judge Flanagan. Many other persons were sitting at the table as we went through this. So this was not a surprise in terms of what the final language was to anyone.

But with regard to what we do in the Circuit Court of Cook County, I sit in the Law Division's Motion Section. There are ten judges that sit in that section. We hear all nonstatutory tort cases, personal injury, wrongful death, Survivor Act, the typical type of personal injury cases we all know about. As of last week when Justice's statistics came out, there are 14,157 cases divided between ten judges. That

means that we have an average of over 1400 cases per judge just on the 22nd floor of the Motion Section. To accept the statements made by some of the people here today with regard to unique HIPAA orders with regard to each of those cases, it is absolutely impossible. It would drive our dockets to a screaming halt. We would be spending most of our time dealing with those sorts of orders. It simply can't done. That is why we tried to achieve a broader HIPAA order that can be applied in a variety of circumstances depending on the factual specifics of the case, the type of case, the type of information that is necessary for that case.

I will say this as well. Because of the use of the HIPAA order, our numbers from -- our disposition date numbers have actually been driven down in the Motion Section. We have been able to get rid of cases earlier because by having the HIPAA order requiring records to be produced on a more rapid basis. We get through the written discovery sooner, we get to oral discovery sooner, we get that done sooner, the case gets resolved sooner. So it has actually had a statistical

effect and increased the efficiency we have in the Motion Section. And why those numbers are important is not to indicate that we are hardworking judges in the Motion Section, my flag to wave for the judges in that section, but the takeaway is if the HIPAA order that we have works under the extreme circumstances that we have in Cook County, then plainly it would work in counties where they have far fewer cases in which you don't have this volume and the need to address specific issues with regard to discovery.

Third, I'd like to address exactly how we deal with, or how a HIPAA order is used in Cook County. Once a HIPAA order is entered by the judge, it is attached to all subpoenas that are issued for records. As I indicated before, that is permitted under HIPAA to get the release pursuant to the subpoena. The subpoena is the document that drives the discovery and the release of protected health information. The fact that we don't have objections, I will just as a side note, since this went into effect year and a half ago, I have gotten three motions -- three motions, and three motions only -- from plaintiff's attorneys

objecting to the scope of the release of documents pursuant to a subpoena. This in no way changes the requirements for the parties to conduct discussions under Rule 201(k) and to agree to the scope of discovery, and it in no way affects Illinois Supreme Court Rule 201(c), which authorizes the court to control discovery to prevent abuse from going on in the litigation. So to the extent that persons are complaining that this is too broad, it certainly hasn't come up either in my courtroom or, I can tell you on behalf of the other judges on the 22nd floor, it simply is raised almost -- as I said, three in my courtroom. I think Judge Flanagan told me she had two last year. So it simply is not the issue that people testifying today have made it out to be.

The suggestion that we go back to using authorizations, Mr. Pfaff addressed that and some of the other people today addressed that as well. That would be an enormous mistake. When you deal with authorizations, you take the case, you take the authorization out of the court purview. I have no control over an authorization that is signed by a plaintiff if it is a form from the

University of Chicago Hospital or Northwestern. If it's coming from a court order that has the subpoena attached to it, I have the authority to require University of Chicago to produce those records or Northwestern or any other provider to give me those records.

The second problem with authorizations is every provider has its own form. So plaintiff has to file -- has to sign every single form for every single provider that it has. And I can tell you in complex personal injury cases, medical malpractice cases, sometimes we get 15, 20, up to 30 different providers in those cases. Plaintiff would have to sign all of them. The reason that's important is that once documents are produced in discovery, oftentimes it's seen that there is past treatment that is somehow relevant to the current treatment. We don't have to go back and get another authorization for that other doctor whose records appear to be somehow relevant to the case. We can use the same HIPAA order that's already been ordered and attach it to a new subpoena to that physician, who then can provide those records.

Scope issues. This was particularly indicated in some of the written submissions but also made today orally. Again I will note that if there have been objections, they have not been presented to courts. It's simply not the practice we have on the 22nd floor. We have just not gotten any complaints in the system.

Second, there's an enormous misunderstanding in terms of what HIPAA covers. HIPAA is the Health Insurance Portability and Accountability Act. It is not the workers' compensation portability and accountability act. It is not errors and omissions. It is not any other type of insurance. It's health insurance. That's why property and casualty insurers are explicitly exempt from HIPAA. Nothing that you've heard today affects property and casualty insurers. They're simply not subject to HIPAA regulations. And that, again, is a misunderstanding that people don't seem to apprehend. That's why we had to include in the HIPAA order some aspect of the Insurance Code, the insurance regulations, because it's those that are driving that property and casualty insurers must

retain, not HIPAA. So that's why those explicit statements are in there as to what the documents may be used for.

The reason we included that language, and I heard this objection to it from Mr. Pfaff -- and I have a great respect for Mr. Pfaff -- the reason we included that is because without having some specific explanation of what those documents may be used for, there's not a knowing and explicit waiver by the plaintiff over their medical records. So that's the reason we included that.

Fourth issue regarding scope, any sort of production or any disclosure of protected health information in litigation is going to be overly broad. The reason is if you go to a doctor for a broken leg as a result of a motor vehicle collision, the fact that you are taking antidepressants or beta blockers or some other sort of medications will already be automatically included in the records you get. That's because medical providers do not segregate medical records based upon what we need them for for purposes of litigation. You get what you get. But that's something, again, to be discussed by the parties

ahead of time. Absolutely I agree if you're going in for a broken leg, there's no reason whatsoever for OB-GYN records to be produced unless there's a claim of fetal harm of some sort. But that's an issue for a 201(k) conference for the parties. They're the ones who can direct why they want them, drive the type of discovery that's going on, not the courts coming in and interfering on the front end. If they have a problem, they come and talk to us about it.

Finally, the scope issue also is, as Mr. Hebeisen told you before, many times, parties submit their medical records to a property and casualty insurer in hopes of settling a claim prior to filing a suit. So this is even before someone is a plaintiff. It's just a claimant. Well, those records are, again, not subject to HIPAA whatsoever, because they're not subject to -- they're not being brought as part of the litigation, it's simply brought as part of the claims process. So again, there's no control of that.

Let me finally get to the recommendations. I have three which I think might

be of use to the Committee in terms of where we go with this moving forward.

First, I would add the word "limited" in two places to the proposed Rule 218(b), first in the title of the Rule itself. So it would read "Limited Release of Medical Information." And secondly, in the text of 218(b) so it would read "executed limited waiver." To the extent that people think this is somehow an overall, broad waiver, which it is not, even though the order doesn't say that, this would provide some additional sort of protection or explanation in terms of what we mean is the scope of the HIPAA order itself.

VICE CHAIR ROMANUCCI: I'm sorry, your Honor. Could you repeat that last part?

JUDGE EHRLICH: Sure. Two things. First, in the title itself, "Limited Release of Medical Information," because the words "release of medical information" are already there, so simply adding the word "limited" before that.

And secondly, in the text itself, I think it's the bottom of the Rule, would be "an executed limited waiver." Again, the word "limited" is the

new word to be inserted. That's one recommendation.

The second recommendation is to add a paragraph to the protective order itself that -- language to the effect that -- and again, I'm just suggesting this -- "The scope of disclosure of protected health information pursuant to this order is limited by the subpoenas for release of protected health information that accompany this order."

That goes back to, again, how we deal with this in Cook County. Subpoenas are attached to the court order, the providers see that there is an attached court order requiring them to produce those records, and it is defined by the subpoena that is attached thereto. So again, the parties will have discussed what they want to have produced. They will agree to subpoena for the release of those documents. They will attach that to have them shipped off. And again, that would make clear by this provision that indicates the scope of disclosure of the protected health information is controlled by the subpoena. Again, HIPAA provides for the release of records pursuant to subpoena, so that's certainly within the scope

of HIPAA.

Third recommendation, add a paragraph to the qualified protective order again stating language to this effect: "Nothing in this QPO, or qualified protective order, limits the rights of any party to challenge the scope of the subpoenas issued in conjunction with this order or the court's authority to prevent discovery abuse pursuant to Illinois Supreme Court Rule 201(c)." That addresses the issue which, again, should have been obvious to everyone. It doesn't seem to have been. Nothing in this court order, or nothing in the QPO that we currently use affects in any way their duties under 201(k) or the Court's authority under 201(c). But if we need to make it explicit, let's make it explicit in that paragraph.

Those are my comments. If you have any questions, I would be happy to take them.

MR. HANSEN: I have a background, kind of; I want to get your fundamental opinion on this. I'm a downstate civil litigator, as is Mr. Tucker here. We cover central and southern Illinois. And as you said, what goes into court orders on this issue has been up to a particular court. And

identified it as well with regard to transfer of cases. This is not an issue that should be subject to the discretion of Circuit Court judges, at least in the sense of creating their own orders for their own specific courts. This is something that goes to the use of records, or the use of protected health information regardless of the county, regardless of the case. It's, I think, a burden that does not need to be imposed on either parties, plaintiffs and defendants, or on the insurance industry, in terms of having to adjust to every particular courtroom. I mean, if that were the case, there would be ten separate orders on my floor relating to how cases are handled, whether it's before me, Judge Flanagan, or another judge.

If it works here, it's going to work in your courtrooms downstate because it will be the same thing. And essentially what it's doing is simply putting in text what you as practitioners already do in central and southern Illinois. You agree with all this in 201. That's what this order is attempting to do as well here. So I think for consistency's sake, it's something we do

it sounds like based on what you're telling me, you've kind of solved your problem in Cook County. You said since this has been entered, you've had three motions since this HIPAA issue has been addressed by your court.

But downstate, we don't seem to have as many problems as, obviously, motion practice, et cetera. For the most part, we usually come to an agreement. The amount of times I've had to litigate this issue I can tell you has been few and far between.

JUDGE EHRLICH: Would you like to come and practice here more often?

MR. HANSEN: So my question is this. Why should we enact a rule that will imposes this order on everybody else, and why would we not just leave it to the courts to say, "You solved your problem in Cook County, it appears. If Lake has a different opinion, et cetera, let them hammer out what they want in their order"?

JUDGE EHRLICH: I think there needs to be consistency in the state. I think Mr. Amundsen addressed this as well. There needs to be a consistent order for -- and Mr. Kirchner

need statewide.

PROFESSOR BEYLER: Do you have any advice on how we deal with the fact that the Lake County court thinks HIPAA preempts this?

JUDGE EHRLICH: With regard to Judge Hoffman's recommendation, his attachment, he fails to address -- This is as a constitutional issue. And he doesn't make any indication there was a necessary waiver of constitutional rights. I don't know how one gets around that fact since simply filing a lawsuit does not waive your constitutional right to privacy. I think there has to be some sort of waiver included in the order. I think that's a major shortcoming to his recommendation.

I think with regard to Judge Ortiz's opinion, I think as I stated before, it improperly conflates the issues of protected health information and medical records and, again, also just misses the boat in terms of property and casualty insurers. They are simply exempt under HIPAA 100 percent. And that's, again, why we tried to, in doing this language, deal with those sorts of three buckets of law: The Insurance

Code, the Constitution, and HIPAA.

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

CHAIRMAN ANDERSON: Thank you very much.

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

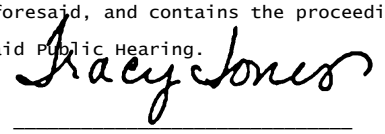
CHAIRMAN ANDERSON: Thank you.

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

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

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

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



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LIC. NO. 084-004553