

ued In

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and Jillian Taylor*



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Prior results do not guarantee similar outcomes.

Civil Procedure Update: Non-Party Treating Chiropractor Entitled to Fee as “Physician” for Time Testifying In Discovery Deposition

By: Shannon E. Holbrook – Chicago, Illinois office

In the recent decision of *Montes v. Mai*, 398 Ill. App. 3d 424 (1st Dist. 2010), the Illinois First District Appellate Court addressed the issue of whether a non-party treating chiropractor is a “physician” under Supreme Court Rule 204(c) and thus entitled to be paid a reasonable fee for time testifying in a discovery deposition. In a matter of first impression, the appellate court answered this question in the affirmative, but offered common sense limits on the amounts that can be charged.

The plaintiff in this case, Norma Montes, brought an action against defendant Carter Mai for injuries sustained when the defendant’s vehicle struck the car in which the plaintiff was a passenger. Dr. Fernando Perez, a chiropractor, treated the plaintiff following the accident. The defendant later issued a subpoena for Dr. Perez’s discovery deposition and was notified that Dr. Perez’s deposition fee was \$550 per hour, that a two-hour minimum fee was required, and that the fee must be paid in advance. The defendant countered with an offer to compensate Dr. Perez at \$300 per hour for Dr. Perez’s deposition time with no minimum payment or prepayment, but Dr. Perez refused the offer. Dr. Perez later submitted financial records for the trial court’s review to determine the reasonableness of Dr. Perez’s requested hourly fee. The trial court ruled that an hourly fee of \$66.95 was reasonable and that the defendant was not required to pay a minimum payment or to prepay the deposition fee. Dr. Perez refused to be deposed at the hourly fee set by the trial court and was found in contempt for failing to appear for his deposition.

Dr. Perez appealed the trial court’s ruling, arguing that the trial court abused its discretion in determining his hourly deposition fee, as the financial information submitted to the court justified the requested fee. Surprisingly, neither party raised the issue with the trial court as to whether Dr. Perez, as a chiropractor, was even a “physician” entitled to a reasonable fee for his

deposition testimony under Rule 204(c). Despite the technical waiver of this threshold issue, the appellate court decided to consider the issue on appeal, as the matter was an issue of law and had been fully briefed by the parties. The fact that the term “physician” as used in Rule 204(c) had not been previously defined by any Illinois case undoubtedly played a key role in the court’s decision to hear the issue.

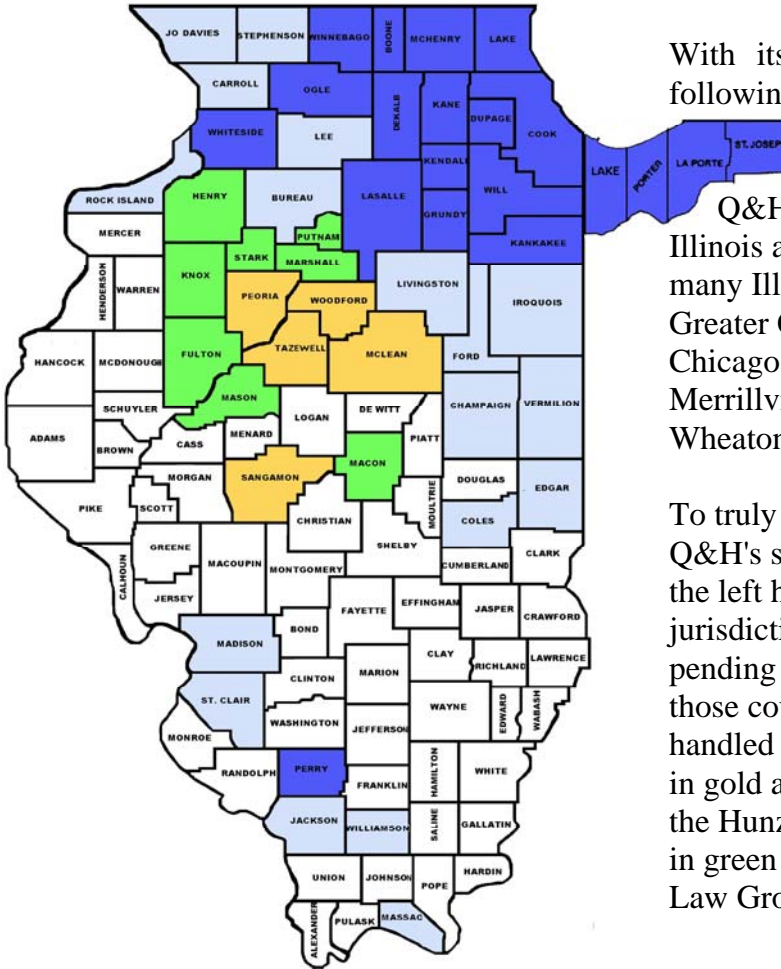
Rule 204(c) provides that:

“[a] party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken.”

In addressing whether Rule 204(c) applied to a chiropractor, the appellate court considered the meaning of the term “physician” as referenced in prior Illinois cases and the term’s ordinary and popularly understood meanings. The appellate court further noted that the current version of the Medical Practice Act of 1987 expressly defines a “physician” as “a person licensed ... to practice medicine in all of its branches *or a chiropractic physician licensed to treat human ailments* without the use of drugs and without operative surgery.” The appellate court concluded that the term “physician,” as used in Rule 204(c), does encompass a non-party, treating chiropractor and that a chiropractor is entitled to a reasonable fee for time spent in a discovery deposition.

In addressing Dr. Perez’s challenge as to the reasonableness of the hourly deposition fee of \$66.95 as determined by the trial court, the appellate court noted that the trial court’s order indicated that the fee was based on Dr. Perez’s income as set forth in his latest W-2 form, divided by 52 weeks, at 40 hours per week. Dr. Perez argued that the records presented to the

Q&H Serves Wide Areas of Illinois and Indiana



With its move into central Illinois following its strategic alliance with the Peoria, Illinois-based Hunziker Law Group, Q&H now serves a wide area of Illinois and Indiana. Q&H serves many Illinois counties outside the Greater Chicago Area via offices in Chicago, Joliet, Oak Lawn, Merrillville, Waukegan, and Wheaton.

To truly appreciate the reach of Q&H's services, the county map to the left highlights, in blue, those jurisdictions in which Q&H has pending matters and, in light blue, those counties in which we have handled matters in the past. Counties in gold are served by both Q&H and the Hunziker Law Group. Counties in green are served by the Hunziker Law Group.

trial court reflected that his clinic's hourly revenue of \$1,750 per hour of operation justified his requested fee, but the appellate court countered that the clinic's hourly revenue was not equivalent to the hourly rate paid to Dr. Perez.

Although the appellate court emphasized that the trial court's method of calculating the fee was not the only means by which a fair and reasonable fee could be calculated, applying the highly deferential abuse of discretion standard, the appellate court affirmed the trial court's fee calculation. The appellate court further affirmed the trial court's ruling that the defendant was not required to pay a two-hour minimum fee or prepay the deposition fee, reasoning that Rule

204(c) provides that the fee is owed "for the time he or she will spend testifying at any such deposition" and that the committee comments to Rule 204(c) explain that the fee is to be paid only after the doctor has testified.

Although the *Montes* holding provides chiropractors with legal justification for seeking fees for the time spent in giving deposition testimony (a practice that is already commonplace), the case upholds the principle that deposition fees are not intended to be a profit center for chiropractors or other physicians, but rather are intended to reasonably compensate the physician for the time spent testifying. In this case, the record reflected that Dr. Perez sought a deposition fee in excess of

eight times his true income and that he refused the defendant's offer to compensate him at approximately four times his hourly income.

The best approach when an exorbitant fee is requested and a party seeks a reduction in the fee is for the physician and the party to reach an agreement as to the fee. This approach not only avoids the necessity of court intervention to determine the fee and the disclosure of the physician's private financial information to the court for review, but it should decrease the animosity between the physician and the attorney requesting the deposition and decrease the chances that the physician will skew his testimony. The attorney requesting the deposition and the attorney's client will need to weigh the potential prejudicial effect of a fee challenge with the physician's anticipated testimony and the value of the case to determine whether a fee challenge is economically and strategically justified.

* * *



Shannon Holbrook, an associate in our Chicago office, concentrates his practice in health care liability where he has significant experience in the defense of medical malpractice claims against hospitals, physicians, and other health care professionals. Shannon's experience also includes the defense of premises liability and other personal injury matters, as well as counseling hospitals and other professionals in the health care industry in the prevention of claims against them and medical charting issues. He has also been involved in a number of state and federal appellate court decisions involving medical malpractice, personal injury, premises liability, and other professional liability claims.

If you have any questions regarding this article, contact Shannon via sholbrook@querrey.com, or via 312-540-7642.

Q&H Wins Another Case for Chicago Police Department



Congratulations to **Stacey Atkins** and **Larry Kowalczyk** on their not guilty verdict obtained on July 12, 2010 on behalf of a City of Chicago police officer and the City of Chicago in the Federal District Court for the Northern District of Illinois, Eastern Division. The Plaintiff claimed she was wrongfully detained on a traffic stop without probable cause. She was then detained on a warrant and subsequently released when it was determined the warrant was for another person. Stacey was also previously successful via summary judgment in cutting out myriad civil rights claims against several other officers and the City added by the plaintiff. The entire case is now a "NG." The jury returned its verdict in favor of the officer and the City in twenty minutes.

Q&H Successfully Represents Village of Oak Lawn in Arbitration



Chicago shareholder **Paul O'Grady** and associate **Matt Daley** recently proceeded to an interest arbitration for the Village of Oak Lawn following a grievance filed by the Illinois FOP Labor Council regarding health care increases and whether said increases were "substantial" in violation of the Village's collective bargaining agreement. Following the arbitration, Arbitrator Wolff denied the grievance and found in favor of the Village of Oak Lawn.

Rubin Completes Successful Copyright Mediation Between Trophy Manufacturers



In an all day formal mediation session held on July 8, 2010, **Len Rubin** as Mediator guided the parties to a settlement of a several million dollar lawsuit then pending in the U.S. District Court for the Southern District of Ohio alleging multiple instances of copyright infringement. The parties were competing manufacturers of commercial trophies.

Indiana Supreme Court Bars Defendants' Challenges to Necessity of Plaintiffs' Medical Treatment

By: John H. Halstead - Merrillville, Indiana office

On March 4, 2010, in *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. 2010), the Indiana Supreme Court released an opinion which amounts to a sea change in current Indiana law regarding the ability of defendants in bodily injury actions to challenge the necessity of medical treatment incurred by a plaintiff.

Indiana has long held that “[i]n order to recover an award of damages for medical expenses, the party seeking to recover these damages must prove that the expenses were both reasonable and necessary.” *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277 (Ind. 2003)); *Smith v. Syd's, Inc.*, 598 N.E.2d 1065, 1066 (Ind. 1992). Under Indiana Rule of Evidence 413, statements of charges for such expenses constitute *prima facie* evidence that the charges are reasonable. However, in order to recover an award of damages for medical expenses, the plaintiff must also prove by a preponderance of the evidence that the expenses were medically necessary and that they were necessitated by the accident in question (causation in fact). A common defense asserted by defendants in bodily injury actions, therefore, has been that the treatment ordered by the plaintiff's treating physician was not medically necessary. This defense was especially common in cases involving chiropractic care following low impact automobile collisions.

The specific question presented in the *Sibbing* case was whether the defendant could challenge the medical necessity of a treating physician's nerve conduction studies and "passive care" treatment for more than four weeks after the auto collision. The trial court had struck portions of the defense expert's testimony on that issue. The holding, now referred to as the "*Sibbing* rule", states that defendants may not "question the judgment of plaintiff's health care providers". The court explained, "[e]ven if their medical judgment is unsound or erroneous, such human frailties are reasonably foreseeable and

do not allow a defendant to escape liability for wrongful conduct."

The court based its reasoning on another long-standing rule in Indiana that, if a defendant is liable for another's bodily injury, the defendant is also liable for any additional bodily harm which results from the effort of a third party to render aid, regardless of whether the third party acts negligently. Thus, traditionally, a defendant in a bodily injury action will also be held liable for the subsequent medical malpractice of any health care provider rendering medical treatment to the plaintiff as a result of the original injuries sustained by the plaintiff. In *Sibbing*, the Court extended this rule to apply to liability for treatment which is medically unnecessary.

The Chief Justice wrote a concurring opinion, but raised an issue regarding the breadth of the ruling, which he said, "will lead future judges and juries to work injustices at the very moment when judgment is most needed to hold to account providers at the edge of reasonably necessary treatment, or beyond it. Today's '*Sibbing* rule' insulates sharp practices from scrutiny." Unfortunately, the Chief Justice's opinion did not affect the holding, and only makes more clear that the holding means just what it seems to mean: that borderline and over-the-line medical practices are insulated from scrutiny by juries in bodily injury actions.

The supreme court noted that a defendant may still challenge the reasonableness of the charges, i.e., the "dollar amounts". A defendant may also challenge causation, i.e., the "but for" element of a bodily injury claim. The court offered the example of a "non-aggravated, pre-existing condition", for which a defendant would not be liable. So, if a plaintiff seeks treatment that he or she would have sought anyway due to a pre-existing condition, then arguably it is not recoverable.

Another example offered by the court, was a plaintiff who seeks to recover for dental care following a collision in which harm to the plaintiff's teeth was not "implicated". However, this example seems to beg the question of what is medically necessary. There seems to be a fine line between, on the one hand, challenging the dental care of a plaintiff who may or may not have injured his teeth or jaw in an accident, and on the other hand, challenging the extended chiropractic care of a plaintiff in a low-impact rear-end collision.

In short, in those cases where the plaintiff has a related pre-existing condition, defendants can still argue the causation element of the claim. Where there is no pre-existing condition, however, defendants would have to analogize their defense to the dental care example offered by the court. This will be challenging in most cases, though, since the court limited this exception to "medical treatment wholly unrelated to a defendant's wrongful conduct".

Therefore, defendants in Indiana who seek to challenge the medical necessity of a plaintiff's treatment would be well advised to rephrase all future arguments as to medical necessity in terms of but-for causation. Likewise, defendants can expect that testimony by defense experts to

the effect that medical treatment was "unnecessary" to be barred, while testimony that the treatment "wholly unrelated to the accident" may be permitted. How Indiana courts will interpret and apply the *Sibbing* case remains to be seen, but it is hard to overstate the impact this ruling will have on the defense of bodily injury actions in Indiana.

* * *



John Halstead, an associate in our Merrillville, Indiana office, concentrates his practice in civil litigation, title defense, and mechanics liens. Prior to joining Querrey & Harrow, he gained experience as a plaintiff's attorney in personal injury, contract, and estate law, which provides him a view of opposing perspectives in a lawsuit or in a contract dispute.

John is a former law clerk to the Allen Superior Court and interned in the U.S. District Court for the Southern District of Indiana. He was also the director of the Indiana University Protective Order Project. If you have any questions regarding this article, please contact John via 219-738-1820, or via jhalstead@querrey.com.

Schoumacher Named Secretary of ISBA Committee on Construction Law



Congrats to Chicago office shareholder **Bruce Schoumacher** who was recently named Secretary of the Illinois State Bar Association's Special Committee on Construction Law. The committee was formed 2 years ago to enhance the ability and knowledge of general practitioners and those concentrating in construction law. The 18-member committee hosts continuing legal education programs and is engaged on the legislative front. It was instrumental in amending a proposed bill which ultimately amended Section 7 of the Mechanics Lien Act, and it supported SB 254, which will identify remedies under the Home Repair and Remodeling Act.

Bruce is Group Co-Chair of Q&H's Construction Practice Group and also practices in several other areas, including professional liability, product liability, commercial litigation, and antitrust. He works with a variety of professionals, including architects, engineers, contractors and manufacturers. Bruce has recently been recognized by his peers and named as a Leading Lawyer in the area of construction law.

Federal Lead Exposure Regulations Impact Work Done on Pre-1978 Residences and Child-Occupied Facilities

By: Jennifer J. Sackett Pohlenz – Chicago, Illinois office

[Editor's Note: This article was first published in the Illinois State Bar Association's "Real Property" newsletter and is reprinted here with permission of the ISBA. A copy of the article as it appeared in the ISBA publication can be obtained at <http://www.querrey.com/assets/attachments/312.pdf>.]

Nearly any renovation or removal activity involving lead-based paint in pre-1978 building where children under the age of six reside or occupy at least 60-hours a year is regulated to certain performance standards and is required to have work performed by a certified professional. Pursuant to Subchapter IV of the Toxic Substances Control Act (TSCA), the United States Environmental Protection Agency (U.S. EPA) developed regulations for "lead-based activities" and "renovations" in "child-occupied facilities" and "target housing." (15 U.S.C. §2681, *et seq.*). This lead exposure reduction program is administered by U.S. EPA in all states, except: Wisconsin, Iowa, and North Carolina, which are authorized to administer

their own programs in lieu of the federal program.

It is interesting that a "child-occupied facility" is defined slightly differently under the two sets of TSCA regulations. In the parts of the regulations concerning "lead-based paint activities" (40 C.F.R. §745.220, *et seq.*) a "child-occupied facility" is: "a building or portion of a building, constructed prior to 1978, visited regularly by the same child, 6 years of age or under, on at least two different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visit lasts at least 6 hours, and the combined annual visits last at least 60 hours. . ." [\[1\]](#)

In the part of the regulations applicable to "all renovations performed for compensation" (40 C.F.R. §745.82 at applicable buildings, the same sentence above is used to define "child-occupied facility" *except* that it is applicable to children "under 6 years of age" rather than "6 years of age or under."

Berneman Chairs ABA IP Bankruptcy Special Committee



Chicago shareholder **Beverly A. Berneman** has been appointed chair of the American Bar Association committee on Bankruptcy and Secured Transactions in Intellectual Property. At the annual meeting of the American Bar Association in August, Beverly will introduce a committee action plan involving proposed changes to the United States Bankruptcy Code to reconcile two competing lines of cases regarding the assumption and assignment of Intellectual Property licenses by a debtor. Beverly will assume the role at the annual meeting of the ABA Intellectual Property Law Section in San Francisco on August 7th and 8th.

Jessica O'Neill Chairs Women's Bar Association Outreach



Congrats to Chicago office associate **Jessica O'Neill** for attaining position of Chair of the WBAI Community Outreach Committee. Jessica hosted the first committee meeting at our Chicago office on July 15, 2010. Jessica has been active in the organization, having served on various event committees, since she joined WBAI in 2008.

Thus, a day care center, preschool, and kindergarten classroom easily meet the definition of "child-occupied facility, but if a kindergarten (for example) is occupied by children who are all six years old, then the portion of the regulations applying to "renovations performed for compensation" is (oddly) not applicable.

In addition to "child-occupied facilities," the regulations apply to "target housing," defined as: "any housing constructed prior to 1978. . . or any 0-bedroom dwelling." (15 U.S.C. §2681(17).) Multi-family dwellings are subject to the regulations. However, exempt from the statutory definition of "target housing" is housing for the elderly or persons with disabilities, unless a child *less than* six years old resides or is expected to reside there. *Id.* The portion of the regulations applicable to "lead-based activities" (40 C.F.R. §745.220, *et seq.*) also exempts residential dwellings that are inhabited and owned by the person (or his family) doing the work, as long as there is no child residing in the dwelling with an elevated lead level.

The portion of the regulations applicable to "renovations performed for compensation" excludes renovations to target housing or child-occupied facilities where, at a minimum, the areas affected by the renovation have been determined pursuant to specified testing standards to be free of lead. Additionally excluded is housing in which the owner has signed a statement that: no children under the age of six and no pregnant woman resides there; it is not a child-occupied facility; and that the

renovation firm will not be required to use the work practices contained in EPA's renovation, repair and painting rule. There is also a *partial* exemption for "emergency renovations" which are not planned and result from a sudden, unexpected event that, if not immediately attended to, presents a safety or public health hazard, or threatens equipment and/or property with significant damage.

While there is nothing in these regulations that mandates a person to engage in lead-based paint activities, if any of the following is done at a 6-year old or younger child-occupied facility or non-exempt residential dwelling, it is a lead-based paint activity that *needs* to be done by certified lead abatement professional: inspection, risk assessment, abatement (meaning, essentially, the removal of paint and dust; encapsulation of lead-based paint, or removal or permanent covering of lead-based paint contaminated soil). Likewise any "renovation" in an under six-year-old child-occupied facility or non-exempt residential dwelling needs to be done by a certified lead renovation professional. There are record-keeping and notification requirements for "renovations."

A "renovation" is any modification that results in the disturbance of six-square feet or more on the interior and 20-square feet or more on the exterior of painted surfaces of any structure built prior to 1978. (40 C.F.R. §745.83) It includes, but is not limited to: repair of painted surfaces, scraping or sanding of painted surfaces, window repair, and weatherization projects.

Q&H Hosts Youth Outreach Services 2010 Annual Meeting



Querrey & Harrow and Chicago shareholder **Robert Benjamin** were proud to donate space at the East Bank Club to Youth Outreach Services for their 2010 Annual Meeting on June 23, 2010. Youth Outreach Services is dedicated to caring for Chicago's most vulnerable youth, inspiring positive development in their lives, families and communities. Founded in 1959, the charity has served nearly 300,000 youth, helping them overcome challenges such as abuse, neglect and homelessness. Bob currently serves on the Board of Directors for Youth Outreach Properties. More info on Youth Outreach Services can be found at <http://www.yos.org/>.

Additionally, regulations require that *all renovations* performed for compensation in pre-1978 "target-housing" and child-occupied facilities provide a copy of the U.S. EPA's pamphlet titled "*Renovate Right – Important Lead Hazard Information for Families, Child Care Providers, and Schools*" to building owners, occupants in cases of target-housing, and parents and guardians of all children using the child-occupied facility, and obtain a written acknowledgment from such persons prior to the start of work. Although there is no specific limitation on the notification regulations to parents and guardians of children of any age, since the definition of "child-occupied facility" addresses situations in which a room or rooms in a larger building are the only rooms occupied by children ages six and under. Thus, it would be a strained interpretation to try to apply the notification requirement to all parents and guardians in, for example a school, when only two kindergarten rooms of that school (and the bathrooms and common areas used by the kindergarten class) comprise the "child-occupied facility."

However, from a parent-relations perspective, although not required by regulations, child-occupied facilities should consider distributing the pamphlet to all parents and guardians of children in the school. There are also requirements to, in certain circumstances, post informational signs while the work is proceeding.

In both "target-housing" and "child-occupied facilities" the buildings can be excluded from the regulations *if* they are tested pursuant to the standards specified in the regulations and are found to be below specified actionable limits of lead (as provided in the same regulations).

The regulations have teeth and can bite, at a minimum, owners and hired contractors. Enforcement can occur one of two ways: U.S. EPA can enforce its regulations (or, if you are in one of the three states that have an authorized program, the state can enforce it), or through a "citizen suit." (15 U.S.C. §2619). The costs of suit and reasonable fees for attorneys and expert

witnesses may be recoverable if a "final order" is issued in a "citizen suit" case. Additionally, there are civil penalties payable to the United States for any suit or administrative action it brings in the amount not to exceed \$25,000 each violation and, if criminally prosecuted as a knowing or willful violation, the maximum penalty is increased to up to \$25,000 per day of violation and up to a year imprisonment. There is a five-year statute of limitation that should be applicable to any civil penalty sought under the lead exposure reduction statute and regulations. (28 U.S.C. §2462).

Although it is not required, if you are a child-occupied facility, multi-family housing, or residence that is anticipating renovations – test for lead, find out whether these regulations are applicable to you, and educate yourself and your tenants/occupants prior to the start of work even if you are "lead-free." Including TSCA-regulated substances like lead and asbestos in your pre-work planning can ultimately make for a smoother and more economical project.

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[\[1\]](#) Arguably, the applicability of the regulation to children six years of age can be challenged since the enabling statute applies to children under the age of six.

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Jennifer J. Sackett Pohlenz, a shareholder in our Chicago office, represents local governments, private and publicly traded corporations, and individuals in a wide array of environmental law issues. Jennifer is the chair of Querrey & Harrow's Environmental Practice Group.

If you have any questions regarding this article or Q&H's environmental law practice, please contact Jennifer via jpohlenz@querrey.com, or via 312-540-7540.

SEMINARS

Illinois Mechanics Lien Law

On October 26, 2010, **Tim Rabel** will host a luncheon table discussion on “Illinois Mechanics Lien Law” at the Illinois Association of Healthcare Attorneys' 28th Annual Health Law Symposium, which the firm also sponsors.

Q&H Hits Milestone With Construction Lien Seminar

On June 22, 2010, our attorneys presented Querrey & Harrow's Construction Lien seminar for the 30th time. Chicago office shareholders **Tom Kaufmann, Scott Krider, Tim Rabel** and **Bruce Schoumacher** have been involved with the seminar since the beginning of the program. Over the years, approximately 1,200 people have attended the seminar at various locations throughout Illinois.

Berneman Chairs ABA IP Bankruptcy Special Committee

Chicago shareholder **Beverly A. Berneman** has been appointed chair of the American Bar Association committee on Bankruptcy and Secured Transactions in Intellectual Property. At the annual meeting of the American Bar Association in August, Beverly will introduce a committee action plan involving proposed changes to the United States Bankruptcy Code to reconcile two competing lines of cases regarding the assumption and assignment of Intellectual Property licenses by a debtor. Beverly will assume the role at the annual meeting of the ABA Intellectual Property Law Section in San Francisco on August 7th and 8th.