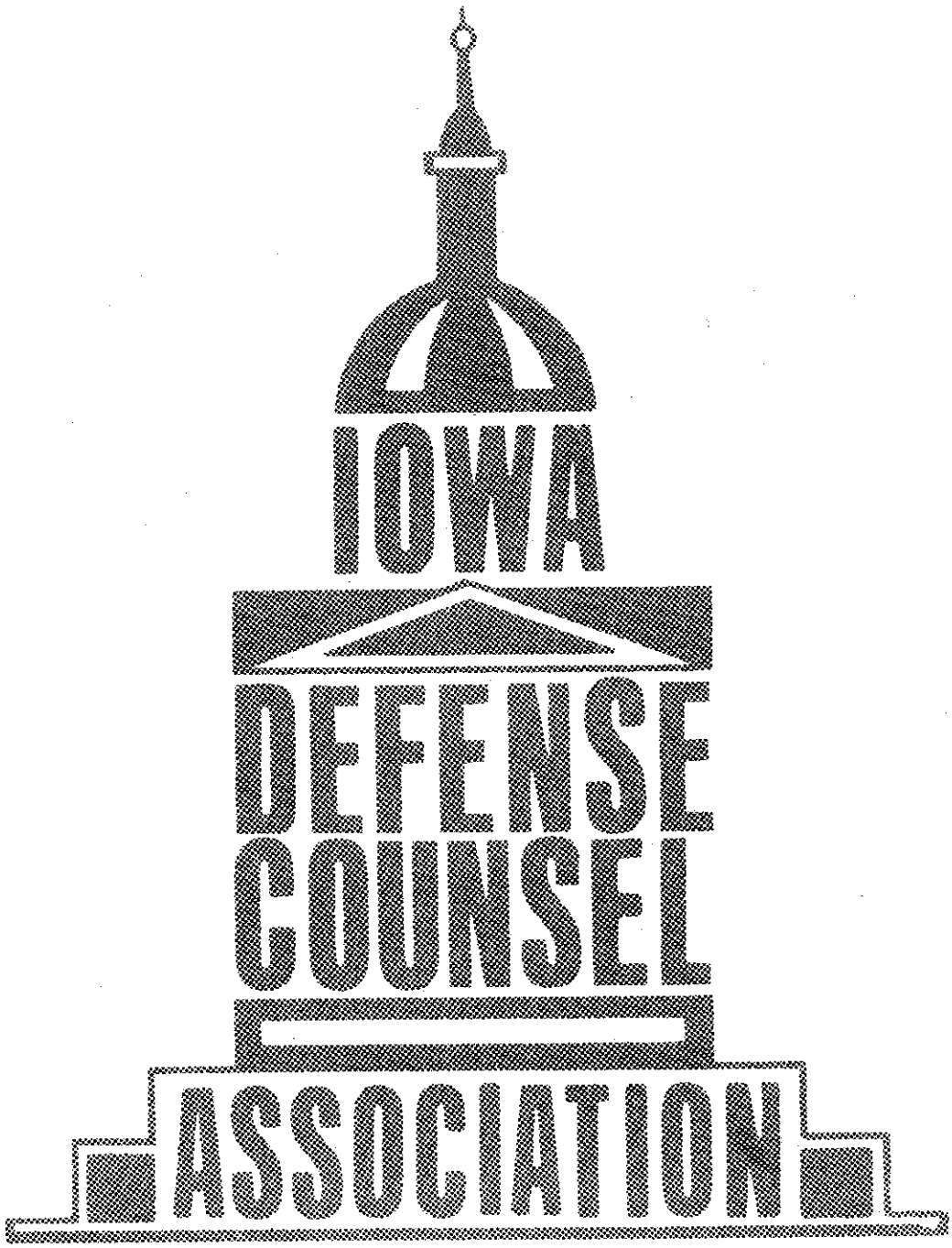
Eugene Marlett




# ANNUAL MEETING

September 29, 30, and October 1, 1977

JOHNNY & KAY'S HYATT HOUSE
Des Moines, Iowa


# 1976 — 1977
# OFFICERS AND DIRECTORS

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Haynie & Smith
920 Liberty Building
Des Moines, Iowa 50309

**VICE PRESIDENT**

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Whitfield, Musgrave, Selvy,
Kelly & Eddy
1400 Central National Bank Bldg.
Des Moines, Iowa 50309

**TREASURER**

Albert D. Vasey
IMT Insurance Company
6000 Grand Avenue, P.O. Box 1336
Des Moines, Iowa 50305

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& Ellwood
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| | |
|---|---|
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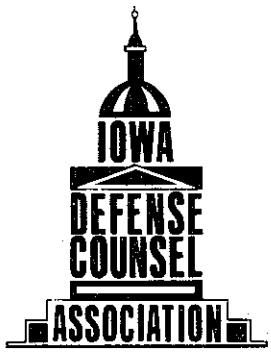
| D. J Goode | 1966-1967 |
| Harry Druker | 1967-1968 |
| Philip H. Cless | 1968-1969 |
| Philip J. Willson | 1969-1970 |
| Dudley Weible | 1970-1971 |
| Kenneth L Keith | 1971-1972 |
| Robert G. Allbee | 1972-1973 |
| Craig H. Mosier | 1973-1974 |
| Ralph W. Gearhart | 1974-1975 |
| Robert Waterman | 1975-1976 |




# 1977 Annual Meeting

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# BAD FAITH AND EXCESS PROBLEMS
# CAVEAT TO THE DEFENSE ATTORNEY

Thomas J. Shields
LANE & WATERMAN
700 Davenport Bank Building
Davenport, Iowa 52801

I. INTRODUCTION.

"When there is a settlement available within the policy limits and the insured is otherwise unrepresented, such a lawyer walks a narrow and dangerous path." Koppie v. Allied Mutual Insurance Company, 210 NW 2d 844, 849 (Iowa 1973).

II. DETERMINING THE EXCESS PROBLEM: A CHECKLIST.

A. Policy limits.

1. Obtain copy of policy.

2. Examine policy limits.

3. Examine damage coverage.

B. Examine policy exclusions.

C. Determine the identities of the parties to the litigation; determine the identities of the insureds.

D. Date of policy/date of accident.

E. Reservations of right/non-waiver agreements.

F. Understand and comprehend the insurance company's position as to litigation.

G. Ascertain the insured's knowledge of the lawsuit, policy coverage and policy limitations.

H. Acquisition of independent counsel.

III. GOOD FAITH VS. NEGLIGENCE.

A. Iowa has adopted the "Bad Faith" Rule.

1. Henke v. Iowa Home Mutual Casualty Company, 250 Iowa 1123, 97 NW 2d 168 (1959).

Bad faith requires more than a showing of inadvertence and honest mistake of judgment.

2. Ferris v. Employers Mutual Casualty Company, 255 Iowa 511, 122 NW 2d 263 (1963).

The burden is on the Plaintiff to show bad faith, including negligence as a possible factor therein.

3. Koppie v. Allied Mutual Insurance Co., supra.

A Plaintiff has to establish bad faith by a preponderance of the evidence, not by clear and convincing evidence.

4. Kohlstedt v. Farm Bureau Mutual Insurance Company, 258 Iowa 337, 139 NW 2d 184 (1965).

Iowa has established the bad faith test as the rule for recovery in excess liability cases. The presence of negligence permits an inference of bad faith. Also to be considered is the fact of whether the insurer was reasonable at the time it rejected settlement, and not whether it was correct in light of subsequent events.

5. Trask v. Iowa Kemper Mutual Insurance Co., 248 NW 2d 97 (Iowa 1976).

In order to establish bad faith in Iowa, there is required substantial evidence to provde bad faith, and the Courts will not follow the scintilla rule.

B. The negligence standard.

1. Petersen v. Farmers Casualty Company, 226 NW 2d 226 (Iowa 1975).

This case may have adopted the negligence standard as to an insurer's liability as to the limited facts in this case:

a. Failure to file post-trial motions; and

b. Failure to properly perfect appeal.

2. Kohlstedt v. Farm Bureau Mutual Insurance Company, supra.

Negligence permits the inference of bad faith. A failure to appeal might not indicate bad faith.

3. Koppie v. Allied Mutual Insurance Co., supra.

Failure to appeal might indicate bad faith.

IV. THE IOWA BAD FAITH TEST.

A. The test, as enunciated in Henke v. Iowa Home Mutual Casualty Co., supra.

1. The insurer must give equal consideration to the interests of the insured as it does to its own interests.

2. Rejection of settlement proposals which the insurer knew to be reasonable, and which were within the policy limits.

3. Where the insurer advised the insured to transfer his property to avoid payment of possible excess liability.

4. Where the insurer rejected or disregarded the recommendations urged by field adjusters as well as by local and trial counsel.

5. The insurer must exercise the utmost care and diligence in investigating the case, including interviewing witnesses and ascertaining all the facts and circumstances, including visiting the scene. Failure to do so will be held to be negligence and will have influence on the issue of bad faith.

6. The insurer must not refuse to make a settlement if it has no more than an equal chance of winning; it can settle within the policy limits and the likely verdict will exceed policy limits.

7. The insurer must necessarily develop sufficient information to arrive at an intelligent evaluation of the claim. Attempting to do so without sufficient information may be influential on the issue of bad faith.

8. Failure on the part of the insurer and counsel; to inform the insured of his possible excess liability or to disclose to him the status of settlement negotiations and offers of settlement, may be indicative of bad faith.

9. Where there is a clear liability on the part of the insured, it may be evidence of bad faith if an earnest and prompt attempt is not made to settle the case for its reasonable value, depending on the nature and extent of the claimant's injuries.

B. The test as set forth in Ferris v. Employers Mutual Casualty Co., supra.

1. If the evidence as to liability or damages is strongly against the insured, it is indicative of either bad faith or negligence.

2. The insurer recognized the advisability of settlement, but attempted to induce insured to contribute from his own funds thereto.

3. The insurer failed to properly investigate the claim so as to be able to intelligently assess the probabilities.

4. The insurer rejected the advice of its own counsel.

5. A failure to compromise the claim persists after adverse judgment is obtained against the insured.

6. A failure to advise the insured of a compromise offer.

V. DECISIONS IN OTHER JURISDICTIONS.

A. Federal Court Decisions.

1. Southern Farm Bureau Casualty Insurance Co. v. Mitchell, (CA 8, 1963), 312 F. 2d 485.

An insurer owes the duty to act in good faith and without negligence, and if through either negligence or bad faith, it fails to settle within the policy limits, where it was possible to do so, it is liable for the excess judgment. It is a jury question as to whether there is bad faith.

2. Milbank Mutual Insurance Co. v. Schmidt, (CA 8, 1962), 304 F. 2d 640.

The test for good faith on the part of an insurer is as follows: If the proof, in light of all the relevent circumstances, and inferences to be drawn therefrom, is such as to leave a reasonable basis for disagreement among reasonable minds, the question of good faith of the insurer in the handling of the claim and conducting compromise negotiations is for the jury.

3. State Farm Mutual Auto Insurance Co. v. Jackson, (CA 8, 1964), 346 F. 2d 484.

   a. The insurer is not required to settle instead of litigating if, in good faith, it believes there are litigable issues present.

   b. The instructions to the jury on bad faith stated the applicable law where it was stated that bad faith means intentional disregard of financial interest of the insureds in hope by the insurer of escaping

its full responsibility under the terms of the policy.

4. Riske v. Truck Insurance Exchange, (CA 8, 1974), 490 F. 2d 1079.

   a. Minnesota law requires that the insurer review each settlement offer as if there were no policy limits.

   b. The insurer is liable for the excess judgment where it was guilty of bad faith in refusing to settle the claim by failing to:

      i. depose the claimant's doctor;

      ii. take cognizance of the claimant's strong case;

      iii. give equal consideration to the interests of the insured; and

      iv. disclose to the insured the viable settlement offers from the claimant.

5. Western Casualty Company v. Herman, (CA 8, 1968), 405 F. 2d 121.

Bad faith is established where the insurer refused to settle within the policy limits due to the pendency of a declaratory judgment action as to non-coverage, and which suit turned out to be unsuccessful.

6. Luke v. American Family Mutual Insurance Co., (CA 8, 1973), 476 F. 2d 1015, cert. denied, 94 S.Ct. 158, 414 U.S. 856.

   a. Bad faith is the same if the insurer refuses to defend, or if it fails to settle within the policy limits.

7. Dairyland Insurance Co. v. Hawkins (D.C. Iowa 1968, 292 F.Supp. 947.

Bad faith was found on the part of the insurer where it refused to defend on the basis of no coverage and also refused to settle within the policy limits where no reasonable basis existed for the insurer to believe grounds for non-coverage were present.

8. Herges v. Western Casualty and Surety Co., (CA 8, 1969), 408 F. 2d 1157.

a. When insurer fails to inform insured until the morning of the trial that offers of settlement had previously been made; that the first demand in the suit exceeded the policy limits; and that the insured could retain his own attorney at his own expense, the insurer was guilty of bad faith and liable for the excess judgment.

b. The duty to exercise good faith includes the obligation to inform the insured of the insurer's potential adverse interests.

c. Good faith in refusing to settle within policy limits involves more than constructing a defense to a suit and requires that the defense be evaluated as if it will

prevail, and if not, then the range of of a verdict and possible settlement must be viewed in light of such expectations, with equal weight given to the financial considerations of both the insured and the insurer.

B. State Court Decisions.

1. Olsen v. Union Fire Insurance Co., 174 Nebraska, 375, 118 NW 2d 318 (1962).

   a. The insurer is not required to surrender its defense of non-liability in order to avoid the risk of an excess judgment.

   b. Where the insurer rejected settlement within the policy limits after a full and fair consideration; and its decision to litigate was based on an honest belief, a fair review of the evidence and competent legal advice, there was no bad faith.

2. Berk v. Milwaukee Auto Insurance Co., 245 Wisconsin, 597, 15 NW 2d 834 (1944).

The test of liability for the insurer in an excess judgment case is bad faith, which is a species of fraud and must be shown by clear and convincing evidence.

3. Crabb v. National Indemnity Company, 205 NW 2d 633 (South Dakota 1973).

   a. Bad faith consists of a failure to give equal consideration to the insured with that of the insurer, including the insurer's

duty to act as if there is no policy limit in terms of settlement.

b. The good faith test is stricter when the issue involves an appeal, since an appeal exposes the insured to greater risk than the insurer; the decision to appeal is made in good faith only where facts point to probability of reversal.

4. Silberg v. California Life Insurance Co., 11 Calif. 3d 542, 521 P. 2d 1103 (1975).

An insurer has an implied contractual obligation to deal in good faith in considering settlements within policy limits.

5. Lange v. Fidelity and Casualty Co., 290 Minn. 61, 185 NW 2d 81 (1971).

Even if the insured is judgment proof and cannot pay the judgment entered against him, he can still sue the insurer for its failure to settle within the policy limits.

6. Hamilton v. State Farm Insurance Co., 83 Wash. 2d 787, 523, P. 2d 193 (1976).

Elements of bad faith to be considered by the jury include:

i. the fact that the attorney did not seriously consider the claimaint's injuries;

ii. the failure of the insurer to realistically evaluate the case;

iii. the failure to give fair consideration to the fact that if a judgment was rendered, it would be far in excess of the policy limits; and

iv. a negligent or bad faith refusal to recommend settlement.

V. IOWA STATUTES: CHAPTER 516, CODE OF IOWA (1977).

A. Section 516.1 - Inurement of Policy.

All policies insuring the legal liability of the insured, issued in this state by any company, association or reciprocal exchange, shall, notwithstanding any other provision of the statutes, contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced his claim against such insurer, had such insured paid such judgment.

B. Section 516.2 - Settlement.

No settlement between said insurer and insured, after loss, shall bar said action unless consented to by said judgment Plaintiff.

C. Section 516.3 - Limitation of Action.

Said action may be brought against said insurer within 180 days from the entry of judgment in case no appeal is taken, and in case of appeal, within 180 days after the judgment is affirmed on appeal, anything in the policy or statutes to the contrary, notwithstanding.

VI. PARTING CONSIDERATIONS.

A. Failure to defend.

B. Negligence in failing to settle within policy limits, as it pertains to legal malpractice.

C. Intentional infliction of a tort.

1. Amsden v. Grinnel Mutual Re-Insurance Co., et al., 203 NW 2d 252 (Iowa 1972).

2. Meyer v. Nottger, 241 NW 2d 911 (Iowa 1976).

D. Summary.

## TABLE OF ADDITIONAL AUTHORITIES

Listed below are cases and authorities, including those cited within the outline, pertaining to this subject matter.


Amsden v. Grinnell Mutual ReInsurance Co., et al., 203 NW 2d 252 (Iowa 1972).

Andrew v. Hartford Accident and Indemnity Co., 207 Iowa 652, 223 NW 529 (1929).

Berk v. Milwaukee Auto Insurance Co., 245 Wisconsin 597, 15 NW 2d 834 (1944).

Central Bearings Co. v. Wolverine Insurance Co., 179 NW 2d 443 (Iowa 1970).

Crabb v. National Indemnity Company, 205 NW 2d 633 (South Dakota 1973).

Dairyland Insurance Co. v. Hawkins (D.C. Iowa 1968), 292 F.Supp. 947.

Farm and City Insurance Co. v. Hassel, 197 NW 2d 360 (Iowa 1972).

Farmers Handy Wagon Co. v. Casualty Co. of America, 184 Iowa 773, 167 NW 204, Supplemented at 184 Iowa 774, 169 NW 178.

Ferris v. Employers Mutual Casualty Co., 255 Iowa 511, 122 NW 2d 263 (1963).

Getchell & Martin Lumber & Mfg. Co. v. Employers' Liability Assurance Corp., 117 Iowa 180, 90 NW 616 (1902).

Glade v. General Mutual Insurance Association of Des Moines, 216 Iowa 622, 246 NW 794 (1933).

Globe Indemnity Co. v. Hansen (CA 8, 1956), 23 F. 2d 895.

Hagen Supply Corp. v. Iowa National Mutual Insurance Co. (CA 8, 1964, 331 F. 2d 199.

Hamilton v. State Farm Insurance Co., 83 Wash. 2d 787, 523 P. 2d 193 (1976).

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 NW 2d 168 (1959).

Herges v. Western Casualty and Surety Co. (CA 8, 1969), 408 F. 2d 1157.

Humboldt Trust and Savings Bank v. Fidelity and Casualty Co. of New York, 255 Iowa 524, 122 NW 2d 358 (1963).

Ingraham v. Dairyland Mutual Insurance Co., 178 NW 2d 299 (Iowa 1970).

Kohlstedt v. Farm Bureau Mutual Insurance Co., 258 Iowa 337, 139 NW 2d 184 (1965).

Koppie v. Allied Mutual Insurance Co., 210 NW 2d 844, (Iowa 1973).

Lange v. Fidelity and Casualty Co., 290 Minn. 61, 185 NW 2d 881 (1971).

Luke v. American Family Mutual Insurance Co., (CA 8, 1973), 476 F. 2d 1015, cert. denied, 94 S.Ct. 158, 414 U.S. 856.

McChristian v. State Farm Mutual Insurance Co. (D.C. Arkansas 1969), 304 F.Supp. 748.

Mendota Electric Co. v. New York Indemnity Co., 169 Minn. 377, 211 NW 317, later appealed, 175 Minn. 181, 221 NW 61.

Meyer v. Nottger, 241 NW 2d 911 (Iowa 1976).

Milbank Mutual Insurance Co. v. Schmidt (CA 8, 1962), 304 F. 2d 640.

New Hampshire Insurance Co. v. Christy, 200 NW 2d 834 (Iowa 1972).

Olsen v. Union Fire Insurance Co., 174 Nebraska 375, 118 NW 2d 318 (1962).

Peter v. Travelers Insurance Association, (C.C. Colo. 19 ), 375 F.Supp. 1347.

Petersen v. Farmers Casualty Co., 226 NW 2d 226 (Iowa 1975).

Railsback v. Buesch, 253 Iowa 1064, 114 NW 2d 916 (1961).

Riske v. Truck Insurance Exchange (CA 8, 1974), 490 F. 2d 1079.

Rojas v. State Farm Mutual Insurance Co. (CA 9, 1975), 518 F. 2d 85.

Southern Farm Bureau Insurance Co. v. Mitchell (CA 8, 1963), 312 F. 2d 845.

State Farm Mutual Auto Insurance v. Jackson (CA 8, 1964), 346 F. 2d 484.

Stover v. State Farm Mutual Insurance Co., 189 NW 2d 588 (Iowa 1971).

Transport Insurance Co. v. Michigan Mutual Liability Insurance Co. (CA 6, 1974), 496 F. 2d 265.

Trask v. Iowa Kemper Mutual Insurance Co., 248 NW 2d 97 (Iowa 1976).

Union Insurance Co. v. Iowa Hardware Mutual Insurance Co., 175 NW 2d 413 (Iowa 1970).

Wessing v. American Indemnity Company of Galveston, Texas, (D.C. Missouri, 1955), 127 F.Supp. 775.

Western Casualty & Surety Co. v. Herman (CA 8, 1968), 405 F. 2d 121.

Western Casualty & Surety Co. v. Southwestern Bell Telephone Co. (CA 8, 1968), 396 F. 2d 351.

Western Mutual Insurance Co. v. Baldwin, 258 Iowa 460, 137 NW 2d 918 (1965).

Yordy v. Farmers Auto Insurance Association, 328 Ill. App. 312, 65 NE 2d 619 (1946).

7 Drake Law Review 23.

40 A.L.R. 2d 168, Liability Insurer - Duty to Settle.

63 A.L.R. 3d 725, Insurer's Wrongful Refusal to Settle Claims.

6 Am.Jur. Proof of Facts 2d 6-247 Insurer's Refusal to Settle.

# RESERVATION OF RIGHTS AND TENDERS OF DEFENSE

by David Phipps
(Whitfield, Musgrave, Selvy, Kelly & Eddy)
Des Moines, Iowa

I. Insurer's duty to defend under liability policy:

A. Origin - source and characteristics of duty:

1. Duty to defend is contract right arising from the policy language.
Insurance Co. of North America v. Saltzman, 111 F. Supp. 695 (D.C. Ark., 1953).

2. Duty to defend is correlative to policy coverage.
Stover v. State Farm Mutual Ins. Co., 189 N.W.2d 588 (Iowa 1971);
Dodge v. Fireman's Fund Ins. Co., 362 S.W.2d 767 (Mo. App. 1962).

3. Duty to defend is broader than duty to pay and arises from "possibility" of recovery - not "probability".
Sucrest Corp. v. Fisher Governor Co. Inc., 371 N.Y.S.2d 927 (1975).

4. Doubt as to duty to defend must be resolved in favor of insured.
Dairyland Ins. Co. v. Hawkins, 292 F. Supp. 947 (D.C. Iowa 1968).

B. Determination of duty:

1. Duty ordinarily determined from allegations of Plaintiff's complaint even if false.
Priester v. Vigilant Ins. Co., 268 F. Supp. 156 (D.C. Iowa 1967).

2. Plaintiff's allegations not determinative of duty to defend; however, if insured or insurer has knowledge of extraneous facts making out a case against the insured within the policy,
Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443 (Iowa 1971)
or where coverage is dependent upon facts which will not be determined in original suit by third party.
New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834 (Iowa 1972).

3. If Plaintiff's petition alleges causes both within and without policy coverage, duty to defend exists until confined to recovery that

policy does not cover.
Caroline Co. v. Home Indemnity Co.,
522 F.2d 363 (C.A. Ill. 1975);
Sucrest Corp. v. Fisher Governor,
supra.

C. Avoidance of duty by payment of limits:

1. Better reasoned rule: since defense rests upon potential liability under policy, duty ends when limits paid.
Commercial Union Ins. Co. of N.Y. v. Adams,
231 F. Supp. 860 (D.C. Ind. 1964);
Lumberman's Mut. Casualty Co. v. McCarthy,
90 N.H. 320, 8 A.2d 750 (1939).

2. Some authority (probably majority) to effect duty to defend is complete in itself separate from duty to pay and therefore, continues after payment of limits.
Western Chain Co. v. American Mut. Liability Ins. Co.,
527 F.2d 986 (C.A. Ill. 1975);
American Cas. Co. of Reading, Pa. v. Howard,
187 F.2d 322 (4th Cir. 1951).

D. Waiver and Estoppel as applied to duty to defend:

1. Insurer entitled to reasonable time within which to investigate and determine coverage (so long as insured not prejudiced).
Jones v. Continental Cas. Co.,
123 N.J. Super. 353, 303 A.2d 91 (1973).

2. Insurer not estopped by filing answer so long as insured advised of Company's position within reasonable time.
Western Cas. & Sur. Co. v. City of Frankfort, Ky.,
516 S.W.2d 859 (1974).

3. Right to deny coverage waived by insurer's failure to give reservation of rights or assert non-liability (and by assumption of defense).
Maryland Cas. Co. v. Peppers,
29 Ill. App. 3d 26, 329 N.E.2d 788 (1975).

4. May be estopped to deny coverage by acts detrimental to insured (as where insurer's investigation focuses upon excluding coverage rather than defending insured).
Hanover Ins. Group v. Cameron,
122 N.J. Super. 51, 298 A.2d 715 (1973).

II. Reservation of Rights:

A. Content:

1. Must fairly and clearly inform insured of Company's position.
Cowan v. Ins. Co. of North America, 22 Ill. App. 3d 883, 318 N.E.2d 315 (1974).

2. Bare notice of "reservation of rights" is not sufficient; but notice must advise of specific rights reserved, of policy defenses asserted and of the conflict of interest.
Northwestern Nat. Ins. Co. v. Corley, 503 F.2d 224 (C.A. Ill. 1974);
Cowan, supra.

B. Method of giving reservation of rights:

1. Reservation of rights may be given either by bilateral agreement (signed by insured) or by unilateral notification so long as clearly gives reasons.
John Alt Furniture Co. v. Maryland Cas. Co., 88 F.2d 36 (8th Cir. 1937).

2. Oral notification to insured's counsel confirmed by letter sufficient.
Duke v. Hoch, 468 F.2d 1973 (C.A. Fla. 1972).

3. Insured must agree to insurer's continuing defense under reservation of rights and may force insurer to election by demanding unqualified defense.
Pacific Indemnity Co. v. Acel Delivery Service Inc., 485 F.2d 1169 (C.A. Tex. 1973);
DeHart v. Ill. Cas. Co., 116 F.2d 685 (7th Cir. 1940).

4. Insured's aquiescence to reservation of rights presumed from silence after receipt of notice.
Ohio Cas. Ins. Co. v. Rynearson, 507 F.2d 573 (C.A. Ind. 1974);
Oncateau v. Commercial Cas. Ins. Co., 318 Ill. App. 553, 48 N.E.2d 440 (1943).

5. Injured claimant is not a party to reservation agreement and has no right therein.
McCann v. Iowa Mut. Liability Ins. Co., 231 Iowa 509, 1 N.W.2d 682 (1942);
Morris v. Allstate Ins. Co., 523 S.W.2d 299 (Tex. Civ. App. 1975).

C. Timeliness:

1. Reservation or denial of coverage must be timely.
Winters v. Government Emp. Ins. Co., 209 S.E.2d 32 (Ga. 1974);

Allied Mut. Ins. Co. v. Hingst,
360 F. Supp. 1204 (D.C. N.D. 1973).

2. Timeliness determined from point where insurer has knowledge of true facts.
Employers Liability Assur. Corp. Ltd. v. Vella,
321 N.E.2d 910 (Mass. 1975).

3. Where initial reports to insurer were sufficiently in conflict to alert insurer to need for investigation timeliness of reservation determined from that point.
Pacific Indem. Co. v. Acel Delivery Service Inc.,
supra.

4. Late assertion of reservation still effective where no prejudice to insured.
Neuman v. Traveler's Indem. Co.,
271 Md. 636, 319 A.2d 522 (1974).

D. Effect of Reservation:

1. Precludes operation of rule that insurer waives policy defenses or coverage questions by assuming defense of claim.
Allied Mut. Ins. Co. v. Hingst,
supra.

2. Reservation preserves insurer's obligation of loyalty and prevents "estoppel" argument.
Cowan v. Ins. Co. of North America,
supra.

E. Changes in position:

1. No estoppel arises if defense is undertaken under reservation for "investigation" and notice is given promptly thereafter of Company's position.
Columbia Cas. Co. v. Ingram,
154 Md. 360, 140 A. 601 (1928).

2. May assume defense under reservation and then turn defense over entirely to insured when it becomes certain that policy does not cover facts under which suit is presented.
Traveler's Indem. Co. v. State Farm Mut. Auto Ins. Co.,
330 F.2d 250 (C.A. Cal. 1964);
Allied Mut. Ins. Co. v. Hingst,
supra.

III. Tender of Defense:

A. Insurer who refuses to defend claim contrary to policy provisions is liable for indemnity as to resulting judgment and reasonable attorney fees.

Turner v. Zip Motors,
245 Iowa 1091, 65 N.W.2d 427 (1954);
New Hampshire Ins. Co. v. Christy,
supra;
Priester v. Vigilant Ins. Co.,
supra.

B. Insurer is not liable for attorney fees in declaratory judgment action to determine coverage in absence of fraud, bad faith or stubborn litigiousness.
New Hampshire Ins. Co. v. Christy,
supra.

C. Once insurer has denied coverage, insured is under no duty to keep insurer advised of progress, but conduct of insured is factor to be considered in "bad faith" claim.
Dairyland Ins. Co. v. Hawkins,
292 F. Supp. 947 (D.C. Iowa 1968).

# Bibliography

Annotations 81 ALR 1355, 38 ALR2d 1148
(Re: Defense of insured as waiver of insurer's defenses).

Annotation 45 ALR2d 1174
(Re: Right to recover attorney fees for defense of action after refusal of defense).

Appleman, Insurance Law and Practice, §4681 et seq.

Couch on Insurance 2d §51.77 et. seq.

Article:
Non-Waiver, Reservation of Rights, Duty to Defend and Disclaimer; Edward C. German; Liability Insurance Disputes, Practising Law Institute (1968).

West's General Digest, Insurance §514.8 et. seq.

# PROPOSED AND PENDING LEGISLATIVE CHANGES IN MEDICAL MALPRACTICE AND PRODUCTS LIABILITY

By: Marvin F. Heidman
GLEYSTEEN, HARPER, KUNZE,
EIDSMOE & HEIDMAN
200 Home Federal Building
Sioux City, Iowa 51101

I. Medical Malpractice (Iowa House File 179 - passed by House in April, 1977)

A. Review by court of any contingent fee arrangement between Plaintiff and Plaintiff's attorney. (Already implemented in Section 147.138, Iowa Code).

B. Statute of Limitations.

1. Suit to be filed within two years after date on which Claimant knew, or should have known, of the injury or death for which damages sought.

2. In no event, more than 6 years after the date on which the act or omission or occurrence alleged to have been the cause of injury or death, unless foreign object unintentionally left in body. (Already in Section 614.1, Iowa Code).

C. Set off for collateral source benefits. (Already in Section 147.136, Iowa Code).

D. Money damages not to be stated in pleadings. (Already in Section 619.18, Iowa Code).

E. Disciplinary powers of Health Care Board.

F. Judgments in medical malpractice actions.

1. Trier of fact in malpractice action shall find as separate facts the total amount to be awarded as damages for past injuries and specific amounts to be awarded as damages for future injuries.

2. If future damages awarded, must be broken down into loss of future income, future expenses for care and treatment, and future noneconomic harm to party.

3. If future damages exceed $50,000, the Court may order those damages to be paid in installments with interest at legal rate.

4. Attorney fees to be assessed by Court and paid by judgment debtor upon entry of judgment.

5. If installment payments ordered, judgment debtor must establish security for payment by filing surety bond or admission of liability for payment by liability insurance carrier. May also purchase annuity to satisfy judgment.

6. If failure of debtor to make timely payments, Court can set aside installment judgment.

7. Court may modify installment judgment at any time upon showing of need.

8. In event of death of injured party, balance of judgment unpaid, together with interest, to be paid in full to persons designated by injured party.

G. Arbitration Agreements.

1. Patient and health care practitioner or hospital may contract to submit to arbitration all disputes arising out of treatment. May be for future disputes.

2. Arbitration Agreement cannot be a prerequisite to receiving health care and treatment.

3. Patient or legal representative may revoke Agreement within 90 days after execution, or in case of hospital, within 90 days after discharge from hospital. Doctor or hospital cannot revoke Agreement.

4. Agreement automatically expires within 1 year.

5. Informational brochure to accompany the Agreement.

H. Arbitration Procedures.

1. Parties may be represented by counsel, shall have the right to be heard, may present evidence and cross-examine witnesses.
2. Standard of care - same as in court civil action.
3. No limit on damages.
4. Minor may be bound by agreement of parent or guardian to arbitrate.
5. List of medical experts to be kept by Arbitration Board and made available to patient in event of claim being made. Experts to make themselves available to be consulted by patient and to provide testimony at request of patient in any arbitration matter. Compensation of expert to be limited to $100 per hour for consultation and $500 for appearance and testimoney in arbitration proceeding. If expert not available, patient may withdraw from arbitration proceedings and bring action at law.
6. A person in interest who is not a party to the Arbitration Agreement may join in the arbitration at the request of any party.
7. Offers of settlement priviledged.
8. Panel of three arbitrators.
   a. Attorney - chairperson;

b. health care practitioner;

c. lay person who is not lawyer or doctor nor associated with hospital or insurance company.

9. Method of selection of arbitrators.

10. Discovery - essentially same rules as in civil action in District Court.

a. Must be completed within 6 months;

b. may depose expert witnesses.

11. Arbitration Panel has power of subpoena.

12. Hearings.

a. To be informal;

b. Rules of evidence to be promulgated by Commissioner of Insurance;

c. standard of care may be established by expert testimony or by authoritative published works;

d. Panel may call neutral expert witness on own motion;

e. written briefs to be submitted;

f. panel must render opinion within 30 days.

13. Decision of Panel.

a. Award to be in writing;

b. shall state reasons for findings;

c. shall determine degree of fault for each respondent;

d. shall prepare schedule of contribution according to relative fault of each party.

14. Provisions of award.

a. Determine cash value of remedial services and other non-cash award elements;

b. panel can award remedial medical treatment - need not be accepted by Claimant.

15. Judgment.

a. Docketed with District Court;

b. is then subject to provisions of Chapter 679 of Iowa Code as far as further review and appellate procedures are concerned.

II. Products Liability

(Iowa Senate File 350, Iowa House File 324, and recommendations of Defense Research Institute).

A. Comparative responsiblity.

1. Proposed to abolish contributory negligence rule in all cases and replace with comparative negligence. (Iowa House File 324)

2. DRI - proposes use of comparative negligence in products cases.

B. Workmen's Compensation - third party liability actions.

1. Proposed that employee's right to compensation be his exclusive remedy against the employer and that employer or compensation carrier shall have no subrogation right nor be entitled to any lien on proceeds of an employee's action against any third party. (SF 350)

2. DRI - adds that, in noncomparative negligence states like Iowa, the employer's fault, if any, should reduce Plaintiff employee's verdict to extent of employer's pro rata share. (Verdict would be halved if both product manufacturer and the employer were found to be at fault.)

C. Limitations of actions - Statute of Repose.

1. Proposed that any products liability action must be commenced within 6 years following the date that the product was first purchased, leased, or put to its intended use. Specifically includes actions based upon strict liability in tort, negligence, express and implied warranty, duty to warn, and all other actions based upon tort or contract. (SF 350)

2. DRI proposal restricts limitation to cases based upon strict liability in tort. No definite time limit suggested.

D. Modification or alteration of product.

1. No liability where product was altered or modified or misused and such alteration, modification or misuse was a proximate cause of injury. (SF 350)

2. DRI - adds no liabilty if product owner or user failed to properly maintain, service or repair product.

E. Duty to warn.

1. Duty to warn does not extend to warnings or safeguards and precautions which a person exercising due care could and should take for his own safety. (SF 350 and DRI)

F. State of the Art - Industry and Governmental Standards.

1. Evidence of advancement or changes in technical knowledge, design, manufacturing or testing techniques or processes not admissable for any purpose. Neither is evidence of subsequent changes in design, manufacturing, testing, labeling or instructing for use of product in issue or any similar product. (SF 350 and DRI)

2. No liability where prevailing industry standards or specifications for product have been complied with. If product complies with applicable state or federal standards or regulations, should create rebuttable presumption that product is not defective. If such governmental standards are mandatory, liablity precluded. (SF 350 and DRI)

G. Ad Damnum.

1. Amount of claim not to be set forth in any pleadings. (SF 350)

H. Evidence of Collateral Benefits.

1. Evidence admissible as to nature and extent of benefits received or to be received as result of injury or death. In event of wrongful death, evidence of remarriage of surviving spouse admissible. (SF 350)

I. Installment Judgments - Periodic Payments.

1. In actions where judgment for damages exceeds $100,000, court shall order periodic payments.
2. Provisions for parties to agree to plan for periodic payments.
3. Periodic payments of future damages only.
4. Attorney fees to be subtracted before computation of periodic payments.

5. Court may make lump sum judgment. If so, must reduce future damages to present value. (SF 350) (Concept of periodic payments recommended by DRI).

J. Punitive Damages.

1. Prohibited in products cases unless intentional injury proved. (Pending bill in Iowa Legislature)

2. Abolished in all civil actions. (DRI)

(Joint Study Committee has now been appointed by Iowa Legislature to look into products liability situation.)

# ADMISSIBILITY OF EVIDENCE OF OTHER ACCIDENTS AND SUBSEQUENT REMEDIAL MEASURES AND WARNINGS IN PRODUCTS LIABILITY LITIGATION

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I. ADMISSIBILITY OF EVIDENCE OF OTHER ACCIDENTS.

A. GENERAL RULE.

It is the general rule that evidence of other accidents is admissible to show:

1. Notice to the defendant.

2. Proof of defectiveness of the product.

Such evidence must, of course, be relevant. Relevancy is established by showing:

1. The same or a similar product was involved.

2. The circumstances were similar.

3. The other accident occurred at a point in time reasonably close to that of the accident in question.

> In an action where the plaintiff seeks to charge the defendant with liability for damage or injury due to defects in an appliance, mechanical device, or other product belonging to, under the control of, or manufactured by the defendant, evidence of other accidents involving the same product is generally admissible to show its dangerous or hazardous nature, if the accidents occurred under the same or substantially similar conditions as that involving the plaintiff and with reasonable proximity in time. 42 A.L.R. 3rd 780, 783, Products Liability - Similar Accidents.

The foregoing states the general rule with regard to admissibility of other accidents in Products Liability cases.

Frumer and Friedman, in their text on Products Liability state:

> Under the majority rule in negligence cases generally, evidence of prior accidents has been held admissible for limited purposes. Thus, applying this rule in products liability cases, it has been held that evidence of prior accidents involving the same product under similar circumstances is admissible to show notice to the defendant of the danger. In addition, such evidence may be admissible to show the danger and the cause of the accident. §12.01[2], pp. 254.25-254.28

B. IOWA RULE.

The Iowa Supreme Court has not yet been confronted with the specific question of admissibility of evidence of other accidents in a Products Liability case.

In Davis v. L. & W. Construction Company, 176 N.W.2d 223 (1970), the Court examined the propriety of admitting evidence of other similar accidents. Davis was a blasting case where the Court permitted evidence to show that two of plaintiff's neighbors had sustained damage to their property as a result of the blasting operations of which plaintiff complained. Although the Court ruled that the evidence was admissible, it went on to state:

> Without question, relevancy must be established as a condition to introduction of evidence regarding similar events or occurrences.
>
> '* * * evidence of other instances of similar result from a common cause are only

logically relevant when the essential circumstances are sufficiently similar to exclude a reasonable likelihood of the same result being produced by a different cause in the two instances.' (p. 227)

Lindquist v. Des Moines Union Railway Co., 239 Iowa 356, 30 N.W.2d 120 (1947), was an action for injuries resulting when a car in which plaintiff was a guest collided with a box car on defendant's tracks on a Des Moines street at night. The suit alleged negligence in creating a hazardous condition. The Supreme Court, in reversing the directed verdict granted by the Trial Court, ruled that the lower court should have permitted the following evidence proffered by plaintiff:

a. Testimony that there had been two prior accidents at the same location, under the same conditions during the preceding five years. The evidence had been offered to show the existence of a hazard and knowledge of the hazard on the part of the defendant.

b. Testimony that during the two months prior to the accident a witness had repeatedly seen a flagman with a lighted lantern at the crossing to warn oncoming cars. The evidence had been offered to show recognition by the defendant of a dangerous condition.

Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973). This was an action for damages arising from sale of a pre-cut home. The suit was based on a breach of warranty. The Trial Court, in connection with a claim by plaintiffs that defendant had forged their signatures to various documents and had falsified notarial acknowledgements, permitted

evidence that the notary involved in this case made acknowledgements on other documents of signatures of persons who had not appeared before her. The Supreme Court affirmed the Trial Court's action as bearing upon the issue of intent to commit a forgery.

See also: Christianson v. Kramer, 257 Iowa 974 135 N.W.wd 644 (1965), [restating the rule on slip and fall cases].

C. REPRESENTATIVE CASES:

SAME PRODUCT:

Jones & Laughlin v. Matherne, 348 F.2d 394 (C.A.5 1965).

Plaintiff claimed fracture of a clamp permitted a boom to fall striking decedent. Manufacturer's negligence claimed. Court permitted evidence of fracture of other clamps made by same manufacturer, even though the crane involved was larger, and no evidence of prior use or condition of second clamp was offered. Defendant, according to the Court, could have covered the differences on cross. Differences go to the weight of the evidence.

SAME PRODUCT - SIMILAR CIRCUMSTANCES:

Frisch v. International Harvester, (Ill.App Ct. 1975), 338 N.E.2d 90.

Strict Liability case, tried to the court. Plaintiff claimed defective gas cap caused flames to shoot out of gas tank and burn him while on his tractor. Trial court properly admitted evidence of unproven occurrences involving other tractors in which a cap had come loose. Offered to

show that pressure could build up. Admissible to establish nature of an unreasonably dangerous condition.

SAME PRODUCT - SIMILAR CIRCUMSTANCES:

Olin Mathieson Chem. Corp. v. Allis Chalmers Mfg. Co., 438 F.2d 833 (Tenn. 1971).

Plaintiff sued for property damage caused by malfunction of heavy electrical equipment. Trial court refused to permit evidence of a malfunction of the same piece of equipment three months later. During the three month period, the unit had been remanufactured and certain equipment relocated. Also the first explosion occurred shortly after routine maintenance while the second explosion happened with no one present. Court of Appeals referred to proposed Federal Rule of Evidence 403 and stated that probative value of the evidence would have been outweighed by the harm caused.

SAME PRODUCT:

Lolie v. Ohio Brass Co., (C.A.7 Ill. 1974) 502 F.2d 741.

Strict liability action against manufacturer of metal clips used to hold power cable in place on roof of coal mine. Child was killed when a heavy rod struck the cable some distance from the child and cable fell on the child. The Court excluded evidence of similar happenings in other mines because there was no showing that clips in other mines were comparable to those manufactured by defendant.

SAME PRODUCT - SIMILAR CIRCUMSTANCES:

Spruill v. Boyle-Midway, Inc., 308 F.2d 79, (C.A.4 1962 [Va.]).

Child died from drinking furniture polish. The Court permitted evidence that there had been 32 cases of chemical pneumonia from ingestion of the product by persons of various ages including at least seven children, four of whom died. Evidence admissible to show defendant's duty to warn of danger of ingestion by humans based on actual knowledge. Only required similarity was that the product was drunk by humans and caused chemical pneumonia.

SAME PRODUCT - SIMILAR CIRCUMSTANCES:

DiPangrazio v. Salamonsen, et al, 393 P.2d 936 (Wash. 1964).

Strict Liability - Warranty case. Ten-year-old ran through glass door. Trial court granted new trial because he had not permitted plaintiff to introduce evidence of frequency of occurrence of incidents involving collisions with glass doors. It was relevant to show whether glass doors were inherently and immimently dangerous. Supreme Court affirmed.

SAME PRODUCT - SIMILAR CIRCUMSTANCES:

Berry v. Fruehauf Trailer Co., 124 N.W.2d 290, (Mich. 1963).

Plaintiff was injured loading a truck on defendant's haulaway trailer when the ramp he was driving onto collapsed. Claim of negligent design and manufacture. The Court per-

mitted evidence of an accident two weeks prior to plaintiff's injury involving a similarly designed ramp which differed from the one at issue in that it had added struts and braces and different skids. Evidence admitted to show defective condition.

D. IS EVIDENCE OF SUBSEQUENT ACCIDENTS ADMISSIBLE?

Since evidence of other accidents is generally admissible to show notice of a defect and proof of defectiveness, evidence of subsequent accidents is not admissible to show notice. It has, however, been held admissible to show causation and defectiveness.

McGinnis v. Mapes Hotel Corp., 470 P.2d 135, 42 A.L.R. 3d 769 (Nev. 1970).

Hotel guest sued for injuries suffered when automatic doors closed on her. Trial court did not submit strict liability as to manufacturer. Nevada Supreme Court reversed on that ground and ordered a new trial. The Trial Court had excluded evidence of several subsequent accidents involving the same door. The Court stated that:

> Since we hold the lower court should have instructed upon the strict tort liability doctrine in this case, we also say evidence of subsequent, similar accidents involving the same door is relevant to causation and a defective and dangerous condition under that theory.
>
> In 1 Frumer & Friedman, Products Liability §12.01(4), the authors say: '[E]vidence of subsequent accidents is not ordinarily pertinent to the issue of notice or knowledge. But such evidence may be considered pertinent in determining whether or not the product was hazardous.'

> Likewise, B. Witkin, California Evidence §353 (2d ed. 1966), states: 'The relevancy of other accidents, whether prior or subsequent, depends on the purpose for which the evidence is offered. A subsequent accident would not be relevant on the issue of knowledge or notice of a possibly dangerous condition at the time of the injury giving rise to the action. But a subsequent accident at the same or a similar place, under the same or similar conditions was in fact dangerous or defective, or that the injury was caused by the condition.' (Emphasis in the original.) * * *
>
> The trial court allowed in evidence three prior repair orders on the door causing the accident under Georgia's negligence theory. It excluded 16 other repair orders for other doors or for repairs subsequent to the accident. We see no error in those rulings.
>
> However, when the case is retried on the strict tort liability doctrine, a different issue is presented. Should the repair orders, prior or subsequent, tend to prove the faulty design or manufacture or any other necessary element of that cause of action, they would be admissible. (42 A.L.R. 3d at p. 777)

Wojciechowski v. Long-Airdox, 488 F.2d 1111, (C.A.3 [Pa.] 1973).

Plaintiff was operating a compressed air blasting device manufactured by defendant. During the blasting operation a shell exploded. Plaintiff sued on strict liability theory. Defendant appealed the verdict for plaintiff in part because the trial judge permitted evidence of prior and subsequent incidents involving defendant's shells. The defense had been that a shell could not have mis-fired to cause plaintiff's injury. The Court of Appeals, in affirming the trial court said:

> Although there was no evidence that the shells involved in these incidents were the

> same shell that injured plaintiff, there was testimony that each of the shells was of identical design with the suspect shell. Furthermore, aside from being direct evidence that the suspect shell was itself defective, the testimony was intended to counter defendant's contention that the shell design made impossible a misfiring caused by air retention. Such a contention could best be refuted by examples to the contrary, and defendant had full opportunity to cross-examine plaintiff's witnesses to develop any significant differences in circumstances that it deemed relevant. Even now defendant does not state specifically how the differences in circumstances affect the probative value of the admittedly minor incidents to refute the defendant's general contention that the shell design made misfiring impossible. (p. 1116)

E. SOME THOUGHTS ON HOW TO DEAL WITH EVIDENCE OF OTHER ACCIDENTS.

1. Interrogatories to plaintiff concerning any other accidents claimed to be similar. Obtain specifics.

2. During deposition of plaintiff's expert - explore claimed similar accidents that he relies on in connection with his opinions.

3. Obtain complete information from the client as to the specifics of other accidents. Find out how they are similar and how they differ.

4. Be prepared to prove differences which may make other accidents sufficiently dissimilar or remote to prevent their admissibility.

5. Raise the question of confusion of issues, unfair prejudice, etc.

Federal Rules of Evidence 402 and 403.

6. File a motion in limine seeking an in camera hearing for the purpose of requiring plaintiff to lay adequate foundation as to the claimed silimar accidents.

Iowa Practice - TWYFORD V. WEBER, 220 N.W.2d 919

Federal Practice - Federal Rule of Evidence 103(c)

II. ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES AND WARNINGS.

The general rule in negligence cases is that evidence of remedial measures taken after the occurrence of an accident is not admissible to show negligence. The Iowa Court has followed this rule. See: Luse v. Sioux City, 253 Iowa 350, 112 N.W.2d 314 (1961), and Hammarmeister v. Illinois Central Railroad Company, 254 Iowa 253, 117 N.W.2d 463 (1962).

The rule is based upon a public policy against discouraging the taking of safety measures after an accident has occurred, and is applied when the person making the repairs is the one who is claimed to have been negligent. This policy ground may not apply where the repairs are made by a third person.

In Wallner v. Kitchens of Sare Lee, Inc., 419 F 2d 1028 (7 Cir. 1969), the Trial Court admitted photographs of modifications made by Sara Lee's orders to a conveyor belt located at its plant subsequent to an accident in which a maintenance employee was injured. The Court held that this was not error as to the designer and manufacturer (Thiele) and gave the following reasoning (P. 1032 of 419 F.2d):

> We agree with defendants that post-accident changes are not admissible to show negligence. (citing authority). This rule is widely accepted and based upon the salutary policy of avoiding jury prejudice and encouraging persons to make repairs following an accident. Nevertheless, we do not think this rule was designed to protect either defendant in this case. Since Thiele did not make the changes in question, the policy of encouraging repair which underlies the rule is inapplicable and the admission of the photographs was not error as to it.

See also Louisville and Nashville Rwy. Co. v. Williams, 340 F.2d 839 (CA5 1966).

Federal Rule of Evidence 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The Advisory Committee note accompanying the rule states in part:

> The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R.N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests

on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them.

Does 407 apply to strict liability cases? Weinstein's Evidence says:

> * * * The use of the phrase "remedial measures" is designed to bring within the scope of the rule any post-accident change, repair or precaution. The rule was most widely applied in industrial accident cases--before workmen's compensation made negligence irrelevant in most such situations--involving offers of evidence of repairs of a defective condition or installation of safety device on the injury-causing machine. Now it is more commonly applied in manufacturer's liability cases to exclude evidence of subsequent modifications in product design. * * * (Vol. 2, p. 407-5)

In Hoppe v. Midwest Conveyor Company, Inc., 485 F.2d 1196 (Mo. 1973), the Eighth Circuit Court of Appeals reversed a directed verdict in a strict liability action claiming defective design. In the opinion, Judge Lay, commenting upon the Trial Court's exclusion of certain evidence stated by way of dictum that:

> Here plaintiff's theory was based on dangerous design of a highly complicated piece of machinery. Liability alleged from defective design encompasses many factors not generally relevant to ordinary negligence in tort cases. The comparative design with similar and competitive machinery in the field, alternate designs and post

> accident modification of the machine, the frequency of infrequency of use of the same product with or without mishap, and the relative cost and feasibility in adopting other design are all relevant to proof of defective design. [citing cases] (p. 1202)

Hoppe was decided prior to the adoption of the Federal Rules of Evidence. Sterner v. U.S. Plywood-Champion Paper, Inc., 519 F.2d 1352 (Iowa 1975), was a case which was also decided by the Eighth Circuit prior to the adoption of the Federal Rules of Evidence. The Court in Sterner affirmed a verdict for a plaintiff who had been injured as a result of ignition of contact cement which he was using. The jury, in answer to special interrogatory, indicated that it found in favor of plaintiff on his negligence theory and not on the strict liability theory. Judge Hanson had permitted the introduction of evidence of subsequent warnings contained on the product which were more emphatic than those which appeared on the can purchased by plaintiff. In holding that the subsequent warnings were admissible as going to the issue of feasibility of providing more detailed and understandable warnings, Judge Lay stated:

> Subsequent alteration in the warnings given concerning the proper use of a product are, just as evidence of post-accident modifications in the product itself, inadmissible as an implied admission of negligence. Evidence of such changes are, however, admissible for some purposes such as demonstration of knowledge of dangerous properties prior to the accident or the availability of better design or the feasibility of a more adequate warning of the risk involved. [citing cases] (p. 1354)

HOWEVER, it is now the rule in the Eighth Circuit that Rule 407 does not bar evidence of post-accident changes and warnings as substantive evidence in strict liability cases.

In Robbins v. Farmers Union Grain Terminal Ass'n., 552 F.2d 788 (S.D. 1977) plaintiffs sued the manufacturer of a cattle feed supplement for loss or damage to their cattle allegedly caused by the supplement. The jury found for plaintiffs under the theories of negligence, breach of implied warranty and strict liability.

The Trial Court admitted a letter from the manufacturer to its sales personnel containing a warning relating to the use of the supplement. The letter was issued after plaintiffs had used the supplement and after the cattle had died or otherwise been damaged. The letter was offered to show an unreasonably dangerous and defective product. The Trial Court ruled that the letter was admissible as substantive evidence since Rule 407 did not apply to strict liability.

The trial judge relied upon Ault v. International Harvester Co., 528 P.2d 1148 (Cal. 1974), in making his ruling. The Eighth Circuit, in a decision by Judge Lay, affirmed the Trial Court's ruling and stated:

> We have applied the Ault rationale in allowing proof of post-occurrence design modification and to a subsequent remedial instruction, and find no reason to bar its applicability to Rule 407 since Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct. The doctrine of strict liability by its very nature, does not include these elements. [citing cases] (p. 793)

In Ault, supra, the California Supreme Court held that evidence that a manufacturer had stopped making gear boxes on a vehicle out of aluminum three years after plaintiff's accident and changed to using malleable iron for the boxes was admissible in a strict liability case. The Court held that §1151 of the California Evidence Code did not bar the evidence. [Federal Rule of Evidence 407 is patterned after §1151, see Robbins, supra, Note 9, p. 793.] The Court decided that the term "culpable conduct" did not refer to strict liability situations. The following excerpt from the Court's decision is noteworthy in light of the fact that Federal Rule 407 is based on §1151.

> While the provisions of section 1151 may fulfill this anti-deterrent function in the typical negligence action, the provision plays no comparable role in the products liability field. Historically, the common law rule codified in section 1151 was developed with reference to the usual negligence action, in which a pedestrian fell into a hole in a sidewalk * * * or a plaintiff was injured on unstable stairs; * * * in such circumstances, it may be realistic to assume that a landowner or potential defendant might be deterred from making repairs if such repairs could be used against him in determining liability for the initial accident.
>
> When the context is transformed from a typical negligence setting to the modern products liability field, however, the "public policy" assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the

> attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 does not effect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, the purpose of section 1151 is not applicable to a strict liability case and hence its exclusionary rule should not be gratuitously extended to that field.
>
> This view has been advanced by others It has been pointed out that not only is the policy of encouraging repairs and improvements of doubtful validity in an action for strict liability since it is in the economic self interest of a manufacturer to improve and repair defective products, but that the application of the rule would be contrary to the public policy of encouraging the distributor of mass-produced goods to market safer products.

South Dakota, in Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (1976), apparently adopted the Ault reasoning as a common law rule.

The Illinois Supreme Court in Sutkowski v. Universal Marion Corporation, 281 N.E.2d 749 (1972), held that the Illinois statutory rule excluding evidence of post-occurrence changes in negligence cases did not apply to products liability cases.

# UPDATE -- WORKERS' COMPENSATION

Robert C. Landess
Iowa Industrial Commissioner

## NEW LEGISLATION AND RECENT CASES

### New Legislation

*S.F.328* - This act affects only procedural rights in workers' compensation cases. The amount of benefits to which an injured employee may be entitled is in no manner affected by the act. The act's primary purpose is to remove problem areas of some magnitude encountered by the industrial commissioner and practitioners before the industrial commissioner's office because of the Iowa Administrative Procedure Act, Chapter 17A of the Code.

Section 1 of the bill merely clarifies that service upon the Secretary of the State, where appropriate, is in addition to persons upon whom service may be had under the provisions of Chapter 17A of the Code. The use of the term "delivery" is placed in the section as it is the term used in Chapter 17A of the Code.

Section 2 clarifies problems encountered concerning workers' compensation statues of limitations. Paragraph 2 in pertinent part is currently found in Section 86.34 of the Code. As will be noted later, Section 86.34 of the Code has language creating one of the primary problems intended to be corrected by this bill. Portions of that section not to be repealed have been moved to other statutory sections. As Section 86.34 of the Code now contains a statute of limitations provision, that provision would be placed in the same statutory section, Section 85.26 of the Code, with the other statute of limitations.

Paragraph 3 of Section 2 clarifies another major problem encountered with the passing of the Administrative Procedure Act. The paragraph would clearly define the act necessary to toll a statute of limitations. Filing with the industrial commissioner has historically been the method of tolling the statute of limitations. Provisions of Section 17A.12 of the Code have caused some concern that perhaps "delivery" is the act which would toll the statute of limitations. Parties have been uncertain as to the proper action necessary to toll the statutes of limitations.

Section 3 broadens the base where compromise settlement agreements may be used. The Iowa Administrative Procedure Act encourages settlements.

Section 4 is necessary because of the relocation of the statute of limitations of Section 86.34 of the Code into Section 85.26 of the Code. Additionally, it points out that no compromise settlement resulting in a final disposition can affect medical benefits unless the general applicability of the workers' compensation law is the issue where weekly benefits have been paid.

Section 5 merely adds reference to the other two chapters, Chapters 86 and 87 of the Code, dealing with workers' compensation benefits.

Section 6 removes the limitation on the number of deputy commissioners. Section 17A.11, paragraph 1 of the Code, defines administrative hearing officers and indicates that each agency "shall appoint as many of them to its staff as are necessary".

Section 7 clarifies that the delegation of authority provisions from the industrial commissioner to a deputy commissioner of Section 86.3 of the Code do exist notwithstanding the provisions of Chapter 17A. As the only "agency member" as defined by Section 17A.2, paragraph 10 of the Code, is the industrial commissioner, and as a deputy commissioner is an administrative hearing officer, (17.11 of the Code), specific reference to the Administrative Procedure Act and the delegation of authority appears necessary. In view of the same definitions, delegation of the statutory authority to an administrative hearing officer is to be done carefully. The additional changes concerning written delegation of authority are in this vein.

Section 8 of the Act strikes superfluous provisions now contained in the Administrative Procedure Act, (See Section 17A.3 of the Code and Section 17A.13 of the Code).

Section 9 removes the present Section 86.14 of the Code. The present section refers to the commencing of an action now dealt with in Section 17A.12 of the Code. It also requires a notification by the commissioner to the parties which is now superfluous due to Iowa Administrative Procedure Act provisions. It refers to a time to answer a petition. 17A.12 of the Code merely makes reference to an opportunity for parties to answer. This appears to be better handled by rule. Section 86.14 of the Code also refers to pleading of affirmative defenses. The Iowa Administrative Procedure Act refers to the opportunity to respond generally. Methods of pleading defenses are better left to control by rule. This section also indicates the type of inquiry in an "arbitration" proceeding. The new section is limited to providing for the scope of inquiry in the type of proceeding previously referred to in 86.14 of the Code and also Section 86.34 of the Code. As in the situation involving the statute of limitations, categories of functions relative to both types of contested cases are placed into the same statutory section.

Section 10 clarifies the function of a deputy commissioner in contested case proceedings. Paragraph 2 indicates where hearings in workers' compensation cases may be held. Paragraph 2 places in one section provisions previously found in Section 86.17 of the Code and 86.37 of the Code.

Section 11 uses language more consistent with the Administrative Procedure Act scheme with reference to evidence and procedure in workers' compensation cases. Paragraph 2 is a relocation of a provision of Section 86.21 of the Code.

Section 12 makes reference to the recording of the

proceedings as required by Section 17A.12 of the Code. Provisions found in Section 86.19 and Section 86.28 of the Code are combined into one statutory section. Additionally, the court reporters are made the custodians of the notes as required by by Chapter 17A of the Code.

Section 13 strikes reference to a section which is repealed by this act.

Section 14 deals with intra-agency appeal procedure. Section 86.24 in its current form refers to appellate procedure within the industrial commissioner's office. According to the schematics set forth in Section 17A.15 of the Code and the prior prior indicated definition of "agency member" and "administrative hearing office", the appellate procedure is left to rule. Accordingly, Section 86.24 of the Code would defer the appellate procedure to the rulemaking process. Reference to the location of the appeal hearing currently found in Section 86.37 of the Code is placed in this section. The power of the industrial commissioner currently found in Section 86.24 of the Code on appeal is likewise placed into this section. The duty of the appealing party to obtain a transcript currently found in Section 86.24 of the Code is placed in this section.

Section 15 strikes reference to judicial review from the commissioner's decision on appeal from a lower level arbitration decision. This reference is no longer necessary as the intra-agency appeal process is the same for all proceedings under this act and would be defined by rule. The judicial review process is provided for in Chapter 17A of the Code.

Section 16 merely changes the language from "appeal" to "judicial review".

Section 17 strikes the first subsection of Section 86.36 of the Code. This subsection is removed as superfluous. Provisions concerning notice and delivery of process are now taken care of by Chapter 17A of the Code. Reference to methods of any other notice to be given in the workers' compensation statutes are independently provided for.

Section 18 clarifies that an alternative method of service upon a nonresident employer as defined in Section 86.36 of the Code is permitted.

Section 19 refers to the same statutory section as Section 18 of this act. The change merely adds the terminology "delivery" as used in Section 17A.12 of the Code.

Section 20 clarifies the circumstances when a decision or order of the industrial commissioner's office which has become final, as defined by the Administrative Procedure Act, may be taken to the District Court for enforcement. The changes were made in view of the definitions found in Section 17A.15 of the Code as to the finality of agency action.

Section 21 is the repealer section of the bill.

Section 85.46 of the Code would be repealed as the Administrative Procedure Act provides for both the original notice and its delivery upon an opposing party in a contested case proceeding. The language of Section 85.46 of the Code is therefore not needed.

Section 86.21 of the Code refers to the taking of depositions. The paragraph which refers to the use of depositions for evidential purposes has been salvaged and relocated into another statutory section. The remainder of the section is dealt with in Section 17A.13 of the Code.

Section 86.22 of the Code is no longer needed in view of Section 17A.13 of the Code.

Section 86.23 of the Code is no longer necessary in view of Section 17A.16, paragraph 1, of the Code.

Section 86.25 of the Code is no longer necessary in view of the provisions of Section 17A.16, paragraph 1, of the Code.

Section 86.28 of the Code was relocated.

Section 86.34 of the Code is repealed as it has been relocated in part as previously indicated. The primary section removed deals with judicial review of a deputy commissioner's decision by the District Court. In view of the discussion and definitions of the Administrative Procedure Act as to an "agency member" and "administrative hearing officer", and in view of who may issue a "proposed" and "final" decision as indicated in Section 17A.15 of the Code, a deputy commissioner as an administrative officer cannot issue a "final" decision which would be directly reviewable by a District Court except in certain limited circumstances. This current reference in Section 86.34 of the Code to the right of judicial review of a deputy commissioner's decision directly to the District Court and the existence of the Administrative Procedure Act provisions and definitions has created great confusion. Removal of the section and the previously noted amendments is essential for clarity.

Section 86.35 of the Code is repealed consistent with the indications that the intra-agency appellate procedures should be governed by rule. See Section 17A.15 of the Code.

Section 86.37 of the Code would no longer be necessary as the section referring to the location of the hearings has been placed elsewhere.

*S.F. 329* - This act corrects erroneous, inconsistent or obsolete provisions of the 1977 Code.

Section 4 corrects an erroneous reference in Section 85.34, subsection 3, to the average weekly wage as determined by the "Iowa employment security commission" by changing it to the "director

of the Iowa department of job service." This is now the new name for that department and in no way affects the manner in which the average weekly wage will be determined. You will note that the July 1, 1976 edition of the Iowa Workers' Compensation Laws caught this with the exception of the words "director of the".

Section 5 makes the same correction in Section 85.36, subsection 10, and also changes the word "he" to "the employee".

*Chapter 1245, 1976 Iowa Acts, (session laws), Chapter 4, as amended by S.F.318 (effective January 1, 1978).*

Section 42 amends Section 85.41 making a simple misdemeanor out of the refusal to furnish a statement of earnings to an employee or his representative upon request.

Section 43 amends Section 85.54 making it a simple misdemeanor to withhold from an employee any amount for the purpose of providing workers' compensation coverage.

Section 44 amends Section 86.4 making it a simple misdemeanor for a commissioner or his appointee to espouse the election or appointment of a candidate for political office but removes such conduct as sufficient grounds for removal from office. It also removes prohibition for political contributions.

Section 45 amends Section 86.5 making it a simple misdemeanor for a candidate for appointment as commissioner to promise to appoint a person to a position within his authority in exchange for assistance in obtaining the appointment.

Sections 46 and 47 were repealed by S.F.318 as they are inconsistent with changes which were made last year amending Sections 86.10 and 86.12 (referring to inspection of books and records of an employer and the penalties for refusal) and are incorporated into the 1977 Code.

Section 48 amends Section 87.2 making it a simple misdemeanor for failure to post notice when you have failed to insure.

Section 49 amends Section 87.14 making it a simple misdemeanor for failure to insure a mining operation.

*Existing provisions of Code, 1977 which become effective July 1, 1977.*

Section 85.30 changes the date at which the first payment of compensation becomes due from the "fifteenth" to the "eleventh" day following the injury.

Section 85.32 changes the seven day waiting period to a three day waiting period and makes the waiting period compensation of three days all payable at once if the disability extends beyond fourteen days.

Section 85.33 changes the seven day waiting period to three days also.

Section 86.11 conforms the reporting requirement to the three day waiting period provisions.

Sections 85.31, 85.34(3) and 85.37 provides that weekly benefits to which a claimant is entitled for death, permanent total disability, healing period and temporary disability is raised to 133 1/3% of the state average weekly wage.

Section 85.34(2) provides that maximum weekly benefit for permanent partial disability is raised to 122 2/3% of the state average weekly wage.

Recent cases

Supreme Court Decisions

*Porter v. Continental Bridge Company*, 246 N.W.2d 244 (October, 1976

Appeal from the district court judgment affirming the percentage of permanent disability found by deputy industrial commissioner. The supreme court affirmed. Claimant was injured when a crane boom fell on his back, was operated on and was later injured in a fall. On the basis of conflicting medical testimony, 35% permanent disability to the body as a whole was awarded by the deputy. The issue on appeal was the extent of disability. The court held that findings by the commissioner or by the deputy would not be overturned if they were supported by substantial evidence. The court, noting that the argument should have been raised before the deputy, pointed out that the substantial evidence rule satisfied due process requirements and that a de novo review was not required by the Constitution. The court further held that the findings of the deputy met the requirements established in *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 509 (Iowa 1973) by being "sufficiently certain to enable a reviewing court to ascertain with reasonable certainty the factual basis on which the administrative officer or body acted".

*Smith v. Saylor Feed & Grain Co.*, ___ N.W.2d___ (January, 1977)

Appeal from the district court affirming the industrial commissioner's determination that claimant had sustained a second back injury. The supreme court affirmed. Claimant suffered a back injury in 1969 and a subsequent injury in 1970. The issue was whether or not the 1970 injury was a new one or a continuation of the previous one. The supreme court held that the findings of the industrial commissioner were supported by substantial evidence.

*Reid v. Landess, Iowa Industrial Commissioner*, ___ N.W.2d___ (April, 1977)

Appeal from the district court affirming the industrial commissioner's refusal to furnish a free transcript of a workmen's compensation proceeding. The supreme court affirmed. Plaintiff's claim was denied in an arbitration proceeding. Plaintiff filed a petition for review by the industrial commissioner. The industrial commissioner requested a transcript of the former proceeding.

Plaintiff petitioned the district court alleging indigency and seeking a writ of mandamus to require the industrial commissioner to provide a free transcript. The supreme court noted and the commissioner acknowledged that under Iowa Code Section 86.24 (1971) the industrial commissioner has a duty to conduct a review even if no transcript of the arbitration proceeding is filed. The court held that the commissioner's refusal to furnish plaintiff a free transcript of the arbitration proceeding was not a breach of his statutory duty. Noting that the furnishing of free transcripts in workmen's compensation appeals is a matter for the legislature, the court found that none of the plaintiff's constitutional rights were foreclosed and that a rational legislative purpose was served by avoiding expense by the public for free transcript.

Court of Appeal Decisions

*Roby v. John Deere Waterloo Tractor Works*, Court of Appeal (March, 1977)

Appeal from the district court affirming deputy industrial commissioner's decision granting increased compensation to claimant as a result of a review-reopening proceeding under Iowa Code Section 86.34 (1973). The court of appeals affirmed. Claimant was injured March 19, 1968 and applied for review-reopening on July 20, 1972. Defendant answered asserting that claimant's remedy should arise in an arbitration proceeding. The claimant filed an amended petition October 6, 1972 which was answered by defendant on the morning of the hearing, October 11, 1972 and was further affirmatively answered at the close of claimant's case by defendant who asserted that the claimant's cause of action was barred by the statute of limitations. The issue here is whether or not it was within the commissioner's discretion to reject the defense as untimely and if that rejection was an abuse of discretion. The court of appeals held that defendant's assertion of the statute of limitations was not authorized as a matter of right. A conflict between the commissioner's rules and the Rules of Civil Procedure should be resolved in favor of the commissioner's rules. As the commissioner has authority to prescribe rules, it naturally follows that he has discretion in enforcing them. The court further held the deputy commissioner's refusal to allow the statute of limitations defense was within his discretion. The court indicated that the deputy was not, prior to rendering a final decision, precluded from changing his mind as to the timeliness of an asserted defense.

SENATE FILE 328

AN ACT

TO RESOLVE DIFFERENCES IN PROCEDURES INVOLVING PROVISIONS OF THE WORKERS' COMPENSATION LAW AND THE IOWA ADMINISTRATIVE PROCEDURE ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section eighty-five point three (85.3), subsection two (2), unnumbered paragraph two (2), Code 1977, is amended to read as follows:

~~Such~~ In addition to those persons authorized to receive personal service as in civil actions as permitted by chapter seventeen A (17A) of the Code, such employer shall be deemed to have appointed the secretary of state of this state as its lawful attorney upon whom may be served or delivered any and all notices authorized or required by the provisions of this chapter, chapters 85A, 86, ~~and~~ 87, and seventeen A (17A) of the Code, and to agree that any and all such services or deliveries of notice on the secretary of state shall be of the same legal force and validity as if personally served upon or delivered to such nonresident employer in this state.

Sec. 2. Section eighty-five point twenty-six (85.26), Code 1977, is amended by striking the section and inserting in lieu thereof the following:

85.26 LIMITATIONS OF ACTIONS.

1. No original proceedings for benefits under this chapter, chapter eighty-five A (85A) or eighty-six (86) of the Code, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of the occurrence of the injury for which benefits are claimed except as provided by section eighty-six point twenty (86.20) of the Code.





2. Any award for payments or agreement for settlement provided by section eighty-six point thirteen (86.13) of the Code for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under such award or agreement. Once an award for payments or agreement for settlement as provided by section eighty-six point thirteen (86.13) of the Code for benefits under the workers' compensation or occupational disease law has been made where the amount has not been commuted, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section eighty-five point twenty-seven (85.27) of the Code.

3. Notwithstanding the terms of chapter seventeen A (17A) of the Code, the filing with the industrial commissioner of the original notice or petition for an original proceeding or an original notice or petition to reopen an award or agreement of settlement provided by section eighty-six point thirteen (86.13) of the Code, for benefits under the workers' compensation or occupational disease law shall be the only act constituting "commencement" for purposes of this statutory section.

4. No claim or proceedings for benefits shall be maintained by any person other than the injured employee, his or her dependent or his or her legal representative if entitled to benefits.

Sec. 3. Section eighty-five point thirty-five (85.35), unnumbered paragraph one (1), Code 1977, is amended to read as follows:

~~When no memorandum of agreement has been filed and approved by the industrial commissioner, the~~ The parties to

a contested case, or persons who are involved in a dispute which could culminate in a contested case may enter into a settlement of any claim arising under this chapter, ~~or~~ chapter 85A or chapter eighty-six (86) of the Code, providing for final disposition of the claim, provided that no final disposition affecting rights to future benefits may be had when the only dispute is the degree of disability resulting from an injury for which an award for payments or agreement for settlement under section eighty-six point thirteen (86.13) of the Code has been made. The settlement shall be in writing and submitted to the industrial commissioner for approval. The settlement shall not be approved unless evidence of a bona fide dispute exists concerning any of the following:

Sec. 4. Section eighty-five point thirty-five (85.35), subsection three (3), Code 1977, is amended by striking the subsection and inserting in lieu thereof the following:

3. Whether or not the statutes of limitations as provided in section eighty-five point twenty-six (85.26) of the Code have run. When the issue involved is whether or not the statute of limitations of section eighty-five point twenty-six (85.26), subsection two (2) of the Code, has run, the final disposition shall pertain to the right to weekly compensation unless otherwise provided for in subsection seven (7) of section eighty-five point thirty-five (85.35) of the Code.

Sec. 5. Section eighty-five point thirty-five (85.35), subsection seven (7), unnumbered paragraph one (1), Code 1977, is amended to read as follows:

This chapter or chapter 85A, eighty-six (86) or eighty-seven (87) of the Code applies to the party making the claim.

Sec. 6. Section eighty-six point two (86.2), Code 1977, is amended to read as follows:

86.2 APPOINTMENT OF DEPUTIES. The commissioner may appoint ~~four~~ deputy industrial commissioners for whose acts



~~he~~ the commissioner shall be responsible and who shall serve during the pleasure of the commissioner, and all such deputies must be lawyers admitted to practice in this state.

Sec. 7. Section eighty-six point three (86.3), Code 1977, is amended to read as follows:

86.3 DUTIES OF DEPUTIES. ~~In~~ Notwithstanding the provisions of chapter seventeen A (17A) of the Code, in the absence or disability of the industrial commissioner, or when ~~acting under the directions of~~ written delegation of authority to perform specified functions is made by the commissioner, the deputies shall have ~~all of the~~ any necessary specified powers ~~and~~ to perform ~~all of the~~ any necessary or specified duties of the industrial commissioner pertaining to his or her office. Notwithstanding the definitions and terms of chapter seventeen A (17A) of the Code, pertaining to the issuance of final decisions, when the above circumstances exist a deputy commissioner shall have the power to issue a final decision as if issued by the agency.

Sec. 8. Section eighty-six point eight (86.8), subsection four (4), Code 1977, is amended to read as follows:

4. To ~~keep records of all proceedings and decisions of such boards, issue subpoenas for witnesses, issue subpoenas duces tecum,~~ administer oaths, examine books and records of parties subject to such provisions.

Sec. 9. Section eighty-six point fourteen (86.14), Code 1977, is amended by striking the section and inserting in lieu thereof the following:

86.14 CONTESTED CASES.

1. In an original proceeding, all matters relevant to a dispute are subject to inquiry.

2. In a proceeding to reopen an award for payments or agreement for settlement as provided by section eighty-six point thirteen (86.13) of the Code, inquiry shall be into whether or not the condition of the employee warrants an end

to, diminishment of, or increase of compensation so awarded or agreed upon.

Sec. 10. Section eighty-six point seventeen (86.17), Code 1977, is amended by striking the section and inserting in lieu thereof the following:

86.17 HEARINGS--PRESIDING OFFICER--VENUE.

1. A deputy industrial commissioner may preside over any contested case proceeding brought under this chapter, chapter eighty-five (85) or eighty-five A (85A) of the Code in the manner provided by chapter seventeen A (17A) of the Code. The deputy commissioner or the commissioner may make such inquiries and investigation in contested case proceedings as shall be deemed necessary, consistent with the provisions of section seventeen A point seventeen (17A.17) of the Code.

2. Hearings in contested case proceedings under chapters eighty-five (85), eighty-five A (85A) and eighty-six (86) of the Code shall be held in the judicial district where the injury occurred. By written stipulation of the parties or by the order of a deputy industrial commissioner or the commissioner, a hearing may be held elsewhere. If the injury occurred outside this state, or if the proceeding is not one for benefits resulting from an injury, hearings shall be held in Polk county or as otherwise stipulated by the parties or by order of a deputy industrial commissioner or the industrial commissioner.

Sec. 11. Section eighty-six point eighteen (86.18), Code 1977, is amended by striking the section and inserting in lieu thereof the following:

86.18 HEARINGS--EVIDENCE.

1. Evidence, process and procedure in contested case proceedings or appeal proceedings within the agency under this chapter, chapters eighty-five (85) and eighty-five A (85A) of the Code shall be as summary as practicable consistent with the requirements of chapter seventeen A (17A) of the



Code.

2. The deposition of any witness may be taken and used as evidence in any pending proceeding or appeal within the agency.

Sec. 12. Section eighty-six point nineteen (86.19), Code 1977, is amended by striking the section and inserting in lieu thereof the following:

86.19 REPORTING OF PROCEEDINGS.

1. The industrial commissioner, or a deputy commissioner, may appoint or may direct a party to furnish at the party's initial expense a certified shorthand reporter to be present and report, or to furnish mechanical means to record, and if necessary, transcribe proceedings of any contested case under this chapter, chapters eighty-five (85) and eighty-five A (85A) of the Code and fix the reasonable amount of compensation for such service. The charges shall be taxed as costs and the party initially paying the expense of the presence or transcription shall be reimbursed. The reporter shall faithfully and accurately report the proceedings.

2. Notwithstanding the requirements of section seventeen A point twelve (17A.12), subsection seven (7) of the Code, a certified shorthand reporter, appointed by the presiding officer in a contested case proceeding or by the industrial commissioner in an appeal proceeding, may maintain and thus have the responsibility for the recording or stenographic notes for the period required by section seventeen A point twelve (17A.12), subsection seven (7), of the Code.

Sec. 13. Section eighty-six point twenty (86.20), unnumbered paragraph five (5), Code 1977, is amended to read as follows:

If a memorandum of agreement is filed and approved pursuant to section 86.13 or an award for payments is granted ~~pursuant to section 86.23~~ the employer or insurance carrier shall be entitled to credit for amounts paid under this section.

Sec. 14. Section eighty-six point twenty-four (86.24), Code 1977, is amended by striking the section and inserting in lieu thereof the following:

86.24 APPEALS WITHIN THE AGENCY.

1. Any party aggrieved by a decision, order, ruling, finding or other act of a deputy commissioner in a contested case proceeding arising under this chapter or chapter eighty-five (85) or eighty-five A (85A) of the Code may appeal to the industrial commissioner in the time and manner provided by rule. The hearing on an appeal shall be in Polk county unless the industrial commissioner shall direct the hearing be held elsewhere.

2. In addition to the provisions of section seventeen A point fifteen (17A.15) of the Code, the industrial commissioner may affirm, modify, or reverse the decision of a deputy commissioner or he may remand the decision to the deputy commissioner for further proceedings.

3. In addition to the provisions of section seventeen A point fifteen (17A.15) of the Code, the industrial commissioner, on appeal, may limit the presentation of evidence as provided by rule.

4. A transcript of a contested case proceeding shall be provided by the appealing party at his or her cost and shall be filed with the industrial commissioner within thirty days after the filing of the appeal to the industrial commissioner.

Sec. 15. Section eighty-six point twenty-six (86.26), Code 1977, is amended to read as follows:

86.26 JUDICIAL REVIEW. Judicial review of decisions or orders of the industrial commissioner ~~in a proceeding on review of an arbitration decision~~ may be sought in accordance with the terms of ~~the Iowa administrative procedure Act~~ chapter seventeen A (17A) of the Code. Notwithstanding the terms of ~~the Iowa administrative procedure Act~~ chapter seventeen A (17A) of the Code, petitions for judicial review may be



filed in the district court of the county in which the hearing under section 86.17 was held. Such a review proceeding shall be accorded priority over other matters pending before the district court.

Sec. 16. Section eighty-six point thirty-two (86.32), Code 1977, is amended to read as follows:

86.32 COSTS ~~ON APPEAL~~ OF JUDICIAL REVIEW. In proceedings for judicial review of compensation cases the clerk shall charge no fee for any service rendered except the filing fee and transcript fees when the transcript of a judgment is required. The taxation of costs ~~in such appeals~~ on judicial review shall be in the discretion of the court.

Sec. 17. Section eighty-six point thirty-six (86.36), subsection one (1), Code 1977, is amended by striking the subsection.

Sec. 18. Section eighty-six point thirty-six (86.36), subsection two (2), unnumbered paragraph one (1), Code 1977, is amended to read as follows:

~~Whenever~~ In addition to the manner provided in chapter seventeen A (17A) of the Code, whenever service or delivery of any notice is made on a nonresident employer under the provisions of section 85.3, subsection 2, the same shall be done in the following manner:

Sec. 19. Section eighty-six point thirty-six (86.36), subsections three (3) and four (4), Code 1977, are amended to read as follows:

3. In lieu of mailing said copy of notice to the nonresident employer in a foreign state, plaintiff may cause the same to be personally served or delivered in the foreign state on such employer by any adult person not a party to the proceedings, by delivering said copy of notice to the nonresident employer or by offering to make such delivery in case ~~he~~ delivery is refused ~~to accept delivery~~.

4. Proof of the filing of a copy of said notice with the

secretary of state and proof of the mailing or personal delivery of the copy to said nonresident employer shall be made by affidavit of the party doing said acts. All affidavits of service or delivery shall be endorsed upon or attached to the original of the papers to which they relate and all such proofs of service or delivery, including the certified mail return receipt shall be forthwith filed with the original of the papers.

Sec. 20. Section eighty-six point forty-two (86.42), Code 1977, is amended to read as follows:

86.42 JUDGMENT BY DISTRICT COURT ON AWARD. Any party in interest may present a certified copy of an order or decision of the commissioner, from which no timely petition for judicial review has been filed ~~within the time allowed therefor~~ or if judicial review has been filed, which has not had execution or enforcement stayed as provided in section seventeen A point nineteen (17A.19), subsection five (5) of the Code, or an order or decision of a deputy commissioner from which no timely appeal has been taken within the agency and which has become final by the passage of time as provided by rule and section seventeen A point fifteen (17A.15) of the Code, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court ~~of the county in which the injury occurred~~ where judicial review of the agency action may be commenced, whereupon said court shall render a decree or judgment in accordance therewith and cause the clerk to notify the parties. Such decree or judgment, in the absence of a petition for judicial review or if judicial review has been commenced, in the absence of a stay of execution or enforcement of the decision or order of the industrial commissioner, or in the absence of an act of any party which prevents a decision of a deputy industrial commissioner from becoming final, shall have the same effect and in all proceedings in relation thereto





shall thereafter be the same as though rendered in a suit duly heard and determined by said court.

Sec. 21. Sections eighty-five point forty-six (85.46), eighty-six point twenty-one (86.21), eighty-six point twenty-two (86.22), eighty-six point twenty-three (86.23), eighty-six point twenty-five (86.25), eighty-six point twenty-eight (86.28), eighty-six point thirty-four (86.34), eighty-six point thirty-five (86.35), and eighty-six point thirty-seven (86.37), Code 1977, are repealed.

ARTHUR A. NEU
President of the Senate

DALE M. COCHRAN
Speaker of the House

I hereby certify that this bill originated in the Senate and is known as Senate File 328, Sixty-seventh General Assembly.

STEVEN C. CROSS
Secretary of the Senate

Approved _____, 1977

ROBERT D. RAY
Governor

WORKERS' COMPENSATION -- PRESENTING YOUR CASE UNDER THE IOWA ADMINISTRATIVE PROCEDURE ACT

I. CHAPTER 17A-THE IOWA ADMINISTRATIVE PROCEDURE ACT AND RULES OF THE INDUSTRIAL COMMISSIONER-500 SERIES OF THE IOWA ADMINISTRATIVE CODE.

A. The Iowa Administrative Procedure Act was effective July 1, 1975. It applies to cases not in process on that date. Section 17A.23, section 17A.24.

B. Rules of the Iowa Industrial Commissioner were effective September 19, 1975 and are found in the 500 series of the Iowa Administrative Code.

II. NATURE OF THE CONTESTED CASE BEFORE THE INDUSTRIAL COMMISSIONER. SECTION 17A.2(2).

A. Examine Rule 500-4.1 as to the nature of the proceeding desired. See the statutory sections referenced in the rule.

B. If a memorandum of agreement is on file in the Industrial Commissioner's Office, the basic proceeding is review-reopening. See Rule 500-3.1(2), section 86.34.

C. Indicate all relief sought by checking appropriate boxes on the form 100. Complete the rest of the form 100. See Rule 500-4.6 concerning use of the form 100 or form 100A, if appropriate, or requirements if a separate petition and original notice is used.

D. See also Rule 500-4.11 concerning signing the form 100 and 100A.

III. COMMENCEMENT OF ACTION BEFORE THE IOWA INDUSTRIAL COMMISSIONER.

A. Delivery of the form 100, 100A or original notice and petition is commencement of the action. Section 17A.12(1). IAPA delivery is jurisdictional.

B. Delivery of the form 100, 100A or original notice and petition must be by the initiating party, not the Industrial Commissioner's Office. Rule 500-4.7.

C. Delivery of the form 100, 100A or original notice and petition is by certified mail or personal service as in civil actions. Section 17A.12(1). Also see section 86.36 and section 85.3(2). See Rule 500-4.7.

D. The original notice must contain the elements of section 17A.12(1). The form 100 and 100A are designed to include these elements.

E. File timely with the industrial commissioner to toll the statute of limitations. Section 85.26(3).

F. Delivery of the form 100 or 100A original notice and petition is to be made in the required manner to the employer. A claimant is urged to send the form 100 or 100A original notice and petition to the insurance carrier, if known. Section 87.10, Rule 500-4.10.

G. A copy of the form 100 or 100A original notice and petition must be filed with the industrial com-commissioner within 10 days after delivery upon the opposing party. Rule 500-4.8.

IV. RESPONSES AND PROCEDURES AVAILABLE PRIOR TO THE HEARING.

A. An answer must be filed within 20 days of the receipt by the respondent of the form 100 original notice and petition. Rule 500-4.9.

B. An appearance alone submits only to jurisdiction and will not prevent a default type sanction. A motion will delay the time to answer as provided in the rule.

C. The Rules of Civil Procedure apply insofar as applicable and not in conflict with other statutes and rules. Rules 500-4.9 and 500-4.35.

D. The right to subpoena and availability of discovery is the same as in civil actions. Section 17A

E. Available physicians' reports must be exchanged at least 30 days prior to the hearing date. Rule 500-4.18. [Note: This is not related to the introduction into evidence of reports as set forth in Rule 500-4.17.]

F. All documents seeking any action or relief from an opposing party are to be served on a party by the party requesting the action. The industrial commissioner will not make service. Rule 500-4.12, 500-4.13, 500-4.15.

G. Copies of such documents are to be filed with

the industrial commissioner. Rule 500-4.14.

H. Copies of filings requested from the industrial commissioner can be obtained only upon compliance with Rule 500-4.16.

I. Prehearing procedures are available and in use. See Rules 500-4.19-4.22.

J. All cases will be subject to assignment after six months from the date of filing. Rule 500-4.23. Please take note of the continuance provisions of Rule 500-4.23. Please take note of the provisions concerning dismissal for lack of prosecution noted in Rule 500-4.34.

V. THE HEARING.

A. Physical examinations and evaluations must be completed prior to the hearing. Rule 500-4.31.

B. All evidence must be taken within 30 days of the hearing date. Rule 500-4.31

C. The court reporter is to be obtained by the defendants and paid initially by the defendants. Section 17A.12(7), section 86.19, Rule 500-4.32.

D. Parties are urged to take all expert evidence by deposition and present only lay testimony at the hearing. See Rule 500-4.31 concerning completion of the record.

E. Rules of Evidence. Section 17A.14, Section 86.18.

1. Irrelevant, immaterial and repetitious evidence is to be avoided. Section 17A.14(1).

2. Evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs is proper, even if it would be inadmissible in a jury trial. See section 17A.14(1). See Rule 500-4.17 as to the admissibility of medical reports, noted required and burden of cross-examination

3. Rules of privilege are applicable. Section 17A.14(1). But see section 85.27.

4. When a hearing may be expedited and no prejudice will result, the evidence may be required to be submitted in written verified form. Section 17A.14(1).

5. Copies may be presented if the original is not readily available. Section 17A.14(2).

6. Witnesses or persons whose testimony is submitted in written form are subject to cross-examination as necessary for a full and true disclosure of the facts. Section 17A.14(3).

7. Official notice can be taken of matters judicially noticed and of facts within the specialized knowledge of the agency. Section 17A.14(4).

F. The order of proof, scope of examination and any other matters relevant to the presentation of evidence is at the discretion of the presiding deputy commissioner, or industrial commissioner, subject to applicable statutes and rules.

VI. APPEAL WITHIN THE INDUSTRIAL COMMISSIONER'S OFFICE.

A. All decisions or orders of a deputy commissioner will be "appealed" to the industrial commissioner. See section 17A.2(1)(10), sections 17A.11, 17A.15, 86.24 and Rules 500-4.25 and 4.27.

B. All appeals are commenced by filing a notice of appeal in the office of the industrial commissioner within 20 days of the filing of the decision. Rule 500-4.27.

C. A rehearing may be requested and when requested extends the time for appeal - Rules 500-4.24 and 500-4.25.

D. The industrial commissioner may limit the issues and evidence on appeal. See sections 17A.15, 86.24. See Rule 500-4.28. [Note: Request for taking of additional evidence must be filed with the industrial commissioner within 20 days of the filing of the appeal in all cases.]

E. A transcript of the industrial commissioner's lower level hearing must be filed with the industrial commissioner within 30 days after the notice of appeal is filed at the initial cost of the appealing party. See Rule 500-4.30. See also section 86.24.

F. Completion of the record, completion of examinations and sanctions of dismissal for lack of prosecution are applicable in the appeal process. See Rules 500-4.31, 500-4.34, 500-4.36.

G. A rehearing of the industrial commissioner's final decision on appeal may be requested by filing an application within 20 days of the date of the industrial commissioner's decision. Time for judicial review to the district court is affected by

this action. Sections 17A.16(2), 17A.19(3).

VII. JUDICIAL REVIEW TO THE DISTRICT COURT.

A. Any action taken by the district court concerning a decision of the industrial commissioner rendered after July 1, 1975 is by judicial review as provided in section 17A.19.

B. All administrative remedies must be exhausted. Section 17A.19(1).

C. Venue for judicial review is in:

1. Polk County District Court. Section 17A.19(2), or

2. District court for county where the petitioner resides or has its principal place of business Section 17A.19(2), or

3. In the county where the hearing under section 86.17 was held, or

4. Wherever a court may transfer the proceeding. Section 17A.19(2).

D. A petition must be filed with the district court within 30 days of the issuance of a final decision of the agency. Section 17A.19(3). See the same section for reference to time for judicial review when an application for rehearing has been made under section 17A.16(2).

E. The petitioner must mail file stamped copies of the petition for judicial review to all parties of record before the agency within 10 days of the filing of the petition. Section 17A.19(2).

F. An appearance in the district court by one wishing to intervene and participate must be filed within 45 days after the petition is filed. Section 17A.19(2).

G. The industrial commissioner is to be named as a respondent in the petition for review. The industrial commissioner's name follows that of the opposing party as respondent. Sections 86.29, 17A.19(4). Use only the term "Iowa industrial commissioner" and not the given name of the commissioner.

H. Section 17A.19(7) sets forth the powers of the district court on judicial review. Note the provisions relative to contested case action as opposed to agency action generally.

I. Note Section 17A.19(8) as to the grounds for judicial review.

## VIII. MISCELLANEOUS.

An appeal of the district court action to the supreme court is the same as in all civil actions. Section 17A.20.

B. A "Declaratory Ruling" on matters affected by agency rules of other action is available. Section 17A.9, Rule 5.1

C. Settlement agreements, which result in a release of liability, may be entered when the agreements comply with appropriate statutes and rules. Note that Section 85.35 requires that evidence or a recital of the evidence must be submitted to the industrial commissioner for approval along with the agreement. Rule 500-6.1. See also section 17A.10, section 86.27. If A claimant is represented by counsel, counsel's professional statement in the form of a detailed allegation of facts indicating a dispute is considered prima facie evidence of a dispute under section 85.35, see Rule 500-6.1 averified statement from the claimant indicating awareness of the final release must accompany a settlement or commutation where a final release is taken. Rule 500-6.5.

D. Certain "judicial" standards exist as never before relative to communication with deputy commissioners and the industrial commissioner's involvement with parties prior to the hearing of a case. Section 17A.17. Contact with a case which gives the impression of impropriety requires self disqualification by a deputy commissioner or the commissioner. Rule 500-4.38.

E. Rule 500-4.33 defines costs which are taxed in proceedings before the industrial commissioner.

F. Rule 500-4.36 defines sanctions which are being and will be imposed upon parties who fail to comply with the industrial commissioner's orders or rules.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

# ORIGINAL NOTICE AND PETITION

**NOTE TO PETITIONER:** All boxes and blanks appropriate to your claim must be checked or completed. All addresses must be given. You or your attorney must sign where indicated. **PLEASE TYPE OR PRINT LEGIBLY.**

| | |
|---|---|
| Claimant | ☐ Arbitration (86 14) ☐ Dependency (85 42. 43. 44) |
| vs | ☐ Review-Reopening (86 14) ☐ Equitable Apportionment (85 43) |
| Employer | ☐ 85 27 Benefits ☐ Second Injury Fund (85 63 et seq) |
| Insurance Carrier | ☐ Death Benefits (85.28. 29, 31) ☐ Other (attach petition) |

NOTE: The above boxes indicate only the nature of the proceeding. No answer by respondent is necessary

You are notified that an action has been commenced before the Industrial Commissioner seeking relief under the chapters of the Iowa Code relating to workers' compensation and Occupational Disease Act benefits (Chapter 85, 85A, 86 and 87). A hearing will be held in the county indicated in No. 23 below at 1:30 p.m. on the 90th day after the filing of this form in the Industrial Commissioner's Office unless an appearance is filed on your behalf or you are otherwise notified. If the 90th day falls on a Saturday, Sunday or State holiday, the hearing will be on the first day following which is not a Saturday, Sunday or a State holiday. The filing of an appearance will result in a continuance of the matter from the above indicated day to a time to be assigned. Hearing will be in the county court house, except that hearings held in Polk County will be in the Industrial Commissioner's office, 610 Des Moines St., Des Moines, Iowa

**You are required to file an answer within 20 days of the receipt of this document** and to otherwise move or respond as provided by Rule 500 - 4.9 of the Industrial Commissioner's Rules. Failure to comply may result in the imposition of the sanctions of Rule 500 - 4.36 of the Industrial Commissioner's Rules such as barring you from further activity for failure to appear and respond as required.

**IF ADDITIONAL SPACE IS NEEDED, USE REVERSE SIDE; IDENTIFY BY BOX NUMBER**

| | | |
|---|---|---|
| 1 Claimant's Address<br>Street<br>City State | 2 Employer's Address<br>Street<br>City State | 3 Ins. Co. Address<br>Street<br>City State |
| 4 Inj. date<br>/ / | 5 Birth date<br>/ / | 6 Earnings<br>$__hr $__wk $__mo |
| 7 Married ☐ Single ☐<br>Male ☐ Female ☐ | 8 Exemptions | 9. Time w/emplr. when inj. |
| DEATH 10 Deceased name | 11 Relationship of claimant | 12. Other Dependents Relationship<br>a<br>b |
| 13 Date of death<br>/ / | 14. Funeral Expense | |

15 How did injury occur?

| | |
|---|---|
| 16 Parts of body affected or disabled | 17 Have weekly payments been made?<br>a. Voluntary? __ b. Compensation? |
| 18 Time disabled (give dates) | 19. Nature and extent of permanent disability |

20 Names of doctors

a b

21 85 27 expenses: With whom incurred and amount

a b

22 State the dispute in this case

| | |
|---|---|
| 23 County and judicial district where inj. occurred (or nearest county and judicial district if out of state) | 24 Petitioner requests respondent to agree hearing may be held in the following judicial district: |
| 25 Petitioner ready for hearing after: | 26 If second injury fund benefits:<br>a. date of first loss __/__/__ b. member affected (first loss) _____ c. how affected _____ |

The petitioner incorporates by this reference the statutory provisions applicable to the relief sought and prays the Industrial Commissioner grant the relief sought, set a time and place for the hearing and request the defendants to respond or incur the sanctions noted above.

Petitioner's Attorney

Address of Attorney Phone of Attorney

Signature (of attorney or petitioner if unrepresented) / / Date

Form No. 100

CPC-40261 7/77

**DELIVERY OF FORM**

1. Delivery of this form is to be by personnel service as in civil actions or by certified mail, return receipt requested.
2. A copy of this form, with proof of delivery must be filed with the Industrial Commissioner no later than 10 days after delivery upon the respondent.
3. The commissioner will not deliver this form to the respondent for a petitioner.

The following space is to be used for additional information for which inadequate space exists on the front of this form. Please indicate the box number that requires the additional information **TYPE OR PRINT LEGIBLY**

| | |
|---|---|
| Employee | Employer |
| Address | Address |
| Injury Date/County Where Injured | Insurance Carrier |
| Part of Body Injured | Address |

I. EMPLOYEE'S REQUEST FOR EXAMINATION Section 85.39, Code of Iowa

Physician _____ (Name) _____ (Address) _____ (Phone)

Examination _____ (Time) _____ (Date) _____ (City) _____ (State)

II EMPLOYER'S REQUEST FOR EXAMINATION, Section 85.39, Code of Iowa

Physician _____ (Name) _____ (Address) _____ (Phone)

Examination _____ (Time) _____ (Date) _____ (City) _____ (State)

III WEEKLY VOCATIONAL REHABILITATION SUPPLEMENT, Section 85.70, Code of Iowa

Training Facility _____ (Name) _____ (City) _____ (State)

Type of Training _____

Training will be for _____ weeks commencing _____, 19 ____ and ending _____,

19 ____ Supplement requested for _____ weeks.

_____ / _____
Rehabilitation Counselor — Date

Approved—Iowa Industrial Commissioner by _____ / _____
Signed — Date

A The undersigned employer/employee (circle one) requests the relief sought in part I/II/III (indicate which) above.

_____ / _____
Applicants Signature — Date

B The undersigned employer/employee (circle one) **consents** to the relief sought above and **waives** any provision relative to contested cases of Chapter 17A, Code of Iowa or otherwise

_____ / _____
Signature — Date

OR

The undersigned employer employee (circle one) **resists** the relief sought above and **acknowledges delivery** of a copy of this original notice and petition. All other provisions relative to contested cases of Chapter 17A, Code of Iowa and otherwise are not waived

_____
Signature — Date

If you are the applicant and the relief sought is denied or, if relief is sought from you and you wish to resist:

SEE REVERSE SIDE

Form No. 100A

APPLICANT: IF RELIEF SOUGHT IS RESISTED AND THE RESPONDENT has not consented to delivery of this notice:

1. Delivery of this form is to be by personal service as in civil actions or by certified mail, return receipt requested

2. A copy of this form, with proof of delivery, must be filed with the Industrial Commissioner no later than 10 days after delivery upon the respondent.

3 **The commissioner will not deliver this form to the respondent for a petitioner**

**RESPONDENT**: IF YOU RESIST RELIEF SOUGHT:

You are notified that an action has been commenced before the Iowa Industrial Commissioner seeking relief under the chapter 85, Code of Iowa A hearing will be held in the county where the injury occurred on the 90th day after the filing of this form in the Industrial Commissioner's Office unless an appearance is filed on your behalf or you are otherwise notified. If the 90th day falls on a Saturday, Sunday, or State holiday, the hearing will be on the first day following which is not a Saturday, Sunday or a State holiday The filing of an appearance will result in a continuance of the matter from the above indicated day to a time to be assigned. Hearings will be in the county court house, except that hearings held in Polk county will be in the Industrial Commissioner's Office, 610 Des Moines Street, Des Moines, Iowa.

Your are required to file an answer within 20 days of the receipt of this document and to otherwise move or respond as provided by Rule 500-4 9 of the Industrial Commissioner's Rules. Failure to comply may result in the imposition of the sanctions of Rule 500-4 36 of the Industrial Commissioner's Rules such as barring you from further activity for failure to appear and respond as required.

# THE HERE AND NOW OF THE IOWA ADMINISTRATIVE LAW

OUTLINE OF SPEECH FOR DEFENSE LAWYERS

September 29, 1977

IOWA ADMINISTRATIVE PROCEDURE

Perspective

History of Iowa Code Chapter 17A and the Iowa Administrative Law Committee

Agencies included in scope of 17A

Authority to implement act

Statutory construction

Legislative impact

Federal comparison

Rule Making by Iowa Agencies

Notice of intent

Hearings

Publication

"Emergency" rules

Administrative Remedies

Declaratory rulings

Discovery

Hearings

Hearing officers

Contested cases

Notice

Formality vs. informality

Rules of evidence

Ex parte communications

Decisions

- Proposed
- Final

Judicial Review

- Pitfalls in §17A - 19
- Stay of agency ruling
- The aggrieved party
- Review proceedings
  - Petition in district court
  - Record
  - Additional evidence
- Scope of review decision

Prospects on the course of future development.

# DEPOSITION OF EXPERT WITNESSES

Philip J. Willson
Smith, Peterson, Beckman & Willson
Council Bluffs, Iowa

I. DEFINITION OF EXPERT.

"An expert has been defined as one who is qualified by study, training, or experience in a particular subject or field of endeavor which gives him special knowledge and permits him to form a definite opinion of his own on matters persons lacking such knowledge or training cannot correctly decide." Dougherty v. Boyken, 261 Iowa 602, 605, 155 NW2d 488, 490 (1968).

Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualififed as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

II. RULES FOR DISCOVERY AS TO EXPERTS.

Federal Rule 26(b)(4) and Iowa Rule 122(d) contain similar provisions, with minor exceptions. Iowa Rule 122(d) provides:

(d) *Trial preparation — experts* Except as provided in rule 133, discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision "a" of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision "d" (3) of this rule, concerning fees and expenses as the court may deem appropriate.

(2) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 133 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, (A) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions "d"(1) B and "d"(2) of this rule; and (B) with respect to discovery obtained under subdivision "d"(1) B of this rule the court may require, and with respect to discovery obtained under subdivision "d" (2) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

A. The restrictions imposed by the discovery rule on facts known and opinions held by experts are applicable only to those facts and opinions acquired or developed in anticipation of litigation. Grinnell Corp. v. Hackett, (D.C. R.I., 1976), 70 FRD 326.

B. Experts may be freely deposed without permission of the court where they are to be deposed in their capacity as actors, viewers, or witnesses to the events giving rise to the suit. Advisory Committee Comments to the Federal Rules, 48 FRD 497, 503; Grinnell Corp. v. Hackett, supra.

C. There is a division of authority as to whether an employee of a party who is an expert is entitled to immunity from deposition as to facts and opinions developed in anticipation of litigation. Seiffer v. Topsy's Intern, Inc., (D.C. Kan., 1975), 69 FRD 69; Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., (D.C. Va., 1975), 68 FRD 397.

III. DISCOVERY FROM EXPERTS.

A. Information may be obtained by written interrogatories under Iowa Rule 122(d).

B. Exchange of written reports by agreement.

C. Deposition of witnesses by stipulation.

1. Stipulation should cover who is to pay fees of experts, and where experts are to be produced.

D. Motion to the court under Rule 122(d)(1)(B).

IV. PRODUCTION OF FILES OF EXPERTS.

If a deposition of an expert is taken, arrangements need to be made to make certain that the expert will bring

the files to the deposition. The matter can be handled by stipulation of the parties (a sample stipulation is attached at the end of these materials) or by subpoena duces tecum. In Quadrini v. Sikorsky Aircraft Division, (D.C. Conn., 1977), 74 FRD 594, the court upheld a request to produce the files and reports of plaintiff's experts.

## INFORMATION TO BE OBTAINED WHERE YOU ARE REPRESENTING THE MANUFACTURER

1. Name of the representative of your client who will be your contact. If that person is not able to answer the technical questions, you will also need the name of another person you can contact directly on technical questions.
2. Name of the person who designed the product.
3. Information concerning the size and nature of the industry involved and the position of your client's product in such industry.
4. How the product is marketed and what part wholesalers and dealers play in the distribution and the general sales practices.
5. Whether there are any warranties.
6. All advertising pamphlets, brochures, operators manuals, or service instructions.
7. Records showing the time and place of manufacture, including any quality control records used in the manufacturing process.
8. Sales records showing how the ultimate purchaser obtained title to the product and copies of the orders, invoices or other documents involved in the sale.
9. Information as to similar complaints and law suits relating to the product or similar products and the names of defense attorneys involved in law suits.

10. Suggestions as to whether an independent expert should be engaged and, if so, any suggestions for names.

PRELIMINARY INTERROGATORIES RE: EXPERTS

1. Please identify in complete detail each person whom you expect to call as an expert witness at the trial to testify as to facts or opinions acquired or developed in anticipation of litigation or for trial, stating as to each such person: (a) full name, home address and business address; (b) business name of the witness or employer; and (c) description of the specialized field in which it is claimed said witness will qualify as an expert in this case.

2. As to each such person referred to in answer to the preceding interrogatory, please state in full detail: (a) the subject matter or area on which such person is to testify; (b) the substance of the facts and opinions on which such person is to testify; and (c) a summary of the grounds for each opinion.

3. Please state whether you have retained or specially employed any person relating to the alleged occurrence in anticipation of litigation or for trial preparation purposes who you do not expect to call as an expert witness at the time of trial.

4. If your answer to the preceding interrogatory is in the affirmative, please identify each such person in detail, giving name, profession or occupation, and address.

5. As to each expert listed in the answer to Interrogatory #1, state:

(a) The title, subject matter, name and address of publisher and date of publication of each book, paper, and article by each expert in his or her field.

(b) All litigation in which each expert has been consulted or testified in trial or by deposition in the last ten (10) years, including the name and address of the person engaging the services of such expert, the names of the plaintiffs and defendants in each case, and whether such expert was consulted on behalf of a plaintiff or defendant.

6. As to each expert identified in answer to Interrogatory #1, state whether such expert has completed preparation for testifying and is ready to express final opinions in this case.

7. If the answer to Interrogatory #6 is "no", state when each expert will have completed preparation and will be ready to express final opinions in this case.

8. State whether any expert listed in answer to Interrogatory #1 has furnished any report, letter, memo, or writing of any kind relating to this case and, if so, state the dates of each item.

9. State whether any expert referred to in answer to Interrogatory #1 has referred to or will refer to any product other than the product involved in this case and, if so,

describe each product by model number or other sufficient description and the manufacturer or distributor of each such product.

10. If any expert referred to in answer to Interrogatory #1 has taken any photographs, state the subject matter of the photographs and the time and place of taking.

11. As to each expert referred to in answer to Interrogatory #1, state whether such expert has referred to any other products having functions similar to the one involved in this case and, if so, describe each in sufficient detail so that the same may be identified.

12. As to each expert identified in answer to Interrogatory #1, state whether any sketches, diagrams, models or any form of demonstrative evidence has been prepared or is anticipated being prepared and, if so, describe each item in sufficient detail that it may be identified.

CHECKLIST FOR DEPOSITION OF EXPERT

QUALIFICATIONS

1. In what areas of scientific, technical or specialized knowledge do you consider yourself an expert?[1]
    a. Other persons or organizations qualified as experts in this field
2. Formal education in that field
    a. Dates
    b. Degree
3. Other specialized training in area
    a. Description
    b. Dates
4. Teaching experience in field
5. Membership in professional or trade associations in area
    a. Qualifications for membership
    b. Dates
    c. Offices held
    d. Committee participation
6. Authorship of papers, articles, or books in area (titles, subject matter, name and address of publisher, date of publication)
    a. Trade or professional journals subscribed to or read

7. License by governmental authority

    a. By whom licensed

    b. Date

    c. Requirements to obtain license

    d. How requirements were met

8. Other litigation or potential litigation in which consulted, offered testimony by deposition, or testified in trial.

    a. Who engaged services

    b. Names of parties

    c. City and court in which filed

9. Extent of practice in area

    a. How long

    b. Ratio between plaintiffs and defendants

10. Practical experience in the area

11. Have you testified or furnished opinions or memos to:

    a. Legislative member, committee or staff?

    b. Consumer agency?

    c. Industry committee?

PREPARATION FOR OPINION

12. What references consulted

13. What other research of written materials did you do?

14. What other authorities do you recognize as reliable authority on the subject?[2]

15. Financial or other arrangements for preparing opinion and testifying

16. Amount of time spent to date on this case

## INFORMATION ABOUT PRODUCT

17. First contact with or acquaintance with this product
18. First acquaintance with this case
    a. By whom contacted
    b. When
    c. What information was furnished
    d. What was witness requested to do
19. Any experiments or tests reviewed or performed in developing opinion
    a. Are any planned in the future?
20. Any photos, models, drawings, specifications, sketches, reports or memos consulted or prepared in developing opinion
    a. Are any planned in the future?

## MANUFACTURER OR SELLER

1. General history or background of company
2. Firm membership in industry or professional societies or organizations
3. Locations of plants and administrative offices.
4. Areas where firm does business

## THE INDUSTRY

1. Other firms producing products with similar uses or functions
2. Names of standard texts or references used in industry
3. Standards published by the industry

## THE PRODUCT

1. General
    a. Identify sufficiently to distinguish from similar products
    b. History--date first manufactured, number produced and sold
    c. Design
        1. Who primarily responsible for
        2. Where all records, plans and specifications pertaining to
        3. Basic ingredients or composition
        4. Specifications of finished product
        5. Industry or other standards followed
        6. Ranges of speed, heat, pressure, etc. designed to withstand
        7. Safety factor built in for extreme conditions of use
    d. Manufacture
        1. Source of all raw materials used
        2. Source of all component parts used
        3. Sub-contractors involved
        4. Quality control on materials and parts used
        5. Pre-testing of product
        6. Description of physical and chemical processes used
        7. Heat, time, pressure, etc. of process

e. Inspection

1. Names of inspectors and identification of records

2. Exact nature of

3. Equipment used in

4. Each item inspected or spot-checks only

5. Which defects can be caught--which cannot

f. Aware of any intentional attempts to sabotage product

g. Manner of packaging

h. Written instructions on or accompanying product

i. Warnings (check labels)

j. Advertising (magazines, newspapers, radio, TV)

k. Sales literature to distributors

l. Manner of shipment

m. Unit wholesale and suggested retail price

n. Usual method of distribution throughout country (if through franchised dealers, get copy of agreement)

o. Patents

p. Warranties and disclaimers

q. Defendant's knowledge regarding finished product in use:

1. Class, age or type of person normally expected to buy and use

2. Manner of use by average consumer

3. Abnormal ways product known to be used

4. Experience regarding normal or expected life of product
5. Conditions and uses known to shorten life of product or cause failures
6. Effect of heat, moisture, time, sunlight, etc. on product

r. Proper method of installing product

s. Policy on adjustments for defective products
1. Percentage of product returned
2. Who has records
3. General types of failures most observed
4. Relation between area of country and number of adjustments

t. Maintenance or service practices of defendant--records

u. Complaint department and records

v. Notice of prior similar failures or defects

2. Specific (the item involved)

a. When and where manufactured

b. Locate all records, correspondence, etc. pertaining to manufacture, inspection, order, sale and shipment

c. Place where the "sale" occurred (franchise agreement may name the place where sales are considered final)

d. All persons and organizations having ownership, possession or control of product from defendant to plaintiff

## CHANGES

1. Since the sale in this case, have there been any changes in the product, its label, packaging, instructions, mode of shipment, or manner of distribution?

## GOVERNMENTAL REGULATIONS

1. Determine if the manufacture, labeling, transportation or sale of the product is supervised or controlled by any governmental, state or local statute, regulation, agency or ordinance. Areas to cover here include the statutes referred to in Am Jur 2d Ed., New Topic Service, Consumer Products Safety Acts.

## THE ACCIDENT

1. Determine if the witness has first-hand knowledge of any of the facts surrounding the accident, and if he has none, exactly what information he has been given concerning its details.

## FINDINGS

1. Every significant finding from each inspection, test, photograph, etc.
2. Get opinion as to cause of each such finding
3. Get opinion as to the mechanism of failure in detail. Fix time and sequence of events leading up to failure.
4. Opinion regarding relation of product failure and accident in which plaintiff was injured.

5. Distinguish between the damage existing prior to the accident and that which resulted from the accident.
6. Eliminate as many "possible" causes of failure as you can
7. Determine exactly the information and objects upon which he is relying to form his opinion
8. Get him completely committed to his findings and his theories.
9. Determine if any other agency or party in his opinion played a part in causing failure or accident
10. Determine if any scale models or drawings have been made or planned and if any additional tests are planned or necessary
11. At the time of the sale of the product was there, in your opinion, any applicable
    a. Governmental statute, ordinance or regulation? If so, describe.
    b. Standard or recommendation adopted by any non-governmental organization or association? If so, describe.

## ORGANIZATION, CONTENT AND ADMINISTRATION OF COMPANY PRODUCTS LIABILITY PROGRAMS

1. Do our company have a "formal" products liability (reliability, quality, safety, etc.) program?
2. Does your company have a written products liability policy?
3. Who (title) administers the products liability program?
4. Please give the titles of individuals or committees (comprised or representatives from various departments)

responsible for administering the products liability program in the following areas:

a. New product development

b. Design engineering

c. Manufacturing

d. Inspection and testing

e. Quality control

f. Sales

g. Installation and service

h. Purchasing

i. Insurance

j. Other

5. Do you have a design review program? If yes, please indicate the type of review(s) conducted and whether it includes:

a. "Preliminary" design review

b. "Intermediate" design review

c. "Final" design review

6. Please list the various products liability preventive techniques in engineering used by your company, including, for example, failure mode analysis, product verification, part standardization, design simplification, corrective action, etc.

7. Do you have a quality control audit program? If so, please list by title the makeup of the audit team.

8. What steps are taken to ensure that packaging and shipping instructions are accurate and adequate for the purposes of products liability?

9. Please indicate the titles of those involved in the review process of instructional manuals for customers (e.g., legal, safety, design engineering, marketing, etc.)

10. What steps are taken to warn users of products of potential dangers (e.g., plate affixed to products stating load limitations and maximum speeds, warning labels, instructional manuals, etc.)?

11. Are advertising, sales promotional, and public relations materials reviewed by the following functions for accuracy and adequacy for the purpose of products liability?

    a. Engineering

    b. Legal

12. Are field service reports used by sales, engineering, and service personnel to record the work done? If yes, do these reports require service representatives to record any defect or unsafe conditions they may observe (e.g., safety guards removed, machine altered, maximum load capacity not being observed)?

13. Do you have a "product failure report" or "product liability report" or similar form used to report accidents and occurrences involving your product? If so, how is the information and data in this report acted upon and followed up?

14. Do you have a field changeover or modification program covering engineering changes or modifications when such changes are made to products as a direct result of malfunctions?

15. Do you have a products recall program? If yes, what steps are taken to notify the retailers and end users of products when your company determines that a recall of the product is necessary?

16. What steps are taken to ensure that your products meet the various legal requirements of the various states in which you do business?

17. Do you have a formal records retention program for products liability materials? If yes, please give examples of such record retention for design engineering, quality control service and installation, and warranty records, and state the length of such retention.

18. Do you sell through independent dealers or distributors? If yes, please answer the following questions:

    a. Do you regularly issue information to such dealers or distributors on product liability claims or claims problems?

    b. Do you require products liability insurance coverage on the part of dealers or distributors, etc.?

        1. Are certificates of insurance required of dealers or distributors by your company?

    c. Do you, as a matter of practice, inform your dealers or distributors and the end users of the products of changes or modifications?

d. Do you monitor product changes or modifications performance by your dealers or distributors?

e. What steps are taken to encourage your dealers or distributors to recommend to customers that they purchase with certain products additional safety devices which are optional attachments but are necessary for the safe use and operation of the products in special applications or situations?

f. Do you extend vendors endorsement products liability coverage to dealers and distributors? If yes, do you use the limited vendors endorsement form and/or the broad vendors endorsement form?

[1]FRE Rule 702

[2]FRE Rule 803(18) provides: "To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits."

A 1971 note in the Iowa Law Review (56 Iowa L. Rev. 1028) relating to medical treatises states:

> ( Medical treatises may be employed to a limited extent by counsel conducting cross-examination. If the expert medical witness bases his opinion on a particular treatise, that authority may be introduced to impeach his testimony if it

does not support his opinion. To illustrate, if the medical witness testified that a certain treatise stood for proposition A when in fact it stood for proposition B, then that treatise may be introduced to contradict this testimony. When introduced, the treatise may be used only to show that it stated something contrary to the oral testimony, and may not be admitted as independent, substantive evidence of the material it contains. Furthermore, the witness may be cross-examined in this manner only about those portions of his testimony that relied upon the particular treatise involved.

If the medical witness's testimony is based upon knowledge gained from his reading in the field rather than upon his personal experiences and observations, he may be cross-examined regarding the teachings of recognized authorities to test the accuracy of his knowledge.

STIPULATION CONCERNING DEPOSITIONS OF EXPERTS

It is stipulated between the parties that plaintiff and defendant will take the depositions of the opposing experts, that the parties will agree on the times for the depositions, that each party agrees to produce its expert witnesses at or near the residence or place of business of the respective experts without charge to the opposing party as to witness fees or expenses or preparation for depositions (provided, however, defendant agrees that any of its experts who live outside the United States will be produced in the United States) and that the parties will obtain advance agreement from each expert to have available at the time of the depositions, the following:

1. All materials and records including but not limited to films, reports, instrumentation data, notes and records relating to performance of any automobile tested under crosswind conditions, and otherwise, handling maneuvers including but not limited to skid pad tests, suspension systems of various automobiles and specifically all of the aforementioned requests particularly relating to a 1967 Volkswagen Type I sedan.

2. All materials, records, information and underlying data relied upon relating to the performance of any automobile tested under crosswind conditions, and otherwise, handling maneuvers including but not limited to skid pad tests, suspension systems of various automobiles and specifically all of the aforementioned requests relating in particular to

a 1967 Volkswagen Type I sedan.

3. All materials reviewed and relied upon by the witness in formulating his conclusions and opinions.

4. All materials, records, information and underlying data utilized as the basis for articles and opinions rendered in published writings authored by the witness relating to the performance of any automobile tested under the crosswind conditions, handling maneuvers including but not limited to skid pad tests, various suspension systems of automobiles and specifically all of the aforementioned requests particularly relating to the 1967 Volkswagen Type I sedan.

5. A list of each and every automobile products liability claim or law suit in which the witness has either been consulted or retained. The claims or law suits should be identified by claimant or plaintiff's name and defendant's name, the model year, type and make of automobile, a brief description of the accident circumstances, seated positions of occupants involved, injuries sustained, allegations, name of attorney who retained witness or with whom he consulted and whether he was deposed or rendered testimony at trial in the individual case and the dates thereof.

6. Experts are to be prepared with their final opinions at the time of their deposition.

# DISCOVERY AND PRETRIAL PROCEDURES - USES AND ABUSES

The adoption of the Federal Rules of Civil Procedure in 1938 produced a major change in the concept of the trial system in federal courts. The new procedures contained in the rules were designed to eliminate disposition of cases on technical errors; instead, the concept behind the new rules was that controversies were to be resolved on the merits. To implement this concept, pleading rules were greatly simplified and discovery provisions were designed so that parties would be adequately informed as to each adversary's claim or defense and have full access to evidence bearing on the dispute.

The success or failure of pretrial discovery under the rules depends largely upon proper enforcement of discovery procedures at the trial level. Current discovery rules grant the trial court the power to demand full disclosure but leave the imposition of particular sanctions to the discretion of the trial court. It is the exercise of this discretion which is critical to fulfilling the concept of disposition based on merit. Failure to secure compliance by the parties defeats the purpose of the discovery rules by refusing the access of litigants to relevant evidence and leaving the issues of the controversy ill-defined prior to trial. On the other hand, harsh enforcement of discovery rules through imposition of unwarranted sanctions results in disposition of cases for failure

to comply with the technicalities of the federal procedural rules -- the very abuse the original federal procedural rules were designed to alleviate.

Even in the typical federal case, if such a case now exists, the scope of discovery sought by parties often reaches staggering and wholly unmanageable portions. Demands for nationwide discovery are commonplace even in local or regional cases. Requests for documents and interrogatories too often cover excessive time periods. Inquiries into business records of corporate subsidiaries and divisions and deposition notices for the highest corporate officials are routinely filed. In attempting to capitalize on liberal judicial attitudes toward discovery, parties assert dragnet demands even in the most marginal of cases. Especially when coupled with requests for class action treatment, discovery is often reduced into a vehicle for extracting settlement with litigants reluctantly consenting to "legalized extortion" in order to avoid judicial involvement with its attendant expenses and attorney fees, and drain upon the time and energy of the litigants.

Another item on the list of discovery abuses is the problem of litigants refusing or avoiding full and adequate responses to discovery requests. The unresponsive or evasive answer to a discovery request, or the failure to produce relevant documents, and arbitrary instructions from counsel to refuse answers to deposition questions have become familiar. Attempts to cope with these problems are often times aggravated by two growing trends: (1) the reluctance of federal

courts to involve themselves in discovery matters, and (2) the unwillingness of the courts to employ sanctions under Rule 37.

There is a sound basis for minimizing the federal courts' role in the discovery process. There is a valid need to lighten the burdens on the Court in these days of mounting case load for every federal court. However, the federal court must not avoid its duty to take a firm hand at an early stage, especially in complex litigation, to realistically impose limits upon discovery. Matters such as the geographical scope of discovery and applicable time limits must be established early if they are matters in controversy. The effective use of competent magistrates at this stage of the proceeding can be an invaluable tool to proper disposition of litigation.

When litigants fail to respond to legitimate discovery requests, the only effective means for fulfilling the concept of the Federal Rules of Civil Procedure is the employment of sanctions under Rule 37. Since the sanction to be imposed lies within the discretion of the trial court, that court must carefully examine the needs of the discovering party and evaluate them in terms of the nature of the compliance by the recalcitrant litigant. The proper sanction to be imposed should not exceed the infringement upon the legitimate preparation of the case caused by the party resisting discovery. Neither party should be unduly prejudiced by this imposition of sanctions. However, when appropriate, the sanction must be sufficiently severe not only to rectify a party's misconduct, but to also forewarn future litigants that the Court intends to

enforce discovery in a manner consistent with the purposes of the Federal Rules of Civil Discovery.

## Effective Use of Pretrial

The main purposes of the pretrial conference are the defining and simplification of issues, the lessening of surprise at trial and risk of judicial error, the drafting of stipulations on matters of evidence, and the promotion of settlement. Essentially, the purpose of the pretrial is to "strip each case to its essential." This goal may be achieved through stipulating to undisputed matters, specifying issues with particularity, and formulating a trial plan which will avoid technical objections and the introduction of unnecessary evidence.

Rule 16 of the Federal Rules of Civil Procedure providing for the pretrial conference was never designed to make the lawyers try a case on paper instead of in a courtroom. Rule 16 should not be implemented in such a maner as to make the pretrial procedure more difficult and time consuming than the trial itself.

Judge Pollack of the Southern District of New York has listed objections to pretrial procedures as follows:

> "(1) they represent a mere compilation of legalistic contentions and pleadings without any real analysis of the particular case, (2) they result in formal agreements on minutiae which have no significant effect on the result of the case, (3) they represent a burdensome chore in cases plainly destined to be settled before trial, and (4) they are ceremonial, ritualistic exercises with little actual impact or actual value to the bar or the trier of fact."

65 F.R.D. 475, 477 (1975).

Rule 16 spells out a relatively simple agenda for the pretrial conference:

(1) Simplification of the issues.

(2) Necessity or desirability of amendments to the pleadings.

(3) The possibility of obtaining admissions of fact and admissions of authenticity of documents.

(4) Limitation of the number of expert witnesses.

(5) Advisability of referring issues to a Special Master.

(6) Such other matters as may aid in the disposition of the action.

Certainly the use of the term "such other" refers to matters similar to the other five items specifically mentioned and obviously are limited to those matters which aid in the disposition of the case.

Recently, federal appellate courts have refused to uphold a trial court's dismissal for failure to comply with its pretrial order. See McCargo v. Hedrick, 545 F.2d 393 (1976) : J.F. Edwards Construction Co. v. Anderson Safeway, 542 F.2d 1318 (1976). The latter case involved the failure of the party to join in a pretrial stipulation. The record clearly disclosed that the party against whom sanctions were imposed had made good faith efforts to comply with the Court's direction to enter into a pretrial stipulation and was simply unable to approve the stipulation filed by two other parties in the lawsuit. The appellate court found that Rule 16 of the Federal Rules of Civil Procedure does not compel a stipulation of facts so that sanction for failure to file one are not available. The Court did indicate that a trial court does have the power to make effective a pretrial order within the four corners of Rule 16,

but an order forcing parties to stipulate facts is not authorized by that rule.

The Court went on to find that even if Rule 16 as enforced through Rule 41 (B) or the Court's inherent ability to control its own docket did empower the Court to compel parties to stipulate, the ultimate sanction of dismissal should be utilized only for conduct "so reprehensible that no other alternative sanction would protect the integrity of the pretrial procedures contemplated by Rule 16." Edwards, at 324.

In finding that the trial court erroneously dismissed the plaintiff's lawsuit for failure to comply with the Court's direction for the filing of a proposed pretrial order, the appellate court in the McCargo case found that a trial court may dismiss an action for lack of prosecution either upon a motion by defendant pursuant to Federal Rule of Civil Procedure 41 (B) or on its own motion. The Court went on to indicate that such dismissal should be imposed as a sanction only in extreme cases; and, that in deciding whether a case should be dismissed, the trial court must consider the following facts: First, the degree of personal responsibility on the part of the plaintiffs (dismissal should be ordered only in the face of a clear record of delay or recalcitrant conduct by the plaintiff). Second, the amount of prejudice caused to the defendant by the delay. In applying these factors, the McCargo court found that the balance weighed in favor of trial on the merits and reversed the trial court's dismissal of plaintiff's action for failure to file a pretrial order in conformity with the Court's local rules.

The proper balance to be obtained in both pretrial and discovery matters is often times delicate. Ironclad rules cannot be formulated which will govern the trial court's conduct in disposing of all pretrial disputes. However, each case must be evaluated on its own merits and the problems placed in perspective in terms of the case in which they arise. However, if the goals of Federal Rules of Civil Procedure are to be reached, courts must not be hesitant to impose appropriate sanctions when discovery and/or pretrial abuses have been properly documented.

# A DEFENSE LAWYER LOOKS AT THE PROFESSIONAL LIABILITY OF TRIAL LAWYERS

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## INTRODUCTION

THE DEFENSE ATTORNEY HAS A SOMEWHAT UNIQUE VANTAGE POINT FROM WHICH TO VIEW THE PROFESSIONAL LIABILITY OF TRIAL LAWYERS. ON THE ONE HAND, HE IS RETAINED TO DEFEND ATTORNEYS ACCUSED OF PROFESSIONAL MALPRACTICE AND ON THE OTHER HAND IS GENERALLY ENGAGED IN A FULL TIME LITIGATION PRACTICE IN WHICH HIS OWN ACTIVITIES ARE CONSTANTLY JUDGED IN THE LIGHT OF THE HIGH PROFESSIONAL COMPETENCE EXPECTED OF HIM.

FOR PURPOSES OF ANALYSIS, THE POTENTIAL PROFESSIONAL LIABILITY OF THE TRIAL LAWYER CAN PERHAPS BEST BE ANALYZED FROM THE STANDPOINT OF THE PERSONS WHO MAY BRING SUCH A CLAIM: (1) THE CLIENT; (2) THE INSURER, WHO MIGHT RETAIN THE ATTORNEY TO DEFEND A CLIENT, OR (3) THIRD PERSONS TO THE ACTION WHO ARE NOT PRIVY TO THE ATTORNEY-CLIENT RELATIONSHIP.

## I
## CLAIMS BY CLIENTS

CLAIMS MADE AGAINST LITIGATION ATTORNEYS BY CLIENTS FALL IN THREE

GENERAL CATAGORIES:

A. CLAIMS FOR FAILURE TO PROPERLY PROCESS CASES; FAILURE TO OBSERVE THE STATUTE OF LIMITATIONS; CONDUCT RESULTING IN DISMISSALS FOR WANT OF PROSECUTION OR DEFAULT JUDGMENTS; SANCTIONS IMPOSED UPON THE CLIENT FOR FAILURE OF THE ATTORNEY TO MEET DISCOVERY REQUIREMENTS; AND FAILURE TO PERFECT AN APPEAL.

B. CLAIMS AGAINST THE TRIAL ATTORNEY RELATING TO HIS FAILURE TO COMMUNICATE OFFERS OF SETTLEMENT, WHETHER REPRESENTING A PLAINTIFF OR A DEFENDANT IN LITIGATION.

C. CLAIMS FOR ALLEGED GROSS ERRORS OF JUDGMENT IN HANDLING CASES.

Maryland Cas Vs Peppers
64 Sec 2nd 187
355 NE 2nd 24

## II

## CLAIMS BY LIABILITY INSURANCE CARRIERS

THERE ARE ESSENTIALLY TWO AREAS OF POTENTIAL CLAIMS BY A LIABILITY INSURER AGAINST AN ATTORNEY RETAINED BY AN INSURER TO REPRESENT AN INSURED:

A. CLAIMS FOR FAILURE TO PROCESS CASES PROPERLY, WHICH, IN ESSENCE, ARE THE SAME TYPE OF CLAIMS WHICH WOULD BE MADE BY AN UNINSURED DEFENDANT FOR THE SAME ERROR OR OMISSION.

B. CLAIMS FOR FAILURE TO COMMUNICATE OFFERS OF SETTLEMENT IN THE SO-CALLED EXCESS OR BAD FAITH SITUATION. THIS TYPE OF CLAIM SHOULD BE A PARTICULAR CONCERN TO ANY ATTORNEY ENGAGED IN AN INSURANCE PRACTICE AND ARISES OUT OF THE RELATIONSHIP WHICH IS PECULIAR TO AN ATTORNEY

RETAINED BY AN INSURER TO REPRESENT AN INSURED.

## III
## CLAIMS MADE BY THIRD PARTIES TO THE ATTORNEY-CLIENT RELATIONSHIP

THIS HAS BEEN A RELATIVELY INFREQUENT TYPE OF CLAIM AND HAS PREVIOUSLY BEEN LIMITED TO NON-TRIAL SITUATIONS AND PARTICULARLY TO SITUATIONS REGARDING ERRORS COMMITTED IN THE DRAFTING OF WILLS AND REVIEWING LAND TITLES.

HOWEVER, THE BERLIN CASE IN CHICAGO, AND ITS AFTERMATH, HAS CREATED THE POSSIBILITY OF A NEW TYPE OF CLAIM AGAINST THE TRIAL ATTORNEY, AND PARTICULARLY AGAINST TRIAL ATTORNEYS REPRESENTING PLAINTIFFS.

IN THE LAST FEW YEARS, THERE HAS BEEN AN INCREASE OF CLAIMS MADE AGAINST ATTORNEYS REPRESENTING PLAINTIFFS IN MEDICAL MALPRACTICE CASES BROUGHT AFTER THE CONCLUSION OF THE BODILY INJURY CASE BY THE PHYSICIAN WHO HAS BEEN ADJUDGED NOT GUILTY OF MALPRACTICE. THE GIST OF THESE CLAIMS HAS BEEN THAT THE PLAINTIFF'S ATTORNEY HAS BEEN GROSSLY NEGLIGENT AND GUILTY OF UNPROFESSIONAL CONDUCT IN FILING SUCH AN ACTION WITHOUT UNDERTAKING SUFFICIENT INVESTIGATION TO DETERMINE IF HIS CLIENT'S CASE HAS ANY MERIT. THE RAMIFICATIONS OF THIS TYPE OF CASE SHOULD BE OF PARTICULAR CONCERN TO THE TRIAL BAR.

A SECOND TYPE OF ACTION WHICH MIGHT BE BROUGHT AGAINST AN ATTORNEY BY A THIRD PARTY IS A PROGENY OF THE SO-CALLED EXCESS AND BAD FAITH SITUATIONS. IN THE LYSICK CASE IN CALIFORNIA, THE PERSONAL INJURY PLAINTIFF WHO HAD OBTAINED A JUDGMENT FAR IN EXCESS OF THE DEFENDANT'S POLICY LIMITS RECEIVED AN ASSIGNMENT FROM THE INSURED DEFENDANT OF THE

LATTER'S POTENTIAL CLAIM AGAINST HIS INSURER AND HIS ATTORNEY. WHEN THE INSURER REACHED A SETTLEMENT OF THE EXCESS CASE WITH THE PLAINTIFF ASSIGNEE, THE CASE PROCEEDED SOLELY AGAINST THE DEFENSE TRIAL LAWYER. THIS TYPE OF CLAIM, LIKE THE BERLIN TYPE OF CLAIM, SHOULD ALSO BE OF PARTICULAR CONCERN TO TRIAL ATTORNEYS.

## IV

## PRACTICAL CONSIDERATIONS FROM THE ASPECT OF THE DEFENSE LAWYER IN THE DEFENSE OF PROFESSIONAL LIABILITY CLAIMS AGAINST TRIAL LAWYERS

THE DEFENSE ATTORNEY CHARGED WITH THE RESPONSIBILITY OF DEFENDING ANY PROFESSIONAL MALPRACTICE CLAIM HAS AN UNUSUALLY HIGH BURDEN BECAUSE, REGARDLESS OF THE PROFESSION OF THE DEFENDANT HE IS CHARGED NOT ONLY WITH PROTECTING THE ASSETS OF HIS CLIENT BUT ALSO HIS CLIENT'S PROFESSIONAL REPUTATION.

WHILE THE DEFENSE OF A PROFESSIONAL MALPRACTICE CLAIM FOLLOWS, IN A GENERAL WAY, THE DEFENSE OF ANY CLAIM, PARTICULAR ATTENTION MUST BE GIVEN TO THE FOLLOWING AREAS:

A. THE LIMITATION OF ACTIONS;

B. THE BURDEN OF PROOF;

C. THE REQUIREMENTS FOR EXPERT TESTIMONY;

D. THE MEASURE OF DAMAGES;

E. THE "PLAY WITHIN A PLAY".

EACH OF THESE FACTORS MUST BE CONSIDERED IN LIGHT OF THE FACTS IN THE SPECIFIC CASE AND ALSO IN LIGHT OF THE NATURE OF THE CHARGE IN PROFESSIONAL LIABILITY MALPRACTICE.

## CONCLUSION

OUR ADVERSARY SYSTEM IS SOMEWHAT UNIQUE IN THE WORLDS JURISPRUDENCE. IT CONFERS BOTH PRIVILEGES AND OBLIGATIONS UPON THE TRIAL ATTORNEY. HE IS EXPECTED TO RESPOND TO THESE OBLIGATIONS AND IT IS UNDERSTANDABLE THAT WHEN THE RESULTS OF HIS PROFESSIONAL SERVICES DO NOT MEET THE EXPECTATIONS OF HIS CLIENTS THAT CLAIMS MAY OCCASIONALLY RESULT.

HOWEVER, SPECIAL CONSIDERATION MUST BE GIVEN BY THE COURT TO THE UNIQUE ROLE OF THE TRIAL ATTORNEY IN THE ADVERSARY SYSTEM AND THE COURTS MUST EXAMINE CLAIMS MADE AGAINST TRIAL ATTORNEYS IN LIGHT OF THIS STATUS.

THERE SHOULD BE NO QUESTION THAT TRIAL ATTORNEYS SHOULD BE SUBJECT TO CIVIL LIABILITY FOR TRUE PROFESSIONAL MALPRACTICE. HOWEVER, PROFESSIONAL MALPRACTICE SHOULD NOT BE DEFINED BY THE COURTS IN A MANNER THAT IMPOSES UPON A TRIAL LAWYER THE BURDEN OF ESTABLISHING A TOTAL JUSTIFICATION FOR EACH AND EVERY OF THE MANY JUDGMENTAL DECISIONS THAT HE IS REQUIRED TO MAKE IN A LITIGATED MATTER. THESE DECISIONS ARE USUALLY THE RESULT OF LONG TRAINING, HARD EXPERIENCE AND OCCASIONALLY INTUITION. THE VERY NATURE OF THE FUNCTION PERFORMED BY THE TRIAL ATTORNEY MILITATES AGAINST AN EX POST FACTO CRITIQUE OF HIS PERFORMANCE AS AN ADVOCATE.

IT IS REASONABLE TO EXPECT THAT THE COURTS WILL RECOGNIZE THIS UNIQUE SITUATION AND NOT CREATE SWEEPING GENERAL PRINCIPLES WHICH WILL HAVE A CHILLING EFFECT ON EFFECTIVE AND ECONOMICAL ADVOCACY TO THE DETRIMENT OF THE ADVERSARY SYSTEM.

# REVIEW OF RECENT IOWA SUPREME COURT DECISIONS

(244 N. W. 2d to 256 N. W. 2d)

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VII. PROCEDURE

X. WORKER'S COMPENSATION

Koll v. Manatt's Transp. Co., 253 N.W.2d 265 (Iowa 1977)

Plaintiff's decedent was killed in a highway construction accident when a gravel truck backed over him. The gravel truck was neither owned nor operated by the decedent's employer.

The Iowa Supreme Court held that it is hereafter error to give an "unavoidable accident" instruction. A violation by an employer of an OSHA or IOSHA standard is negligence per se as to his employee and is evidence of negligence as to all persons who are likely to be exposed to injury as a result of the violation.

Kalianov v. Darland, 252 N.W.2d 732 (Iowa 1977)

Professional jazz pianist suffered a left ulnar nerve injury in an automobile accident. The injury required surgery and the plaintiff claimed that he was no longer able to work as a pianist because of permanent disability of his left hand and arm.

Approximately 15 minutes after the jury was instructed and retired to deliberate, an alternate juror mentioned that he had observed the plaintiff during a trial recess and the plaintiff was using his left arm and hand much better than the evidence tended to indicate. Over defendant's objection, that juror was excused and the court recalled an alternate juror who had been previously dismissed. Jury returned a verdict of $90,000.

The court also refused to find error in recalling an alternate juror even though Rule 189, seems to indicate that an alternate juror may replace another juror only "before the jury retires".

Finally, the court did not find that a $90,000 verdict was excessive where medical and hospital expenses amounted to $3,000, evidence would have allowed the jury to find that the plaintiff lost between $25,000 and $30,000 in both 1972 and 1973 and where there was substantial evidence of permanent impairment of earning capacity.

Wiedenfeld v. Chicago & N.W. Transp. Co., 252 N.W.2d 691 (Iowa 1977).

Car in which plaintiff's decedents were passengers collided with train at railroad crossing. Suit named railroad and engineer as defendants and trial court instructed that if the engineer was not negligent, there could be no recovery against the railroad. Trial court submitted issue of passenger's duty to maintain lookout. Jury returned a verdict for defendants.

The Iowa Supreme Court reversed, holding that the defendant railroad could be liable if there was evidence of negligence on the part of the railroad's employees, even if those employees were not named defendants, and the jury should have been so instructed.

Although not reversible error, trial court would have been within its discretion to exclude evidence of a test which included recordings made at the same crossing using the same engine and same railroad personnel with the recordings being made from inside a car with two microphones placed at ear level.

The nature or amount of travel on a highway crossing the railroad is a factor the jury may consider in determining whether the crossing is so unusually dangerous that the railroad must provide more warning than the usual crossbuck sign, whistle and bell.

Hunt v. Ernzen, 252 N.W.2d 445 (Iowa 1977)

Plaintiff, a minor guest, was injured in a one vehicle accident. While undergoing treatment at a hospital, a nurse negligently injected a drug, injuring a nerve and causing the plaintiff permanent foot drop. Plaintiff's foot drop injury claim was settled by Ernzen (intoxicated host driver) paying $11,200.00 and the hospital paying $25,000.00. Ernzen then sought indemnification from the hospital for $11,200.00 and the hospital sought contribution which would result in each defendant paying one-half of the total settlement.

The Iowa Supreme Court held that where the damages caused by the hospital were distinguishable from the damages resulting from the car accident and where the original force of the driver's

misconduct was not still operating when the hospital caused its harm, the original tort feasor is entitled to indemnity from the hospital for the amount the former paid towards the plaintiff's claim arising from the hospital's wrongful conduct. This rule applies if the original wrongdoer was negligent or reckless. It would not apply if the original wrongdoer's action was intentional. The court reaffirmed the law that, as to the injured person, the original tort feasor is chargeable with the consequences of subsequent negligent treatment which was occasioned by the original wrongful act.

Hunt v. State, 252 N.W.2d 715 (Iowa 1977).

Plaintiff sustained severe injuries when his automobile went out of control on an icy bridge. The evidence showed that the State of Iowa failed to anticipate the formation of frost on bridge floors even though the Highway Maintenance Manual contains policies and procedures for doing so. Plaintiff introduced a document entitled "Survey of Business Statistics", which contained a current consumer price index to show the effects of inflation relating to the issue of the amount of plaintiff's damages. The state objected that the document was hearsay and that no witness was called to identify or authenticate it. The trial court awarded damages of $501,750.00.

The Iowa Supreme Court held that a violation of the Maintenance Manual of the Iowa State Highway Commission is evidence of negligence.

The Iowa Supreme Court held that the document, an official government publication, is self-authenticating and does not require extrinsic evidence of authenticity pursuant to Rule 902, Uniform Rules of Evidence (1974). Further, pursuant to Uniform Rule of Evidence 803, the consumer price index is a public record or report which comes within the hearsay exception.

Also see Ehlinger v. State, 237 N.W.2d 784 (Iowa 1976).

Lattimer v. Frese, 246 N.W.2d 255 (Iowa 1976).

Action against city and abutting property owner for injuries sustained in fall on sidewalk. Plaintiff alleged §613A.5 notice and attached a copy of same to the Petition. City denied notice and trial court directed a verdict for city when plaintiff failed to offer proof regarding the alleged notice to the city. Supreme Court affirmed.

Plaintiff's suit against the abutting property owner also failed because there was no evidence of affirmative negligence creating the dangerous condition (dish-shaped indentation in sidewalk which caused water to accumulate and freeze) and no applicable statute creating liability on the abutting property owner for defects in a public sidewalk.

Champlin v. Walker, 249 N. W. 2d 839 (Iowa 1977)

Plaintiff, a social guest in a residence on property adjoining the defendant's property, fell into an excavation on defendant's property. The accident happened at night. Plaintiff was unaware of the excavation and was admittedly a trespasser. The court instructed the jury that the plaintiff could not recover unless he proved defendant's conduct was "wanton". The jury returned a verdict for the plaintiff. Trial court sustained a Motion Notwithstanding the Verdict.

The Iowa Supreme Court affirmed, stating there was insufficient evidence of wanton conduct. The court did not have occasion to consider the applicability of Restatement of Torts 2d, §370 (liability for dangerous conditions on land) or whether the traditional common law limitation on a land possessor's duty to adult trespassers should be altered in Iowa.

Wolder v. Rahm, 249 N. W. 2d 630 (Iowa 1977)

Plaintiff's malpractice suit against the estate of a deceased physician was dismissed. Plaintiff originally filed a claim against the estate. The administrator disallowed the claim pursuant to Iowa Code §633. 440 and notified the claimant that her claim would be forever barred unless she requested a hearing within 20 days. Instead of requesting a hearing, the plaintiff filed the malpractice lawsuit.

The Iowa Supreme Court held that a claimant has two ways to assert a debt or liability against decedent's estate: A claimant may commence a separate action pursuant to Iowa Code §633. 415 or may file a claim as provided in §633. 410 and §633. 418. If this latter method is invoked, and the claim is disallowed, the claimant must file a request for hearing or be barred from pursuing that claim. The Iowa Supreme Court noted that the claimant raised no constitutional issues and made no claim that her asserted incompetency would have nullified the provisions of §633. 442.

Moser v. Brown, 249 N.W.2d 612 (Iowa 1977)

The Iowa Supreme Court approved a jury verdict of $30,000 in what appeared to be a case of a typical back strain. One of the grounds for defendant's appeal was an alleged error on the part of the trial court in failing to mention specific dollar amounts for various items of damage in its instructions. The plaintiff had deleted specific amounts of damage claimed for lost wages, medical expenses and property damages in Petition; and defendants never stipulated or conceded the amounts of those items.

Under those circumstances, the Iowa Supreme Court held that the trial court did not err in refusing to mention the amounts in its instructions. Caveat to defense attorneys: If the specials are relatively low it may be wise to stipulate to their reasonableness and have them set out specifically in the instructions.

The court also discussed the manner of substituting the personal representatives of defendant's estate as parties pursuant to Iowa Code §633.415.

Edmundson v. Miley Trailer Co., 252 N.W.2d 415 (Iowa 1977)

Horse trailer became disengaged from car, struck a bridge and both the trailer and horse were destroyed. Plaintiff, owner of trailer, filed suit against foreign corporations. The horse owner filed a Petition of Intervention under R.C.P. 75 alleging that he is "interested" within the meaning of that Rule because of the potential applicability of res judicata concepts to any subsequent action brought be him against the same defendants.

The Iowa Supreme Court held that the mere fact that both the plaintiff and intervenor were represented by the same attorney was insufficient to support a finding of "control" by the intervenor so that a judgment in the plaintiff's suit would become res judicata to the intervenor. The alleged potential applicability of res judicata concepts is so indirect, remote or conjectural that it cannot afford a sufficient basis for holding that the intervenor has an "interest" in the original suit required for intervention within the meaning of Rule 75.

In Re Marriage of Bouska, 256 N. W. 2d 196 (Iowa 1977)

In a 5-4 decision the Iowa Supreme Court held that where the Petitioner had not been an Iowa resident for the statutory one-year period (Iowa Code §598. 6), the trial court lacked jurisdiction and jurisdiction could not be conferred by waiver, estoppel or consent. The Iowa Supreme Court affirmed the setting aside of a previously entered dissolution decree for lack of subject matter jurisdiction.

Mandernach v. Glass, 253 N. W. 2d 917 (Iowa 1977)

This was a suit brought by a non resident on a contract which was to be performed in whole or in part in Iowa. The plaintiff was a resident of Iowa at the time of the contract, but had subsequently moved from the State. He attempted to perfect service on the defendant by way of the long arm statute, Iowa Code §617. 3. The trial court sustained defendant's Special Appearance.

The Iowa Supreme Court reversed, holding that where the plaintiff was a resident of Iowa when the contract was made, he could utilize the long arm statute to perfect service in a suit brought on the contract, even though he was not a resident at the time the suit was filed.

Norton v. Local Loan, 251 N. W. 2d 520 (Iowa 1977)

Plaintiff was indebted to defendant as a result of a transaction in California. Defendant placed a long distance telephone call from Nebraska to plaintiff in Iowa in an effort to collect on the debt. Plaintiff filed suit in three divisions: Two were based on the violation of the Iowa Consumer Credit Code and a third was a common law claim of intentional infliction of emotional distress. Service of original notice was made under Iowa Code §617. 3. The trial court sustained the defendant's Special Appearance asserting lack of in personam jurisdiction.

The Iowa Supreme Court reversed. The Iowa Court had in personam jurisdiction over the defendant because the plaintiff's alleged an intentional infliction of emotional distress which would be tortious conduct committed "in whole or in part" in Iowa.

The Iowa Consumer Credit Code specifically provides that the district court shall have jurisdiction over any person with respect to "any conduct in this state" governed by the Code. The Iowa Supreme Court held that a telephone call from one state into Iowa constitutes "conduct in this state" and provides sufficient minimum contacts with Iowa so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

House v. Hendley & Whittemore Co., 251 N.W.2d 490 (Iowa 1977)

Defendant manufactured a machine outside of Iowa in 1954 and sold it to an Iowa Company. Plaintiff became entangled in the machine, filed suit and served notice on the defendant under Iowa Code §617.3. Allegations against defendant included a failure to warn and properly instruct the users of the machine. Defendant's Special Appearance was sustained.

The Iowa Supreme Court affirmed because the defendant's "affirmative acts" occurred prior to the effective date (July 4, 1963) of the long arm statute, Iowa Code §617.3.

Trask v. Iowa Kemper Mut. Ins. Co., 248 N.W.2d 97 (Iowa 1976)

Plaintiff received jury verdict of $37,000 against defendant's insured, who had $25,000 policy limits. Plaintiff's execution was returned unsatisfied and plaintiff sued defendant directly under the direct action statute, Iowa Code §516.1 for bad faith in failing to settle for the demanded policy limits. Plaintiff appealed directed verdict for defendant. Iowa Supreme Court held:

Plaintiff can sue insurer directly without acquiring insured's claim by levy, sheriff's sale or any other manner.

Plaintiff must introduce "substantial evidence" of insurer's bad faith. Here, competent defense counsel thoroughly investigated the case, kept insureds advised throughout, felt there was an issue as to the plaintiff's contributory negligence and made a $10,000 offer to the plaintiff, who sustained a brain concussion, concussion of the left hip, abrasions of the right elbow and an aggravation of a pre-existing arthritis in the spine, a permanent condition. The plaintiff had medical expenses of approximately $1,500, but three or four prior accidents.

The Iowa Supreme Court reviewed the prior "excess" suits and felt that there was no substantial evidence of bad faith.

Becker v. D & E Distributing Co., 247 N. W. 2d 727 (Iowa 1976)

Plaintiff, in clear liability accident, sustained a fractured kneecap, rib and lumbar sprain. He underwent surgery on the knee. Four months after he returned to work, he was treated for a "foot problem". A podiatrist stated that a pre-existing condition, the knee injury and a subsequent fracture of the foot all contributed to the plaintiff's foot problem and disability at the time of trial and he could not approximate the percentage of disability, if any, caused by the subject accident.

The Iowa Supreme Court held that a jury question on causal connection can be raised by the testimony of an expert that the connection was a "possibility" when accompanied with non-expert testimony that the described condition of which complaint is made did not exist or that there was no prior disability and the condition was asymptomatic.

Where a pre-existing condition exists, but no apportionment of disability between that caused by pre-existing condition and that caused by the trauma can be made, even though a portion of the present and future disability is attributable to the pre-exisitng condition, the defendant whose act of negligence was the cause of the trauma, is responsible for the entire damage.

The Iowa Supreme Court also reiterated that a licensed chiropractor is qualified to interpret x-rays and express opinions within the bounds of that field, even though they are in direct conflict with an orthopedic specialist.

Smith v. State Farm Mut. Auto. Ins. Co., 248 N. W. 2d 903 (Iowa 1976)

Action for reformation of insurance policy and damages based upon negligence of insurance agent. Father-Administrator of son's estate sought to reform an insurance policy to correctly state that his son, rather than himself, was to have been the named insured which would have allowed the collection of accidental

death benefits. In a second division, he sought $10,000 damages (accidental death limits) against his insurance agent for negligently failing to correctly identify the named insured. The reformation action was tried to the court and judgment was rendered for the defendant insurance carrier. Negligence action was tried to a jury, and a verdict was rendered on behalf of the plaintiff.

The Iowa Supreme Court held that the reformation and negligent actions were separate and could be tried separately without an election of remedies; that there is a duty of an insurance agent to his principal and causes of action may be based upon the agent's negligence; and that a decision on the reformation action is not res judicata so as to bar the negligence actions, especially where the parties stipulated that the latter would be preserved and the trial court reserved those rights in its decision in the reformation matter.

Westhoff v. American Interinsurance Exchange, 250 N.W.2d 404 (Iowa 1977)

Declaratory judgment action to determine amount of uninsured motorist coverage available under three policies. Two plaintiffs were insureds under one policy with American Interinsurance Exchange and two policies with Auto Owners, all containing $10,000 in uninsured motorist coverage. All policies had "other insurance" clauses with a pro rata-type provision in American's policy and an escape-type provision in Auto-Owner's policy.

The Iowa Supreme Court reaffirmed its decision in McClure v. Employers Mut. Cas. Co., 238 N.W.2d 321 (Iowa 1976) which prohibited stacking of uninsured motorist limits so long as the clauses do not purport to reduce the uninsured motorist insurance below the statutory minimum of $10,000. Further, where the escape-type clause and the pro rata-type clause are obviously conflicting, the coverage will be pro rated between the carriers.

Estate of Campbell, 253 N.W.2d 906 (Iowa 1977)

Declaratory judgment action for a determination of tenant farmer's obligations to pay rent. The plaintiff moved for a summary judgment. An evidentary hearing was held without the presence of a court reporter. The trial court overruled the plaintiff's motion for summary judgment for the non-moving defendant.

The Iowa Supreme Court reversed, holding that a party must file a motion before summary judgment may be granted in his favor. Four justices concurred in the result, but disagreed that a motion must be filed before a party is entitled to summary judgment. The concurring justices also recommended that all evidence presented at such hearings should be reported so as to preserve the record for appeal.

Lloyd v. State, 251 N. W. 2d 551 (Iowa 1977)

A tort claims suit for damages for assault committed by a prisoner who had been released by the State despite a diagnosis of severe antisocial personality. The trial court sustained the state's Motion for Summary Judgment on the basis that the acts complained of were discretionary and therefore afford no relief against the state pursuant to Iowa Code Chapter 25A.

The Iowa Supreme Court affirmed. The acts complained of were discretionary and the trial court lacked jurisdiction. However, the appropriate action would be to dismiss, rather than entertain a motion for Summary Judgment. The matter was remanded to the trial court for the limited purpose of setting aside the award of Summary Judgment and entering an Order dismissing plaintiff's claims.

Speed v. Beurle, 251 N. W. 2d 217 (Iowa 1977)

Plaintiff had previously recovered $750,000 against the State of Iowa for alleged medical malpractice. He now seeks punitive damages for the same incident against the individual physicians. Trial court held that the prior judgment against the state was a complete bar to the plaintiff's subsequent claim for punitive damages by reason of Iowa Code §25A.8.

The Iowa Supreme Court affirmed.

Mid-Continent Regrigerator Co. v. Harris, 248 N. W. 2d 145 (Iowa 1976)

Plaintiff sues for unpaid balance claimed owing under a written contract with defendant for the fixed term lease of a commercial freezer. Defendant counterclaims alleging breach of express and implied warranties and seeking damages because of an unsuspected increase in electrical bills. Trial court sustained

plaintiff's Motion for Summary Judgment for the balance of the lease payments and specifically reserved the merits of defendant's counterclaim for trial. Defendant appealed as a matter of right pursuant to Rule 331(a).

The Iowa Supreme Court dismissed the appeal. A ruling on a Motion for Summary Judgment in a case where a compulsory counterclaim is left unresolved is not a final judgment from which an appeal as of right could be had.

Weber v. Madison, 251 N. W. 2d 523 (Iowa 1977)

Plaintiff was injured when she drove her vehicle into a ditch to avoid a flock of defendant's geese which had come upon the highway. The Petition alleged common law negligence in failing to restrain the geese and a violation of Iowa Code §188.2 (Restraint of Animals). The trial court sustained a Motion to Dismiss on the basis there was no common law or statutory duty to restrain geese from running at large.

The Iowa Supreme Court reversed. Although the term "animal" in Iowa Code Chapter 188 is not intended to include fowl and an owner does not have a statutory duty to restrain fowl, there is a common law duty against negligently permitting them to be unattended on a traveled highway if the owner knew or should have known that their presence created a hazard to the motoring public.

Although the fact that geese were on the roadway will not constitute prima facie evidence of negligence, an allegation that the owner failed to warn of their presence is sufficient, when attacked by Motion to Dismiss, to allege by necessary implication that the owner had actual or constructive knowledge of the danger.

Stoebe v. Kitley, 249 N. W. 2d 667 (Iowa 1977)

Plaintiff-attorney and defendant-client entered into a contingency fee agreement wherein plaintiff sought to represent the defendant in securing recovery of benefits under a disability policy. After suit was filed, disability carrier paid lump sum accured disability benefits and agreed to continue monthly disability payments pursuant to the policy. The issue was whether or not the plaintiff was entitled to a contingency fee on the future monthly benefits. The trial court held that the plaintiff was so entitled.

The Iowa Supreme Court affirmed. Contingency fee contracts are legal and enforceable and the evidence taken as a whole would indicate an agreement that the attorney would be entitled to a fee on future disability benefits. The Court did admonish that attorneys should take more time in preparing a written instrument which precisely details all terms of the fee agreement.

Berding v. Thada, 243 N. W. 2d 857 (Iowa 1976)

In several claims arising out of the same accident, plaintiffs sought to have the trial court instruct the jury that the defendant's intoxication had already been "judicially established" by a prior jury verdict against the defendant on an OMVUI charge. Trial court refused to give res judicata effect to the defendant's conviction and did not so instruct the jury. Jury returned a verdict for the defendant.

The Iowa Supreme Court affirmed, citing Iowa Code §321. 489 which provides that no record of the conviction of the laws of the road shall be admissible as evidence in a civil action. A guilty plea would, of course, be admissible as an admission.

Jacobs v. Stover, 243 N. W. 2d 642 (Iowa 1976)

Plaintiff claims damages when an automobile he was driving collided with a horse owned by Stover. Defendants, Stover and Stallman were adjacent property owners and had previously disputed who was to maintain a boundary fence between their lands. Upon Petition the matter had been submitted to fence viewers pursuant to Iowa Code Chapter 113. The fence viewers order was entered on October 4, 1968 and required Stallman to maintain that portion of the fence which the horse went through and to comply on or before November 3, 1968. The accident happened on October 13, 1968. The trial court sustained Stallman's Motion for Summary Judgment on the grounds that he had no duty at the time of the accident to maintain the fence.

The Iowa Supreme Court affirmed stating that there is no common law duty resting upon adjoining land owners to fence their property. The duty to fence arises only by agreement of the parties by order pursuant to Chapter 113. Therefore, Stallman owed no duty to the plaintiff prior to November 3, 1968, the compliance date set by the fence viewer's order.

Ferris v. Anderson, 255 N. W. 2d 135 (Iowa 1977)

Undisputed advance payments made by the defendant's insurer were properly credited against a verdict returned by a jury. The Iowa Supreme Court impliedly recommended that the defendant simply file a post verdict motion setting forth the advance payment and requesting that the court incorporate the partial satisfaction in the Judgment.

Chicago Title Insurance Co. v. Huff, 256 N. W. 2d 17 (Iowa 1977)

The trial court refused to enjoin the enforcement of Iowa Code §515. 48 (10) (1973) which prohibits corporations doing business in Iowa from insuring titles to real estate.

The Iowa Supreme Court affirmed.

Jones v. Bowers, 256N. W. 2d 233 (Iowa 1977)

An amendment to Iowa Code Chapter 25A effective July 1, 1975, which makes tort claims against state employees subject to the provision of Chapter 25A and requires the claim be first submitted to the State Appeal Board, applies retrospectively to causes of action which arose prior to July 1, 1975.

Reid v. Landess, 252 N. W. 2d 442 (Iowa 1977)

The Industrial Commissioner did not breach a statutory duty in refusing to furnish an indigent claimant with a free transcript of arbitration proceedings for use in workmen's compensation review proceedings; and such refusal did not deny claimant due process or equal protection.

Porter v. Continental Bridge Co., 246 N. W. 2d 244 (Iowa 1976)

Claimant sustained serious injuries to his back and leg. Claimant's physician gave him 50% permanent impairment to the back and 20% permanent impairment to the right leg. Employer's physician gave the claimant 20% permanent impairment for the back injury, 10% for the leg injury, or 25% because of the two injuries combined. The Deputy Commissioner found the permanent disability to be 35% of the body as a whole and the claimant appeals. Commissioner and District Court affirmed.

The Iowa Supreme Court affirmed holding that there was evidence in the expert and lay testimony to support the deputy's decision and it will not be overturned.

Although determining that the issue was not properly raised for review, the Iowa Supreme Court seemed to hold that the statutes allowing the commissioner or his deputy to find facts, without de novo judicial review, do not deprive claimant of due process of law.

Kerrigan v. Errett, 256 N. W. 2d 394 (Iowa 1977)

Plaintiff, an employee of Firestone, was severely injured when a bladder press malfunctioned. Evidence showed that press operators on two prior shifts had complained of problems with the press, but no one examined the press or told the plaintiff of these events.

The defendant was a Firestone executive who admittedly was not charged with the responsibility of personally inspecting the defective press. Trial to the jury resulted in a verdict of $178, 500 for the personal injury and $25, 000 for the loss of consortium. Defendants appealed.

The Iowa Supreme Court reversed. There was no evidence from which the jury could reasonably find that the defendant undertook any personal obligation relative to the type of inspections which conceivably would have revealed a defect. The court adopted the reasoning in Canter v. Koehring Co., 283 So. 2d 716 (La. 1973) which held, among other things, that to impose liability upon a co-employee, that co-employee must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. It is insufficient that the defendant have general administrative responsibility.

Miller v. International Harvester Co., 246 N. W. 2d 298 (Iowa 1976)

Plaintiff was injured when a "beater shifting lever retention device" engaged causing the beaters on a manure spreader to begin rotating thereby entangling the plaintiff's clothing and causing serious injuries. Defendant appealed following a verdict for the plaintiff.

The Iowa Supreme Court held that there was sufficient evidence to generate a jury question as to whether this particular defendant did place the manure spreader in the stream of commerce and whether the spreader, more particularly the beater shifting lever retention

device, was defective when it left this defendant's hands. The plaintiff's expert, Leo Peters, testified that there appeared to be no movement or change in this regards from time of assembly. Further, there was no evidence that the distributor made any adjustments and neither the plaintiff or his son had made alterations or repairs.

The court also found sufficient evidence to support the submission of the particulars of negligence alleged against the defendant. The decision is helpful in that it sets out, in some detail, the testimony of the plaintiff's expert as well as several of the court's instructions regarding strict liability, negligence and contributory negligence.

Lewis v. State, 256 N. W. 2d 181 (Iowa 1977)

Actions against the State of Iowa for injuries sustained by the plaintiffs as a result of an automobile accident on the theory that it was the result of a state liquor store employee's negligence in selling liquor to a minor and the state's negligence in the design and construction of a highway. The state appealed on an interlocutory basis from the trial court's ruling denying a motion for summary judgment.

The Iowa Supreme Court held:

Iowa Code §123.43, which prohibits the sale of liquor to minors, sets a minimum standard of care for conduct generally required of the reasonably prudent person under like circumstances for purposes of a common law action of negligence based on the sale or furnishing the liquor; and such an action can be maintained against the state to the same extent as a private individual.

The sale or furnishing of intoxicating liquor in violation of Iowa Code §123.43 may be the proximate cause of injuries sustained as a result of an intoxicated individual's tortious conduct. The question of proximate cause under such circumstances would be a fact question. This serves to overrule Cowman v. Hansen, 250 Iowa 358, 92 N. W. 2d 682 and other inconsistent cases. This holding is prospective and applicable only to the instant case and to personal injuries sustained after June 29, 1977.

Plaintiff's allegations that the state improperly designed and constructed the highway so as to permit automobiles to cross over from the northbound lane to the southbound lane and failed to construct a railing or barricade on the median did not come within the discretionary function exclusion of Iowa Code §25A.14 (l). The Court relied upon Stanley v. State, 197 N.W.2d 599 (Iowa 1972).

Gravelie v. TBS Pacific, Inc., 256 N.W.2d 230 (Iowa 1977)

Plaintiffs claimed to be third-party beneficiaries of a contract between two Iowa travel agencies and the defendant, a foreign corporation. The contract called for lodging for plaintiffs at defendant's hotel in Hawaii. Plaintiffs allege that the contract between the travel agencies and defendant was "formed" in Iowa and that the draft was tendered to, and negotiated by the defendant in Iowa. Defendants attacked jurisdiction by filing a document designated as a "Motion to Dismiss for Warrant of Jurisdiction". Plaintiffs had sought jurisdiction over the defendant under Iowa Code §617.3. The trial court overruled and defendant appealed.

The Iowa Supreme Court reversed, holding that the contract between the agencies and the defendant was not "to be performed" in Iowa within the meaning of Iowa Code §617.3 The court did not decide whether a third party beneficiary of a contract can utilize §617.3.

The court further held that the defendant had not submitted to the jurisdiction by generally appearing, notwithstanding the designation of their document as a "motion". The court indicated that it would look to the substance of the document, rather than the form and treated the document as a Special Appearance.

Davis v. Jenness, 253 N.W.2d 610 (Iowa 1977)

A Tort Claims action against the state of Iowa alleging negligence in issuing a drivers license to a former mental patient who was thereafter involved in an automobile accident with the plaintiff's decedent. The trial court rendered judgment for plaintiffs and the state appealed.

The Iowa Supreme Court held that the decision to lift or terminate the suspension of a drivers license is "discretionary" within the exceptions set out in Iowa Code §25A.14 (l) and there was

satisfactory evidence to warrant the lifting of the suspension.

The plaintiffs also alleged that the driver's license examiner was negligent in failing to require Jenness to take a manual driving test prior to reinstating his license. The Iowa Supreme Court held that there was no evidence that the trooper failed to dutifully carry out his responsibilities since the ground for suspension was mental disability and not driving incompetence.

Further, the court found, as a matter of law, that no proximate cause was shown between the alleged negligence of the state and the collision of the automobiles.

Moose v. Rich, 253 N.W.2d 565 (Iowa 1977)

Plaintiff sued his superintendant and foreman for negligence in carrying out his responsibilities for providing safe equipment and conducting safety inspections of the job sites. Plaintiff was injured when worn platform boards slipped off of a scaffold causing the plaintiff to fall. Plaintiff, unemployed since the date of the accident, was unable to walk without the aid of a prosthetic device. Jury returned a verdict in the amount of $285,000.

The Iowa Supreme Court affirmed holding:

Discussion of insurance by jurors in their deliberations, not interjected into the record by the plaintiff, does not automatically constitute misconduct.

Where jurors wrote down estimated figures to determine the value of pain and suffering for the purpose of discussion only, and did not agree to be bound by the figure thus obtained, the verdict was not a quotient verdict, contrary to law.

A jury question was generated as to whether the defendant, as supervisor and foreman, owed a duty to the plaintiff.

The 1974 amendment to Iowa Code §85.20, limiting the rights of an employee to receive compensation from a co-employee, does not apply retrospectively.

A release of an employer and its insurers pursuant to Iowa Code §85.47 does not bar recovery from parties except as provided by Chapter 85 unless the release so states that it is full satisfaction of that particular claim.

Where plaintiff amended his Answers to Interrogatories after trial had commenced to reflect that intention to call two expert witnesses, the trial court sustained the defendant's objections to the witnesses because their names had not been furnished, and allowed the witnesses only to testify to matters within their personal knowledge. However, the defendant failed to adequately preserve his objection to their testimony at the time of trial.

The trial court was correct in refusing to admit the defendant's offer of the plaintiff's employer's report of work injury as a business record (§622.28) where the defendant failed to show the report was recorded at the time of the injury, the source of the information and where the preparer was not present to answer foundational questions.

The verdict was not excessive.

Haumersen v. Ford Motor Co., (Filed August 31, 1977)

A vehicle went out of control in a school yard, striking and killing a seven year old bystander. The case went to trial against Ford Motor Company alone with strict liability as the sole basis for recovery. The jury returned a verdict of $100,000 for the estate of the deceased child and $60,000 for his father.

The Iowa Supreme Court affirmed holding that the doctrine of strict liability is extended to bystanders. The verdicts, although large, were not so excessive as to shock the conscience or exceed the evidence.

# THE NEW RULES OF APPELLATE PROCEDURE
## SIGNIFICANT CHANGES

BY EMIL TROTT, JR.

1. Rule 3. Amount in controversy. The "jurisdictional amount" for an appeal has been raised from $1000 to $3000.

2. Rule 10. Record on Appeal. Rule 10(b) specifies that a description of the parts of the proceedings ordered transcribed be filed with the trial court clerk if a partial transcript is ordered.

Rule 10(c) specifies a time limit of 20 days after notice of appeal for the filing with the trial court clerk of a statement of the evidence or proceedings when no report was made or when the transcript is unavailable.

The option of preparing an agreed statement as the record on appeal has been eliminated. However, new rule 15(f) does provide for an optional agreed statement of the case to be filed as the appendix.

3. Rule 11. Transmission of record. Pursuant to rule 11(b) appellant is now to request the trial court clerk to transmit the record within seven days after all required briefs and the appendix have been served instead of upon receipt of the brief of the appellee. Rule 11(b) requires the trial court clerk to number the documents comprising the record before transmitting them to the supreme court.

4. Rule 12. Docketing appeal; filing record. When appellant causes any appeal to be docketed, he must pursuant to rule 12(a) file a statement as to whether or not rule 17, regarding child custody cases, applies.

Under rule 12(b) the certificate of ordering transcript must include (1) a description of the portions of proceedings ordered transcribed and (2) a statement regarding arrangements made for payment of the cost of the transcript as well as the matter previously required. If no transcript is ordered, appellant is now required to file a certificate so stating. Rule 12(b) also makes provision for the filing of a supplemental certificate of ordering transcript.

5. Rule 13. Filing and service of briefs and amendments. Rule 13(a) now makes it clear, by eliminating reference to a three-day period before argument, that appellant's reply brief is to be filed within 14 days after service of appellee's brief.

Rule 13(b) sets out a briefing schedule when a cross appeal has been taken.

Rule 13(c) makes provision for computing times for filing of papers when multiple adverse parties exist.

Rule 13(d) provides for the filing of amendments to briefs.

6. Rule 14. Briefs. Rule 14(a)(3) makes it clear that each separately stated issue must include its own list of authorities. The list must contain "other authorities" as well as cases and statutes. One, two, three, or four authorities under each issue must be underlined to indicate your belief that they are the most pertinent and convincing. Rule 14(a)(3) includes the sentence, "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."

Rule 14(a)(5) requires the argument to be arranged in separately numbered divisions corresponding to the separately stated issues.

Under rule 14(b) appellee's brief must always contain a statement of the issues.

Rule 14(e) requires that you indicate the court that rendered the decision when citing cases. This includes Iowa cases as well as cases from other jurisdictions. Parallel cites should be used. The rule gives several illustrative examples. Cites to specific pages are now required when appropriate. Unpublished decisions of the Iowa appellate courts are not to be cited as authority. Textbooks and encyclopedias as well as treatises are to be cited to section and page. Use of "supra" and "infra" is discouraged.

Compare rule 14(f)(5) which states "Ordinarily the burden of proof on an issue is upon the party who would suffer loss if the issue were not established" as a well established proposition which needs no citation to authority with previous rule 344(f)(5), Rules of Civil Procedure.

Required briefs are now limited by rule 14(h) to 50 pages and reply briefs are limited to 25 pages regardless of the method of printing or duplicating.

Under rule 14(i) when there is a cross appeal the party who filed notice of appeal first is deemed to be the appellant for purposes of (1) determining the times for filing briefs, (2) determining the form and contents of briefs, and (3) preparing the appendix.

7. Rule 15. Appendix to briefs. Rule 15(a) requires the text of the notice of appeal to be included in the appendix. Rule 15(a) contains the following two new sentences which make explicit what was only implicit in previous rule 344.1, R.C.P.: "Portions of the record shall be set out verbatim in the appendix. Summaries, abstracts or narratives shall not be used unless the parties prepare an agreed statement of the case pursuant to subdivision (f) of this rule." Rule 15(a) makes provision for amending the appendix.

If the parties reach an agreement on the contents of the appendix they must now, pursuant to rule 15(b), file a short memorandum of that agreement within 14 days after the appeal is docketed. If the parties do not agree on the contents of the appendix, the appellant must file (as well as serve) a designation of the parts he intends to include in the appendix and a statement of issues within 14 days (rather than ten days) after docketing.

If an appellant elects to defer the appendix he must now file and serve a notification of such election pursuant to rule 15(c) within ten days after docketing. The initial printed brief subalternative within the deferred appendix alternative has been eliminated. Under rule 15(c) if the appendix is deferred the parties must initially file two typewritten or page proof copies and serve one copy of their briefs with references to pages of parts of the original record. After these initial briefs are filed the appendix is filed. Then all the parties refile and serve printed or duplicated copies of their briefs with references to pages of the appendix in addition to or in lieu of references to pages of parts of the record.

The following new sentence appears in rule 15(d): "Portions of the reporter's transcript of proceedings shall be inserted in chronological order based on the date the transcribed proceedings took place rather than on the date the completed transcript was filed."

Language changes appearing in rules 15(d) and (e) make it clear that only relevant portions of exhibits are to be included in the appendix.

Rule 15(f) makes provision for the filing of a narrative agreed statement of the case as the appendix. Such an optional statement must be prepared within 14 days after docketing. Previous rule 340(d), R.C.P., provided for an agreed statement as the record on appeal which was also filed as the appendix.

8. Rule 16. Form of briefs, appendix and other papers. If you produce a brief or appendix by copying or duplicating a typewritten original, then pursuant to rule 16(a) lines of typewritten text must be double spaced. Type matter must be 6 inches by 8 1/2 inches. The cover of an amendment should be the same color as the cover of the document which it amends.

Rule 16(b) provides that three copies of motions and papers other than briefs or the appendix are to be filed and one copy is to be served on each party separately represented.

9. Rule 17. Child custody cases. Rule 17, which cuts the times for filings briefs in half in certain cases involving juveniles contains the following sentence: "If filing of the appendix is deferred pursuant to rule 15(c), Rules of Appellate Procedure, the appendix shall be served and filed not more than fifteen days after service of appellee's initial brief and printed or duplicated copies of all the briefs shall be served and filed within seven days after service of the appendix."

10. Rule 18. Brief of amicus curiae. This rule is entirely new and provides, inter alia, that a brief of an amicus curiae may be filed only with leave of the appropriate appellate court, at the request of the court, or when accompanied by the written consent of all parties.

11. Rule 21. Oral argument; submission. Rule 21(a) provides that if a party fails to state at the end of his brief his desire to be heard orally, he will not be heard orally except by special permission or order of the appropriate appellate court.

The content of rule 21(e) is new and provides, "Appeals shall be submitted to the Supreme Court or transferred to the Court of Appeals substantially in the order they are made ready except when advance submission is accorded by statute, rule or order of the Supreme Court."

12. Rule 22. Writs, motions, orders. Rule 22(b) deals with writs and process in the court of appeals. Any writ, order, or other process issued by the court of appeals in an appeal not transferred to it by the supreme court is of no effect.

Rule 22(c) deals with motions in the appellate courts. A party may generally file a resistance to a motion within 14 days after service of the motion. A reply may be filed within three days after service of the resistance.

Rule 22(d) provides that motions will generally be ruled on at least seven days after the serving of the resistance unless a different time for submission has been ordered. Unresisted motions may be ruled on after the expiration of at least three days from the last day for timely filing of a resistance.

Rule 22(e) deals with motions for procedural or temporary orders and provides that such motions may be ruled upon at any time without awaiting a resistance. A party adversely affected by such a ruling may apply for reconsideration, vacation, or modification of the ruling within 14 days.

Rule 22(f) deals with the authority of a single justice of the supreme court to entertain motions.

Rule 22(g) deals with the authority of the court of appeals and its judges to entertain motions.

13. Rule 23. Motions to dismiss or affirm. Rule 23(b) states that a motion to affirm may be filed on grounds the issues raised by the appeal are frivolous and the appeal was taken solely for the purpose of delay. A motion to affirm may be filed no later than seven days after service of appellant's brief.

14. Rule 29. Procedendo. The first sentence of rule 29 deals with the issuance of procedendo after the filing of an opinion by the supreme court. The second sentence of rule 29 states, "Unless otherwise ordered by the Court of Appeals, no procedendo shall issue for twenty-one days after an opinion of the Court of Appeals is filed, nor thereafter while an application for further review by the Supreme Court is pending." No mention is made of petitions for rehearing in the court of appeals.

15. Rule 30. Filing and service. If a paper is to be deemed filed on the day of mailing, the person doing the mailing must now include a certificate of filing pursuant to rule 30(a). When multiple copies of a paper are required, filing is not complete until all the copies are filed.

16. Rule 101. Perfecting appeal in criminal cases. Rule 101 provides that criminal appeals are taken and perfected within the time and in the manner prescribed by statute.

17. Rule 102. Procedure. Rule 102 provides that after perfection of a criminal appeal all procedure shall be governed by the Rules of Appellate Procedure.

18. Rule 103. Docketing criminal appeals. Criminal appeals are docketed as provided in rule 12, Rules of Appellate Procedure. If trial court has found a defendant-appellant to be indigent and appointed appeal counsel for him, then the appeal is docketed upon the defendant's request without payment of the fee.

19. Rule 201. Application for discretionary review. Rule 201 provides that an application for discretionary review shall be filed within the time and in the manner prescribed by statute. The applicant must also mail a copy of the application and pay a $15 fee to the clerk of the supreme court. The fee is not required in a criminal proceeding for discretionary review if trial court has found defendant indigent and appointed appeal counsel for him.

20. Rule 202. Resistance; ruling. Rule 202 provides that an application for discretionary review may be resisted and ruled upon in the manner prescribed by rule 22, Rules of Appellate Procedure, unless otherwise ordered.

21. Rule 301. Petition for writ of certiorari. A petition for a writ of certiorari directed to the district court must be filed with the supreme court clerk within the time prescribed by rule 319, Rules of Civil Procedure. Copies of the petition must be filed and served in the manner prescribed by the Rules of Appellate Procedure for the filing and serving of motions.

22. Rule 302. Resistance; ruling. A petition for a writ of certiorari may be resisted and ruled upon in the manner prescribed in rule 22, Rules of Appellate Procedure.

23. Rule 303. Original certiorari procedure. After a petition for certiorari is granted by the supreme court the petitioner must pay the docket fee within ten days. The Rules of Appellate Procedure apply with those applicable to appellants applying to the plaintiff-petitioner and those applicable to appellees applying to the defendant-respondent. Defendant district court is to make return to the writ when requested to do so by plaintiff. The request is to be made within seven days after all required briefs and the appendix have been served.

24. Rule 401. Transfer of cases to the court of appeals. Rule 401(a) provides that the supreme court may, on its own motion, transfer to the court of appeals any case filed in the

supreme court except a case in which provisions of the Iowa Constitution or statutes grant exclusive jurisdiction to the supreme court.

Rule 401(b) enumerates types of cases the supreme court will ordinarily retain. With the addition of "cases appropriate for summary disposition" rule 401(b) is similar to rule 1(b), Temporary Rules of Appellate Procedure, adopted by supreme court order of November 15, 1976.

Rule 401(c) provides that cases which involve substantial questions of enunciating or changing legal principles will ordinarily be retained by the supreme court and cases which involve questions of applying existing legal principles will be transferred to the court of appeals.

25. Rule 402. Application for further review. Rule 402(a) states that no fee is required for filing an application for further review.

Rule 402(b) is similar to rule 2(a), Temporary Rules of Appellate Procedure, adopted by supreme court order of November 15, 1976, and states the grounds for an application for further review.

Rule 402(c) deals with the form, length, and number of copies of an application or resistance. It is similar to temporary rule 2(b). Under rule 402(c) an application or resistance may be printed or duplicated on only one side of the sheet.

Rule 402(d) provides that if an application for further review is granted the supreme court may require the filing of supplemental briefs on the merits of some or all of the issues.

Rule 402(e) provides that when an application for further review is denied procedendo shall issue immediately. This allows no time for the filing of a petition for rehearing.

26. Rule 501. Procedure in other proceedings. This rule prescribes that the procedure for all other proceedings not specifically covered elsewhere in the Rules of Appellate Procedure shall be that prescribed in the Rules of Appellate Procedure to the full extent not inconsistent with rules specifically prescribing the procedure or with statute.

27. Rule 702. Effective and governance dates. The Rules of Appellate Procedure became effective on July 1, 1977, and generally apply to further acts in proceedings then pending as well as to proceedings commenced after the effective date.

Section 176.051. Provides that household workers not otherwise covered by Minnesota workers' compensation may be covered by election of the employer. Effective August 1, 1975.

Chapter 176.081, Subd. 1. Provides that attorney's fees must be approved in writing by the Deputy Commissioner of the Department of Labor and Industry in charge of workers' compensation or other persons as previously authorized by statute. Compensation judges have authority to approve attorney's fees up to 25% of the first $4,000 of compensation and up to 20% of the next $20,000 of compensation and the Workmen's Compensation Commission has the same authority on matters before them. Subd. 2. Any application for fees above those allowed in Subd. 1 must be filed with the Deputy Commissioner in charge of workers' compensation for approval or disapproval with provision for a hearing by any interested party upon request. Subd. 3. Any employee who is dissatisfied with attorney's fees may file an application for review by the Deputy Commissioner in charge of workers' compensation, and any interested party may request a hearing. The Deputy Commissioner in charge of workers' compensation may raise the issue of attorney's fees at any time and shall have continuing jurisdiction over attorney's fees. Subd. 4. Review of determinations by the Deputy Commissioner shall be only by the Supreme Court. Subd. 5. Specific statutory criteria are set forth as guidlines for determiners of attorney's fees. Subd. 6. The Deputy Commissioner in charge of workers' compensation may prescribe reasonable rules and regulations regarding determination of attorney's fees. Subd. 7. In cases where dispute arises between the employer/insurer and the employee regarding payment of workers' compensation benefits and the employee secures an attorney, the employer/insurer shall be liable for an amount equal to 25% of that portion of the attorney's fees which have been awarded, on all fees in excess of $250. Subd. 8. In cases of dispute between two or more employers or insurers where compensation benefits are payable, the employee is entitled to all reasonable attorney's fees and costs incurred to protect his rights, against the losing party. Effective August 1, 1975.

Section 176.101, Subd. 1. The maximum weekly benefits payable shall be $135. The minium benefit for temporary total disability shall be 20% of the statewide average weekly wage. The 350 week limitation of temporary total disability is removed. Subd. 2. The maximum compensation for temporary partial disability shall be $135 per week. If the employer does not furnish the employee with work that he can do in his temporary partial disability condition and he cannot find such work the 350 week limitation on the compensation is removed. Subd. 3. The maximum compensation for permanent partial disability shall be $135 per week. Sub-paragraph 41. Scarring as well as disfigurement is compensable under the permanent partial disability schedule. Both are compensable if they affect not only the employability but the advancement opportunity of the injured person and applies to employments for which the employee later becomes qualified for as well as employment he was qualified for at the time of the injury. Subd. 4. For permanent total disability the maximum weekly compensation and the minimum weekly compensation shall be the same as that for temporary total disability. Subd. 6. This subdivision provided for credit for payments made to an injured employee prior to his death against the compensation payable to the dependents. This whole subdivision has been stricken, thus eliminating any credit. New Subd. 6. (Old Subd. 7). Minors and apprentices for temporary total, temporary partial, retraining, permanent partial or permanent total disability shall be paid the larger of either the statewide average weekly wage

or the employee's weekly wage, subject to the maximum compensation rate in cases involving permanent partial or permanent total disability. New Subd. 7. (Old Subd. 8). Increases the maximum weeks of retraining from 104 to 156 weeks. Also removes the limitation on the retraining of the total number of weeks of compensation paid for the injury. Provide that the employer and insurer shall pay, besides the compensation, any other expense determined reasonably necessary to restore former earning capacity. Effective August 1, 1975.

Section 176.111, Subd. 1. (b). Provides that full time students shall be conclusively presumed dependent to the age of 21 years rather than 19 years as previously allowed. Effective August 1, 1975.

Section 176.111, Subd. 6. Provides that a widow alone shall receive 50% of the wage of the deceased employee rather than 40%. Effective October 1 1975.

Section 176.111, Subd. 7. Provides that a surviving spouse and one dependent child shall receive 60% of the wage of the deceased rather than 50%. Effective August 1, 1975.

Section 176.111, Subd. 8. Provides that a surviving spouse and two dependent children shall receive 66-2/3% of the wage of the deceased employee rather than 60%. Effective August 1, 1975.

Section 176.111, Subd. 11. Provides that in case of remarriage a surviving spouse (not just a widow as previously stated in the law) shall receive a lump sum settlement equal to two full years of compensation. A remarried surviving spouse shall be paid the compensation for dependent children unless the Division or Commission orders otherwise. If the dependency of the children ceases within two years of the parent's remarriage the remainder of the compensation shall be paid in a lump sum to the parent. Effective October 1, 1975.

Section 176.111, Subd. 12. Provides that a dependent orphan shall be paid at the rate of 55% of the wage rather than 45%, and that for two or more orphans the payment shall be 66-2/3% of the wage of the deceased employee. Effective August 1, 1975.

Section 176.111, Subd. 20. Removes any dollar limitation on length of dependency weekly benefits and provides the weekly benefit shall not exceed that for temporary total disability. Effective October 1, 1975.

Section 176.111, Subd. 21. Provides that coordination with governmental survivor benefits shall apply to all of Section 176.111 and not just Subd. 19 and 20. Effective August 1, 1975.

Section 176.131, Subd. 10. Provides that beginning on September 30, 1975 and each September 30 thereafter the balance in the Special Compensation Fund shall be determined, and effective January 1 thereafter an adjustmen shall be made depending upon the balance in the Fund as provided in the statute. There is also provision for an acceleration in the decrease in percentage of payment into the Fund when the balance in the Fund is $3,000,000 or more. Effective August 1, 1975.

Section 176.132, Subd. 2. Provides that the supplementary benefit payable shall bring the compensation up to 50% of the statewide average weekly wage as computed annually. This is a change from correcting the supplementary benefit by the same amount as the change in percentage of statewide average weekly wage from year to year. Effective August 1, 1975.

Section 176.133. Provides that attorney's fees, when they are allowed on supplementary benefit cases shall be contributed to by the employer and insurer in the same fashion as other attorney's fees are determined. Effective August 1, 1975.

Section 176.151. Provides that actions or proceedings for workers' compensation benefits must be performed within three years after the Workers' Compensation Division receives the first report instead of two years under the previous statute. Eliminates the requirement that once benefits have been paid if the employee goes for eight years without benefits being paid the Statute of Limitations runs on the claim. The situation now reverts back to the previous law which leaves such claims open for the life of the employee. Provides that in cases of a physical or mental incapacity an injured person or dependent shall have a three year period of limitation to take action rather than two years from the date the incapacity ceases. Provides for cases of injury caused by x-rays, radium, radioactive substances or machines, ionizing radiation or any other occupational disease that the employee shall give notice to the employer and commence his action within three years after the employee has knowledge of the cause of such injury and the injury has resulted in disability. Effective August 1, 1975.

Section 176.461. Gives the Workmen's Compensation Commission jurisdiction to set awards aside at any time, removing the limitation of eight years from the date compensation was last paid. Effective August 1, 1975.

Section 176.511, Subd. 3. Provides that in cases of appeal to the Workers' Compensation Commission, after the first $250 the fee for the attorney shall be allowed in the same fashion as it is for other types of cases. Effective August 1, 1975.

Section 176.645. Provides for adjusting payments for temporary total, temporary partial and permanent total disability and for dependency benefits on October 1, 1976 and each October 1 thereafter by multiplying the benefit payable prior to each adjustment by a fraction the denominator of which is the statewide average weekly wage for December 31, twenty one months prior to the adjustment and the numerator of which is the statewide average weekly wage for December 31, nine months prior to the adjustment. Effective August 1, 1975.

Section 176.82. Provides that any employee who is discharged or threatened with discharge by an employer for seeking workers' compensation benefits may sue in civil action for damages. Effective August 1, 1975.

Repealer. Provides that Section 176.111, Subd. 9 and 19 are repealed. Effective August 1, 1975.

Instruction to Revisor. Provides that wherever the word workmen's is used in Chapters 79, 175 and 176 the term workers' shall be inserted.

WORKMEN'S COMPENSATION DIVISION
DEPARTMENT OF LABOR AND INDUSTRY

## SUGGESTED READING

1. Rules of Appellate Procedure and Appellate Operating Procedures which may be found in West's Iowa Legislative Service 1977, issue no. 2, beginning on pages 67 and 101, respectively, or in advance sheet no. 6 of 253 N.W.2d beginning on yellow pages 3 and 39, respectively.

2. Trott, The New Iowa Rules of Appellate Procedure 1977: A Comparison with Hints for the Practitioner, published by the Association of Trial Lawyers of Iowa, 500 Fleming Building, Des Moines, Iowa 50309.

# ATTORNEY'S LIABILITY TO THIRD PARTIES

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I. HISTORY

1. Privity: Winterbottom v. Wright, 152 Eng. Rep. 402) (Ex. 1842).

2. No Privity: Attorney's obligation is to his client, not a third party. (Real Estate title opinion), National Savings Bank v. Ward, 100 U.S. 195 (1895)

3. MacPherson v. Buick, 111 N.E. 1050 (1916)

   Limited abandonment of privity.

4. Glanzer v. Shepard, 135 N.E. 275 (1922). (Cardoza)

   Bean bag weigher
   Further abandonment of privity.

5. Iowa. Ryan v. Kanne, 170 N.W. 2d 395 (1969)

   Approach to abandonment of privity.
   Accountant's report can be relied upon by third party actually foreseen.

II. TYPES OF CLAIMS

1. Historically, claims limited to two classes:

   (a) Will Drafting: Third Party Beneficiary

   (b) Real Estate Title Opinions: Third Party Lender - detrimental reliance.

2. Now, two new areas:

   (a) Excess (Bad Faith)

   (b) Exonerated Medical Malpractice Physician

      1. Cause of Action (Claim)

         (a) Abuse of Process

         "one who uses a legal process against another to accomplish a purpose for which it is not designed."

         Probable cause and favorable termination are not essential elements.

         Sarvold v. Dodson, 237 N.W.2d 447

(b) Malicious Prosecution:

No claim without arrest or property seized. (AALFS v. AALFS (1954), 66 N.W.2d 121)

Affirming: Wetmore v. Mellinger, 18 NW 870 (1884)

(c) Negligence:

Possibly, in future, with "special" damages.

(1) Violation of Canons

(2) Expert witness - that the act or failure was in violation of the standard.

III. CANONS - ICA 610

"Are Binding Principles, not just aspirational." Iowa Court (Feb. 18, 1976) Frerichs, 238 NW 2d 769. (May be held to be standards of due care).

Standards: Disciplinary Rules.

1. Adequate Preparation.

610, DR 6-101 (A) (2)

"A lawyer shall not .... handle a legal matter without preparation adequate in the circumstances."

2. Filing a lawsuit:

(a) Determine the real defendant.

(b) Have an expert's written opinion supporting his cause to a jury.

(c) Have a prima facie case in his file, when with reasonable inquiry, the fact that no claim existed against this plaintiff could have been ascertained without filing suit.

(1) Reasonable inquiry would include review of hospital records.

(2) "in his file" means statements, reports or memos supporting the claim, even though they later may be retracted.

(d) With his client's permission.

3. Harrassment.

DR 7-102 (A) (1)

In his representation of a client, a lawyer should not: File a suit ..... when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

4. Avoid Needlessly Harming Third Persons.

EC 7-10

The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." (Emphasis added)

IV. BERLIN CASE

1. Specifications of Negligence:

Defendant attorney "filed and prosecuted a lawsuit against plaintiff without taking the proper steps to determine that there was reasonable cause to believe said cause of action existed." (Two trial attorneys testified for plaintiff).

2. Court's Instruction:

"In filing a lawsuit, against a defendant, an attorney must possess and apply the knowledge and use the skill and care and have regard for potential defendants that is ordinarily used by reasonably well qualified attorneys in the locality in which he practices or in similar localities in similar cases and circumstances."

V. DEFENSE OF PROFESSIONAL LIABILITY CLAIMS AGAINST TRIAL LAWYERS

1. Factors to Consider

(a) The limitation of actions

(b) The burden of proof

(c) The requirements for expert testimony

(d) The measure of damages; (special damages?)

(e) The "trial" within a "trial".

Each of these factors must be considered in light of the facts in the specific case and also in light of the nature of the charge in professional liability malpractice.