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Rule 137 Sanctions

BY RICHARD DOUGLASS

As trial lawyers, we are always looking for ways to best serve our clients and advance their interests in court. We face off with each other all the time, each with our own styles ranging from conciliatory to hostile and threatening – *i.e.*, good, zealous advocacy. But every now and then, our adversaries cross the line by pursuing frivolous claims. And if reason alone is not enough to dissuade them from pursuing such claims, often the best action we can take on behalf of our clients is to seek sanctions under Rule 137.

Because Illinois follows the American Rule on attorneys' fees, the loser in litigation does not automatically have to pay the winner's legal fees, as is required in other countries. Rule 137, however, allows the entry of monetary sanctions, including reimbursement of the winner's legal fees. In this way, despite the American Rule on fees, the power to award sanctions under Rule 137 fulfills the essential and

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ESI: A Primer

BY GEORGE BELLAS & JOSEPH DYBISZ

Understanding how to identify, preserve, and admit electronically stored information (ESI) as evidence in court is the key to a successful litigation strategy. Although a lawyer's goal should be always obtaining favorable outcomes for his or her clients, one cannot be a competent and effective litigator without appreciating the importance of ESI and its role in adversarial proceedings. Thus, knowing how to manage ESI as an attorney in a society fixated on technology is a bare necessity, however, it is also much more than that. Lawyers have an ethical duty to educate themselves about the benefits and risks of using technology, including ESI that is relevant to litigation.[1] In addition to the duty set forth by the ABA's Model Rules of Professional Conduct and the Illinois Code of Professional Responsibility,[2] courts today expect a lawyer's competence in handling ESI and using it at trial. Therefore, lawyers must be proficient in understanding ESI to avoid court-imposed sanctions for failure to properly manage ESI and so as not to abdicate their ethical duty owed to their clients.

Competence in identifying and preserving relevant ESI is critical to every case featuring electronic discovery.

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Rule 137 Sanctions

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long-held judicial goal of discouraging frivolous litigation which, left unchecked, brings disrepute to the profession. *Nelson v. Chicago Park District*, 408 Ill. App. 3d 53, 68 (2011) ("The purpose of Rule 137 is to prevent the filing of false and frivolous lawsuits.")

As members of the bar, on those rare occasions when a trial lawyer faces unrepentant frivolous claims, the decision to seek sanctions often best serves our clients and the integrity of the legal profession. But because the need for sanctions is so rare, when it comes up there can be questions about the procedure. One such question faced me when, after a sanctions order was entered, the offending attorney sought leave to withdraw as counsel. I worried that I had to oppose that withdrawal for the court to retain jurisdiction over the pending motion. Thankfully, as explained below, that is not the case.

Although properly styled as motions, the Illinois Supreme Court has explained: "it is clear that motions for sanctions under our Rule 137 are 'claims' in the cause of action with which they are connected." *John G. Phillips & Assocs. v. Brown*, 197 Ill. 2d 337, 339-40 (2001). *See* also Ill. Sup. Ct. R. 137 ("no violation or alleged violation of this rule shall give rise to a separate civil suit, but shall be considered a claim within the same civil action.") In sum, "filing a Rule 137 motion is the functional equivalent of adding an additional count to a complaint, or counter-claim, depending on which party files the motion." *Brown*, 197 Ill. 2d at 339-40. *See also Lakeshore Center Holdings, LLC v. LHC Loan, LLC*, 2019 IL App (1st) 180576, ¶ 18 (quoting *Brown*).

Upon filing such a motion, the court immediately obtains jurisdiction over the attorney(s) that filed the offending document(s), even if they have already withdrawn as counsel of record. *Western Auto Supply Co. v. Hornback*, 188 Ill. App. 3d 273 (5th Dist. 1989) (cited and applied in the unreported decision, *LaSalle Nat. Tr., N.A. v. Lamet*, 2014 IL App (1st) 121730-U, ¶21). That is because "[b]y signing the offending document and submitting it to the court," an attorney "subject[s] himself to the court's jurisdiction" for purposes of sanctions. *LaSalle*, 2014 IL App (1st) 121730-U, ¶21.

Thus, much to my relief, the withdrawal as counsel of record is a non-issue. The court retains jurisdiction over all lawyers who have appeared in the case, after they withdraw, and may award sanctions against them for conduct occurring before or, in some cases, even after the withdrawal.■

ESI: A Primer

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eDiscovery is "the process of identifying, preserving, collecting, processing, searching, reviewing, and producing [ESI] that may be relevant to [any] civil, criminal, or regulatory manner."[3] ESI is any information that can be stored on a computer or a computer network.[4] This includes electronic documents (e.g., memoranda and spreadsheets), email and other forms of electronic communications, computer data, and files downloaded from the internet.[5] ESI could also include instant messages and voice messages.[6] Knowledge of technical concepts, such as how information is stored on a computer or a network, is important to understanding ESI and its intricacies. Nevertheless, it is critical to differentiate between technical concepts pertaining to ESI and the legal consequences of utilizing ESI in litigation. Below are some objectives lawyers should consider in developing an effective plan for electronic discovery.

Duty to Preserve

The law is clear that litigants have a duty to preserve evidence that may be

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relevant to anticipated litigation.[7] Courts generally find that a duty to preserve evidence arises when a party had "notice" of the anticipated or pending litigation.[8] This "notice" is normally referred to as the "triggering event."[9] The duty to preserve ESI attaches once a triggering event occurs.[10] More specifically, the obligation to preserve ESI arises when "reasonable anticipation" of litigation occurs.[11] The duty to preserve often arises before a summons or complaint is ever filed.[12] Although triggering events are generally fact-specific scenarios, some examples include when a company has a history of previous litigation involving similar circumstances, or when an organization has reason to believe litigation against it is imminent due to industry-wide litigation having commenced against similarly-situated companies.[13] Although intentional spoliation of ESI is a conclusive way to draw the fury of any court, scienter is not required for a party to be subject to case-terminating sanctions for failing to preserve relevant ESI.[14] At least one court issued sanctions for negligent spoliation of ESI,[15] and courts will continue to impose sanctions for failure to properly issue legal holds until counsel meet their ESI identification and preservation obligations.[16]

Prepare for Litigation

As such, it is vital for counsel to establish a litigation readiness plan[17] and should:

1. Implement appropriate ESI **preservation** procedures even before any litigation commences.[18]
2. Familiarize themselves with the client's ESI system and storage of the various forms in which ESI is stored.[19] This is integral to forming a competent and effective ediscovery strategy, which necessarily includes filtering the amount of ESI opposing counsel discloses.[20]
3. **Identify custodians** of relevant ESI to increase efficiency in cases where the sheer volume of ESI requires focused efforts to avoid giving the impression of conducting a "fishing expedition."[21]
4. **Collect and preserve** all ESI to protect the integrity of relevant ESI.[22]
5. **Meet and confer** with opposing counsel to discuss and negotiate compliance with discovery requests and the cost of disclosing relevant ESI.[23]

This 5-step approach aims to reduce confusion because the manifold nature of complex e-discovery increases the likelihood of protracted litigation resulting in significantly higher costs for clients.[24] The potential for higher costs is due in part because sources of ESI are generally classified into two categories: sources that are "accessible" and sources that are "in-accessible." In *Zubulake v. UBS Warburg*, the court held that each party is responsible for its own e-discovery expenses provided that the data being sought out is reasonably accessible.[25] If a party stores ESI in a medium considered to be not reasonably accessible (such as preserving old emails on physical back up tapes as opposed to a network server), that party must bear its own expenses in preserving the ESI and producing it upon request.[26] Notably, "[i]n determining whether data is not reasonably accessible, the focus is more on the source or location of the data rather than the substance of the data."[27] Therefore, an early agreement between parties as to what form the ESI is to be produced in may help mitigate costly e-discovery disputes. This is important in instances when parties have failed to anticipate issues that otherwise could be resolved through timely negotiation, such as agreeing to methods by which each side can reduce the volume of documents that need to be preserved and reviewed.[28]

Full Disclosure

Amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure, respectively, highlight an emphasis on promoting disclosure between adversaries in litigation. These amendments require parties to disclose what kinds of ESI the parties believe are relevant to the litigation and what ESI each party will preserve.[29] These amendments illustrate the recurring tension between the sheer volume of ESI versus the potential relevance of specific data to litigation proceedings. Assessing the relevance of certain ESI contains ramifications regarding a party's tolerance for costly review of troves of data in addition to weighing on a party's duty to preserve ESI. To help alleviate the financial (and mental) stress of balancing relevant data against the volume of discoverable ESI, courts will consider the expense, burden, and practicality of preserving the evidence in question.[30] In addition, the pre-discovery conference requirement under rule 26 reflects the Advisory Committee on Civil Rules' normative judgment that "hiding the ball" in litigation as it pertains to ESI is no longer an acceptable strategy.[31] For example, Rule 26 confers the presumption that ESI is beyond the scope of discovery if it cannot be obtained without undue burden or cost to determine whether it is relevant to the claims or defenses of each party in litigation.[32] Therefore, understanding what ESI is located in a client or adversary's system allows for counsel to negotiate compliance favorably and, perhaps most importantly, reduce the cost of disclosure considerably.[33]

Summary

Because exorbitant litigation costs resulting from complex e-discovery could materially impact a client's ability to prove a given claim or defense, knowing how to identify, preserve, and negotiate with opposing counsel to obtain relevant ESI presents critical leverage points during e-discovery. Moreover, the current litigation ecosystem is controlled by those who have adapted their practice to become proficient in handling ESI to help establish and prove their respective claims or defenses. Embracing the role of ESI is paramount to a lawyer's success and in keeping up with one's duty to their client. In a world filled with incomplete information, knowing how to identify the right information is the key to staying on top.■

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1. Model R. Prof. Conduct 1.0 Comment 8 and Comment 8 to Rule 1.1 of the Illinois Code of Professional Responsibility added in 2015.
2. *See Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* 2005 WL 67071 (Fla. Cir. Ct. Mar. 1, 2005), *rev'd on other grounds*, 955 So.2d 1124 (Fla. 4th CA 2007) (the jury returned a 1.4 billion dollar verdict after the court found the defendant's counsel failed to properly implement a legal hold.).
3. Michael R. Arkfeld, Information Technology Primer for Legal Professionals 6 (LawPartner Publishing 2019–2020 ed. 2019).
4. Allison Brecher & Shawna Childress, eDiscovery Plain and Simple xxi (AuthorHouse copy. 2009).
5. *Id*.
6. *Id*.
7. Arkfeld, *supra* note 3, at 14.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. Brecher & Childress, *supra* note 4, at 20.
13. *E.g.*, Brecher & Childress, *supra* note 4 citing *Micron Technology, Inc. v. Rambus, Inc.*, 2009 U.S. Dist. 54887 LEXIS 1260 (D. Del. Jan. 9, 2009).
14. Brecher & Childress, *supra* note 4, at 13-14.
15. Brecher & Childress, *supra* note 13, at 7.
16. Arkfeld, *supra* note 3, at 10.
17. Arkfeld, *supra* note 3.
18. *Id*., at 10.
19. Some examples include native files, databases, spreadsheets, images (TIFF and PDF), video and audio files, paper, etc.
20. Arkfeld, *supra* note 3, at 10.
21. *Id*. at 96-97.
22. *Id*. at 10.
23. *Id*.
24. *See generally* Allison Brecher & Shawna Childress, eDiscovery Plain and Simple xxi (AuthorHouse copy. 2009).
25. Brecher & Childress, *supra* note 4, at 11; *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).
26. Brecher & Childress, *supra* note 4, at 49 ("In order to collect even a single email off of a backup tape, every tape used to create the server backup must be manually restored to, essentially, recreate all of the data on the server.").
27. Brecher & Childress, *supra* note 4, at 10.
28. *Id*., at 18.
29. *Id*., at 10.
30. *Id*. at 26.
31. *Id*., at 10.
32. *Id*.
33. Arkfeld, *supra* note 3, at 8.

Keys to Increasing Your Prospects for Success in Mediation: Insights from Chief Circuit Mediator for the U.S. Court of Appeals for the Seventh Circuit

BY EDWARD CASMERE

As a mediator at the U. S. Court of Appeals for the Seventh Circuit for the last 28 years, Joel Shapiro knows how to successfully mediate disputes. He and his colleagues in the Circuit Mediation Office conduct confidential mediations in fully counseled civil appeals in accordance with Federal Rule of Appellate Procedure 33 and Circuit Rule 33. They handle over 400 mediations every year with a success rate of around 40 percent. That is quite an impressive statistic given how the underlying district court proceedings resolve so many cases by ruling, disposition, or settlement. As a result, cases typically come to the Seventh Circuit mediators with a history that includes clearly drawn lines and vexing issues which often polarize parties and cement positions increasing the degree of difficulty of the mediation.

Through a series of interviews in early 2022 Mr. Shapiro graciously shared some of the insights he has gained mediating cases over the past three decades. What follows are some distilled down highlights from those conversations with Chief Circuit Mediator Shapiro:

What are the benefits of mediation?

Mediations are a great way for parties to maintain control over the outcome of litigation through a guided resolution process with an independent third party who can bring perspective to, and provide a sounding board for, litigants. Mediators can accomplish that without the burden or stigma of declaring "winners" or "losers." Being a different species from judicial settlement conferences, mediations have an ability to delve deeper into the needs and interests of participants with less pressure to try to broker a quick deal. Mediations are, therefore, a bit enigmatic with an arguably more ambitious objective than a judicial settlement conference, but with less leverage because mediators do not carry the power of being an ultimate decision-maker.

Besides the sympathetic ear of their counsel, mediators are often the first (and sometimes only) independent person connected with the litigation process that will listen directly to a client's side of the story. That can provide a form of catharsis – sometimes people just need to get something off their chest, to say things out loud to someone who will listen and not judge. As such, mediations provide a forum for clients to obtain acknowledgement (and sometimes "tough love") from an independent source – someone who can let both lawyer and a client feel heard while also providing an unbiased reality check.

Mediations also provide an opportunity to bring together all the main faculties of lawyering: counseling, advocacy, negotiation, documenting, and oversight. Lawyers can get creative in solving problems for clients and help limit or mitigate risk and uncertainty. According to Mr. Shapiro, "lawsuits are really coins thrown into wishing wells, and lawyers are the plumbers that try to turn those wishes into some kind of reality," with mediation serving as a critical tool in the

lawyer's ability to do that.

What are some mediation insights learned over the years?

Technique is secondary to mindset. Having the parties and their counsel engage in the mediation process with the right mindset – one open to understanding the other side's point of view, open to compromise, and realizing that everyone cannot get everything they want – is more important to increasing the chances of a successful mediation than any strategy or technique. "Too often," Mr. Shapiro observes, "parties attach a symbolic significance that the mediation cannot bear." Mediations are not designed to give any party total victory, domination, or oppressive punishment. If that is a party's mediation goal, they will be disappointed.

Try to listen more than you talk. The key to compromise is focusing not on a party's own interests, but considering the other side's needs as well. Parties must listen to each other to understand what they really want, and really need. Addressing your counterpart's needs is often necessary to be able to meet yours. "It is surprising," Mr. Shapiro notes, "how often people are wrong about what their counterpart actually wants or will agree to." Listen and observe to understand, not just to figure out your counterargument.

There is no optimal tactic, move, or game theory. Each mediation is unique, and life is a lot messier than academics. Parties need to adjust expectations, embrace uncertainty, and get comfortable with feeling their way to a resolution in unanticipated ways. These journeys often mysteriously deliver solutions and accommodations that were never anticipated. "Mediation is not like a juicing machine, where you put a bunch of material in one end and a settlement instantly comes out the other," says Mr. Shapiro. The mediation process evolves over time and makes use of all the inputs. Take each step as it comes. Do not worry about being perfect. There are very few mistakes in a mediation that cannot be fixed.

Take as little as possible for granted. This frees you up to respond to what is *actually* happening, as opposed to what you *thought* would happen.

Success does not happen by chance. Mediation is a collaboration. Everyone must be prepared to do their part to have a successful outcome, however that is defined (resolution or some other positive outcome).

How can counsel best use mediation to benefit their clients?

On this score, Mr. Shapiro said he could not improve on the advice he put forward many years ago, which still appears at the Circuit Mediation Office webpage: "Recognize that the mediation is an opportunity to achieve a favorable outcome for your client. Without laying aside the advocate's responsibility, approach the mediation as a cooperative, rather than adversarial, exercise. Help your client make settlement decisions based not on overconfidence or wishful thinking, but on a realistic assessment of the case. Assist clients to make decisions not on emotion, regardless of how justified they may be, but on rational self-interest. Suggest terms of settlement that maximize the benefits of settlement for all parties. Take advantage of the opportunity to talk confidentially and constructively with counsel for the other parties. If clients are present, address them respectfully but convincingly. Let the mediator know how he or she can assist you in obtaining a satisfactory resolution. Be candid. Don't posture. Listen closely to what other participants have to say. Give the process a chance to work."

What is one thing that has been a surprise?

Prior to the pandemic, the Seventh Circuit program hosted about 40 percent of its initial mediation sessions in person. From Mr. Shapiro's point of view, conducting all mediations remotely has not been a hardship because, in his experience, there is no meaningful difference in success between telephonic and face-to-face mediations. In fact, there are some significant benefits to conducting mediations by phone. In telephone mediations you can focus on listening without distractions and reading or misreading body language and facial reactions. Thus, there is a level of protection against mental background noise and the barrage of sensory information that is often misinterpreted. There is also protection for parties and counsel from the discomfort of sitting across the table from people they have reason to dislike. Parties are present to one another without the disadvantages of being face-to-face. In Mr. Shapiro's experience, "phone discussions allow the litigants and the mediator to develop a sense of intimacy that is not always achieved in person."

Is there a secret to the success of the Seventh Circuit mediators?

First, mediation is all the Circuit mediators do. It is their full-time job**,** and they take seriously the privilege and delicacy of their work. Second, because they are cloaked with the court's authority, they take their responsibility to the court – and their identification with the court – very seriously. They are dedicated to the integrity of the process. Third, being an extension of the court, the Rule 33 mediation process is extraordinarily respectful of the litigants and demands the same of them toward one another and toward the mediation. Fourth, through years of experience with every kind of case, situation, conduct and negotiating tactic, they have accustomed themselves to making no assumptions. They take each case as it comes, practicing the "Three P's:" Preparation, patience and persistence.

In Mr. Shapiro's view, his work is less about pulling rabbits from hats than about helping people to find their way out of a jam. His parting insight is perhaps as obvious as it is profound: **Mediators don't settle cases, parties and counsel settle cases.** The mediator provides guidance, a steady hand, and a calm influence, but does not make the settlement happen. Only the parties can do that. As such, parties and their counsel need to take ownership of, and responsibility for, the process and the outcome.

To learn more about the Circuit Mediation Program of the U. S. Court of Appeals for the Seventh Circuit visit https://www.ca7.uscourts.gov/mediation/mediation.htm.■

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Appellate Court Dodges an Interesting Question: *Kallal v. Lyons*

BY ROBERT HANDLEY

Kallal v. Lyons, 2021 IL. App (4th) 200319, May 4, 2021

Procedural History

Parents/Plaintiffs, Krista Kallal and Skylar Kallal, brought suit individually and as Next Friends of Their Minor Child, Brooke Kallal against Timothy Lyons, M.D. and other Defendants arising out of injuries to Brooke Kallal which occurred at the time of her birth. They asserted claims of negligence and lack of informed consent for acts and omissions during labor and delivery. Additionally, Krista and Skylar asserted claims individually under the Family Expense Act for their past, present, and future medical bills as a result of the claim negligence.

Pursuant to Rule 215, the Defendants filed a pre-trial motion to compel all three plaintiffs to submit to blood draws for the purpose of genetic testing. In support of the motion, Defendants submitted an affidavit from a geneticist who opinioned that Brooke's physical and mental impairments, "likely have a substantial genetic cause." And, that an analysis of the blood draws of Brooke, Krista and Skylar, would be "the optimal means of ascertaining whether Brooke has a genetic etiology for her current impairments." Apparently, Plaintiff submitted no oppositional affidavit.

Illinois Supreme Court Rule 215 provides, in part, as follows:

"Rule 215 - Physical and Mental Examination of Parties and Other Persons

(a) Notice; Motion; Order. In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court, upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved."

Plaintiffs objected and argued that the court had no authority under Rule 215 to order Krista and Skylar to submit to a physical examination as their medical conditions were not in controversy and they were only acting in a representative capacity. Also, because the blood draw would be useless without samples from the Parents, Plaintiffs argued that Brooke should not be required to submit a blood sample.

Defendants replied as follows:

"The Kallals have sued defendants asserting both individual and representative claims. They have placed their own physical (genetic) conditions at issue in this case by claiming that their biological minor child was injured by negligence and denying that the minor's injury could be related to a genetic defect (which the child's own medical providers suspect). As Trio WES (analysis) requires parental sampling, the parents' genetic composition is at issue, and the science establishing this reality is uncontradicted in the record before this court."

Defendants also argued that Krista's and Skylar's "medical/genetic conditions may be relevant to conditions of Brooke Kallal at birth and discovery of such medical/genetic information is necessary to prepare for trial."

The circuit court heard the arguments. Defendants argued that the genetic material from the parents was relevant and that the parents were parties. Defendants also argued that its uncontradicted that the requested analysis requires parental testing. Plaintiffs, however, persisted in their argument that the parents' physical conditions were not in controversy and therefore, without samples from them, the testing on Brooke would be useless.

The circuit court ruled in favor of the Defendants finding that there is good cause and that the probative value outweighs any risk or potential risk to the patient, including the child and the parents. The court ordered Krista, Skylar, and Brooke to submit to a blood draw. A motion to reconsider by Plaintiffs was denied; and the court entered an order holding Plaintiffs' counsel in contempt and fining him $10 per day until his clients submitted to the blood draw.

Analysis

On appeal, the appellate court decided that the circuit court was required, under the plain language of Rule 215, to first address whether Krista and Skylar were parties whose physical conditions were in controversy. The circuit court provided the appellate court with no analysis or findings as to whether Krista and Skylar were parties whose physical conditions were in controversy.

The appellate court also found it "concerning" that the case law relied upon by the parties in support of their respective positions on appeal stem, with one exception from decisions made by federal and state trial court Judges interpreting rules similar to Rule 215 weren't addressed in the circuit court's ruling. Therefore, because the circuit court did not address the issue of whether Krista and Skylar were parties, the appellate court decided that, "For this Court to address the issue without any analysis or findings of the Circuit Court would not serve the interests of justice in the development of good law."

Further, without any findings or analysis by the trial court for the appellate court to review concerning the parental testing, they found it premature to consider the correctness of the trial court's decision. Based on all of that, the appellate court concluded that the discovery order requiring the parents to submit a blood draw was granted without "sufficient underpinning" and a more thorough examination was necessary. Because of that, the appellate court vacated

the discovery order, the contempt order, and remanded the case for further proceedings.

One of the cases cited by the appellate court that was not analyzed by the trial court was *Fisher v. Winding Waters Clinic, P.C.*, No. 2:15-cv-01957-SU, 2017 WL 574383 (D. Or. Feb. 13, 2017). In that case, a federal trial court considered the application of Fed. R. Civ. P. 35(a)(1). The Federal Civil Practice Rule establishes two requirements for when the Court, "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination:" that the mental or physical condition be "in controversy," and that, "good cause" be shown.

The court further stated that Federal Rule 35 "requires discriminating application by the Trial Judge." Rule 35 examinations must not be, "ordered routinely;" "the plain language of Rule 35 precludes such an untoward result."

The district court went on to go through the requirements for "in controversy" and "good cause" After looking at the testimony of the doctors, this court found that there was not good cause because one of the doctors testified that Trio WES testing is "new," "investigational," and "experimental." Based on that, the court concluded that the Defendants failed to carry their burden to meet Rule 35's "in controversy" and "good cause" requirements with regard to the Trio WES testing.

Conclusion

What will happen in this Jersey County, Illinois case remains to be seen. Are Krista and Skylar "parties" for the purposes of Rule 215? If so, is their physical or mental condition "in controversy" under the facts of the case?

As of this writing, the matter is still pending in the trial court in Jersey County. Since its remand, the case has been continued several times for "Case Management Conferences." Unfortunately, these very interesting questions remain undecided even at the trial court level. ■