PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

PRESIDENT
Bradley C. Nahrstadt
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Chicago

PRESIDENT ELECT
William K. McVisk
Tressler LLP, Chicago

1st VICE PRESIDENT
Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

2nd VICE PRESIDENT
Laura K. Beasley
Baker Sterchi Cowden & Rice LLC, Belleville

SECRETARY/TREASURER
Terry A. Fox
Flaherty & Youngerman, P.C., Chicago

DIRECTORS
Joseph M. Baczewski
Brandon & Schmidt, Carbondale
Denise Baker-Seal
Brown & James, P.C., Belleville
C. Wm. Busse, Jr.
Busse, Busse & Grasse, P.C., Chicago
Adam C. Carter
Esp Kreuzer Cores LLP, Chicago
Bruce Dorn
Bruce Farrell Dorn & Associates Chicago
James P. DuChateau
HeplerBroom LLC, Chicago
Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago
John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria
David A. Herman
Giffin, Winning, Cohen & Bodewes, P.C., Springfield
Seth Lamden
Neal, Gerber & Eisenberg LLP, Chicago
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, Rockford
Gregory W. Odom
HeplerBroom LLC, Edwardsville
Donald J. O'Meara, Jr.
Lindsay, Pickett & Postel, LLC, Chicago
Cecil E. Porter, III
Litchfield Cavo, LLP, Chicago
Kimberly A. Ross
Ford & Harrison, LLP, Chicago
Britta Sahlstrom
SmithAmundsen, LLC, Chicago
Tracy E. Stevenson
Law Offices of Tracy E. Stevenson, P.C., Chicago
John F. Watson
Craig & Craig, LLC, Mattoon
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM
Rochester

June 5, 2019

Illinois Supreme Court Rules Committee
Attn: Amy Bowne, abowne@illinoiscourts.gov
222 North LaSalle Street, 13th Floor
Chicago, Illinois 60601

Dear Ms. Bowne and Members of the Illinois Supreme Court Rules Committee:

As the 2018-2019 President of the Illinois Association of Defense Trial Counsel (IDC), I submit to you the following IDC position statement on Proposal 18-01, which seeks to amend Supreme Court Rule 218.

Introduction

When a plaintiff's medical condition is at issue in litigation, defense counsel must have access to relevant protected health information in order to fully and fairly investigate the claim. A standardized court order facilitates access to relevant medical records and bills in connection with the use of a discovery request or subpoena. After obtaining relevant health information, defense counsel regularly shares that information with both insureds and insurers. The insured, not the insurer, is the named party in a personal injury action. Still, to fulfill the duty to defend, insurers routinely obtain medical records and bills to evaluate claims for settlement purposes.

The proper handling of personal injury claims requires the flow of plaintiff's health information from defense counsel to insurers during litigation. However, once an insurer receives medical records and bills, Illinois insurance regulations require the insurer to maintain that health information for a period of years beyond the conclusion of litigation to ensure proper oversight of the insurance industry. These state regulations cannot be reconciled with an order that requires an insurer to use health information only for the purpose of litigation and destroy the same health information at the conclusion of litigation, which is one of several methods to obtain protected health information in a judicial proceeding.

Proposal 18-01 aims to reconcile the potential conflict between federal and state privacy rules and state insurance regulations. To that end, Proposal 18-01 suggests a limited waiver of the constitutional right to privacy for certain, expressly-stated purposes. One purpose is to allow insurers "to comply and conform with current and future applicable federal and state statutes, rules, and regulations ***." The waiver is purposely limited and applies "only to the extent provided" in the sample proposed uniform order.

Proposal 18-01 does not run afoul of the Illinois constitutional right of privacy protections recognized in *Kunkel v. Walton*, 179 Ill. 2d 519 (1997). Likewise, the sample proposed uniform order is unlike the discovery request that violated the physician-patient privilege in *Palm v. Holocker*, 2018 IL 123152, slip op. (filed Feb. 28, 2019). Proposal 18-01 was crafted to provide a method for obtaining protected health information in accordance with the HIPAA Privacy Rule.

Proposal 18-01 suggests an addition to the current discovery system. Importantly, the proposal does not add a new method to obtain protected health information, nor does it allow opposing

Past Presidents: Royce G. Rowe, James Baylor, Jack E. Horsley, John J. Schmidt, Thomas F. Bridgman, William J. Voelker, Jr., Bert M. Thompson, John F. Skeffington, John G. Langhenry, Jr., Lee W. Ensel, L. Bow Pritchett, John F. White, R. Lawrence Storms, John P. Ewart, Richard C. Valentine, Richard H. Hoffman, Ellis E. Fuqua, John E. Guy, Leo M. Tarpey, Willis R. Tribler, Alfred B. LaBarre, Patrick E. Maloney, Robert V. Dewey, Jr., Lawrence R. Smith, R. Michael Henderson, Paul L. Price, Stephen Corn, Rudolf G. Schade, Jr., Lyndon C. Molzahn, Daniel Formeller, Gordon R. Broom, Clifford P. Mallon, Anthony J. Tunney, Douglas J. Pomatto, Jack T. Riley, Jr., Peter W. Brandt, Charles H. Cole, Gregory C. Ray, Jennifer Jerit Johnson, Stephen J. Heine, Glen A. Amundsen, Steven M. Puiszis, Jeffrey S. Hebrank, Gregory L. Cochran, Rick Hammond, Kenneth F. Werts, Anne M. Oldenburg, R. Howard Jump, Aleen R. Tiffany, David H. Levitt, Troy A. Bozarth, R. Mark Mifflin, Michael L. Resis

PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

PRESIDENT
Bradley C. Nahrstadt
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Chicago

PRESIDENT ELECT
William K. McVisk
Tressler LLP, Chicago

1st VICE PRESIDENT
Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

2nd VICE PRESIDENT
Laura K. Beasley
Baker Sterchi Cowden & Rice LLC, Belleville

SECRETARY/TREASURER
Terry A. Fox
Flaherty & Youngerman, P.C., Chicago

DIRECTORS
Joseph M. Baczewski
Brandon & Schmidt, Carbondale
Denise Baker-Seal
Brown & James, P.C., Belleville
C. Wm. Busse, Jr.
Busse, Busse & Grasse, P.C., Chicago
Adam C. Carter
Esp Kreuzer Cores LLP, Chicago
Bruce Dorn
Bruce Farrell Dorn & Associates Chicago
James P. DuChateau
HeplerBroom LLC, Chicago
Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago
John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria
David A. Herman
Giffin, Winning, Cohen & Bodewes, P.C., Springfield
Seth Lamden
Neal, Gerber & Eisenberg LLP, Chicago
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, Rockford
Gregory W. Odom
HeplerBroom LLC, Edwardsville
Donald J. O'Meara, Jr.
Lindsay, Pickett & Postel, LLC, Chicago
Cecil E. Porter, III
Litchfield Cavo, LLP, Chicago
Kimberly A. Ross
Ford & Harrison, LLP, Chicago
Britta Sahlstrom
SmithAmundsen, LLC, Chicago
Tracy E. Stevenson
Law Offices of Tracy E. Stevenson, P.C., Chicago
John F. Watson
Craig & Craig, LLC, Mattoon
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM
Rochester

litigants to access irrelevant protected health information. Discovery requests and subpoenas remain bound by all applicable discovery rules in the Code of Civil Procedure and Illinois Supreme Court Rules. This framework appropriately requires that discovery requests are relevant and reasonable to ensure the constitutional right to privacy remains protected. Similarly, the *Petrillo* doctrine and statutory privacy protections afforded to Illinois citizens would be unchanged by Proposal 18-01.

Privacy Rights of Patients Receive Federal and State Protections

The United States Constitution provides a right to privacy that includes the "individual interest in avoiding disclosure of personal matters ***." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). This right to privacy, also known as a right to confidentiality, includes the right to protect private health information. *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (citations omitted). In *Doe*, the Second Circuit recognized a constitutional right to confidentiality with respect to HIV status. *Doe*, 15 F.3d at 267. But the federal constitutional right to privacy does not apply to all medical information; rather, the Second Circuit has found that it may be limited to highly personal or serious medical conditions. *Matson v. Board of Educ. Of City School Dist. of New York*, 631 F.3d 57, 64-67 (2d Cir. 2011) (holding that patient does not have a constitutionally protected privacy right as to a fibromyalgia diagnosis). Additionally, the federal constitutional right to privacy does not apply in all instances. *Citizens for Health v. Leavitt*, 428 F.3d 167, 177-78 (3d Cir. 2005). "[I]t is undisputed that a violation of a citizen's right to medical privacy rises to the level of a *constitutional* claim only when that violation can properly be ascribed to the government." *Leavitt*, 428 F.3d at 177 (holding that violation of medical privacy by private entities did not implicate the protections of the Due Process Clause of the Fifth Amendment).

Under federal law, every patient has a right to access their own protected health information held by a covered entity. 45 C.F.R. § 164.524(a)(1). This access includes the right to copy and inspect medical records, typically within 30 days of a request. 45 C.F.R. § 164.524(b)(2).

Opposing litigants, on the other hand, do not have unfettered access to a patient's medical records. On the federal level, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects health information through the HIPAA Privacy Rule. See e.g. 45 C.F.R. § 164.512(e). "HIPAA does not create a privilege for patients' medical information; it merely provides the procedures to follow for the disclosure of that information from a 'covered entity.'" *People v. Bauer*, 402 Ill. App. 3d 1149, 1158 (5th Dist. 2010) (citations omitted); see also *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 925-26 (7th Cir. 2004) ("All that 45 C.F.R. § 164.512(e) should be understood to do *** is to create a procedure for obtaining authority to use medical records in litigation.").

Federal courts do not recognize a physician-patient privilege under the federal law. *Gilbreath v. Guadalupe Hosp. Foundation Inc.*, 5 F.3d 785, 791 (5th Cir. 1993); see also *Ashcroft*, 362 F.3d at 925-26 (HIPAA did not create a physician-patient privilege under federal law).

On the state level, the Illinois Constitution provides a right of privacy. Ill. Const. 1970, art. I, § 6. The state constitutional right to privacy applies to health information. *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997). The Illinois physician-patient privilege also protects a patient's health information. 735 ILCS 5/8-802(1)-(11). Illinois statutes provide protections for certain types of health information, such as mental health records. See e.g. 740 ILCS 110/1 *et seq*. Among other

Past Presidents: Royce G. Rowe, James Baylor, Jack E. Horsley, John J. Schmidt, Thomas F. Bridgman, William J. Voelker, Jr., Bert M. Thompson, John F. Skeffington, John G. Langhenry, Jr., Lee W. Ensel, L. Bow Pritchett, John F. White, R. Lawrence Storms, John P. Ewart, Richard C. Valentine, Richard H. Hoffman, Ellis E. Fuqua, John E. Guy, Leo M. Tarpey, Willis R. Tribler, Alfred B. LaBarre, Patrick E. Maloney, Robert V. Dewey, Jr., Lawrence R. Smith, R. Michael Henderson, Paul L. Price, Stephen Corn, Rudolf G. Schade, Jr., Lyndon C. Molzahn, Daniel Formeller, Gordon R. Broom, Clifford P. Mallon, Anthony J. Tunney, Douglas J. Pomatto, Jack T. Riley, Jr., Peter W. Brandt, Charles H. Cole, Gregory C. Ray, Jennifer Jerit Johnson, Stephen J. Heine, Glen A. Amundsen, Steven M. Puiszis, Jeffrey S. Hebrank, Gregory L. Cochran, Rick Hammond, Kenneth F. Werts, Anne M. Oldenburg, R. Howard Jump, Aleen R. Tiffany, David H. Levitt, Troy A. Bozarth, R. Mark Mifflin, Michael L. Resis

PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

PRESIDENT
Bradley C. Nahrstadt
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Chicago

PRESIDENT ELECT
William K. McVisk
Tressler LLP, Chicago

1st VICE PRESIDENT
Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

2nd VICE PRESIDENT
Laura K. Beasley
Baker Sterchi Cowden & Rice LLC, Belleville

SECRETARY/TREASURER
Terry A. Fox
Flaherty & Youngerman, P.C., Chicago

DIRECTORS
Joseph M. Baczewski
Brandon & Schmidt, Carbondale
Denise Baker-Seal
Brown & James, P.C., Belleville
C. Wm. Busse, Jr.
Busse, Busse & Grasse, P.C., Chicago
Adam C. Carter
Esp Kreuzer Cores LLP, Chicago
Bruce Dorn
Bruce Farrell Dorn & Associates Chicago
James P. DuChateau
HeplerBroom LLC, Chicago
Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago
John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria
David A. Herman
Giffin, Winning, Cohen & Bodewes, P.C., Springfield
Seth Lamden
Neal, Gerber & Eisenberg LLP, Chicago
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, Rockford
Gregory W. Odom
HeplerBroom LLC, Edwardsville
Donald J. O'Meara, Jr.
Lindsay, Pickett & Postel, LLC, Chicago
Cecil E. Porter, III
Litchfield Cavo, LLP, Chicago
Kimberly A. Ross
Ford & Harrison, LLP, Chicago
Britta Sahlstrom
SmithAmundsen, LLC, Chicago
Tracy E. Stevenson
Law Offices of Tracy E. Stevenson, P.C., Chicago
John F. Watson
Craig & Craig, LLC, Mattoon
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM
Rochester

regulations, the Illinois Insurance Code also restricts how insurers may use health information received in connection with litigation. 215 ILCS 5/1014 *et seq*. Numerous other state and federal laws, not discussed herein, ensure the privacy of an individual's health information.

The HIPAA Privacy Rule Permits Disclosure of Protected Health Information During Litigation

The HIPAA Privacy Rule identifies 12 standards when a patient's protected health information may be disclosed by a covered entity without any authorization or opportunity to agree or object. 45 C.F.R. § 164.512 *et seq*. These standards encompass disclosures for uses required by law, health oversight activities, research, and workers' compensation purposes. *Id*. Significantly, the HIPAA Privacy Rule allows for disclosure of protected health information for judicial and administrative proceedings. 45 C.F.R. § 164.512(e).

The judicial proceedings exception to the HIPAA Privacy Rule provides several methods for opposing litigants to obtain medical records from a covered entity during a lawsuit, including: (1) use of a court order, (2) a subpoena with satisfactory assurance that an individual has been given notice of the request, and (3) a subpoena accompanied by a qualified protective order agreed upon by the parties or satisfactory assurance that the party has requested a qualified protective order from the court. 45 C.F.R. § 164.512(e)(1)(i)-(iii). Of course, without relying on the judicial proceedings exception, opposing litigants may obtain protected health information through other means such as (4) a discovery request to the opposing party or (5) the use of an authorization. 45 C.F.R. § 164.508 *et seq*.; Ill. S. Ct. R. 214(a).

Illinois Privacy Rules Permit Disclosure of Protected Health Information During Litigation

By definition, the Illinois physician-patient privilege allows disclosure of a patient's health information "in all actions brought by or against the patient *** wherein the patient's physical or mental condition is an issue ***." 735 ILCS 5/8-802(4). Where a patient files a lawsuit and places his or her medical condition at issue, this action operates as an implicit consent to the release of relevant health information pursuant to the methods of discovery authorized by the Illinois Supreme Court Rules. *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 591 (1st Dist. 1986).

The Illinois constitutional right of privacy is likewise limited, to an extent, with respect to health information when a patient places his or her health at issue in a lawsuit. *El-Amin v. Dempsey*, 329 Ill. App. 3d 800, 809 (1st Dist. 2002) (where infant's medical condition was placed at issue in medical malpractice action filed following death of infant 16 days after birth, constitutional right to privacy did not preclude discovery of mother's prenatal medical records).

Illinois Insurance Regulations Create a Potential Conflict, and Resolution of This Conflict Is Necessary to Promote the Interests of Justice

Illinois insurance regulations require insurers to maintain certain records, including health information, beyond the conclusion of the litigation. For example, the Illinois Administrative Code mandates that an insurer maintain claim data with detailed documentation for claims closed in the current year and two preceding years. 50 Ill. Admin. Code § 919.30(b)-(c). Detailed documentation includes all pertinent work papers and specifically includes medical bills. 50 Ill. Admin. Code § 919.40. The Illinois Administrative Code also mandates that an insurer retain records for at least five years beyond the final disposition of the claim. 50 Ill. Admin. Code §

Past Presidents: Royce G. Rowe, James Baylor, Jack E. Horsley, John J. Schmidt, Thomas F. Bridgman, William J. Voelker, Jr., Bert M. Thompson, John F. Skeffington, John G. Langhenry, Jr., Lee W. Ensel, L. Bow Pritchett, John F. White, R. Lawrence Storms, John P. Ewart, Richard C. Valentine, Richard H. Hoffman, Ellis E. Fuqua, John E. Guy, Leo M. Tarpey, Willis R. Tribler, Alfred B. LaBarre, Patrick E. Maloney, Robert V. Dewey, Jr., Lawrence R. Smith, R. Michael Henderson, Paul L. Price, Stephen Corn, Rudolf G. Schade, Jr., Lyndon C. Molzahn, Daniel Formeller, Gordon R. Broom, Clifford P. Mallon, Anthony J. Tunney, Douglas J. Pomatto, Jack T. Riley, Jr., Peter W. Brandt, Charles H. Cole, Gregory C. Ray, Jennifer Jerit Johnson, Stephen J. Heine, Glen A. Amundsen, Steven M. Puiszis, Jeffrey S. Hebrank, Gregory L. Cochran, Rick Hammond, Kenneth F. Werts, Anne M. Oldenburg, R. Howard Jump, Aleen R. Tiffany, David H. Levitt, Troy A. Bozarth, R. Mark Mifflin, Michael L. Resis

PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

PRESIDENT
Bradley C. Nahrstadt
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Chicago

PRESIDENT ELECT
William K. McVisk
Tressler LLP, Chicago

1st VICE PRESIDENT
Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

2nd VICE PRESIDENT
Laura K. Beasley
Baker Sterchi Cowden & Rice LLC, Belleville

SECRETARY/TREASURER
Terry A. Fox
Flaherty & Youngerman, P.C., Chicago

DIRECTORS
Joseph M. Baczewski
Brandon & Schmidt, Carbondale
Denise Baker-Seal
Brown & James, P.C., Belleville
C. Wm. Busse, Jr.
Busse, Busse & Grasse, P.C., Chicago
Adam C. Carter
Esp Kreuzer Cores LLP, Chicago
Bruce Dorn
Bruce Farrell Dorn & Associates Chicago
James P. DuChateau
HeplerBroom LLC, Chicago
Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago
John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria
David A. Herman
Giffin, Winning, Cohen & Bodewes, P.C., Springfield
Seth Lamden
Neal, Gerber & Eisenberg LLP, Chicago
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, Rockford
Gregory W. Odom
HeplerBroom LLC, Edwardsville
Donald J. O'Meara, Jr.
Lindsay, Pickett & Postel, LLC, Chicago
Cecil E. Porter, III
Litchfield Cavo, LLP, Chicago
Kimberly A. Ross
Ford & Harrison, LLP, Chicago
Britta Sahlstrom
SmithAmundsen, LLC, Chicago
Tracy E. Stevenson
Law Offices of Tracy E. Stevenson, P.C., Chicago
John F. Watson
Craig & Craig, LLC, Mattoon
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM
Rochester

901.20. Records, in this context, include "all *** documentary materials *** received by any domestic insurance company *** in connection with the transaction of its business and preserved *** as evidence of the *** business activities of the company ***." 50 Ill. Admin. Code § 901.10.

A qualified protective order is one of several methods, detailed above, that opposing litigants may use to obtain a patient's protected health information during litigation. A qualified protective order is defined as an order or stipulation by the parties that requires the health information to be used only for the purpose of the litigation and requires the return or destruction of the protected health information at the end of the litigation or proceeding. 45 C.F.R. § 164.512(e)(1)(v)(A)-(B). When protected health information obtained pursuant to a qualified protective order has been transmitted to an insurer, the insurer winds up in a trick bag whereby it is impossible to comply with both the court order requiring destruction of records at the end of litigation and the state insurance regulations requiring that the records be maintained for years after the end of litigation. Additionally, oversight of the insurance industry by the Illinois Department of Insurance may not qualify as a purpose of the litigation.

With these issues in mind, Proposal 18-01 aims to resolve the potential conflict between the applicable privacy rules and state insurance regulations. Resolution of the issue is necessary in order to promote the interests of justice by facilitating the flow of health information from defense counsel to an insurer during personal injury litigation and permitting an insurer to obtain and use relevant health information in accordance with applicable laws, as well as facilitate appropriate regulation in the insurance industry.

Kunkel v. Walton Is Consistent With Proposal 18-01

In *Kunkel v. Walton*, 179 Ill. 2d 519 (1997), the Illinois Supreme Court considered the constitutionality of section 2-1003(a) of the Code of Civil Procedure. Section 2-1003(a) required a litigant who alleged any claim for bodily injury to waive any privilege as to any provider who treatment them at any time. *Kunkel*, 179 Ill. 2d at 525-26. Critically, a litigant was also required to execute an authorization permitting opposing counsel to obtain a complete copy of all medical records in possession of any provider without respect to discovery proceedings. *Id*. The Illinois Supreme Court held that the statute was unconstitutional for two reasons. First, the statute impermissibly violated the separation of powers clause of the constitution. *Id*. at 536-37. Second, the statute violated the constitutional right to privacy. *Id*. at 539-40.

As to the right to privacy, the supreme court explained that only unreasonable invasions of privacy are impermissible. *Id*. at 538. "In the context of civil discovery, reasonableness is a function of relevance." *Id*. Because the statute provided no judicial control to prevent an opposing litigant from obtaining irrelevant medical records, it would result in unreasonable invasions of privacy in violation of the Illinois Constitution. *Id*. at 538-39. Nevertheless, the Illinois Supreme Court observed that it "is reasonable to require full disclosure of medical information that is relevant to the issues in the lawsuit." *Id*. at 538.

Unlike the statute that was found unconstitutional in *Kunkel*, the sample proposed uniform order in Proposal 18-01 makes discovery requests subject to the discovery rules in the Code of Civil Procedure and Illinois Supreme Court Rules. The applicable rules require discovery requests to be reasonably calculated to lead to the discovery of relevant information and allow courts to limit or

Past Presidents: Royce G. Rowe, James Baylor, Jack E. Horsley, John J. Schmidt, Thomas F. Bridgman, William J. Voelker, Jr., Bert M. Thompson, John F. Skeffington, John G. Langhenry, Jr., Lee W. Ensel, L. Bow Pritchett, John F. White, R. Lawrence Storms, John P. Ewart, Richard C. Valentine, Richard H. Hoffman, Ellis E. Fuqua, John E. Guy, Leo M. Tarpey, Willis R. Tribler, Alfred B. LaBarre, Patrick E. Maloney, Robert V. Dewey, Jr., Lawrence R. Smith, R. Michael Henderson, Paul L. Price, Stephen Corn, Rudolf G. Schade, Jr., Lyndon C. Molzahn, Daniel Formeller, Gordon R. Broom, Clifford P. Mallon, Anthony J. Tunney, Douglas J. Pomatto, Jack T. Riley, Jr., Peter W. Brandt, Charles H. Cole, Gregory C. Ray, Jennifer Jerit Johnson, Stephen J. Heine, Glen A. Amundsen, Steven M. Puiszis, Jeffrey S. Hebrank, Gregory L. Cochran, Rick Hammond, Kenneth F. Werts, Anne M. Oldenburg, R. Howard Jump, Aleen R. Tiffany, David H. Levitt, Troy A. Bozarth, R. Mark Mifflin, Michael L. Resis

PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

PRESIDENT
Bradley C. Nahrstadt
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Chicago

PRESIDENT ELECT
William K. McVisk
Tressler LLP, Chicago

1st VICE PRESIDENT
Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

2nd VICE PRESIDENT
Laura K. Beasley
Baker Sterchi Cowden & Rice LLC, Belleville

SECRETARY/TREASURER
Terry A. Fox
Flaherty & Youngerman, P.C., Chicago

DIRECTORS
Joseph M. Baczewski
Brandon & Schmidt, Carbondale
Denise Baker-Seal
Brown & James, P.C., Belleville
C. Wm. Busse, Jr.
Busse, Busse & Grasse, P.C., Chicago
Adam C. Carter
Esp Kreuzer Cores LLP, Chicago
Bruce Dorn
Bruce Farrell Dorn & Associates Chicago
James P. DuChateau
HeplerBroom LLC, Chicago
Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago
John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria
David A. Herman
Giffin, Winning, Cohen & Bodewes, P.C., Springfield
Seth Lamden
Neal, Gerber & Eisenberg LLP, Chicago
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, Rockford
Gregory W. Odom
HeplerBroom LLC, Edwardsville
Donald J. O'Meara, Jr.
Lindsay, Pickett & Postel, LLC, Chicago
Cecil E. Porter, III
Litchfield Cavo, LLP, Chicago
Kimberly A. Ross
Ford & Harrison, LLP, Chicago
Britta Sahlstrom
SmithAmundsen, LLC, Chicago
Tracy E. Stevenson
Law Offices of Tracy E. Stevenson, P.C., Chicago
John F. Watson
Craig & Craig, LLC, Mattoon
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM
Rochester

deny discovery requests that are unreasonable. Ill. S. Ct. R. 201(b)-(c). In all, these rules provide a "comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment." *Kunkel*, 179 Ill. 2d at 531.

The fact that an individual chooses to enter a "highly regulated environment" with numerous individuals involved can result in a "reduced expectation of privacy" with regard to that environment. *Burger v. Lutheran General Hosp.*, 198 Ill. 2d 21, 53 (2001). In *Burger*, the Illinois Supreme Court upheld a statute that permitted a hospital's medical staff members and agents to disclose a patient's health information for purposes including peer review, quality assurance, risk management, and consultation with legal counsel. *Burger*, 198 Ill. 2d at 26,42-43.

There, the highly-regulated environment was a hospital, and the patient's reasonable expectation of privacy was reduced within the hospital. Here, in the highly-regulated insurance industry, a patient's reasonable expectation of privacy is reduced with respect to information provided to the insurer. And where a patient places his or her health information at issue during a lawsuit, the patient allows for the possibility that this health information will be openly discussed by the patient, treating physicians, and others in an entirely public place during trial. The constitutional right to privacy at issue must be viewed in this context. See *Doe v. City of New York*, 15 F.3d 264, 268 (2d Cir. 1994) ("Certainly, there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record. [Citations].").

Moreover, "[i]t is beyond dispute that civil litigants have a drastically reduced expectation of privacy." *Kaull v. Kaull*, 2014 IL App (2d) 130175, ¶ 51. "The requirements of relevance and reasonableness together with judicial oversight provided by the rules of discovery appear to more than satisfy any fourth amendment or Illinois privacy concerns." *Kaull*, 2014 IL App (2d) 130175, ¶ 45 (citations omitted). Accordingly, Proposal 18-01 does not run afoul of the rules established by the Illinois Supreme Court in *Kunkel*.

***Palm v. Holocker* Is Consistent With Proposal 18-01**

In *Palm v. Holocker*, the Illinois Supreme Court considered whether the physician-patient privilege precluded discovery of defendant's medical information in an automobile accident personal injury action. *Palm v. Holocker*, 2018 IL 123152, slip op. at ¶ 1 (filed Feb. 28, 2019). The supreme court held that the physician-patient privilege protects patients who have not placed their own medical condition at issue in an action. *Palm*, 2018 IL 123152, slip op. at ¶ 39 (filed Feb. 28, 2019). As a result, defendant was permitted to assert the physician-patient privilege where he did not place his medical condition at issue. *Id*. However, the physician-patient privilege, by definition, does not apply when a plaintiff places his or her physical condition at issue in a lawsuit. 735 ILCS 5/8-802(4).

Contrary to the defendant in *Palm*, who did not place his medical condition at issue, Proposal 18-01 suggests a change to Rule 218(b) that applies only where the "plaintiff's medical condition is at issue ***." By definition, the physician-patient privilege does not apply where the plaintiff's medical condition is at issue. For many years, a statutory waiver of the physician-patient privilege has been implied with the filing a personal injury lawsuit. See *Petrillo*, 148 Ill. App. 3d at 591 ("when a patient files suit, he implicitly consents to his physician releasing any of the medical information related to the mental or physical condition which the patient has placed at issue in the lawsuit."). Where no physician-patient privilege exists, it cannot be used to preclude disclosure of

Past Presidents: Royce G. Rowe, James Baylor, Jack E. Horsley, John J. Schmidt, Thomas F. Bridgman, William J. Voelker, Jr., Bert M. Thompson, John F. Skeffington, John G. Langhenry, Jr., Lee W. Ensel, L. Bow Pritchett, John F. White, R. Lawrence Storms, John P. Ewart, Richard C. Valentine, Richard H. Hoffman, Ellis E. Fuqua, John E. Guy, Leo M. Tarpey, Willis R. Tribler, Alfred B. LaBarre, Patrick E. Maloney, Robert V. Dewey, Jr., Lawrence R. Smith, R. Michael Henderson, Paul L. Price, Stephen Corn, Rudolf G. Schade, Jr., Lyndon C. Molzahn, Daniel Formeller, Gordon R. Broom, Clifford P. Mallon, Anthony J. Tunney, Douglas J. Pomatto, Jack T. Riley, Jr., Peter W. Brandt, Charles H. Cole, Gregory C. Ray, Jennifer Jerit Johnson, Stephen J. Heine, Glen A. Amundsen, Steven M. Puiszis, Jeffrey S. Hebrank, Gregory L. Cochran, Rick Hammond, Kenneth F. Werts, Anne M. Oldenburg, R. Howard Jump, Aleen R. Tiffany, David H. Levitt, Troy A. Bozarth, R. Mark Mifflin, Michael L. Resis

PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

PRESIDENT
Bradley C. Nahrstadt
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Chicago

PRESIDENT ELECT
William K. McVisk
Tressler LLP, Chicago

1st VICE PRESIDENT
Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

2nd VICE PRESIDENT
Laura K. Beasley
Baker Sterchi Cowden & Rice LLC, Belleville

SECRETARY/TREASURER
Terry A. Fox
Flaherty & Youngerman, P.C., Chicago

DIRECTORS
Joseph M. Baczewski
Brandon & Schmidt, Carbondale
Denise Baker-Seal
Brown & James, P.C., Belleville
C. Wm. Busse, Jr.
Busse, Busse & Grasse, P.C., Chicago
Adam C. Carter
Esp Kreuzer Cores LLP, Chicago
Bruce Dorn
Bruce Farrell Dorn & Associates Chicago
James P. DuChateau
HeplerBroom LLC, Chicago
Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago
John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria
David A. Herman
Giffin, Winning, Cohen & Bodewes, P.C., Springfield
Seth Lamden
Neal, Gerber & Eisenberg LLP, Chicago
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, Rockford
Gregory W. Odom
HeplerBroom LLC, Edwardsville
Donald J. O'Meara, Jr.
Lindsay, Pickett & Postel, LLC, Chicago
Cecil E. Porter, III
Litchfield Cavo, LLP, Chicago
Kimberly A. Ross
Ford & Harrison, LLP, Chicago
Britta Sahlstrom
SmithAmundsen, LLC, Chicago
Tracy E. Stevenson
Law Offices of Tracy E. Stevenson, P.C., Chicago
John F. Watson
Craig & Craig, LLC, Mattoon
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM
Rochester

relevant health information. Accordingly, the physician-patient privilege and Illinois Supreme Court decision in *Palm* are consistent with Proposal 18-01.

The HIPAA Privacy Rule Is Consistent With Proposal 18-01

Although a qualified protective order requires that the health information received be used only for the purpose of litigation and destroyed at the end of litigation, these restrictions do not apply to other methods of obtaining health information in compliance with HIPAA. Of these five alternatives discussed above, only the third option – use of a qualified protective order – contains the requirement that the records obtained be used only for the litigation for which it was requested and destroyed at the conclusion of that litigation. 45 C.F.R. § 164.512(e)(1)(v)(A)-(B). Health information obtained pursuant to a court order, subpoena with satisfactory assurance, authorization, or discovery request to the opposing party are not subject to the same definition. As an example, medical records obtain from a subpoena with satisfactory assurance are not required to be destroyed at the conclusion of litigation and may be used by an insurer consistently with the purposes enumerated in Proposal 18-01.

"A proper reading of regulation 164.512(e)(1) shows that a qualified protective order must only be secured when a disclosure is being made in 'response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court.'" *Tomczak v. Ingalls Memorial Hosp.*, 359 Ill. App. 3d 448, 455 (1st Dist. 2005) quoting 45 C.F.R. § 164.512(e)(1)(ii). Similar to when records are produced pursuant to a court order, a qualified protective order is unnecessary when a subpoena with satisfactory assurance is used. In the latter instance, the patient need not consent. Notice of the request to the patient and the fact that no objections were filed is sufficient to comply with the HIPAA Privacy Rule and permit a covered entity to disclose protected health information in response to a subpoena.

Of the five alternatives detailed above, only the third option explicitly requires that the records obtained be used only for the litigation for which it was requested and destroyed at the conclusion of that litigation. 45 C.F.R. § 164.512(e)(1)(v)(A)-(B). Medical records obtained pursuant to a court order, subpoena with satisfactory assurance, authorization, or discovery request to the opposing party are not subject to the same definition.

Paragraph 3 of Proposal 18-01 expressly requires covered entities to disclose health information for use in litigation. The same paragraph makes this requirement subject to all applicable state and federal laws. Additionally, paragraph 6 requires that all requests made by opposing counsel be subject to the applicable discovery rules of the Code of Civil Procedure and Illinois Supreme Court rules.

Through use of a subpoena with satisfactory assurance, the HIPAA Privacy Rule permits a covered entity to release health information during judicial proceedings in response to a subpoena or other lawful process with notice to the patient. Proposal 18-01's requirement that a subpoena or lawful process be accompanied by a court order signed by plaintiff and plaintiff's counsel is more stringent than HIPAA. When a subpoena is issued, Proposal 18-01 requires a subpoena, notice of the subpoena, and the consent of the patient, patient's attorney, and court through the sample uniform protective order. Accordingly, Proposal 18-01 is consistent with the HIPAA Privacy Rule.

Past Presidents: Royce G. Rowe, James Baylor, Jack E. Horsley, John J. Schmidt, Thomas F. Bridgman, William J. Voelker, Jr., Bert M. Thompson, John F. Skeffington, John G. Langhenry, Jr., Lee W. Ensel, L. Bow Pritchett, John F. White, R. Lawrence Storms, John P. Ewart, Richard C. Valentine, Richard H. Hoffman, Ellis E. Fuqua, John E. Guy, Leo M. Tarpey, Willis R. Tribler, Alfred B. LaBarre, Patrick E. Maloney, Robert V. Dewey, Jr., Lawrence R. Smith, R. Michael Henderson, Paul L. Price, Stephen Corn, Rudolf G. Schade, Jr., Lyndon C. Molzahn, Daniel Formeller, Gordon R. Broom, Clifford P. Mallon, Anthony J. Tunney, Douglas J. Pomatto, Jack T. Riley, Jr., Peter W. Brandt, Charles H. Cole, Gregory C. Ray, Jennifer Jerit Johnson, Stephen J. Heine, Glen A. Amundsen, Steven M. Puiszis, Jeffrey S. Hebrank, Gregory L. Cochran, Rick Hammond, Kenneth F. Werts, Anne M. Oldenburg, R. Howard Jump, Aleen R. Tiffany, David H. Levitt, Troy A. Bozarth, R. Mark Mifflin, Michael L. Resis

PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

PRESIDENT
Bradley C. Nahrstadt
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Chicago

PRESIDENT ELECT
William K. McVisk
Tressler LLP, Chicago

1st VICE PRESIDENT
Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

2nd VICE PRESIDENT
Laura K. Beasley
Baker Sterchi Cowden & Rice LLC, Belleville

SECRETARY/TREASURER
Terry A. Fox
Flaherty & Youngerman, P.C., Chicago

DIRECTORS
Joseph M. Baczewski
Brandon & Schmidt, Carbondale
Denise Baker-Seal
Brown & James, P.C., Belleville
C. Wm. Busse, Jr.
Busse, Busse & Grasse, P.C., Chicago
Adam C. Carter
Esp Kreuzer Cores LLP, Chicago
Bruce Dorn
Bruce Farrell Dorn & Associates Chicago
James P. DuChateau
HeplerBroom LLC, Chicago
Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago
John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria
David A. Herman
Giffin, Winning, Cohen & Bodewes, P.C., Springfield
Seth Lamden
Neal, Gerber & Eisenberg LLP, Chicago
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, Rockford
Gregory W. Odom
HeplerBroom LLC, Edwardsville
Donald J. O'Meara, Jr.
Lindsay, Pickett & Postel, LLC, Chicago
Cecil E. Porter, III
Litchfield Cavo, LLP, Chicago
Kimberly A. Ross
Ford & Harrison, LLP, Chicago
Britta Sahlstrom
SmithAmundsen, LLC, Chicago
Tracy E. Stevenson
Law Offices of Tracy E. Stevenson, P.C., Chicago
John F. Watson
Craig & Craig, LLC, Mattoon
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM
Rochester

The Privacy Waiver Does Not Change What Health Information Can Be Obtained in Litigation

Proposal 18-01 does not provide an additional method to obtain protected health information. It does not allow for additional health information to be obtained in litigation. Rather, the proposal provides a court order to be used in connection with a subpoena or other lawful process to obtain relevant health information that is otherwise obtainable through more cumbersome methods.

Importantly, entry of the sample proposed uniform order contained in Proposal 18-01 would not automatically permit opposing counsel unfettered access to plaintiff's medical records. In fact, opposing counsel does not receive any greater access than currently allowed by the Code of Civil Procedure and Illinois Supreme Court Rules. Paragraph six of the sample proposed uniform order explicitly states that opposing counsel cannot request, obtain, or disclose PHI except through formal discovery procedures. As a result, requests for a plaintiff's medical records would remain subject to relevance and reasonableness requirements. Plaintiff's privacy remains protected by the same "comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment." *Kunkel*, 179 Ill. 2d at 531.

Likewise, Proposal 18-01 does not authorize *ex parte* communications with plaintiff's treating physicians. In *Petrillo v. Syntex Laboratories, Inc.*, the Illinois Appellate Court determined that the public policy of the State of Illinois prohibits *ex parte* communications between opposing counsel and a treating physician. *Petrillo*, 148 Ill. App. 3d at 587-88. A public policy prohibition applies even if an action is not addressed by a statutory or constitutional protection. *Id*. at 587. Thus, the public policy of Illinois prohibiting *ex parte* communications with treating physicians is not changed by Proposal 18-01.

Proposal 18-01 does not change the additional statutory protections afforded to Illinois citizens in areas such as mental health. Finding number three of the sample proposed uniform order plainly requires litigants to follow both named and unnamed privacy laws protecting patients.

Thank you for your consideration of this position statement. Should you have any questions regarding same, please contact me at [redacted].

Sincerely,

Bradley C. Nahrstadt
2018-2019 President, Illinois Association of Defense Trial Counsel
Partner, Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.

Past Presidents: Royce G. Rowe, James Baylor, Jack E. Horsley, John J. Schmidt, Thomas F. Bridgman, William J. Voelker, Jr., Bert M. Thompson, John F. Skeffington, John G. Langhenry, Jr., Lee W. Ensel, L. Bow Pritchett, John F. White, R. Lawrence Storms, John P. Ewart, Richard C. Valentine, Richard H. Hoffman, Ellis E. Fuqua, John E. Guy, Leo M. Tarpey, Willis R. Tribler, Alfred B. LaBarre, Patrick E. Maloney, Robert V. Dewey, Jr., Lawrence R. Smith, R. Michael Henderson, Paul L. Price, Stephen Corn, Rudolf G. Schade, Jr., Lyndon C. Molzahn, Daniel Formeller, Gordon R. Broom, Clifford P. Mallon, Anthony J. Tunney, Douglas J. Pomatto, Jack T. Riley, Jr., Peter W. Brandt, Charles H. Cole, Gregory C. Ray, Jennifer Jerit Johnson, Stephen J. Heine, Glen A. Amundsen, Steven M. Puiszis, Jeffrey S. Hebrank, Gregory L. Cochran, Rick Hammond, Kenneth F. Werts, Anne M. Oldenburg, R. Howard Jump, Aleen R. Tiffany, David H. Levitt, Troy A. Bozarth, R. Mark Mifflin, Michael L. Resis