As Title VII of the Civil Rights Act of 1964 celebrates its 40th anniversary, the method of proving a discrimination claim has greatly evolved. Virtually gone are the "smoking gun" statements using the "n-word," advertisements for applicants of a certain sex, or statements that individuals over a certain age aren't qualified to apply for a particular job. Although the world hasn't reached an era of perfection, blatant discriminatory expressions or policies are comparatively infrequent in modern discrimination litigation. The lack of direct evidence of discrimination has not stayed the steady increase in legal and administrative filings, however. On February 6, 2003, the Equal Employment Opportunity Commission (EEOC) issued a comprehensive report on the status of federal discrimination filings. In that report, the EEOC noted that the number of charges alleging employment discrimination in the private sector increased to 84,442 in fiscal year (FY) 2002 (which ended September 30), up 4.5 percent from the previous year. The EEOC also reported that during FY 2002, it resolved 95,222 private-sector charge filings, up six percent from the previous year, and recovered a record total of $310.5 million in monetary benefits for charging parties through settlements, conciliation, mediation, and litigation. One out of every five charges filed with the agency resulted in a "merit resolution" with a favorable outcome for the charging party. Given a lack of direct evidence, discriminatory motivation in most of these cases is proven by a showing that the employer has acted in a manner that's irregular, inconsistent, or generally contrary to fairness expectations. Absent any direct evidence of discriminatory motive, the employee relies on those factors to develop an inference of discriminatory motive. Merely operating a business makes discrimination claims inevitable. Usually the challenge occurs at discharge, when the employee actually incurs a financial loss. More recently, nontermination scenarios have formed the basis for challenging employers' action (or inaction) in addressing claims of harassment and failure to accommodate workers who are disabled. When claims arise, each step of the employer-employee interaction comes under scrutiny, especially the employer's responsiveness to any employee concern as well as the "fairness" of the disciplinary process. The process of defensive positioning in anticipation of discrimination claims begins long before actual claim receipt. An employer's strategy
in reducing exposure is straightforward: The procedure for taking adverse employee action should be fair, regular, reasoned, and well-documented. In most cases, an outside party evaluating the discrimination claim will afford an employer the benefit of the doubt on its substantive employment decision if the procedural process seems acceptable. Discharge decisions present the greatest opportunity for challenges by individuals claiming discrimination. Following is a list of questions that should be considered in determining whether the firing decision passes the test of procedural propriety: (1) Was the employee adequately warned of the probable consequences of his conduct? Is there a rule encompassing the conduct? (2) Was the employer's rule or order reasonably related to the efficient and safe operation of the job function? (3) Did management investigate before administering the discipline? Was the employee given an opportunity to explain her position? (4) Was management's investigation fair and objective? Is the supervisor reliable? (5) Did the investigation produce reliable support that the employee was guilty of the offense? (6) Has the employer applied its rules, orders, and penalties evenly and without favoritism depending on the department or the supervisor? (7) Was the amount of discipline reasonably related to the seriousness of the offense and the employee's past service and record? (Did the "punishment fit the crime"?)

Documentation can often reduce exposure to discrimination claims. Although no laws require the written documentation of each disciplinary decision, "unwritten laws" nevertheless guide how a "good employer" operates. To the extent that you operate within those expectations, you can reap a significant advantage in persuading third parties to accept your point of view in the event of a controversy. Listed below are some of the unwritten laws for employers with respect to documentation.

- Unwritten assumption #1: If it's not written, you never gave the employee a chance. Most fact finders expect you to "document" significant employment events. A number of them are predisposed to believe that you have no right to discipline employees unless they're given a reasonable "chance." To some, the only way to give them a chance is to have provided notice "in writing" that their job was imperiled. That's a legal fiction because it's certainly possible to have warned an employee many times even if none of the warnings was written down. Nevertheless, many judges and juries will regard an employee as not having been adequately warned unless there's a written document.

- Unwritten assumption #2: If it was documented, it happened as it's written. Quite amazingly, employers sometimes enjoy the benefit of the doubt in a positive direction when an incident has been documented. In other words, many people are predisposed to believe that an event happened as it's written even if later oral testimony contests the validity of the written document. Some are even predisposed to think that when a conflict exists between a written document and someone's oral statement, the written document automatically prevails. Indeed, there's some slight support for that belief to the extent that the document is a more contemporaneous recording of the event. But it certainly doesn't necessarily flow that the document's author is more trustworthy than anybody else by the mere fact that the communication is written.

- Unwritten assumption #3: A documenting employer is usually fair. Regardless of the content of the disciplinary notice, many judges and juries are persuaded by the mere fact that an employer maintains what appears to be organized, fair, and regular recordkeeping. They may assume that an employer that's organized and fair in keeping records is also organized and fair in its treatment of employees. In cases in which it's a close call whether the employer or the employee is more credible, the employer's apparent well-thought-out methodology may influence the judge or jury.

Responding to an EEO complaint
The single most important rule in responding to an EEO complaint is to avoid self-medication. An EEO complaint is no different than any other piece of significant commercial litigation—with potential exposure reaching six- or even seven-figure levels. The case may be won or lost in the very first communications, including the initial contact with the enforcement agency or the unemployment claim agency. It's a mistake to delegate the initial response to the human relations function without a complete legal analysis that can be provided by competent employment counsel. The initial response shouldn't be rushed. It's common for agencies such as the EEOC to provide a copy of a discrimination complaint, coupled with a directive that a full response should be provided within 10 days. Usually, even if a response is provided within 10 days, the EEOC may take months—or even years to resolve the claim. Employers are seldom aware of all the factors that may eventually be relevant to the case. They're often unaware of incidents that may be similar to the event leading to the conduct that's the subject matter of the complaint. Often, supervisors must be surveyed and witnesses tested for their strength of recollection. Witnesses must be probed to determine whether their observations and opinions will sustain the test in cross-examination. A fundamental error arises when a discharged employee's unemployment claim isn't managed at the highest available level. Statements made in the course of an unemployment claim are under oath, and the employee has access to state unemployment records. Accordingly, unsupported or inarticulate explanations given by unsophisticated human relations clerks may forever damage—however unintentionally—an employer's defense to an EEOC claim. Avoid the "easy" defense. In too many cases, employers seek to justify their actions by simplistic explanations. For example, it isn't enough to merely identify that a person was "laid off" if the real issue is how individuals were selected for the layoff. Similarly, it isn't enough to merely state that an individual "violated a rule" unless there's a clear pattern of enforcing the rule. Similarly, statements such as subjective observations that an individual had a "bad attitude" are red flags for investigatory suspicion. Avoid the trap of establishing false policies. It's a common practice for EEOC investigators to first ask about the employer's practices and policies. For example, if an employee is fired for excessive lateness, the investigator may ask for a description of the company's policy. In many instances, an employer, sensing the need to answer the question in specific terms, provides a description of a policy or practice that isn't actually followed. Once the practice has been articulated, any divergence from the policy is used as evidence of discriminatory motive. Accordingly, great care should be exercised before describing any policy or practice of your company. Manage the unemployment case. A fatal error occurs if you allow an unemployment case to be managed by an unsophisticated individual who can be easily "set up" by the former employee's counsel. The unemployment insurance case can be used to conduct free discovery (or pretrial fact-finding) and trap your company into statements and positions not reviewed.
first by counsel.