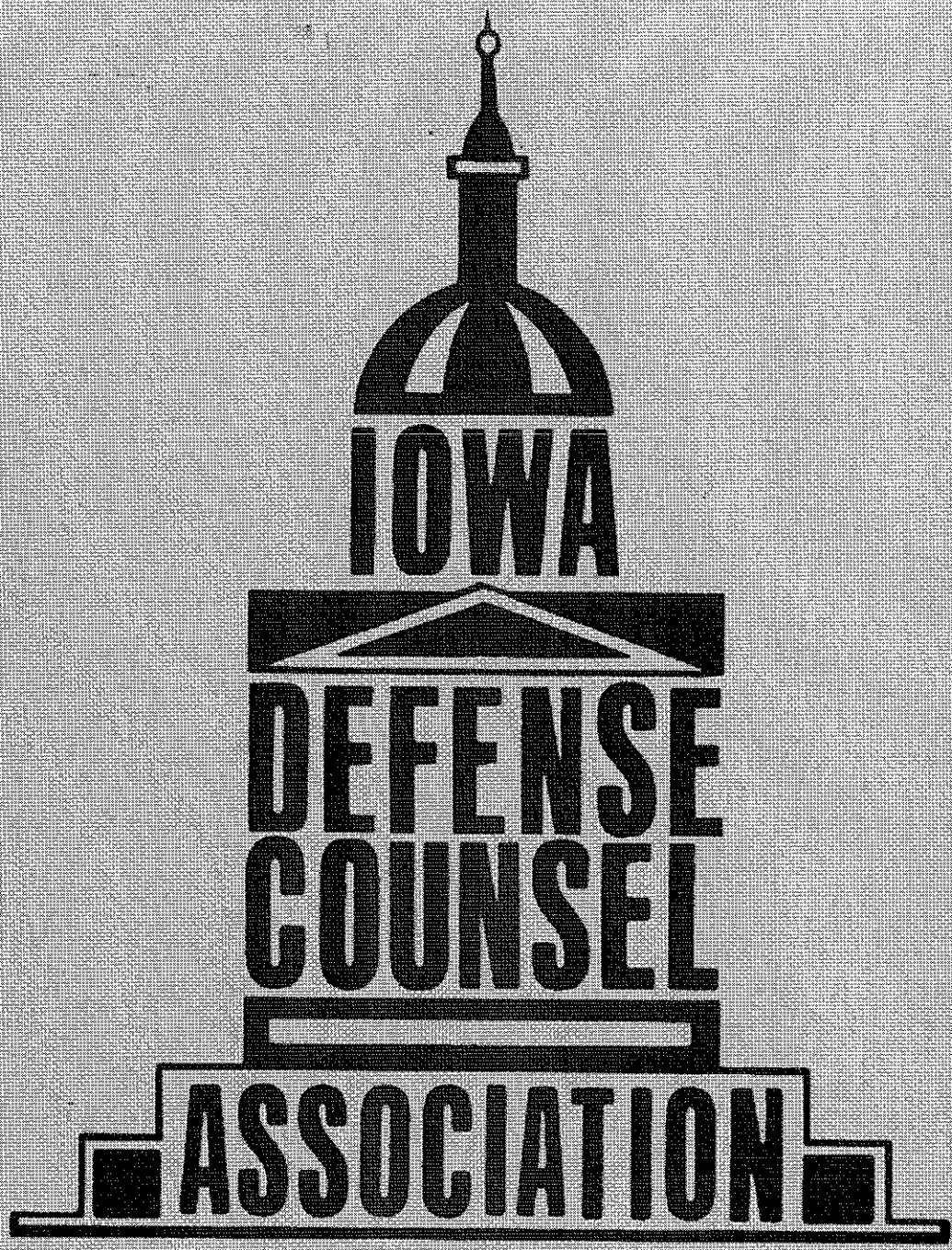

1990
ANNUAL MEETING

OCTOBER 18, 19 & 20, 1990
UNIVERSITY PARK HOLIDAY INN
WEST DES MOINES, IOWA

THURSDAY, OCTOBER 18th

8:00-8:45 a.m. **Registration**

8:45 - 9:00 a.m. **Welcome and Report of the Association**
Craig Warner and Alan Fredregill

9:00 - 10:00 a.m. **The Intoxication Defense and Annual Workers' Compensation Update**
Judith Higgs, Sioux City

10:00 - 10:15 a.m. **Break**

10:15 - 11:15 a.m. **Arson Investigation and Prosecution from the Insurance Company's Perspective**
Robert C. Burrell, Milwaukee, Wisconsin and David J.W. Proctor, Des Moines

11:15 - 12:00 noon **Evaluation of Medical Records, The Search For Truth**
Frederick R. Staab, D.C., Kansas City, Mo.

12:00 - 1:15 p.m. **Luncheon - Honorable Terry E. Branstad,** Governor, State of Iowa

1:15 - 2:00 p.m. **Rock and a Hard Place, Defense Counsel's Duty to Insured and Insurer**
Stephen Powell, Cedar Rapids

2:00 - 3:00 p.m. **The Burning Question — A practical demonstration of the examination and cross-examination of the insurance company's attorney in a first-party bad faith/arson case**
Jaki Samuelson and Timothy Walker, Des Moines

3:00 - 3:15 p.m. **Break**

3:15 - 4:00 p.m. **Lawyer Advertising in Telephone Directories**
Carroll J. Reasoner, Cedar Rapids

4:00 - 4:45 p.m. **Legal Liability for Violation of Disciplinary Rules**
Hon. Ross A. Walters, Iowa District Court Judge, Des Moines

4:45 - 5:45 p.m. **Hospitality Room Open**

6:00 - 7:00 p.m. **Cocktails**

7:00 p.m. Thursday Evening Entertainment
Western Style Barbeque Dinner

FRIDAY, OCTOBER 19th

8:45 - 9:45 a.m. **Overview of The Iowa Defense Counsel Task Force Report**
Richard Sapp, Des Moines

9:45 - 10:00 a.m. **Defense Lawyer In-House Training Program**
Jay H. Tressler, President-Elect, International Association of Defense Counsel

10:00 - 10:15 a.m. **Break**

10:15 - 11:05 a.m. **Case Concept Development — The Jury: Is What You Said What They Heard?**
Charles E. Cleveland, Ph.D., Chairman, Communication Development Company, West Des Moines

11:05 - 12:00 noon **Defending the Agent/Broker: Serving Two Masters** - Gale E. Juhl, West Des Moines

Breakout Session

10:15 - 11:05 a.m. **Conflicts of Interest — In-House Counsel's Perspective** - Wendy Munyon, Assistant General Counsel, Grinnell Mutual Reinsurance Company, Grinnell

11:05 - 12:00 noon **Relations With Outside Counsel**
Thomas C. Farr, General Counsel, Preferred Risk Insurance Company, West Des Moines

12:00 - 1:15 p.m. **Luncheon - Do Judges Have a Sense of Humor?**
Hon. Bruce Snell, Justice, Iowa Supreme Court

1:15 - 2:00 p.m. **The Labyrinth of Conflicts Between Primary and Excess Insurers** - Eugene J. Connor, Vice President, Claims Legal, Allied Group, Des Moines

2:00 - 2:45 p.m. **Thermography — Is it on the Way Out?**
Stephen C. McAliley, West Palm Beach, Fl.

2:45 - 3:00 p.m. **Break**

3:00 - 3:45 p.m. **Opening Statements and Closing Arguments The First Word and The Last Word**
William F. (Buddy) Sutton, Little Rock, Ark.

3:45 - 4:30 p.m. **Releases From The Defense Point of View**
Constance M. Alt, Cedar Rapids

4:30 - 5:00 p.m. **How To Try A Case When You Are Unprepared**
Maurice B. Nieland, Sioux City

5:00 - 6:00 p.m. **Hospitality Room Open**

6:00 - 7:00 p.m. **Reception**

7:00 p.m. **Annual Banquet**

8:15 p.m. **Donald Kaul,**
Columnist, Des Moines Register

SATURDAY, OCTOBER 20th

8:30 - 9:30 a.m. **Annual Appellate Decisions Review**
Gregory Lederer, Cedar Rapids

9:30 - 9:45 a.m. **1990 Legislative Update and Defense PAC Progress**
E.Kevin Kelly, Association Lobbyist, Des Moines

9:45 - 10:00 a.m. **Break**

10:00 - 10:45 a.m. **ERISA: Some Basics**
Charles E. Miller, Davenport

10:45 - 11:30 a.m. **Judicial Ethics, Federal Rule 11 and Iowa Rule 80**
Hon. Charles A. Wolle, United States District Court Judge, Des Moines

11:30 a.m. **Annual Meeting and Election of Officers**

OFFICERS AND DIRECTORS
1989 - 1990

PRESIDENT

Craig D. Warner
Mississippi Valley Savings Building
Burlington, Iowa 52601

PRESIDENT-ELECT

Alan E. Fredregill
200 HOme Federal Building
Sioux City, Iowa 51102

SECRETARY

David L. Hammer
806 CyCare Plaza
Dubuque, Iowa 52001

TREASURER

Eugene Marlett
5400 University Avenue
West Des Moines, Iowa 50265

BOARD OF DIRECTORS
(Date is Term Expiration Date)

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Robert L. Sudmeier - 1990
200 Security Building
Dubuque, Iowa 52001

District II

Craig L. Johnson - 1991
118 E. Main, P O. Box 1180
Marshalltown, Iowa 50158

District III

Emmanuel S. Bikakis - 1989
Suite 340, Insurance Exchange Bldg.
Sioux City, Iowa 51101

District IV

Gregory G. Barntsen - 1991
35 Main Place, Suite 300, P.O. Box 249
Council Bluffs, Iowa 51502

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18th Floor, Hub Tower
Des Moines, Iowa 50309

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200 American Building
Cedar Rapids, Iowa 52401

District VII

Larry L. Shepler - 1990
400 Main Street, Suite 102
Davenport, Iowa 52801

District VIII

Robert A. Engberg - 1992
321 N. 3rd Street
Burlington, Iowa 52601

AT-LARGE

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Marshalltown, Iowa 50158

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Des Moines, Iowa 50309

Ronald J. Shea - 1991
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Primghar, Iowa 51245

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Des Moines, Iowa 50311

* Frank W. Davis, 1965-1966

* D.J. Goode, 1966-1967

Harry Druker, 1967-1968
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Marshalltown, Iowa 50158

*Philip H Cless, 1968-1969

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307 Midlands Mall
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Dudley Weible 1970-1971
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Forest City, Iowa 50436

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300 Liberty Building
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700 Davenport Bank Bldg.
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Stewart H.M. Lund, 1976-1977
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Webster City, Iowa 50595

* Edward J Kelly, 1977-1978

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* Albert D. Vasey (Hon.) 1983

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Raymond R. Stefani, 1984-1985
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Des Moines, Iowa 50309

Patrick M. Roby, 1988-1989
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Cedar Rapids, Iowa 52406

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*Frank W Davis
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*Edward J. Kelly

Mike McCrary
Treasurer

William J. Hancock

Paul D. Wilson

ANNUAL MEETING CHAIRPERSONS

Edward F. Seitzinger
General Program Chair

Alan E. Fredregill
Program Chairperson

*Deceased

1990 Annual Meeting

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WORKERS' COMPENSATION UPDATE
THE STATUTES, THE RULES, THE CASE LAW
AND
THE NEW AND IMPROVED INTOXICATION DEFENSE

Judith Ann Higgs
701 Pierce Street, Suite 200
P.O. Box 3086
Sioux City, Iowa 51102

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STATUTE CHANGES

Iowa Code § 84A.1(2) has been amended to remove from the industrial commissioner responsibilities for administration, compliance and docket control. Those functions are to vest in the director of the Department of Employment Services.

Iowa Code § 85.36 has been amended to contain a new section which provides that the computation of workers' compensation benefits for elected or appointed officials can be based either on the rate of weekly earnings as the elected or appointed official or an amount equal to one hundred forty percent of the state wide average weekly wage. The bill is to apply to injuries incurred on or after July 1, 1990. The statewide average weekly wage for 1990 is $351.36.

Iowa Code § 85.59 has been amended to define the classes of inmates who can receive workers' compensation benefits.

Iowa Code § 85.66 has been changed to raise the ceiling on second injury fund benefits to one million dollars and to provide for collection of benefits anytime the fund goes below $500,000.

Iowa Code § 86.4 was amended to exclude from political activity only the commissioner and the chief deputy commissioners.

Iowa Code § 86.36 relates to nonresident employers and reflects the adoption of the new Iowa Model Business Corporation Act found in chapter 490.

Iowa Code § 87.4 has been amended to allow merged area schools to establish a self insurance program and to exempt those programs

from taxation or from insurance regulations.

RULE CHANGES

A new Rule 343-4.4 provides for mandatory or voluntary dispute resolution. Those matters which may be set for mandatory proceedings include the oldest quarter of contested cases which have not been scheduled for hearing, cases in which discovery deadlines have been set and are past, cases in which the principle dispute is medical benefits, cases where the only dispute is the extent of disability, cases involving disputes between carriers pursuant to Iowa Code § 85.21, equitable apportionment cases and cases where the industrial commissioner determines the dispute resolution would be in the best interest of the parties.

Rule 343-8.8 relates to payroll taxes and was amended to change the dates and percentages of withholding for social security tax.

COURT DECISIONS

1. ARISING OUT OF - HEATSTROKE.

Hanson vs. Reichelt, 452 N.W.2d 164 (Iowa 1990)

Defendants appealed and lost. Claimant/plaintiffs 1. Defendants 0.

Defendants argued that decedent's death from heatstroke while

bailing hay in 95 degree weather did not arise out of and in the course of his employment and that decedent was brain dead after cardiac arrest making his treatment thereafter neither reasonable nor necessary. The supreme court on judicial review changed the law.

The rule in past heatstroke cases had been that "[i]f the employment brings with it no greater exposure to injurious results from natural causes and neither contributes to produce these nor to aggravate their effect, as from lightning, severe heat or cold, than to those which persons generally in that locality whether so employed or not, are equally exposed there is no causal connection between the employment and the injury. But where the employment brings a greater exposure and injury results, the injury does arise out of employment." This is called the "general public increased risk" rule. It was applied in two prior cases, Wax v. Des Moines Asphalt Corporation, 220 Iowa 808, 263 N.W. 333 (1935) and West v. Phillips, 227 Iowa 612, 288 N.W. 625 (1939).

In this case the supreme court adopted the actual risk rule for cases involving exposure to the elements. That rule is that "[i]f the nature of the employment exposes the employee to the risk of such an injury, the employee suffers an accidental injury arising out of and in the course of employment. And it makes no difference that the risk was common to the general public on the day of the injury." The case was remanded to the industrial commissioner for reconsideration consistent with the actual risk rule.

2. EMPLOYEE/EMPLOYER RELATIONSHIP - OWNER/OPERATOR TRUCKER

D & C Express v. Sperry, 450 N.W.2d 842 (Iowa 1990)

Defendants appealed and lost. Claimant/plaintiffs 2. Defendants 0.

The industrial commissioner found the owner/operator was an employee and not an independent contractor. The court noted there were as many, if not more, indica of an independent contractor relationship than of an employer/employee relationship. However, the court stood by the proper standard for judicial review which of course is whether or not there is substantial evidence to support the finding the industrial commissioner made or to determine whether a contrary factual finding was demanded as a matter of law.

The parties had a written agreement whereby the owner/operator was to provide a truck and driver which he maintained, licensed and insured. He paid his own income and social security tax and had declared himself self-employed. The court concluded there was sufficient evidence in regard to control and intent of the parties to affirm the industrial commissioner's finding of an employee/employer relationship.

This case also involved a rate issue. Claimant was found to have the burden of proof as to his actual earnings. There was evidence in the record that the standard wage rate for drivers was twenty-five percent of gross receipts. Known expenses were to be deducted from the amount received to determine actual wages. The court approved the district court's notation that if the claimant

could not establish his actual earnings then Iowa Code § 85.36(8) was applicable.

3. EXCLUSIVE REMEDY - NO DENIAL OF EQUAL PROTECTION.

Suckow v. Neowa F.S., Inc., 445 N.W.2d 776 (Iowa 1989)

Claimant/plaintiff appealed and lost! Claimant/plaintiffs 2. Defendants 1.

The issue here was whether the distinction in liability between employers and co-employees infringed on claimant's access to the court and was a denial of equal protection.

Plaintiff was injured while driving the employer's truck which had a mechanical defect. He sued in district court alleging gross negligence. Defendants filed a motion to dismiss stating that workers' compensation was plaintiff's exclusive remedy under Iowa Code § 85.20. Plaintiff resisted the motion, claiming § 85.20 was an unconstitutional denial of equal protection.

Plaintiff argued that access to the court's was a fundamental right and strict scrutiny should be applied. The court said that judicial process was not essential to the exercise of a fundamental right and that § 85.20 did not infringe on a fundamental right.

The supreme court then applied the rational basis test and found that plaintiff's equal protection rights had not been violated in that there was a rational basis for the distinction between co-employees and employers because employers give up more by giving up normal defenses in workers' compensation matters.

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4. GROSS NEGLIGENCE - NO KNOWLEDGE INJURY PROBABLE.

Henrich v. Lorenz, 448 N.W.2nd 327 (Iowa 1989)

Defendants appealed and won! Claimant/plaintiffs 2. Defendants 2.

Plaintiff was injured in the course of her employment and received workers' compensation benefits. She brought an action against the plant manager and several supervisory employees alleging gross negligence pursuant to Iowa Code § 85.20 and more particularly that defendants were grossly negligent in failing to warn her of the hazardous conditions of a butt skinner, in allowing the machine to be operated when it constituted an unreasonable safety hazard, and in failing to observe, inspect, discover and prevent hazardous working conditions at the plant.

There were two primary issues. On the issue of whether the district court had subject matter jurisdiction over the case, the supreme court held that the question of whether defendants were co-employees was a matter of law and not a question which should be submitted to the jury. If the defendants were plaintiff's employer, then the district court lacked jurisdiction pursuant to Iowa Code § 85.20. The court looked at the definition of employee under Iowa Code § 85.61 and found that the legislature intended supervisors and managers be included in the broad definition of employee and that these defendants were co-employees. Therefore, the district court properly had jurisdiction.

The supreme court concluded that plaintiff had failed to prove

gross negligence of any defendant in that she had not shown an injury was probable as opposed to possible. Evidence considered included the number of prior injuries with the machine and their degree of seriousness. The supreme court ruled that a judgment not withstanding the verdict should have been granted.

McAndrew v. Cadwallader, 452 N.W.2d 810 (Iowa App. 1989)

Claimant/plaintiff appealed and lost. Claimant/plaintiffs 2. Defendants 3.

Plaintiff developed asthma as a result of intermittent exposure to paint fumes in the work place. From November of 1981 plaintiff was a touch-up as opposed to a spray-painter. Respirators were issued to painters upon request although plaintiff never requested a respirator and allegedly was told by one of the defendants in this matter that a respirator was not necessary. None of the defendants in this case had safety training in the use of paint. One said he knew there was increased danger with use of a particular kind of paint, but he was unaware that paint was being used. The district court granted defendants' motion for directed verdict.

The court of appeals found plaintiff failed to establish defendants had knowledge that injury was probable as opposed to possible. There was no evidence other workers had developed asthma as a result of the exposure. Defendants themselves had gone into spray booths without respirators. There was no evidence plaintiffs' exposure exceeded safety standards. There was no evidence defendants were placed on notice by safety inspections

that exposure levels were such that an injury was probable. The district court's granting of summary judgment was affirmed.

5. GROSS NEGLIGENCE - INSUFFICIENT EVIDENCE FOR SUBMISSION TO THE JURY.

Konz v. Ehly, 451 N.W.2d 504 (Iowa App. 1989)

Claimant/plaintiff appealed and lost! Claimant/plaintiffs 2. Defendants 4.

The plaintiff appealed a district court's ruling sustaining defendants' motion for summary judgment. Defendant and plaintiff, employees of the University of Iowa, were to attend a convention in Detroit, Michigan. Defendant, a professor, secured a van owned by the University of Iowa for purposes of transporting seven university employees and two spouses to the Detroit convention. Plaintiff was injured when the van was involved in a one vehicle accident and sued defendant alleging that he was grossly negligent in the operation of the van to the degree that his actions amounted to wanton neglect for her safety.

The court of appeals applied the undisputed facts to the law and determined that no genuine issue of material fact existed and therefore summary judgment was proper.

6. GROSS NEGLIGENCE - SUFFICIENT EVIDENCE FOR SUBMISSION TO THE JURY.

Swanson v. McGraw, 447 N.W.2d 541 (Iowa 1989)

Claimant/plaintiff appealed and won. Claimant/plaintiffs 3. Defendants 4.

The plaintiff sued two fellow employees alleging gross

negligence under Iowa Code § 85.20. He suffered a work-related injury when caustic soap he was using to clean machinery leaked through a hole in his protective rain suit. As a result of that leak, he received third degree chemical burns on his right leg. He told his supervisors of the hole in his suit. At the close of plaintiffs' evidence, the district court sustained the defendant's motion for directed verdict.

The supreme court remanded finding that defendants knew the soap was dangerous as the barrels carried warning labels, other employees had been burned, and the company issued protective gear. The court viewed the situation as "an accident waiting to happen." The opinion said "observation, experience and common sense should have told these defendants that the longer the dangerous situation persisted, the chance of injury passed from the realm of possibility to the realm of probability. We think the jury should have been allowed to determine whether the realm of probability had been reached."

7. INDEPENDENT CONTRACTOR - NEWSPAPER CARRIER.

Lafleur v. Lafleur, 452 N.W.2d 406 (Iowa 1990)

Defendants appealed and won. Claimant/plaintiffs 3. Defendants 5.

The plaintiff was injured when his father ran over him while the family was delivering newspapers published by the defendant newspaper company. After the plaintiff became of age, he sued his father for negligence and the newspaper company on a theory of respondeat superior claiming that the father was an employee of the

newspaper.

Plaintiff's brother and sister had written contracts with the newspaper. Plaintiff and his father had no contracts. The father had entered a consent and guarantee agreement on behalf of the children with the newspaper. The district court overruled the company's motion for summary judgment.

The supreme court considered the amount of control the company exercised over its carriers, examined the carrier contract specifically and found that the company had some control over the way the carriers were to deliver newspapers. However, that control was not deemed sufficient to establish an employee/employer relationship.

The court noted that the terms of the carrier contract were clear in that the parties intended the carrier would be an independent contractor and not an employee. There was an express provision that the carriers could use their own methods. Compensation was based on the result obtained, not the labor performed. Carriers were not compensated by salary or commission and received no employee benefits. The carriers could employ helpers and terminate service to nonpaying customers. They also could seek new business, but they were not required to do so. They had to furnish their own supplies.

The case was remanded for an order sustaining the company's motion for summary judgment.

8. NOTICE - OCCUPATIONAL DISEASE.

Croft v. John Morrell & Co., 451 N.W.2d 501 (Iowa App. 1989)

Claimant/plaintiff appealed and won. Claimant/plaintiffs 4. Defendants 5.

The question appealed was whether claimant failed to give notice as required by Iowa Code § 85A.18.

Claimant who had been employed as a meat packer for nearly forty years saw a physician on April 6, 1982 for breathing complaints which he related to his work at John Morrell. He became incapacitated from working on April 26, 1985 and retired. The industrial commissioner held that April 6 was the first distinctive manifestation of his disease pursuant to Iowa Code § 85A.18 and that his time for giving notice began to run at that point. As claimant had not given notice at that time, his action was barred.

Interestingly, the court of appeals relied upon the title of § 85A.18, "Notice of disability or death - filing claims," in reasoning that the statute does not require an employee to notify the employer of symptoms. Rather the statute refers to "disability" which the court determined means "lack of ability to work." The court believed that the industrial commissioner's application of the statute meant that the claimant was required to give notice before the claim for disability had matured. The court held that "the date for beginning the 90-day notice period under § 85A.18 starts when the disease progresses to the point that the employee because of pain or physical inability is no longer able to work" making the notice requirement for an occupational disease

consistent with the notice requirement in Iowa Code § 85.23.

9. OCCUPATIONAL DISEASE

Frit Industries v. Langenwalter, 443 N.W.2d 88 (Iowa App. 1989)

Defendants appealed and lost. Claimant\plaintiffs 5. Defendants 5.

The commissioner had awarded twenty-five percent industrial disability to a worker with lead poisoning. The claimant was functionally illiterate. He had work experience as an auto mechanic, assembly line worker, roofer, painter, and die maker. He was a recovering alcoholic who was diabetic and suffered from hypertension. He had worked for Frit from 1974 to 1982. He was terminated and got his job back through an arbitration. He became ill again after a short time. Testing showed increased blood lead levels. He was dismissed again. In 1984, a toxicologist found no current signs of lead intoxication or permanent disablement from the past lead exposure.

Defendants argued that there was insufficient proof of causation. The court of appeals repeated standards from past cases which are that the "claimant must show by a preponderance of the evidence (1) the disease is causally related to the exposure to harmful conditions of the field of employment and (2) the harmful conditions must be more prevalent in the employment concerned than every day life or in other occupations." The court did not think it was necessary for claimant to be physically unable to perform his job or have permanent signs of lead intoxication before an occupational disease finding could be made. The court found that

the fact that claimant had increased lead levels when he returned to work as a result of an arbitration decision to be sufficient.

The commissioner found no permanent physical disablement but he found a loss of earning capacity. That loss seems to be based on the fact that the claimant had unsuccessfully applied for work on eight occasions and that he must of necessity refrain from working in environments where he was exposed to lead. The award of a twenty-five percent industrial disability was affirmed.

10. ODD LOT

Haney v. Protein Blenders, Inc., 445 N.W.2d 398 (Iowa App. 1989)

Defendants appealed and won. Claimant/plaintiffs 5. Defendants 6.

Claimant had been awarded a fifteen percent industrial disability. On review before the district court the claimant argued failure by the industrial commissioner to consider the odd lot doctrine. The district court remanded and defendants appealed.

Claimant argued before the district court that the industrial commissioner had failed to examine all factors within the odd lot doctrine. *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 105 (Iowa 1985) The court questioned whether or not the odd lot issue was before it and assumed that it was.

The court of appeals found there was no prima facie showing by the claimant that the only services he could perform were so limited in quality, dependability or quantity that a reasonably stable market for them did not exist. More specifically claimant failed to present convincing evidence that there were no jobs

available. The claimant's condition didn't prevent his looking for work, but he had refused to seek employment and would not consider the possibility of vocational rehabilitation. Claimant was not an odd lot.

11. RETALIATORY DISCHARGE.

Niblo v. Parr Manufacturing, Inc., 445 N.W.2d 351 (Iowa 1989)

Defendants appealed and lost. Claimant\plaintiffs 6. Defendants 6.

Plaintiff developed a skin condition which was diagnosed as work-related. She talked with her supervisor who at first ignored her and later said her medical expenses would not be paid. She then talked with the president of the corporation who told her he would not pay workers' compensation or unemployment and fired her on the spot.

Plaintiff brought an action for retaliatory discharge and recovered both lost wages and damages for emotional distress.

Defendants claimed there was insufficient evidence that plaintiff was going to file a workers' compensation claim for the question to go to the jury and in fact she had not filed for workers' compensation. The supreme court held there was sufficient evidence for the jury to deduce that the plaintiff was discharged for workers' compensation reasons.

Defendants argued that emotional distress was not a proper element of damage for tortious interference with contract of hire. The supreme court held that emotional distress damages are recoverable for retaliatory discharge in violation of public

policy.

Defendants next contended that for the emotional distress to be recoverable, it must be severe. The supreme court held that there was no logical reason to require plaintiff to prove that emotional distress was severe when the tort of retaliatory discharge is a violation of public policy.

Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989)

Defendants appealed and lost. Claimant\plaintiffs 7. Defendants 6.

Plaintiff was employed by defendant as a receiving clerk and custodian in the food service area from August 1977 until his dismissal on January 28, 1985 at age 55. Plaintiff suffered minor injuries in the past and was reimbursed. The only incident of a serious nature occurred in September, 1983 when plaintiff suffered a back injury. It was not until August, 1985, seven months after his discharge that plaintiff filed a workers' compensation claim for a back injury. Plaintiff had received satisfactory evaluations with his work performance, but he was subject to numerous disciplinary actions. During the winter break in December of 1984, plaintiff notified the school of a hygiene problem and of his action to remedy the situation. When he returned to work in January of 1985, the director of food service required a medical release which he obtained. He subsequently was discharged.

Plaintiff made claims based on physical disability, discrimination, retaliatory discharge, breach of employment contract and breach of covenant of good faith and fair dealings and

age discrimination. The trial court dismissed the first four on a motion for summary judgment and a jury rejected the fifth.

The supreme court rejected plaintiff's claim that he was entitled to relief based on retaliatory discharge for filing a workers' compensation claim. The record revealed that he never gave defendants reason to believe he intended to file a workers' compensation claim based on his 1983 back injury. His supervisor testified to no knowledge of claimant's intent to file such a claim.

12. SCHEDULED MEMBER INJURY - FACIAL SCARRING.

Brynes v. Donaldson, Inc., 451 N.W.2d 810 (Iowa 1990)

Claimant appealed and lost! Claimant\plaintiffs 7. Defendants 7.

Claimant, a factory worker, who had severe burns to the face, neck and arms received a permanent facial scar above the lip resulting in an appearance of constant sneering. The deputy who presumably had the opportunity to see the scar awarded benefits which the industrial commissioner took away.

Iowa Code § 85.34(2)(T) provides:

> For permanent disfigurement of the face or head which shall impair the future usefulness and earnings of the employee in the employee's occupation at the time of receiving the injury, weekly compensation for such period as may be determined by the industrial commissioner according to the severity of the disfigurement, but not to exceed one hundred fifty weeks.

The court said that: "[a]lthough this subsection of the workers' compensation law is included among the scheduled permanent injuries, eligibility for benefits is conditioned showing an

industrial disability in the particular occupation in which the claimant was injured." The opinion went on to say that claimant's entitlement was conditioned on a showing that her future usefulness and earnings in factory work would be impaired. Potential loss of earnings in different industries would not entitle claimant to benefits under § 85.34(2)(T).

13. STATUTE OF LIMITATIONS - BENEFITS PAID IN ANOTHER JURISDICTION.

Saywer v. National Transportation Co., 448 N.W.2d 306 (Iowa 1989)

Claimant appealed and lost! Claimant\plaintiffs 7. Defendants 8.

Claimant, a Nebraska resident who was represented by counsel, was injured in an accident in Iowa on January 14, 1981. He was paid benefits and received a lump sum settlement pursuant to Nebraska law which was approved on August 6, 1984. A release was given. On March 4, 1985, claimant filed a petition in Iowa seeking benefits for the same injury.

Although the deputy industrial commissioner awarded benefits, the industrial commissioner held that a claim for Iowa benefits was barred by the statute of limitation pursuant to Iowa Code § 85.26(1) and 86.13.

Claimant contended before the court that the failure of the insurance carrier to file a memorandum of agreement stopped the running of the statue and that the industrial commissioner had erred in concluding that payment of Iowa benefits was necessary to toll the statute. The court agreed with the commissioner that:

"Section 86.13 specifically provided that '[s]uch agreement shall be approved by said commissioner only when the terms conform to the provision of this [chapter 86] and chapter 85.' Chapters 85 and 86 of the 1981 Iowa Code, on their face, apply only to Iowa workers' compensation and the Iowa industrial commissioner."

In addition the supreme court affirmed the district court's holding that no classification existed which denied claimant equal protection.

AGENCY DECISIONS

1. APPORTIONMENT OF DISABILITY.

Brown v. Nissen Corp. File No. 837608 (November 30, 1989) Appealed to district court, pending.

Claimant had a degenerative condition in her back and a number of minor injuries. In 1984 she had a major injury producing radicular symptoms. She recovered and returned to work for approximately six months. Her work included overtime. She was then reinjured in July of 1985 and never returned to gainful employment. The injury in July was found to be the cause of her permanent disability in that her work restrictions changed significantly after that injury. Her loss of earning capacity was attributed to the July incident.

2. ARISING OUT OF EMPLOYMENT - PSYCHOLOGICAL INJURY.

Render v. Iowa Department of Human Services, File No. 765147 (May 15, 1989) Appealed to district court, pending.

Claimant had a long history of psychological disturbances.

She has been employed by the employer for seventeen years despite numerous hospitalizations for psychological difficulties and almost constant psychological treatment. In March of 1982, she appeared to be getting along well at her job, but her condition deteriorated and she was hospitalized. She did not fully recover from that episode. Subsequent problems she experienced were found to be the result of her underlying personality disorder which did not arise out of and in the course of her employment. The Wisconsin rule was cited with approval.

3. ARISING OUT OF - SWALLOWING A CHICKEN BONE.

Klodt v. Hillside Manor Care Center, File No. 855422 (August 17, 1989)

Claimant allegedly swallowed a chicken bone at work. She was denied benefits by the commissioner who found that eating a chicken bone is equally hazardous whether it occurs at work, home or in a restaurant.

4. BURDEN OF PROOF AS TO INJURY.

Mercan v. Iowa Department of Transportation, File Nos. 809975/803246 (August 17, 1989)

Claimant alleged a fall at work which was his second alleged work injury to his back within an eight month period. Three witnesses testified that claimant's spouse had predicted the fall. Claimant did not seek immediate medical care in spite of his allegations of severe pain. The fall was unseen and unheard by any coworker. The commissioner concluded that the fall did not happen

and no work injury occurred.

5. CREDIT FOR GROUP PLAN BENEFITS - PROCEDURE.

Bakalar v. Woodward State Hospital - School, File No. 756871 (June 16, 1989)

Claimant received an award of benefits. Neither party appealed. Defendant then claimed a credit under Iowa Code § 85.38(2) which exceeded the amount of the award. Claimant went to district court in an attempt to enforce the award. Defendants went to the deputy for a ruling apparently on the credit issue. The deputy declined to rule. The deputy's refusal to rule was appealed to the industrial commissioner. The industrial commissioner said that an employer may unilaterally establish the amount of credit under Iowa Code § 85.38(2). If a dispute develops regarding the amount of credit a new petition should be filed to make that determination.

6. INDUSTRIAL DISABILITY - LAYOFF

Wales v. Catipillar Tractor Co. File No. 763660 (March 31, 1989)

Claimant claimed that because he was not called back to work after a work injury he had industrial disability. The commissioner said industrial disability is loss of earning capacity not merely a loss of earnings. Claimant had a back injury and was under a forty-five pound weight restriction. He had a chronic back problem. There was no medical opinion that there was a causal connection between the work injury and claimant's restrictions after the work injury.

7. INDUSTRIAL DISABILITY - SPECULATION.

Meyer v. John Kirby, Inc., File No. 826937 (March 31, 1989)

Claimant was injured and compelled to leave work. He enrolled in college to become an accountant's assistant. The deputy commissioner considered claimant's probable future earning in such a position. On appeal it was held that future earnings constituted speculation and should not be considered in determining the present industrial disability; however, claimant's enrollment in a college program could be considered for its relevancy to such factors such as motivation and intelligence.

8. INDUSTRIAL DISABILITY - SPECULATION.

Schmitz v. Aron's Construction Co., File No. 83404 (June 2, 1989)

Claimant's doctor gave a rating of ten percent of the body as whole, but testified that there was a fifty-fifty chance that the claimant would develop arthritis anywhere from five to ten years in the future. In the event arthritis developed, the rating would be doubled. The industrial commissioner held that what might happen in the future would be speculative and that claimant would have the potential for a review reopening if arthritis did develop. The claimant argued that if arthritis did not develop for some time, his claim could be barred by the statute of limitations. The industrial commissioner said the time for filing a review-reopening was governed by the legislature. He considered present industrial disability only.

9. INDUSTRIAL DISABILITY - SPECULATION

Knight v. Prince Manufacturing, Co. File No. 733994 (June 2, 1989) Appealed to district court, dismissed.

Claimant had an injury to his back. In assessing industrial disability, the deputy noted that the claimant was working, but some portion of the award also was based on claimant's earning capacity in the future should his employment with his employer cease. The industrial commissioner said that utilizing the relieve stability or instability of claimant's employing company was not relative to the determination of industrial disability and that basing an award on that factor would be improper speculation. Industrial disability must be based on the claimant's present condition and not on what might happen in the future.

10. IN THE COURSE OF - OFFICE PARTY.

Hursey v. Gary and Pat McClure d/b/a Country Cottage File No. 844849 (November 22, 1989)

Claimant cut her thumb while carrying cups at a Christmas party on the employer's premises. The industrial commissioner held that a general boost to morale was not enough to constitute a benefit to the employer which would place the claimant in the course of her employment. In this particular case there was testimony that the morale of the employees was already good and did not need improvement. There was no plan that employers would give employees gifts or make speeches. No injury arising out of and in the course of employment was found.

11. LIABILITY DISPUTES - § 85.21

Chubb Group of Insurance Companies v. CNA, File No. 832446. (August 23, 1989)

The insurance carrier at the time a worker missed work for a compensable period was the carrier responsible for benefits in a cumulative injury situation. The insurance carrier who had not paid was ordered to reimburse the carrier who did pay and to pay interest on weekly benefits. Interest on medical benefits and attorneys fees for the successful carrier were not awarded.

12. PREEXISTING CONDITION - ASTHMA.

Morris v. Champion Glove Manufacturing Co., File No. 813735 (October 17, 1989)

Claimant had preexisting asthma. She had an asthma attack after working in a dusty environment and was hospitalized. She returned to work and again had an attack. She argued she was entitled to permanency benefits because she could not work in a dusty environment. Although the medical evidence established the condition necessitated a change in working environment, it was not caused by the work but preexisted it. Claimant was awarded temporary total disability only.

13. PROCEDURE - APPEAL.

Rexroat v. Midwest Manufacturing Co. File No. 883562 (May 10, 1990)

Claimant filed a timely notice of appeal but did not file a timely affidavit saying that a transcript had been ordered. The defendants filed a motion to dismiss. The industrial commissioner

held that the commissioner had jurisdiction because the appeal was timely and that failure to file the affidavit was merely procedural and did not defeat the jurisdiction. The industrial commissioner however retained the ability to impose a sanction for failure to file the affidavit. In this case no sanctions were imposed because the transcript was filed seventeen days after the notice of appeal.

14. PROCEDURE - THEORY OF INJURY.

Deheer v. Clarklift of Des Moines., File No. 804325 (May 12, 1989) Appealed to District Court, affirmed.

Claimant had back pain while lifting a fourteen pound object. A petition was filed based on that traumatic injury. The deputy found from the evidence that a cumulative injury had occurred and used the date the back pain manifested itself as the date of injury. That date was the date the claimant left work. The commissioner approved the deputy's actions.

The deputy found a healing period that differed from the stipulation of the parties. Depositions of the physicians put the defendant on notice of a possibility of a cumulative injury and therefore there was no surprise.

15. PROCEDURE - THEORY OF INJURY.

McCoy v. Donaldson Co., Inc., File No. 805200/752670 (April 28, 1989) Appealed to district court, pending.

Claimant alleged two traumatic injury dates. The injury was bilateral carpal tunnel syndrome. The industrial commissioner approved the deputy's finding of a cumulative injury even though

two traumatic injuries had been pled.

16. REVIEW-REOPENING - FURTHER TREATMENT.

Cornwell v. Griffin Wheel Co., File No. 841129 (June 16, 1989)

Claimant had a ten percent functional impairment of his lower extremity after knee surgery. An additional surgery was performed, but the functional impairment rating remained the same. Claimant argued that because more of his body was gone, he should have an increased impairment. No further benefits were awarded.

17. REVIEW-REOPENING - LIBERALIZED RESTRICTIONS.

Anderson v. J. I. Case Co., File No. 673653 (January 1989)

Claimant had settled his case. His based his review reopening on the fact that a doctor had raised his lifting restriction from twenty-five to fifty pounds. He had presented himself to his employer for reemployment because of the more liberal lifting restriction, but employment was denied. The record showed hostility between the claimant and the employer as a possible reason for the refusal to rehire. All other medical evidence was that the claimant's condition had not changed.

18. REVIEW-REOPENING - SETTLEMENT.

Claimant entered into a settlement based on impairment of his toes. He subsequently filed a review-reopening complaining that his gait had been affected and that in turn caused back problems. He also claimed that he had a mental condition - a fear of working around heavy machinery as a result of the earlier injury.

The settlement documents showed that his gait and back were

already affected at the time of the settlement. He did not prove that his condition became worse after the settlement. The evidence he was trying to present on review reopening was that his present condition was different from his condition prior to the injury. He had said that he had nightmares about the injuries ever since the accident. No change of condition was found.

19. REVIEW-REOPENING - VOLUNTARY RETIREMENT.

Gallardo v. Firestone Tire and Rubber Co., File No. 643357 (December 29, 1989)

Claimant had a hearing and he was awarded benefits as a result of that hearing. Evidence was that claimant had asserted to his doctor he could not perform any jobs for his employer. The employer had kept him working and claimant said at hearing that he was being paid to do nothing.

Following the award of benefits, claimant worked for two weeks and then decided to retire early alleging that it was dangerous for him to work around equipment because of his condition. He then filed for review reopening and filed an appeal of the first award. The medical evidence established no physical change. The claimant relied on the fact that he was no longer working for his employer. The industrial commissioner held that any nonphysical change of condition was caused by the claimant's own change of plans rather than any injury.

THE NEW AND IMPROVED INTOXICATION DEFENSE

I. THE LAW.

A. Old Iowa Code § 85.16(2): "When intoxication of the employee was the direct proximate cause of the injury."

B. New Iowa Code § 85.16(2): "By the employee's intoxication, which did not arise out of and in the course of employment, but was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury."

C. Related statutes

(1) Iowa Code § 321J.2(1)(B): "A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions: (a) while under the influence of an alcoholic beverage or other drug or a combination of such substances (b) while having an alcoholic concentration as defined in § 321J.1 of .10 or more."

(2) IOWA CODE § 730.5(2) Except as provided in subsection 7, an employer shall not require or request employees or applicants for employment to submit to a drug test as a condition of employment, preemployment, promotion, or change in status of employment. An employer shall not request, require conduct random or blanket drug testing of employees. However, this section does not apply to preemployment drug tests authorized for peace officers or correctional officers of the state or to drug tests required under federal statutes or to drug tests conducted pursuant to a nuclear regulatory commission policy statement, or to drug tests conducted to determine if an employee is ineligible to receive workers' compensation under section 85.16, subsection 2.

II. CASE LAW INTERPRETATION.

A. Old Law.

1. *Reddick v. Grand Union Tea Co., 230 Iowa 108, 117, 296, N.W. 800 (1941) ("Intoxication, in order to be defense, must have been the proximate cause of the injury."*

2. Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 178 (Iowa 1979) (insufficient evidence to show intoxication was a proximate cause of the injury.)

3. Hawk v. Jim Hawk Chevrolet - Buick, Inc., 282 N.W.2d 84 (Iowa 1979)

4. Lamb v. Standard Oil, 250 Iowa 911, 96 N.W.2d 730 (1959) (.196 alcohol level)

5. Danico v. Chamber of Commerce, 232 Iowa 318, 5 N.W.2d, 619 (1942)

6. Birch v. Malvern Cold Storage Co., 230 Iowa 357, 358, 297 N.W. 818. (1941) (injury due to inadvertence of right front truck wheel coming in contact with a row of loose material along the right hand side of the roadway which pulled the truck westward into the ditch.)

7. American Bridge Co. v. Funk, 187 Iowa 397, 173 N.W. 119 (1919)

8. Dorman v. Carroll County, 316 N.W.2d 423 (Iowa App. 1981)

B. New Law.

1. *State v. Bratthauer, 354 N.W.2d 774 (Iowa 1984) (intoxication can be established from evidence other than blood alcohol level.)*

2. Rigby v. Eastman, 217 N.W.2d 604, 608 (Iowa 1974) (weight to be given to results of chemical tests for intoxication is for the trier of fact.)

3. *State v. Stout, 247 Iowa 453, 74 N.W.2d 208 (1956) ("while a precise line is not easily drawn regarding whether or not a person is intoxicated, it is certain that a person need not be staggering drunk before they are legally intoxicated.")*

4. *State v. Werling, 234 Iowa 1109, 13 N.W.2d 318 (1944) (the issuance of an opinion regarding intoxication based upon blood alcohol test is competent.)*

5. *State v. Baughn, 162 Iowa 308, 143 N.W. 1100 (1913) ("When a person from the use of intoxicating liquors, has effected his reason or his faculties, or has rendered him incoherent of speech or has caused him to loose control in any manor, or to any extent of the action or motion of his person or body, such person, in contemplation of the law, is intoxicated.")*

6. *State v. Pierce, 65 Iowa 85, 21 N.W. 195 (1884) (person is drunk when "so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired by the liquor.")*

C. Agency Precedents.

1. Den Hartog v. Farmers Coop Oil Association, File No. 777409 (district court affirmed, supreme court pending) (Benefits awarded)

2. Rude v. Highland Potatoe Chip Co., File No. 742548 (Benefits awarded)

3. Hosch v. Bork Transport, Inc., File No. 804991 (district court appeal pending) (Benefits denied)

4. Jayne v. Atlantic Steel Erectors, File No. 830449 (Benefits denied)

5. Stull v. Trusedale Coop Elevator, File No. 780309 (district court affirmed; supreme court remanded for agreement for settlement) (Benefits awarded)

6. Shelton v. Ruan Transport Corp., File No. 738188 (district court affirmed; court of appeals affirmed) (Benefits denied)

7. Albertson v. I-29 Diesel, File Nos. 745347 (appeal to the industrial commissioner, settled by special case) (Benefits awarded)

III. BURDEN OF PROOF.

A. Claimant's initial burden on arising out of and in the course of.

B. Defendants burden as to affirmative defense

1. Intoxication

2. Substantial factor

C. Substantial factor.

1. *Republic Indemnity Company of America v. Workers' Compensation Appeals Board, 187 Cal. Rptr. 636, 639, 138 Cal. App. 3D 44, 47 (App. 1982):*

Reduced to its simplest terms this case involves a severely intoxicated individual working in an area and under circumstances familiar to him who, without being pushed, shoved or interfered with in any way falls to the floor in such a manner as to injure himself.

....

The effect of alcohol, especially the amount of alcohol which must be consumed to produce a .429 blood alcohol level on an individual's reaction, coordination and muscular control is a matter of common knowledge. No reasonable person under the above set of circumstances, could reach any conclusion other than the intoxication was a substantial factor in causing the individual to fall and injure himself.

....

On the other hand in the case of a slip and fall such as the one at bench or any other accident not involving external trauma or force but involving only the reactions, coordination or muscular control of the applicant, intoxication which substantially impairs those functions must necessarily be viewed as a substantial factor in causing the accident.

2. *Smith v. Workers' Compensation Appeals Board, 176 Cal. Rptr. 843, 849-50, 123 Cal. App. 3D 763, 774-75 (App. 1981)*

There is conflicting evidence in the record regarding intoxication. Petitioner cites uncontradicted testimony of witnesses that Smith drove up to the mountain, spent nearly two hours outside in very cold, wet conditions, supervising and assisting in efforts to retrieve the back hoe. He appeared sober to his coworkers and functioned normally. He went down the muddy, slippery bank, without difficulty, to put slings on the back hoe, whereas Morris slipped going down. No one was drinking at the site. Such evidence indicates Smith was not intoxicated.

> However, other evidence supports the conclusion of intoxication. The coroner's report states that Smith's blood contained .25 percent by weight of alcohol. Dr. Hayes testified that anyone, whether he had tolerance to alcohol or not, would be intoxicated at this high blood alcohol level, and that, at such a blood alcohol level, a person would have impaired judgment, impaired sensory perception, and slow reaction time. Although the results of blood tests are not conclusive and must be weighed with all other evidence ... based on the conflicting evidence, the board's finding that decedent was intoxicated is clearly supported by substantial evidence.
>
> ....
>
> Once the board found, on ample evidence, that decedent was intoxicated, the testimony of Dr. Hayes that anyone's judgment and reaction time would be impaired seriously at that blood alcohol level provides the basis for an inference that such impairment was a substantial factor in bring about the accident. We cannot say that such an inference is unreasonable. The existence of numerous circumstances that would support other, conflicting inferences is not a basis for overturning the decision.

IV. MIXTURE OF FACTS AND CIRCUMSTANCES.

A. Physical evidence.

1. Liquor containers, pill bottles, drug paraphernalia, food cartons.

   a. kind

   b. number

   c. bar bill

2. Blood samples.

   a. identified

   b. type-blood, breath, urine, saliva

c. when taken

d. by whom

e. adequacy of sample

f. equipment used

g. prior emergency treatment

h. alcohol after the accident

i. chain of custody

j. result

3. Machinery or vehicle.

a. last maintenance

b. defective parts

c. ownership

4. Road condition reports.

5. Weather reports.

6. Accident reports.

7. Accident photographs.

8. Traffic citations.

9. Medical records of prior alcohol or drug treatment.

B. Circumstantial Evidence.

1. Worker.

a. clothing - disarranged, soiled

b. breath

c. attitude - excited, happy, talkative, profane, combative

d. physical manifestation - hiccupping, belching, fighting, vomiting

e. speech - garbled, slurred, mumbled, thick tongued, confused

f. movement - balance, walking

g. food and drink consumption - what, when, where, with whom

h. recent sleep patterns

i. preexisting physical condition

j. recent medical or dental treatment

k. medication taken on a regular basis

2. Place of the injury.

3. Time of injury.

4. Ambiance of the injury.

a. other persons

b. maps or notation of directions

c. brief case of sample cases

d. cigarettes

e. car litter

5. Treatment by the employer of use of alcohol

a. condonation/condemnation

b. furnishing of

c. payment for

V. WITNESSES.

A. Lay.

1. Generally.

a. reliability

b. intoxicated or impaired

c. relationship to employee

d. opportunity to observe

2. To injury.

3. To facts and circumstances.

a. bartenders

i. what served

ii. when

iii. observation

b. friends or drinking buddies

c. other drivers

i. exaggerated maneuvers

ii. high speed or very slow speed

iii. closer clearance

iv. random lane changes

v. inappropriate breaking or stopping

B. Expert.

1. Medical examiner.

2. Toxicologist.

3. Pathologist.

4. Accident reconstructionist.

5. Investigating officer.

VI. POTENTIAL FOR OTHER DEFENSES

A. Traveling employee.

B. Social.

B

A R S O N

INVESTIGATION AND PROSECUTION

FROM THE INSURANCE COMPANY'S PERSPECTIVE

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1100 Des Moines Building
Des Moines, IA 50309-2464
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B

THINGS YOU WOULD NEVER KNOW IF YOU DIDN'T INVESTIGATE ARSON FIRES

Most people are "out of town" when their house burns.

A lot of people are "at the lake" when their house burns.

Genie's start a lot of arson fires. Who else can get into buildings without using forcible entry or a key?

There are judges and prosecutors who don't believe in arson or in circumstantial evidence.

There are people who keep their fire insurance policies in their car glove compartments instead of in the house or in their safety deposit box. Many of them still believe that you have to produce your policy before you can collect your insurance money.

Restaurants and bars seldom burn when they are open. Invariably they burn between 2:00 a.m. and 5:00 a.m.

People who would never rob a drugstore or burglarize a residence will not hesitate to burn their property.

A lot of jurisdictions do not report arson fires to the FBI.

There are still quite a few fire chiefs who do not "want to get involved" in arson.

There are still fire departments who think that arson is a law enforcement problem - and vice versa.

Many Missourians still believe that arson is a private matter to be settled by the insured and the insurance company. Nobody else should interfere. Also, a lot of these people turn up on juries.

You can't arrest someone for arson because you "know" in your heart they did it. You can't even arrest someone if "everybody" knows they did it.

Contrary to popular belief, you don't have a case if you can't prove arson in a court of law, even if "everybody" knows it's arson.

The fire marshal's investigators, during the past seven years, have made one or more arrests in three out of every ten arson cases they investigate. In three or four of the remaining seven cases they know either who did it or why it was done (or both) but can't prove it.

People who never lie about anything will lie to the arson investigator. And you can always tell when they're lying - their lips move.

For some reason, businesses that are losing money burn a lot more often than businesses that are making money.

Arsonists have a tough time fooling the gas company.

People who are current on their house payments have fewer fires than people who are behind on their payments.

Some Missourians are so unlucky that they have had several disastrous fires over the years. Some of these people have a lot of burglaries too.

Other Missourians are luckier. By chance they have left valuable items like TV's and silver services with neighbors for safekeeping when their house burned while they were visiting Grandma in Arkansas. They also are lucky because they brought all their photo albums with them to show Grandma. Yes, they always carry their Bible while travelling. When was the last time they visited Grandma? April of 1977!

Arsonists who fail in their efforts to defraud an insurance company are not likely to commit arson again.

We are not winning the arson war.

By Jim Helbig

Missouri State Fire Marshal

B

LETTER OF REFERRAL TO COUNSEL

January 3, 1990

Mr. David J. W. Proctor
Bradshaw, Fowler, Proctor & Fairgrave
1100 Des Moines Building
Des Moines, IA 50309-2464

RE: Our Insured: Mick Belcker, d/b/a Dog Breath Lounge
Claim No. 5670, Date of Loss: January 1, 1990

Dear Mr. Proctor:

We are enclosing our limited investigation file in connection with the above-referenced loss. You will note that this loss took place on January 1, 1990 when the building was destroyed by a fire of suspicious origin.

While a decision on our liability for this claim must of course await the completion of the investigation, it appears conceivable that some policy defenses may be applicable with respect to this matter in which case litigation would be a distinct possibility. Accordingly, we ask that you advise us on all of our rights, duties and responsibilities under our policy of insurance.

We wish you to take the appropriate steps necessary to complete the investigation properly, provide us with your recommendations as to the application of policy defenses and, if necessary, be prepared to assert these defenses on behalf of the Company in litigation.

We look forward to your acknowledgment of this assignment and to receiving your specific suggestions and recommendations in the near future concerning the steps to be taken in the handling of this claim.

Yours very truly,

Property Loss Supervisor

XXX:xx

B

CHAPTER 100A

INVESTIGATION OF ARSON

Fire reports public records: see §100.5

100A.1 Definitions.

1. *"Authorized agencies"* means:

a. The state fire marshal.

b. The director of public safety.

c. The county attorney responsible for prosecutions in the county where a fire occurs.

d. The attorney general.

e. The federal bureau of investigation or other federal agency requesting information on a fire loss.

f. The United States attorney's office when authorized or charged with investigation of a fire or prosecution for arson.

g. The fire chief of the city in which the fire occurs.

h. The police chief of the city in which the fire occurs.

2. *"Relevant information"* means information having any tendency to make the existence of a fact that is of consequence to the investigation or determination of the issue more probable or less probable than it would be without the information.

3. *"Insurance company"* includes, but is not limited to, the Iowa fair plan and its member insurance companies.

[C81, §100A.1]

86 Acts, ch 1051 §1

100A.2 Disclosure of information.

1. An authorized agency may, in writing, require an insurance company to release to the agency relevant information or evidence requested by the agency which the company has in its possession relating to a fire loss. Relevant information includes but is not limited to:

a. Insurance policy information relating to a fire loss under investigation including information on the policy application.

b. Policy premium payment records.

c. History of previous claims made by the insured.

d. Material relating to the investigation of the loss, including statements of any person, proof of loss, and other evidence relevant to the investigation.

2. When an insurance company has reason to believe that a fire loss insured by the company was caused by something other than an accident, the company shall, in writing, notify any authorized agency and provide it with all material possessed by the company relevant to an investigation of the fire loss or a prosecution for arson.

3. An authorized agency provided with information pursuant to this section may provide the information to any other authorized agency for purposes of an investigation of a fire loss or a prosecution for arson.

4. An insurance company providing information to an authorized agency pursuant to subsections 1 and 2 may request information relevant to the fire loss investigation from an authorized agency and shall be given the information within a reasonable time not exceeding thirty days.

5. No civil action nor criminal prosecution may arise from any action taken pursuant to this section by an insurance company, a person acting in an insurance company's behalf, or an authorized agency, provided no malice is shown against the insured.

[C81, §100A.2]

100A.3 Confidentiality — subpoena.

1. An authorized agency or insurance company which receives information furnished pursuant to section 100A.2, shall hold the information in confidence until such time as its release is required pursuant to a criminal or civil proceeding.

2. An authorized agency or its personnel, may be subpoenaed to testify in litigation concerning a fire loss in which an insurance company is named as a party.

[C81, §100A.3]

100A.4 Penalty.

1. A person or agency who intentionally or knowingly refuses to release information requested pursuant to this chapter is guilty of a simple misdemeanor.

2. A person who fails to hold in confidence information required to be held in confidence by section 100A.3 is guilty of a simple misdemeanor.

[C81, §100A.4]

100A.5 Concurrent powers.

The provisions of this chapter do not affect or repeal an ordinance of a municipality relating to fire prevention or the control of arson, but the jurisdiction of the state fire marshal and the director of public safety in the municipality is concurrent with that of the municipal and county authorities.

[C81, §100A.5]

100A.6 Chapter not severable.

If any provision of this chapter is declared invalid the whole chapter is void, and to this end the provisions of this chapter are not severable.

[C81, §100A.6]

REGULATIONS

661—5.12(17A,80,100A) Sharing of insurance company information with the fire marshal. Insurance companies shall provide the specified information to the fire marshal as follows:

5.12(1) Whenever an insurance company has reason to believe that a fire loss insured by the company was caused by something other than an accident, said insurance company shall provide to the fire marshal, or some other agency authorized to receive such information under Iowa Code chapter 100A, all information and material possessed by said company relevant to an investigation of the fire loss or a prosecution for arson.

5.12(2) Whenever the fire marshal, or an agent or employee of the fire marshal, requests in writing that an insurance company provide information in its possession regarding a fire to the fire marshal, the insurance company shall provide all relevant information requested. Relevant information may include, but need not be limited to:

a. Insurance policy information relating to a fire loss under investigation including information on the policy application.

b. Policy premium payment records.

c. History of previous claims made by the insured, and

d. Material relating to the investigation of the loss, including the statement of any person, proof of loss, and other information relevant to the investigation.

5.12(3) Unless otherwise expressly limited any request for information under this rule shall be construed to be a request for all information in the possession of an insurance company. Any information in the custody or control of any agent, employee, investigator, attorney or other person engaged by an insurance company, on a permanent or temporary basis, in the person's professional relationship to the insurance company shall be considered to be in the possession of the insurance company subject to this rule.

661—5.13(17A,80,100A) Release of information to an insurance company. An insurance company which has provided fire loss information to an authorized agency pursuant to Iowa Code section 100A.2, may request information relevant to said fire loss investigation from the fire marshal. If the insurance company has provided information to an authorized agency other than the fire marshal, the request shall include proof that information was provided. For purposes of this rule the term insurance company shall include an attorney, adjustor or investigator engaged by the company in reference to the particular fire loss involved in the request even though the attorney, adjustor or investigator is not a full-time employee of the insurance company. The attorney, adjustor or investigator shall provide the fire marshal with proof of authorization from the insurance company to act as its representative relative to the loss.

661—5.14(17A,80,100A) Forms. These rules require the use of the following forms that are available from the commissioner or the state fire marshal.

5.14(1) When an insurance company has reason to believe that a fire loss has occurred, the company shall notify the fire marshal on the form entitled "Insurance Form Number One."

5.14(2) Requests for information by the fire marshal, the fire marshal's agents or employees from an insurance company pursuant to Iowa Code section 100A.2, shall comply with the form entitled Insurance Form Number Two.

5.14(3) Material requested on Insurance Forms Number One and Two shall carry a cover form which complies with Insurance Form Number Three.

5.14(4) Request for information by an insurance company from the fire marshal shall comply with Insurance Form Number Four.

5.15 to 5.39 Reserved.

B

NOTICE OF FIRE :

INSURER PREPARES WHEN FIRE IS BELIEVED TO BE CAUSED BY OTHER THAN ACCIDENTAL MEANS. THE ENVELOPE CONTAINING THIS REPORT MUST BE MARKED CONFIDENTIAL

Date _____

Confidential

The information submitted herein is confidential. Pursuant to 100.A2 : THE OFFICIALS AND DEPARTMENTAL AND AGENCY PERSONNEL RECEIVING ANY INFORMATION FURNISHED PURSUANT TO THIS SECTION SHALL HOLD THE INFORMATION IN CONFIDENCE UNTIL SUCH TIME AS ITS RELEASE IS REQUIRED PURSUANT TO A CRIMINAL OR CIVIL PROCEEDING.

To

From Person Submitting Form

Title

Mailing Address

Claim No. Tele. No.

Insureds Name

Date and Time of Fire

Address of Fire

County

Insurance Company Name

Policy No.

Policy Term Dates

Agents Name

Address

Insured's Mailing Address

Telephone No.

Mortgagee or Loss Payee's Name

Address

Other Persons with Interest in Property or Policy Address

Suspected Origin and/or Cause of Fire

Other Insurance on Property, If any

This Policy Insures:	ITEM (Check Box)	Policy Amount
	BUILDING ☐	$
	CONTENTS ☐	$
	OTHER (specify) _____ ☐	$

Mailing Instructions

ORIGINAL - To Office of State Fire Marshal
COPY - To File

B

REQUEST FOR RELEASE OF FACTUAL INFORMATION — Insurance Form #2

DATE _____

nsured's Name _____ Date and Time of Fire _____

ddress of Fire _____ County _____

:laim Number _____ Incident Number _____

o/Person to Receive Form _____ From _____

\ddress _____

:itle _____

Insurance Company Name _____

?olicy Number _____ Policy Term Dates _____

\gent's Name _____ Address _____

This department (or Agency) is charged with the responsiblity to investigate the fire which occurred at the above captioned address. Pursuant to Chapter 100A.2 which states proximately: The Fire Marshal or personnel from any other authorized law enforcement agency charged with the responsibility of investigating a fire loss, may request any insurance company investigating a fire loss of real or personal property to release any factual information in its possession which is pertinent to this type of loss and has some relationship to the loss itself. The company shall release the information and cooperate with any official authorized to request such information pursuant to this section. The information shall include, but is not limited to:

(1) Any insurance policy relevant to a fire loss under investigation and any application for such a policy
(2) Policy Premium Payment Records
(3) History of previous claims made by the insured for fire loss
(4) Material relating to the investigation of the loss, including statements of any person, Proof of Loss, and any other relevant evidence.

Please Release the Following Information

Please Release Information To: _____
Signature of requesting Officer and Rank

Telephone # _____ _____
Name of Requesting Officer

_____
Department or Agency requesting information

Original - Insurance Company
Copy - File

B

RELEASE OF FACTUAL INFORMATION

DATE_____

Confidential

The information submitted is confidential. The officials and departmental and agency personnel receiving any information furnished pursuant to this act shall hold the information in confidence until such time as its release is required pursuant to a criminal or civil proceeding.

From: Person Submitting Form

To: _____

Title

_____

Mailing Address

Telephone Number

_____

Incident No. _____ Claim No. _____

Insured's Name Date and Time of Fire

Address of Fire County

Insurance Company Name Policy No. Policy Term Dates

Pursuant to your request dated _____ information is herewith submitted in accordance with 100A.2.

Accordingly, the following information or enclosures is provided.

This form should be sent to individual making request. Retain file copy.
THE ENVELOPE CONTAINING THIS REPORT MUST BE MARKED CONFIDENTIAL

B

REQUEST FOR RELEASE OF FACTUAL INFORMATION

DATE_____

Insured's Name | Date and Time of Fire

Address of Fire | County

Incident or Case No. | Claim No.

To/Person to Receive Form | From

Address

Title | Title

Insurance Company Name

Policy No. | Policy Term Dates

Agent's Name | Address

Pursuant to 100A.2, request is being made for your investigation file on the above Case/Incident Number as of this date. Also requested are copies of any factual reports which would be included in the case file on a continuing investigation basis.

The information being requested pursuant to this act will be held in confidence until such time as its release is required in a criminal or civil proceeding.

Release Information To: _____
signature of requesting investigator

_____
name of requesting investigator

telephone number _____

_____
insurance company requesting inform

_____
address

Original: To Agency
Copy: To File

THE ENVELOPE CONTAINING THIS REPORT MUST BE MARKED CONFIDENTIAL.

B

SECTION 100A LETTER

January 4, 1990

Mr. Jerry Corbett
Assistant State Fire Marshal
Department of Public Safety
Division of State Fire Marshal
Wallace State Office Building
Des Moines, IA 50319

RE: Mick Belcker, d/b/a Dog Breath Lounge
Fire Loss of January 1, 1990

Dear Mr. Corbett:

This letter is to advise you that we are counsel for Why Me Insurance Company which provided coverage in connection with the above-referenced fire loss.

Pursuant to the terms of Section 100A.2 of the Code of Iowa we hereby formally notify your Department that we have reason to believe that the fire was caused by something other than an accident. Accordingly, we wish to cooperate with your Department pursuant to those provisions of Chapter 100A of the Code of Iowa which provides for the exchange of information relative to the investigation of a fire loss or a prosecution for arson. Please be advised that we have retained Frank Furillo of the Hill Street Investigative Agency to assist us in our inquiry, and we would appreciate your cooperation with him during the course of the investigation.

It is our understanding that Special Agent Dick Ward of your Department is investigating this fire, and we would appreciate receiving a copy of his written report when it is completed.

Very truly yours,

DJWP:la

David J. W. Proctor

cc: Investigator
Special Agent Dick Ward
Insurance Representative

B

CHAPTER 100A INSURANCE COMPANY CHECKLIST

1. Application
2. Binder
3. Policy and Endorsements
4. Notice of Loss
5. Transcripts of "Voluntary" Taped Statements
6. Written Statements
7. Proof of Loss and Inventory Sheets
8. Company Estimates of Damages
9. Adjustors Photos, Reports and Notes
10. Investigators' Reports
11. PILR - Property Insurance Loss Registry

William MELE and Marie Mele

v

ALL-STAR INSURANCE CORPORATION et al.

Civ. A. No. 76-2637.

United States District Court, E. D. Pennsylvania.

July 24, 1978.

Action was brought to recover on fire policy. Following jury verdict for insurer insureds moved for judgment n. o. v. or, alternatively, for a new trial, the District Court, Joseph S. Lord, III, Chief Judge, held that: (1) insurer had burden of proving affirmative defense of arson; (2) it was a reasonable and logical inference that insured husband procured another to set the fire based on evidence of incendiary origin, substantial financial benefits that might have been derived from the fire and inference that someone with a key and familiar with the structure and its contents set the fire, and (3) though wife and husband were co-owners and coinsureds, wife was entitled to no recovery although she was not responsible for the fire.

Motion denied.

1. Federal Civil Procedure ⇐2338

Although a trial court has much discretion in deciding whether to grant a new trial, the court must not interfere with the jury verdict on such grounds unless it is quite clear that the jury has reached a seriously erroneous result which would amount to a miscarriage of justice if it were left standing.

2. Insurance ⇐429.1(8)

Since defendant insurer's allegation of arson was an affirmative defense, the in-

8. Plaintiff's § 1983 claim also includes allegations that the defendants have violated her rights under the Equal Protection Clause by discriminating against her on the basis of her race, sex and religious beliefs. As the defendants' memorandum in support of their motion for summary judgment did not address these allegations, summary judgment must of course also be denied as to these claims.

surer had burden under Pennsylvania law to prove by a preponderance of evidence that the insured was responsible for the fire.

3. Insurance ⇐429.1(8)

Under Pennsylvania law the standard applied to an arson defense by an insurer is whether the evidence supported a reasonable and legitimate inference that the insured fraudulently burned the building or caused it to be burned.

4. Evidence ⇐54

A "reasonable inference" is one not based on speculation or conjecture but rather is a logical consequence deducted from other proven facts.

See publication Words and Phrases for other judicial constructions and definitions.

5. Insurance ⇐429.1(8)

Although to support an arson defense by an insurer the inference that the insured fraudulently burned the building or caused it to be burned must be reasoned from the evidence presented it need not be the only logical conclusion which a jury could reach.

6. Insurance ⇐429.1(2)

In a civil matter, to determine whether a reasonable inference exists that an insured is responsible for fire which damaged insured property Pennsylvania law permits a jury to consider a combination of evidence of: an incendiary fire; a motive by the insured to destroy the property and circumstantial evidence connecting the insured to the fire.

7. Insurance ⇐429.1(8)

Verdict for fire insurer on arson defense was not against weight of the evidence since there was a reasonable and logical inference that insured procured another to set the fire based on evidence of incendiary origin, financial benefits which might have derived from the fire and inference that someone with a key and familiar with the structure and its contents set the fire.

8. Insurance ⇐429

Where wife was co-owner with husband of insured property and has coinsured on fire policy she was barred from any recovery where husband was found responsible for the fire notwithstanding that wife had not been involved in the arson.

Thomas B. Rutter, Philadelphia, Pa., for plaintiffs.

Harry P. Begier, Jr., Philadelphia, Pa., for defendants.

MEMORANDUM

JOSEPH S. LORD, III, Chief Judge.

After a jury returned a verdict for defendants, plaintiffs in this action on an insurance contract have filed a post-trial motion for a judgment notwithstanding the verdict or in the alternative for a new trial. Plaintiffs husband and wife, seek to recover insurance benefits for fire damage to a building located at 730–732 South Broad Street, Philadelphia, which they own and which was partially destroyed by fire on July 26, 1975. Defendants resist plaintiffs' claim on the ground that the fire was of an incendiary origin and was caused to be set by William Mele. In rendering their verdict for defendants the jury accepted this assertion. In their post-trial motion plaintiffs argue that the verdict was against the weight of the evidence and that I erred in instructing the jury that plaintiff Marie Mele was barred from recovery if the jury concluded that her husband was responsible for the fire. I reject both these arguments.

I. VERDICT AGAINST THE WEIGHT OF THE EVIDENCE:

[1, 2] Plaintiffs contend that the verdict is against the weight of the evidence because there was insufficient evidence for the jury reasonably to conclude that William Mele was responsible for the fire. Although a trial court has much discretion in

deciding whether to grant a new trial the court must not interfere with a jury verdict on this ground unless it is quite clear that the jury has reached a seriously erroneous result which would amount to a miscarriage of justice if it were left standing *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 89 (3d Cir. 1960). Since the allegation of arson by the insured is an affirmative defense, the defendants had the burden to prove by a preponderance of the evidence that William Mele was responsible for the fire *Greenberg v. Aetna Insurance Co.*, 427 Pa. 494, 496, 235 A.2d 582, 584 (1967). Plaintiffs maintain that defendants have failed to meet this burden.

There was not extensive testimony on the issue of Mr. Mele's responsibility for the fire. The evidence from which the jury could infer plaintiffs' responsibility is circumstantial and is not disputed by plaintiffs except for Mr. Mele's denial that he set or procured others to set the fire. The damaged building was acquired by plaintiffs a few months before the fire and plaintiffs were in the process of altering the interior to accommodate a furniture business which they intended to start. The fire which damaged the building obviously was of incendiary origin. Investigation after the fire disclosed that there had been seven separate fires inside the building caused by the ignition of "set-ups" and five additional "set-ups" which did not ignite. These set-ups had been distributed throughout the second, third and fourth floor of the building, and it was the opinion of Lt. Robert V. Quinn of the Fire Marshal's office that this pattern of set-ups was intended to destroy the entire building.

There was substantial evidence from which a jury could have inferred that William Mele had a motive to destroy the building. Mr. Mele purchased the building for $30,000 but insured it for approximately $203,000, which was its replacement cost. Although they expended approximately $18,000 for renovations plaintiffs still would reap substantial financial benefit if the building was destroyed and they collected their insurance benefits. At the time of the fire Mr. Mele was not employed and was collecting unemployment insurance. He also was in debt in the amount of approximately $35,000. Although he had some experience in the furniture business this earlier business venture had not been financially successful.

There was other evidence suggesting that someone familiar with the building was responsible for the fire. At the time of the fire Mr. Mele and his family were in Hawaii and therefore plaintiffs could not have set the fire themselves. To find for the defendants the jury would have to infer that Mr. Mele had procured someone else to set the fire. When the firemen arrived at the fire both the front and rear doors to the building were unlocked. Workmen who had been making alterations to the structure did have keys but they had been instructed to lock the doors whenever they left the building. Since the fire was on a Saturday afternoon when the workmen were not present the doors should have been locked. The jury could have inferred that the arsonist had a key which he or she used to obtain access to the building. Additionally, at least one of the set-ups on the fourth floor used a five gallon container of Buten's Naphtha. A short time before the fire Mr. Mele purchased such a container for the purpose of cleaning the flooring on the fourth floor. I conclude that a jury could have inferred that the container used in the set-up was the one bought by Mele and that the arsonist knew the container was in the building.

Plaintiffs asserted during the trial that there had been labor disputes during the alteration of the building and that laborers possibly were responsible for the fire. However, Lt. Quinn testified that in his experience as an expert in arson, fires resulting from a labor dispute usually involve either the use of a Molotov cocktail or a single open fire used to burn combustibles and that the fire in plaintiffs' building was

not consistent with that pattern. A jury reasonably could have rejected the plaintiffs' theory of the arson.

[3-5] I know of no case law in Pennsylvania setting forth the quantum of evidence which is necessary to support an arson defense by an insurer. The standard is whether the evidence supported a reasonable and legitimate inference that the insured fraudulently burned the building or caused it to be burned. *Ruttenberg v. Fire Insurance Co.*, 122 Pa.Super. 863, 870, 186 A. 194, 196 (1936). A reasonable inference is one not based on speculation or conjecture but rather is a logical consequence deduced from other proven facts. *Commonwealth v. Whitman*, 199 Pa.Super. 631, 634, 186 A.2d 632, 633 (1962). Although this inference must be reasoned from evidence presented, it need not be the only logical conclusion which a jury could reach. *Smith v. Bell Telephone Co.*, 397 Pa. 134, 138, 153 A.2d 477, 480 (1959).

[6] To support their argument that there is sufficient evidence of Mr. Mele's responsibility for the fire, defendants cite numerous state criminal cases reviewing the sufficiency of the evidence in arson convictions. Although the standard of proof is more demanding in criminal matters than in this case, those decisions are informative to demonstrate that limited circumstantial evidence showing defendant's connection with the fire may be sufficient to support a verdict if there is clear evidence of an incendiary origin and of the arsonist's strong motive to destroy the structure. *See e. g. Commonwealth v. Tomaino*, 168 Pa.Super. 505, 79 A.2d 274 (1951); *Commonwealth v. DeMartini*, 125 Pa.Super. 892, 189 A. 564 (1937). It is not necessary to present direct evidence that the arsonist started the fire. *Commonwealth v. Nasuti*, 385 Pa. 436, 444, 123 A.2d 435, 438 (1956); *Commonwealth v. Margie*, 165 Pa.Super. 84, 88, 68 A.2d 194, 196 (1949). Thus in a civil matter to determine whether a reasonable inference exists that an insured is responsible for the fire which damaged the insured property, a jury should consider the combination of evidence of: (1) an incendiary fire; (2) a motive by the insured to destroy the property and (3) circumstantial evidence connecting the insured to the fire.

[7] I conclude that it is a reasonable and logical inference that Mr. Mele procured another to set the fire based upon the evidence of the incendiary origin, the substantial financial benefits plaintiffs might have derived from the fire and the inference that someone with a key and familiar with the structure and its contents set the fire. Although the jury logically could have concluded that someone having no connection with Mele set the fire I do not find that this inference is so compelling that the jury's refusal to accept it was either seriously erroneous or a miscarriage of justice. I conclude, therefore, that the verdict for defendants is not against the weight of the evidence.[1]

II. BARRING MARIE MELE'S RECOVERY DUE TO THE ARSON BY WILLIAM MELE:

[8] Plaintiffs contend that the court committed fundamental error in refusing to charge that plaintiff Marie Mele was entitled to recover monetary damages irrespective of the jury's verdict as to the alleged arson by William Mele. I charged that under Pennsylvania law a wife, who was with her husband co-owner of the insured property and co-insured on a policy, would be barred from any recovery under that policy if her husband was responsible for the fire.

In *Bowers Co. v. London Assurance Corp.*, 90 Pa.Super. 121 (1926), the court

1. Plaintiffs also moved for judgment notwithstanding the verdict, although they did not brief this issue. Since I find that there is no basis for a new trial *a fortiori* I could not conclude that there was a sufficient basis for awarding a verdict for plaintiffs.

held that the fraud of one co-insured bars any recovery by others co-insured under the same policy. The court reasoned that recovery turns on whether the insurance contract is joint or is separable between the defrauder and the claimant. If it is joint, then all must be joined in an action on the contract. The court concluded that "[i]f the action is joint it follows that recovery on the policy is prevented by the fraudulent act of either of the assured whether participated in by the other or not." 90 Pa.Super. at 127. Although in *Bowers* the interests of the co-insureds in their property were not the same as those of plaintiffs here, the *Bowers* court noted that "[i]f the insurance is taken in the joint names of two or more persons the general rule prevails and all the assured must join in the action." *Id.* at 126. I conclude that the *Bowers* rationale applies with equal force to the situation in this case. Supporting this conclusion is the decision by the Court of Common Pleas of Washington County, *Matyuf v. Phoenix Insurance Co.*, 27 D. & C.2d 351 (1933), addressing the precise issue raised here. The court there concluded that the acts of the husband in destroying the insured property barred his wife's recovery even though she was not involved at all in his fraudulent acts. The court held that an insurance contract issued jointly to co-owners imposes a joint obligation on the insured parties not to commit any fraudulent acts.

Considering the *Bowers* and *Matyuf* opinions together I find that the law in Pennsylvania is sufficiently clear so as to bind me to conclude that Marie Mele is barred by the fraudulent acts of her husband if the jury determined that he was responsible for the fire. Although plaintiffs cite decisions in other jurisdictions to the contrary, the law on this issue is not uniform elsewhere and does not justify a departure from this clear albeit somewhat vintage position of the Pennsylvania courts. *Compare Howell v. Ohio Casualty Insurance Co.*, 130 N.J.Super. 850, 327 A.2d 240 (1974) *with California Insurance Co. v. Allen*, 235 F.2d 178 (5th Cir. 1956); *Kosior v. Continental Insurance Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Klemens v. Badger Mutual Insurance Co.*, 8 Wis.2d 565, 99 N.W.2d 865 (1959). I conclude, therefore, that there was no error made in charging the jury.

Name _____

FIRE SCENE REPORT

City of Kansas City, Missouri

Address _____

Date _____

Company # _____

Group _____

Alarm # _____

Were You?

1st Alarm _____

2nd Alarm _____

3rd Alarm _____

4th Alarm _____

Extra Co _____

Still _____

Did You Force Entry? Yes____ No____

Front _____ Rear _____ Side _____

Basement _____ Other _____

No Forced Entry _____

Did You Make Force Entry Into Residence Apartment Involved in Fire?

What was Burning? _____

Where Was Most Fire? _____

Did You Shut Off Utilities? No____

Gas Elec. Water Yes____

Did You Notice any Unusual

Activities? Yes____ No____ What? _____

Odors? Yes____ No____ What? _____

People? Yes____ No____ What? _____

Did You Notice The Color Of?

Smoke _____

Fire _____

Where Was The Most Fire When You Arrived On The Scene?

Did You Notice Anything Else That May Be Important In A Fire Scene Investigation?

B

CLEVER FIRES

MR. COFFEE/RESIDENTIAL

The fire was determined at the kitchen countertop where Mr. Coffee was located. Electrical involvement was eliminated. The chemical department ran tests resulting in determination of gasoline in the warming carafe used to vaporize the gasoline. Without electrical and chemical testing, this case could not have been won at trial.

STEAM BOILER/DOMESTIC

The arsonist disconnected the low water cut off control, drained the boiler of water contents and raised the thermostat to 80 degrees Fahrenheit, allowing the heating equipment to run continuously with subsequent ignition of the building structure. The cherry red cast iron firebox was observed on the scene with tools nearby which had been used to manually disconnect the safety. The building owners had "left for the weekend"

HOT WATER HEATER

Homeowners can arrange accidental fires which are extremely difficult, and sometimes impossible to prove. This one involved clothing in a plastic clothes basket which ignited near the gas hot water heater burner. The gas burner location at the base of the hot water heater is above the floor and protected. However, strategically placed cloth and/or paper will ignite and can be arranged to trail to combustible materials. The homeowner admitted to this occurrence and the case was closed.

TYPICAL OTHER INSURANCE CLAUSE

OTHER INSURANCE. If a loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.

[OVERSIMPLIFIED EXAMPLE]: Assume a dwelling, the value of which is $100,000.00, is insured by two policies of insurance, each policy providing $100,000.00 coverage on the dwelling. The dwelling in an accidental fire is totally destroyed. The insured will not receive $200,000.00, but will receive a total of $100,000 - $50,000.00 being paid by each of the two insurance companies.

$$\frac{\$100{,}000.00 \text{ - Policy Limit of Liability}}{200{,}000.00 \text{ - Total Amount of Insurance Covering the Loss}}$$

B

RELEASE AND AUTHORIZATION

I, _____, residing in _____, Iowa, hereby authorize all banks, savings and loan institutions, credit unions, telephone companies, public utility companies, and all other creditors of mine to release to [name of insurance company] all documents of every kind or nature whatsoever in their care, custody or control that pertain to me, and allow [name of insurance company] to make copies of same.

I hereby release all such banks, savings and loan institutions, credit unions, telephone companies, public utility companies, and all other creditors from all responsibility and liability for disclosing such information to [name of insurance company].

Dated this _____ day of _____, 1990.

_____
(Name of Insured)

_____
(Witness)

B

AUTHORIZATION FOR RELEASE OF INCOME AND CREDIT INFORMATION

This Authorization or photocopy hereof will authorize you to furnish to _____ or its representatives, any and all information, documents and records that you may have regarding me, personally or the business I own, _____ [if none, write none] relating to salary, employment, income, installment loans or purchases, credit reports, bank accounts, secured and unsecured loans, mortgages, security agreements, credit or charge accounts, purchases of personal and business property, tax returns for the current year and three years previous, books of account, ledgers, income statements, balance sheets, accounting records, telephone and toll call records, and also public records retained by any law enforcement agency or court of law relating to criminal arrests, investigations or convictions, and any and all insurance company records relating to policies, losses and claims.

You are further expressly authorized to permit the above to obtain copies of any and all documents or records that they request and to surrender possession of such documents to them for copying.

This Authorization also gives the above-named company and its representatives full permission to enter onto the property where the loss occurred for the purpose of conducting any investigation deemed necessary including the removal of any item or materials for the purpose of determining and investigating the cause and origin of the loss.

By signing this Authorization, the undersigned expressly understands and agrees that neither he nor the company through any investigation of the loss by it or its representatives, waives any of the terms, conditions, requirements, rights, or obligations of the contract of insurance.

Dated this _____ day of _____, 1990.

_____	_____
Insured	Insured
_____	_____
Social Security No.	Social Security No.
_____	_____
Date of Birth	Date of Birth

B

ENTRY ON PROPERTY AND EXAMINATION OF DAMAGED PROPERTY

A. Lines 113 - 115 of the 165 lines:

> "The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all the remains of the property here described, ..."

B. Easy Read:

> "YOUR DUTIES AFTER LOSS. In case of a loss to covered property you must see that the following are done:
>
> . . . .
>
> f. As often as we reasonably require:
>
> (1) Show the damaged property.
>
> . . . ."

C. Commercial:

> "Loss or Damage to Covered Property. If an accident or incident causes a property loss that's covered under this policy you must:
>
> . . . .
>
> 5. Cooperate with us in the investigation and settlement of the claim. Show us the damaged property and any records you have to prove your loss at such times as may reasonably be required. Also permit us to take samples of damaged property for inspection, testing, and analysis. If your loss involves a covered auto, permit us to inspect the auto before it is repaired or disposed of."

PROOF OF LOSS

A. Lines 97 - 113:

> ". . . and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and the belief of the insured as to the following: the time and origin of the loss, the interest of the insured and all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, and all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom or for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules and all policies and, if required, verify plans and specifications of any building, fixtures or machinery destroyed or damaged.

B. Easy read:

> "Send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
>
> (1) the time and cause of loss;
>
> (2) the interest of the insured and all others in the property involved and all liens on the property;
>
> (3) other insurance which may cover the loss;
>
> (4) changes in title or occupancy of the property during the term of the policy;
>
> (5) specifications of damaged buildings and detailed repair estimates;

B

(6) the inventory of damages personal property described in 2e above;*

(7) receipts for additional living expenses incurred and records that support the fair rental value loss; and

(8) evidence or affidavit that supports a claim under the Credit Card, Fund Transfer Card, Forgery and Counterfeit Money coverage, stating the amount and cause of loss."

---

* 2e states:

e. prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;"

C. COMMERCIAL:

"Loss or damage to covered property if an accident or incident causes a property loss that's covered under this policy you must:

. . . .

7. Send us a signed, sworn statement of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We'll supply the forms. We'll pay within 30 days after we reach agreement with you."

B

DEMAND FOR PROOF OF LOSS

January 15, 1990

Mr. Mick Belcker
Dog Breath Lounge
Nowheresville, IA 12345

RE: Fire Loss of January 1, 1990

Dear Mr. Belcker:

In accordance with the provisions of your policy of insurance, a complete copy of which is enclosed, we hereby place you upon formal notice that if you are contemplating making a claim against our Company in connection with the above-referenced alleged loss you are required to sign and submit a sworn proof of loss in accordance with the provisions of the policy of insurance issued to you and otherwise comply in all particulars with the policy provisions. This sworn proof of loss must be submitted within 60 days from the receipt of this Notice.

For your convenience I am enclosing herewith blank proofs of loss and attendant worksheets.

I specifically draw your attention to page 6, item 2 of Form HO-3 denominated "YOUR DUTIES AFTER LOSS" and page 1, item 2, of Form HO-300, also denominated "YOUR DUTIES AFTER LOSS", of your policy of insurance. There you will find the requirements for what must be set forth in, or accompany, the sworn proof of loss. Please pay particular attention to paragraph 2e which requires that you "prepare an inventory of damaged personal property showing in detail the quantity, description, actual cash value and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory".

I am returning to you certain "Schedule of Contents" forms you previously submitted, as they do not constitute a claim under the provisions of your policy of insurance, and are specifically rejected as such. If you decide to resubmit these forms with your sworn proof of loss, please make sure that you show, pursuant to the previously-quoted language, the quantity, description, actual cash value and amount of

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loss for each item of damaged personal property, and follow the policy requirements in all other respects.

The furnishing of the enclosed forms and the sending of this letter is not intended to and shall not waive any of the rights or defenses of Why Me Insurance Company under its policy of insurance.

Yours very truly,

Property Loss Supervisor

XXX:xx

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

B

$ _____ Amount of Policy at time of loss

SWORN STATEMENT IN PROOF OF LOSS

_____ POLICY NUMBER

_____ DATE ISSUED

To the _____

_____ AGENCY AT

_____ DATE EXPIRES

of _____

_____ AGENT

At time of loss by the above indicated policy of insurance you insured _____

_____

_____

against loss by _____ to the property described under Schedule "A" according to the terms and conditions of the said policy and all forms endorsements transfers and assignments attached thereto

1 **Time and Origin:** A _____ (STATE KIND) loss occurred about the hour of _____ o clock _____ M on the _____ day of _____ 19_____ The cause and origin of the said loss were: _____

_____

_____

2 **Occupancy:** The building described or containing the property described was occupied at the time of the loss as follows and for no other purpose whatever: _____

_____

3 **Title and Interest:** At the time of the loss the interest of your insured in the property described therein was _____ No other person or persons had any interest therein or incumbrance thereon except: _____

_____

4 **Changes:** Since the said policy was issued there has been no assignment thereof or change of interest use occupancy possession location or exposure of the property described except: _____

_____

5 **Total Insurance:** The total amount of insurance upon the property described by this policy was at the time of the loss $ _____ as more particularly specified in the apportionment attached under Schedule "C" besides which there was no policy or other contract of insurance written or oral valid or invalid

6 **The Actual Cash Value** of said property at the time of the loss was ..... $ _____

7 **The Whole Loss and Damage** was ..... $ _____

8 **Less Amount of Deductible** ..... $ _____

9 **The Amount Claimed** under the above numbered policy is ..... $ _____

The said loss did not originate by any act design or procurement on the part of your insured or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant to violate the conditions of the policy or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed and no attempt to deceive the said company as to the extent of said loss has in any manner been made Any other information that may be required will be furnished and considered a part of this proof

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights

10 **Subrogation Agreement:** The Insured hereby assigns transfers and sets over to said Company any and all claims or causes of action of whatsoever kind and nature which the Insured now has or may hereafter have to recover against any persons as the result of said occurrence and loss above described to the extent of the payment above made; the Insured agrees that said Company may enforce the same in such manner as shall be necessary or appropriate for the use and benefit of said Company either in its own name or in the name of the Insured that the Insured will furnish such papers information or evidence as shall be within the Insured's possession or control for the purpose of enforcing such claim demand or cause of action and the Insured covenants that no release or settlement of any such claim demand or cause of action has been made

State of _____ _____

County of _____ _____ Insured

Subscribed and sworn to before me this _____ day of _____ 19_____

_____ Notary Public

(OVER)

B

SCHEDULE A — POLICY FORM

Policy Form No _____ Dated _____
Item 1 $_____ on _____
Item 2 $_____ on _____
Item 3 $_____ on _____
Item 4 $_____ on _____
Situated _____
Coinsurance Average Distribution or Deductible Clauses if any _____
Loss if any payable to _____

SCHEDULE B
STATEMENT OF ACTUAL CASH VALUE AND LOSS AND DAMAGE

		Actual Cash Value		Loss and Damage	
Totals:					

SCHEDULE C — APPORTIONMENT

Policy No	Expires	Name of Company	Item No. _____				Item No. _____			
			Insures		Pays		Insures		Pays	
Totals:										

_____ Adjuster

RECEIPT FOR PAYMENT

Received of _____ (insurer) of
_____ Dollars ($)
in full satisfaction and indemnity for all claims and demands upon said company on account of said loss and damage and the said policy is hereby _____ (State whether **Reduced** **Reduced and Reinstated** or **Canceled** by payment)

Date _____ 19____ _____
The Insured

Date _____ 19____ _____
The Mortgagee

B

INVENTORY OF ITEMS

Page ____ of ____ Pages

Insured _____ Date of Loss _____ File No _____

Location _____ Policy No _____

*Bills or Cancelled Checks to support claim should be attached if available.

Item No.	Quantity	Description of Item (Type, name, model year, serial no.)	Where Purchased (Name and Address)	Date of Purchase (Mo./Yr.)	Method of Payment (Cash/Cr.)	Receipts Available? Yes	Receipts Available? No	Original Cost	Replacement Cost	Betterment or Depreciation %	Betterment or Depreciation $	Value	Amount of Claim	Agreed Loss (Adjuster to Complete)
					TOTALS									

SIGN HERE – CERTIFYING INVENTORY OF ITEMS _____ DATE _____ SIGNATURE

B

PRODUCTION OF RECORDS

A. Lines 117 - 122 of the 165 lines:

> ". . . As often as may be reasonably required, shall produce for examination all books of accounts, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made."

B. Easy Read:

> "YOUR DUTIES AFTER LOSS. In case of a loss to covered property, you must see that the following are done:
>
> . . . .
>
> f. As often as we reasonably require:
>
> . . . .
>
> (2) Provide us with records and documents we request and permit us to make copies;
>
> . . . ."

C. Commercial:

> "You also agree to let us examine and audit your financial books and records that relate to this insurance at any time up to 3 years after this policy ends."

FRAUDULENT FIRES

When investigating a fraudulent fire, or an "arson for profit", don't forget that people who set or are responsible for these fires nearly always commit other frauds, or crimes, or engage in some other dishonest activity, such as lying. The chances for a successful outcome on any fraudulent fire are greatly enhanced if you can catch the suspect in a few major lies, and if you can find that other crime or fraud.

On every fraudulent fire the investigator must immediately get a financial release signed. A sample financial release is attached. Then remember that the arsonist who is responsible for that fraudulent fire may not particularly fear you, the arson investigator, but you can rest assured he fears the tax man. Therefore, take the executed financial release and obtain copies of the state and federal income tax returns for the last three years from the suspect's tax preparer (the suspect's tax returns will, of course, have burned up in the fire).

Income tax returns always tell us interesting things. First of all, they can be relied on for almost never will any person admit he filed a fraudulent return. Give the tax returns a quick and preliminary review, and look for trends in the three years. A decrease in interest income reported, or, no interest income reported, can mean cash flow or other financial problems. Likewise, increases in the deductions, over the three-year period, for interest expense indicates augmented borrowing -- a symptom of financial difficulties.

B

Once you have the income tax returns, and if you are dealing with a retail business, you must then obtain from the revenue department for your state copies of the sales tax returns for the three years preceding the fire, as well as for the year of the fire to date. Then compare the sales tax returns to the income tax returns.

On a retail business, the chances are that the owner will have reported much higher gross sales on his income tax return then on his sales tax returns. Chances also are that this owner paid no income tax, either because the business was losing money, or through the use of loss carryovers.

By illustration, a small business reports 1987 gross sales of $110,000 and a taxable income of ($3,950), meaning no income tax is owed. You then get the sales tax returns for 1987, and they show a total of $75,000 reported for gross sales. In due course, you put the sales tax returns and the income tax return in front of the owner and ask him to explain the difference. He won't be able to do it, he will realize that the state revenue department will not see the humor in the situation and will be looking to collect some tax dollars. The owner may even realize that you've caught him in another crime, perhaps even a felony, in your state.

To give another example, a small business reports, on its 1987 federal income tax return, gross sales of $90,000 and a net profit of $23,000. But this business has a loss carryover of $30,000, meaning no taxable income and, therefore, no tax income tax liability. Using the financial release you obtain the sales tax returns and discover that gross sales were reported to the state for 1987 and for sales tax purposes as being

$42,000. Once again, you have caught the suspect in another crime, and have made a new friend in the collection or investigative section of your state's revenue department.

Why does this situation occur time and time again? Perhaps because the arsonist realizes that the more he reports as gross sales, the more he will pay in sales tax. Therefore, he understates his gross sales for sales tax purposes. But, the arsonist also probably realizes that under reporting income is the cardinal sin with the Internal Revenue Service. Therefore, he reports all of his income for income tax purposes -- something that is not very hard for the arsonist to do as he won't be paying any income tax anyway. Were he to report his gross sales for sales tax purposes with equal honesty, it would cost him money. The larceny in his blood prevents him from doing so, and he fails to appreciate how such conduct can come back to haunt him.

Most commonly on fraudulent fires the owner or "insured" will have been required to file a Sworn Statement In Proof Of Loss. Frequently accompanying the Proof Of Loss will be inventory sheets prepared by the owner or at his direction, listing the personal property supposedly lost in the fire. These sheets show on a per-item basis and among other things, where the item was purchased, the year and the month of purchase, and the purchase price.

If your experience has been the same as mine, and somewhat facetiously speaking, only "new" items of personal property are destroyed in fraudulent fires, while seldom are items that are more than five years old destroyed. If you are fortunate enough to have inventory sheets that do in fact show the year the items of personal property were purchased, and their cost, you should total up the claimed cost on a per-year basis. By

simple illustration, on a 1988 fire, the investigator should total the purchase prices for all of the items that allegedly were purchased in 1987. When this is done, you turn to the 1987 federal income tax return, and write down the owner's total income. You then back out true expenses, such as federal and state income tax withheld, self-employment tax withheld, real estate taxes, and interest paid. This will give you a pretty good feel for what the owner's or suspect's "spendable" income was for 1987. Using the financial release, you also determine such things as the amount of money spent for utilities. When this process is completed, you go back to your total of the items of personal property that were purchased in 1987. A significant number of times you will find that this owner is claiming he has purchased items in 1987 with a total cost exceeding what this person had to spend. Confronted with this evidence, the insured or suspect will have a lot of explaining to do to persuade you, or anyone else, that his claim is not fraudulent.

There is another thing that can be done with the financial release that sometimes produces dramatic results. No doubt in your first interview with the owner of the business or house that burned in a fraudulent fire you would have asked this person "how's business" and also would have asked him or her what debts they had. Once these threshold questions have been asked and, if there are no local credit bureaus, which is common in small towns, take the financial release and simply go to banks, savings and loans, and most importantly to small loan companies in the vicinity. Don't be surprised if this process, while very time consuming, generates proof of additional financial obligations that your suspect "forgot" to tell you about. To give one of our most

successful examples in using this technique, by taking the financial release to every small loan company in the vicinity of a fraudulent fire, a total of 11 loans were discovered that the suspect had never bothered to tell the investigator about in the initial round of interviews.

Is the use of income taxes and financial releases particularly new or innovative in the investigation of fraudulent fires? The answer to that is a clear "no". Nonetheless, income tax returns and financial releases have tremendous potential to generate evidence, and the fact remains that these valuable tools are too often overlooked and are under used.

B

LITIGATION

A. Lines 157 - 161 of the 165 lines:

> "No suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy have been complied with, and unless commenced within 12 months after inception of the loss."

B. Easy Read:

> "SUIT AGAINST US. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss."

C. Commercial:

> "Lawsuits Against Us. No one can sue us to recover until all of its terms have been lived up to."

REJECTION OF PROOF OF LOSS FOR TECHNICAL REASONS

January 20, 1990

Mr. Mick Belcker
Dog Breath Lounge
Nowheresville, IA 12345

RE: Fire Loss of January 1, 1990

Dear Mr. Belcker:

On behalf of Why Me Insurance Company we acknowledge receipt of a purported proof of loss filed by you in connection with the fire at your lounge on January 1, 1990. We are returning the proof of loss to you herewith and expressly rejecting it as a proper proof of loss since it does not comply with the provisions of your policy of insurance in the following respects:

1. The statement has not been signed.

2. The statement has not been sworn to by you before a Notary Public or other official entitled to administer an oath.

3. The total amount of insurance upon the property has not been set forth, as required by Paragraph No. 5 of the statement.

4. The actual cash value of all of the property has not been set forth as required by Paragraph No. 6 of the statement.

5. The whole loss and damage has not been set forth as required by Paragraph No. 7 of the statement.

6. The amount claimed under the Why Me Insurance Company policy has not been set forth as required by Paragraph No. 8 of the statement.

B

7. While it appears you have set forth what you believe to be the actual cash value of damaged personal property in the "INVENTORY OF ITEMS", you have not set forth the amount of loss for each such item of personal property as called for under the column denominated "Amount of Claim".

8. You have not set forth the actual cash value of the building nor the amount of loss to this property.

By copy of this letter to Mr. Henry Goldbloom of Why Me Insurance Company, I am requesting that he immediately forward to you additional blank proofs of loss and attendant worksheets for your use. Accordingly, you may, if you wish, submit a new proof of loss that complies with the policy provisions, including those set forth above. Alternatively, you may also simply resubmit the proof of loss I am enclosing herewith as long as it complies with the policy provisions, again including those set forth above. In any case, you should clearly understand that the proof of loss in its present form is not acceptable and is expressly rejected and returned to you at this time. Any resubmission which you may make in connection with the terms of this letter must be submitted to my office not later than 60 days from the date of this letter.

This letter is not intended to and shall not waive any of the rights or defenses of the Why Me Insurance Company under its policy of insurance.

Very truly yours,

BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE

David J. W. Proctor

DJWP:la

Enclosure
cc: Henry Goldbloom

SWORN STATEMENTS

A. Line 113 and Lines 115 - 117 of the 165 lines:

> "The insured, . . . shall . . . submit to examinations under oath by any person named by this Company and subscribe the same; . . . ." (emphasis added)

B. Easy Read:

> "YOUR DUTIES AFTER LOSS. In the case of a loss to covered property you see that the following duties are done:
>
> . . . .
>
> f. As often as we reasonably require
>
> . . . .
>
> (3) Submit to questions under oath and swear to them."

C. Commercial:

> "Loss or Damage to Covered Property. If an accident or incident causes a property loss that's covered under this policy you must:
>
> . . . .
>
> 6. Allow us to question you under oath at such times as may be reasonably required about any matter relating to this insurance or your claim, including your books and records. If we do, you agree to sign a copy of your answers."

B

DEMAND FOR EXAMINATION UNDER OATH

January 30, 1990

Mr. Mick Belcker
Dog Breath Lounge
Nowheresville, IA 12345

RE: Why Me Insurance Company
Policy No. 1234
Fire Loss of January 1, 1990

Dear Mr. Belcker:

On behalf of Why Me Insurance Company we acknowledge receipt of your Proof Of Loss, sworn to on January 25, 1990 with respect to the occurrence of January 1, 1990.

PLEASE TAKE NOTICE that under the terms and conditions of the above-mentioned policy of insurance you are required to submit to an examination under oath with respect to your claim for loss and damage as a result of the fire of January 1, 1990. This examination will take place at our law offices, 11th Floor, Des Moines Building, Des Moines, Iowa on February 17, 1990 commencing at 9:00 A.M. If this date and time is inconvenient to you, you must contact the undersigned as soon as practical so that alternative arrangements may be made.

In connection with the above-mentioned examination under oath, you must produce all relevant documents in your possession or under your control pertaining to the fire or to the damage caused therefrom including, but not limited to, bills, invoices, cancelled checks or cash receipts evidencing the original purchase price, actual cash value and amount of loss. We request that you also bring copies of your income tax for the three years prior to the fire, and any financial statements which you have prepared or had prepared on your behalf within the last three years.

B

In demanding this examination under oath, the Why Me Insurance Company does not waive any of the terms and conditions under its policy of insurance, nor any of its rights and privileges, thereunder.

You are permitted to appear for the examination under oath with counsel if you desire to do so.

Yours very truly,

BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE

David J. W. Proctor

DJWP:la

B

THE FRAUD PROVISION

A. Lines 1 - 6 of the 165 lines:

> "THIS ENTIRE POLICY SHALL BE VOID if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof, or any interest of the insured therein, or in the case of any fraud or false swearing by the insured relating thereto."

B. Easy Read:

> "Concealment or Fraud. We do not provide coverage for an insured who has:
>
> a. Intentionally concealed or misrepresented any material fact or circumstance; or
>
> b. made false statements or engaged in fraudulent conduct;
>
> relating to this insurance."

C. Commercial:

> "Fraud And Misrepresentation
>
> This policy is void if you or any other protected person hide any important information from us, mislead us, or attempt to defraud or lie to us about any matter concerning this insurance - either before or after a loss. Of course, everyone makes mistakes. Unintentional errors or omissions won't affect your rights under this policy."

Edwin C. HAYNES and Barbara Haynes, Plaintiffs,

v.

HANOVER INSURANCE COMPANY, Defendant.

No. S 83-248 C(D).

United States District Court, E.D. Missouri, Southeastern Division.

April 1, 1985.

In action on fire policy, the District Court, Wangelin, J., held that: (1) in view of insured's repeated omissions and misrepresentations during course of insurance investigation, discovery phase of action, and even up to testimony at trial, insured could not recover under policy, which clearly stated that it would be void if insured wilfully concealed or misrepresented any material fact, and (2) policy was void also as to interest of named insured's spouse, who should not be allowed to profit from wrongful act of insured

So ordered

1. Insurance ⇐552

In view of insured's repeated omissions and misrepresentation during course of insurance investigation, discovery phase of action, and even up to testimony at trial with respect to indebtedness on insured property and to his financial status, insured could not recover under policy, which clearly stated that it would be void if insured wilfully concealed or misrepresented any material fact.

2. Insurance ⇐562.4(1)

Blatant abuse of judicial process by insured's repeated omissions and misrepresentations during course of insurance investigation, discovery phase of action on fire policy, and even up to testimony at trial, was sufficient to warrant entry of directed verdict for insurer. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

3. Insurance ⇐552

Fire policy was void as to interest of named insured's spouse, who could not be allowed to profit from wrongful acts of named insured, who wilfully concealed or misrepresented material facts during insurance investigation as to indebtedness on insured property and as to his financial status.

H. Max Hilfiker, Malden, Mo., Robert S. Barney, Bloomfield, Mo., for plaintiffs.

Russell F. Watters, St. Louis, Mo., for defendant.

MEMORANDUM AND ORDER

WANGELIN, District Judge.

This matter is before the Court for entry of judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1332.

At trial, this Court granted defendant's motion for a directed verdict. This suit arose from a fire on plaintiff's premises on March 31, 1983. In effect at the time of the fire was an insurance policy between plaintiff and defendant. Defendant refused to pay for plaintiff's casualty loss citing, *inter alia*, arson, fraud, and misrepresentation.

The policy contained the following provision:

> This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or the interest of the insured therein, or in the case of any fraud or false swearing by the insured relating thereto . . . neglect of the insured to use all reasonable means to save and preserve the property at and after a loss. . . .

During the trial plaintiff admitted to the following misrepresentations:

1. During his examination under oath on June 16, 1983 plaintiff stated that he had only two mortgages on his house and no other loans. At trial, however, plaintiff admitted that he had a total of ten (10) loans outstanding on the date of the fire amounting to Ninety Nine Thousand Six Hundred Thirteen Dollars and Twenty One

Cents ($99,613 21) in debt. Plaintiff admitted to his true financial status only after it had been independently established by depositions of the loan officer and custodian of records at plaintiff s bank.

2. Along with failing to provide the proper amount of indebtedness, plaintiff did not reveal that both the first and second mortgages and three other loans were delinquent at the time of the fire. In fact, plaintiff had previously testified that his loans were current and up-to-date Again, this information had to be independently obtained.

3. At his examination under oath plaintiff stated that he had "three or four thousand dollars" in his bank account at the time of the fire. In his interrogatories plaintiff stated that he had Three Thousand Five Hundred Dollars ($3,500 00) in his account at that time. In fact, he had a negative balance of Two Thousand Eight Hundred Ninety Nine Dollars and Ninety Four Cents ($2,899.94) in his account at the time of the fire. Furthermore plaintiff had testified at his examination that he had a balance of Five to Six Thousand Dollars ($5,000 00–$6 000 00) in his business checking account and had testified at his deposition that the balance was "between four and six thousand dollars" when in fact he had a negative balance of Two Thousand Nine Hundred Eighty One Dollars and Twenty Two Cents ($2,981.22).

Plaintiff had previously testified that his accounts had never been below zero, even though he received a phone call and letter from the bank every time his account was overdrawn and he received monthly statements showing his balance on any given day. Plaintiff also testified at trial that he knew that his account being overdrawn meant that he had a negative balance in his account and that it had, in fact, fallen below zero.

[1, 2] In view of plaintiff's repeated omissions and misrepresentation during the course of the insurance investigation, the discovery phase of this suit and even up to his testimony at trial, it is clear that plaintiff cannot recover under the terms of the policy More importantly, however, the Court cannot countenance such blatant abuse of the judicial process. *See* Federal Rules of Civil Procedure 37. Either of these reasons is sufficient to warrant entry of a directed verdict for defendant.

[3] Immediately prior to trial Barbara Haynes was admitted as a party plaintiff in order to dispose of all possible interests in the property in one litigation. She was not a named insured under the policy although, as the named insured s spouse, she was insured under the policy Regardless of plaintiff Barbara Haynes' status in this case, however, a directed verdict must be entered against her as well. To do otherwise would allow her to profit from the wrongful acts of her husband. The policy stated clearly that the entire policy would be void if the insured had willfully concealed or misrepresented any material fact The Court has found that the named insured did indeed intentionally conceal material facts Accordingly, the policy must be considered void as to the interests of both husband and wife.

It Is So Ordered

B

Arson Investigation Checklist
State's Attorney's Office
Judicial District of New Haven

SCENE:

Date/Time_____ Neighborhood Check_____

Location_____ Photos_____

Consent/Search Warrant_____ Evidence_____

Interviews/Statements_____ Describe_____

First Fireman_____ Seizing Officer_____

Patrol Officer_____ Location_____

Owner_____ Date to Lab_____

Occupants_____ Crime Scene Secured Log_____

Witnesses_____ License Plate_____

Search Area Around Fire Scene for Evidence
(Examples: Cans, Bottles, Gloves, Items
from Bldg. Removed Prior to Fire, Debris
from Explosion) _____

INVESTIGATION:

Caller/Interview/Tape_____ Diagram/Aerial Photos_____

Insurance Information_____ Title Search_____

Amount_____ Tax Records_____

Dates_____ Assessor's Records_____

Insured_____ Housing Code Violations_____

Recent Increase_____ Previous Fires_____

Proof of Loss_____ Previous Vandalism Claims_____

Previous Claims_____ Previous Police Calls to Address_____

Agent_____ Area Gas Stations Checked_____

Cancellation_____ Area Hospitals Checked_____

Background Checks_____ Delivery Persons in Area_____

Owner_____ Private Adjusters_____

Occupant_____ Public Adjusters_____

Victim_____ Is There A Clear Motive?_____

Medical Release Forms_____ Financial Documentation_____

Rights Forms_____ Account Records_____

Laboratory Reports_____ Bank Checks_____

Battalion Chief Photos_____ Business Records_____

Weather Conditions_____ Personal Finances_____

Newspaper Photos_____

FATAL:

Medical Examiner as Scene_____ X-Ray_____

Autopsy_____ Blood Sample_____

B

SWORN STATEMENT OUTLINE

I. Preliminary Matters.

A. No waiver.

B. Statement being taken in order to further consider and evaluate claims.

C. Extremely important proceeding--we will use answers in our consideration and evaluation of claims.

D. Say so if you don't understand a question, etc.

E. Encourage correction of mistakes or errors in testimony.

F. Read, sign, etc.

II. Background.

A. Name, address.

B. Date of birth, place of birth, social security number, drivers license.

C. Marital history, children, other dependents.

D. Education--since high school.

E. Occupational history --since high school.

F. Present job/business. How's business.

1. Describe.

2. Supervisor.

3. Length held.

4. Compensation.

5. Plans for a new job.

G. Receive unemployment compensation in the last three years?

H. Residence for last 10 years.

I. Military service--honorable discharge?

J. Arrests/questioning about crimes--if insured replies in the affirmative, ask about convictions.

K. Aliases

L. Litigation history, both as a plaintiff and a defendant, for the last 10 years.

III. Financial.

A. Current year gross income to date, from all sources.

B. Net and gross income for the last three years, specifying sources.

C. File income tax returns for the last three years?

1. Federal.

2. State.

3. Preparer.

4. Produce!

D. Bank accounts--produce records.

1. Where.

2. Type of account.

3. Who is on the account.

4. Amount in each account.

a. Today.

b. Day of fire.

c. One month before fire.

B

d. Three months before fire.

E. Ask about bounced checks, overdrafts and the like.

F. Broker/dealer accounts.

G. Other assets.

1. Farms, buildings, etc.

2. Trusts.

3. Boats, etc.

H. Identify accountant or bookkeeper.

I. Financial statements.

1. When last prepared.

2. Why.

3. Who prepared--you assist.

4. Produce!

J. Debt--all of them.

1. Mortgages.

2. Other loans.

3. Alimony/child support.

4. Taxes.

5. Judgments.

6. Suppliers.

7. Medical.

8. Charge accounts.

9. Utilities.

For each debt, establish when it occurred, why, and present status.

K. Unusual expenses in the last year such as medical or gambling.

IV. Insurance History.

A. Prior claim--losses.

B. Identify all policies on this property.

C. How limit is established.

D. Current agent.

E. Ever cancelled or not renewed.

F. Recent changes in coverage--why.

V. Dwelling or Building.

A. Acquisition.

1. When.

2. Where.

3. How much.

4. Finance.

5. Status of note.

B. Description of building before loss.

1. Photos.

2. Blue print or sketch.

3. Condition.

B

4. Flammable.

5. Ignition sources.

C. Use.

1. Frequency.

2. When.

3. Where.

4. With whom.

5. For what purpose.

D. Plans for future use.

1. Sale.

2. Remodel.

3. Tear down.

E. Recent damages or alterations, including the name of any repair firm.

F. Extent of loss.

1. Description.

2. Photos.

3. Contractors' estimates.

G. Any recent problems with electrical or hearing systems? Air conditioning? Others? Were these problems corrected?

VI. Contents.

A. Description and itemization of items damaged or destroyed (get receipts, photos, serial numbers, model, manufacturer if possible).

B. Acquisition.

1. When.
2. Where.
3. How much.
4. Financed.
5. Status of note.

C. Use.

1. Frequency.
2. When.
3. Where.
4. With whom.
5. Purpose.

D. Plans for future use at time of loss, such as sale.

E. Preloss damage or repairs, including name of repair firm.

F. Extent of damage or destruction to item.

G. Flammable in or near premises?

1. What.
2. Where stored.
3. Why.

H. Insured to examine proof of loss and be given chance to correct.

1. Ask about unusual or high value items.
2. Valuable papers, photo albums and the like.

B

VII. Day of the Fire.

A. Ask insured and spouse and those with suspected involvement:

1. How they (as well as spouse, kids, etc.) spent the 24 hours before the fire, in detail (i.e., tie down the alibi).

a. Times

b. Places.

c. With whom.

d. When last at the insured premises.

(1) Why leave--when plans made.

(2) Who knew you were leaving.

(3) Who was the first and last to leave.

(4) Everything locked.

(a) Doors.

(b) Windows.

(c) Who had keys and where were they.

2. How learned of the loss and when.

3. Witnesses.

4. Where were pets--normally there?

B. Ask insured and family:

1. Threats.

2. Enemies.

3. Recent burglaries or vandalism.

a. To insured premises.

b. In the area.

VIII. Who Set The Fire.

A. You? Spouse?

B. You know or suspect who did.

C. Did you pay someone to set the fire? Did spouse?

D. Know or suspect who did.

E. What do you think caused the fire?

F. Contact by police or fire officials.

G. Take polygraph? Why not.

H. Anyone tell you the fire was incendiary.

B

DENIAL LETTER

March 1, 1990

Ms. Joyce Davenport
Attorney at Law
Nowheresville, IA 12345

RE: Mick Belcker
Fire Loss of January 1, 1990

Dear Ms. Davenport:

This letter is directed to you in your capacity as counsel to Mick Belcker, the insured under the Why Me Insurance Company Policy No. 12345678.

As you know, your client has submitted a Sworn Statement In Proof Of Loss in support of certain claims under the Why Me policy of insurance concerning a fire at the insured property on January 1, 1990. Please be advised that based on the investigation completed, the Proof Of Loss submitted, the statements under oath completed and the conduct of the insured, it is the position of Why Me Insurance Company that it has no liability for any of the claims submitted in the Proofs Of Loss for the reason that the Why Me policy of insurance has been rendered void by the acts and conduct of the insured or his agent.

The policy of insurance states in pertinent part that the Why Me policy of insurance does ". . . not provide coverage for any insured who has intentionally concealed or misrepresented any material fact or circumstances relating to this insurance". It is the position of the why Me Insurance Company that your client has violated this provision in one or more of the following respects:

1. He has falsely represented that he has no knowledge as to the origin of the fire.

2. He has misrepresented his whereabouts on the night of the fire.

3. He has misrepresented in the Proof Of Loss, among other things, the quantity of real property owned by him and lost in the fire.

It is also the position of the Why Me Insurance Company that the policy of insurance has been rendered null and void by the fact that the insured burned or procured the burning of the insured premises.

The Why Me Insurance Company expressly and specifically reserves its rights to assert all other defenses it may have to the insured's claim, even though not enumerated above.

Please be advised that The Why Me Insurance Company is taking steps today to seek a declaration of its rights under the policy of insurance. [*See note below]:

By this letter, The Why Me Insurance Company does not intend to and does not waive or relinquish any of their rights or defenses under the above-referenced policy of insurance.

Yours very truly,

David J. W. Proctor

DJWP:la

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[*Alternative paragraph if Declaratory Judgment action will not be commenced]:

If your client wishes to proceed with litigation, strict compliance with all terms and conditions of the above-referenced policy of insurance will be required, including, without limitation, the provision that "Suit must be brought within one year after the loss."

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INVESTIGATION AND ADJUSTMENT OF ARSON CLAIMS

Robert C. Burrell
Borgelt, Powell, Peterson & Frauen, S.C.
735 North Water Street
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I. Nature and importance of first party bad faith.

A. Initial insurer claims processing.

1. Upon receipt of first notice, insurer must initiate claims handling steps.

a. Prompt investigation necessary. Efforts to determine amount of loss should proceed simultaneously with liability investigation.

b. Nonwaiver/reservation of rights needed where coverage questions are presented.

c. Initial decisions on experts should be made.

1. Cause and origin expert retained.

2. Consider experts to eliminate non-incendiary causes, i.e., electrical wiring.

3. Subrogation experts.

2. Loss scene.

a. Meeting with insured, if possible at loss scene.

b. Insured has duty under policy to cooperate. See Standard Fire Policy, lines 90-122.

c. Take statements of available witnesses, i.e., firefighters, observers, persons on the scene.

d. Take plenty of photographs of key areas.

3. Suspicious circumstances - Examples of how to spot a potential arson case.

a. Incendiary origin indicators.

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1. Multiple points of origin.

2. Difficulties of fire department in extinguishing.

3. Horizontal spread of fire - i.e., doors, windows left open to provide ventilation; should also check vertical ascension of fire if, for example, attic doors are left open.

4. Discoloration of concrete floors, walls, especially in low spots of building.

5. Contents of rooms:

   a. Valuables missing in drawers.

   b. Items out of place - i.e., plastic jugs in a room of books, waffle iron in bedroom.

   c. Depreciated items recently moved into building.

6. Trailers.

7. Items planted in area of origin such as newspapers, cotton, kerosene.

8. If liquid accelerant involved, subject glass samples to spectograph.

9. Frustration of sprinkler system or of other fire protection devices.

b. Motive of insured.

   1. Financial problems are most predominant.

      a. Heavy or unpaid debts.

      b. Declining business.

      c. Attempts to sell property.

      d. Unusual expenses, i.e. gambling, stock market, medical.

e. Foreclosure threats.

f. Outstanding unsatisfied liens, judgments.

g. Alimony, support obligations.

2. Excessive insurance.

3. Lack of motive for others to set fire.

c. Opportunity of insured to set fire.

1. Locate all keys.

2. Establish lack of forced entry.

3. Establish whereabouts of all interested persons.

4. Determine and check out insured's alibi.

d. Other inculpating circumstances.

1. Removal of valuable or sentimental property just before fire.

2. Increase in insurance.

3. Insureds discussions with agent - "Is my policy still in effect?" "How fast are claims handled?"

4. Extent of uninsured loss.

B. Insured's duties after loss occurs.

1. "give immediate written notice to this Company of any loss: (lines 90-91);

a. Purpose of this requirement is to afford insurer adequate opportunity to timely investigate while facts are still available. 5A J. Appleman, "Insurance Law and Practice" §3481; 13 R. Anderson, "Couch on Insurance 2d", §49:2.

b. Unless waived, such immediate notice constitutes a condition precedent to suit under the policy. See RTE Corp. v. Maryland Cas. Co., 74 Wis. 2d 614, 626, 247 N.W.2d 171 (1976); Siravo v. Great

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American Ins. Co., 410 A.2d 116 (R.I. 1980).

c. The term "immediate" as used here means only that notice is to be given in such time as is reasonably required under the circumstances RTE Corp. v. Maryland Cas. Co., 74 Wis. 2d 614, 247 N.W.2d 171 (1976).

2. "protect the propety from further damage" (lines 91-92);

a. No recovery will be allowed to the extent the insured could have salvaged some of the goods. Henri's Food Prods. Co., Inc. v. Home Ins. Co., 474 F. Supp. 889 (E.D. Wis. 1979).

3. "forthwith separate the damaged and undamaged personal property" (lines 92-93);

a. Fact question presented on whether weather made it hazardous to separate damaged from undamaged property. Taubman v. Allied Fire Ins. Co., 160 F.2d 157 (4th Cir. 1947)

4. "put it in the best possible order" (lines 93-94);

5. "furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed" (lines 94-97).

6. "and within sixty (60) days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss" (lines 97-99).

a. 60 day time period commences after fire has abated sufficiently to permit inspection to determine the loss. Slocum v. Saratoga & Washington Fire Ins. Co., 134 N.Y.S. 72 (App. Div. 1912).

b. Most courts even consider the 60 days to commence at the date of discovery of the loss. See, Zaffuto v. Northern Ins. Co., 167 A. 298 (Pa. Super. 1933).

c. The Proof of Loss must be:

1. "signed and sworn to by the insured" (lines 99-100).

   (a) But probably signing by the agent of the insured may be sufficient, at least where the insured is unavailable or in other appropriate circumstances. Gump v. National Union Fire Ins. Co., 99 N.E. 1130 (Ohio 1912)

2. "stating the knowledge and belief of the insured" as to the following:

3. "the time and origin of the loss" (lines 100-101);

4. "the interest of the insured and of all others in the property" (lines 101-102);

5. "the actual cash value of each item thereof" (lines 102-103);

6. "the amount of loss thereto" (line 103);

7. "all encumbrances thereon" (lines 103-104);

8. "all other contracts of insurance, whether valid or not, covering any of said property" (lines 104-105);

9. "any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy" (lines 105-107);

10. "by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss" (lines 107-109);

11. "whether or not it then stood on leased ground" (lines 109-110).

d. Purpose of the Proof of Loss is to acquaint the insurer with the circumstances surrounding the loss and the nature and extent of the loss, so as to allow the insurer to determine what further steps are to be taken. 5A J. Appleman; "Insurance Law and Practice", §3531.

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e. Courts generally hold merely "reasonable" and "substantial" compliance with Proof of Loss policy requirements is sufficient. See 5A J. Appleman, "Insurance Law and Practice", §3532-3548.

7. "Easy Read" policies and the new ISO Commercial Property policy modify the Proof of Loss timing to require the Proof within 60 days after request by the insurer.

   a. Typical of such policies: "Give us a signed, sworn description of your loss within 60 days after we ask."

   b. Besides the timing change, the Easy Read policies modify somewhat the contents of the "signed sworn description of your loss" as compared to the proof of loss requirements under the Standard Form Fire Insurance Policy.

8. "and shall furnish a copy of all the descriptions and schedules in all policies" (lines 110-111).

9. "and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged" (lines 111-113)

10. "the insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described" (lines 113-116)

   a. Fourth Amendment problems applicable to law enforcement agencies give investigating agencies fewer rights and more restrictions as compared to the insurer in the investigation of the loss. Michigan v. Tyler, 436 U.S. 499 (1978); greater and possibly contrary restrictions on law enforcement are contained in Michigan v. Clifford, 464 U.S. 287 (1984).

   b. Policy provisions give the insurer the right to search without a warrant Honeycutt v. Aetna Ins. Co., 510 F.2d 340 (7th Cir. 1975) cert. den. 421 U.S. 1011 (1975). But see dicta in Terpstra v. Niagara Fire Ins. Co., 256 N.E. 2d 536 (N.Y. App. 1970).

11. Mortgagee obligations.

a. Mortgagee named under New York standard mortgage clause is deemed to have a separate contract with the insurer; the mortgagee must comply with that contract.

b. A contract vendor is considered to be the same as a mortgagee, even where listed on the policy as a loss payee Kintzel v. Wheatland Mut. Ins. Ass'n., 203 N.W.2d 799, 803 (Iowa 1973). Wholesale Sports Warehouse Co. v. Pekin Ins. Co., 587 F. Supp. 916, 919-20 (S.D. Iowa 1984); 5A J. Appleman "Insurance and Law Practice" §3401, p. 282-84 (1970).

c. "If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and bringing suit". (lines 74-78)

II. Examinations Under Oath.

A. Policy Requirements.

1. The policy requires the insured: "submit to examinations under oath by any person named by this Company and subscribe the same" (lines 116-117);

2. "and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made" (lines 118-122).

B. Permissible Examination Under Oath purposes.

1. To enable the insurer to obtain all information and material in the possession of the insured regarding the claim, the company's rights and its obligations under its policy of insurance. Happy Hank Auction Co. v. American Eagle Ins. Co., 136 N.E.2d. 842 (N.Y. App. 1956); Claflin v. Commonwealth Ins. Co., 110 U.S. 81 (1884).

2. To protect the insurance company against fraud by

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discouraging exaggerated or improper claims. Hart v. Mechanics & Traders Ins. Co., 46 F. Supp. 166 (La. 1942).

3. Expedite evaluation and settlement of valid claims.

4. Examination Under Oath differs from a discovery deposition.

   a. Insured's obligations arise from contract rather than from rules of civil procedure.

   b. Insured lacks the right to ask questions or have his own lawyer cross examine. Liverpool & London & Globe Ins. Co. v. Cargill, 145 P. 1134 (Okla. 1914).

C. Case authorities refine and interpret policy requirements regarding Examination Under Oath.

1. Insured's refusal to submit to Examination may preclude recovery under the policy. Gross v. United States Fire Ins. Co., 337 N.Y.S. 2d 221 (1974); Restina v. Aetna Cas. & Sur. Co., 360 N.Y.S.2d 331 (1969); Bonner v. Home Ins. Co., 13 Wis. 258 (1861).

   a. Insured's deportation prior to his Examination Under Oath was a valid excuse for his failure to appear. Roberto v. Hartford Fire Ins. Co., 177 F.2d 811 (7th Cir. 1949).

   b. Insured's pending criminal prosecution may prevent denial because of refusal to submit to Examination Under Oath. Greenberg v. Aetna Ins. Co., 501 P.2d 1032 (Cal. 1973).

   c. Insurer must make formal demand for Examination Under Oath in clear and unambiguous language. C-Suzanne Beauty Salon Ltd. v. General Ins. Co., 574 F.2d 106 (2d Cir. 1978).

   d. Insurer waives right to Examination Under Oath if claim is denied before Examination Under Oath is conducted. Lititz Mut. Ins. Co. v. Lengacher, 248 F.2d 850 (7th Cir. 1957).

2. At the Examination Under Oath, the insurer is entitled to all documentary evidence material to the insurer's liability.

a. Insured is required to produce "all books of account, bills, invoices and other vouchers, or certified copies thereof if the originals be lost..." (lines 118-120).

b. Income tax records and returns and his financial position. McIntosh v. Eagle Fire Ins. Co. of New York, 325 F.2d 99 (8th Cir. 1963); Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141 (W.D. Wis. 1968); aff'd 416 F.2d 967 (7th Cir. 1969). Kisting holds that denial of insured's claim was appropriate based upon insured's failure to produce, at this Examination Under Oath, tax returns, his salary records and other financial information.

c. Other examples of documents insureds have been required to provide include virtually all items and variations of documents designated in the policy.

d. Insured must answer all material questions, and every relevant and pertinent question relating to the bona fide nature of the claim is material. Happy Hank Auction Co. v. American Eagle Ins. Co., 136 N.E.2d 842 (N.Y. App. 1956). Materiality means: all such matters as have a bearing on the insurance and the loss. 5A Appleman, "Insurance Law and Practice" §3551 (1970). 13A Couch on Insurance 2d §49A:362, p. 762-63.

3. Corporate officers, employees and agents are proper examinees but independent contractors or attorneys are not. Palace Cafe v. Hartford Fire Ins. Co., 97 F.2d 766 (7th Cir. 1938).

4. Attorney authorized by insurer is a proper person to administer the Examination Under Oath. American Macaroni Mfg. Co. v. Niagara Fire Ins. Co., 164 F.2d 878 (5th Cir. 1947).

5. Examination Under Oath may establish evidence of fraud and false swearing necessary to void the policy. Miele v. Boston Ins. Co., 288 F.2d 178 (8th Cir. 1961); Juneau Store Co. v. Badger Mut. Fire Ins. Co., 216 Wis. 342, 257 N.W. 144 (1934); Fink v. La Crosse Mut. Fire Ins. Co., 203 Wis. 350, 234 N.W. 339 (1931).

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6. Procedural formalities of Examination Under Oath.

a. Time, place, and person designated to take the examination must be explicitly stated. Citizens Ins. Co. v. Herpolsheimer, 109 N.W. 160 (Neb. 1906); Nicolai v. Transcontinental Ins. Co., 378 P.2d 287 (Wash. 1963). See also Brookins v. State Farm Fire & Cas. Co., 529 F.Supp. 386 (S.D. Ga. 1982) and Saft America, Inc. v. Insurance Co. of North America, 271 S.E.2d 641 (Ga. 1980).

1. Appearance by insured and submission to examination waives right to object to sufficiency of notice and demand. Davidson v. Providence Washington Ins. Co., 157 A. 148 (N.J. 1931).

b. Make formal demand for the Examination in clear and unambiguous language. C-Suzanne Beauty Salon, Ltd. v. General Ins. Co., 574 F.2d 106 (2d Cir. 1978).

c. Demand the examination within a reasonable time after the loss and submission of the proof of loss. 5A Appleman, "Insurance Law and Practice", §3551 (1970). Beckley v. Ostego County Farmers Coop Fire Ins. Co., 159 N.Y.S.2d 270 (1957).

d. Take the Examination in the county where the loss ocurred or where the insured resides. Pierce v. Globe & Rectors Fire Ins. Co., 182 P. 586 (Wash. 1919); American Central Ins. Co. v. Simpson, 43 Ill. App. 98 (1892).

e. Permit the insured to be accompanied by his attorney or other representative. Gordon v. St. Paul Fire & Marine Ins. Co., 163 N.W. 956 (Mich. 1917).

f. Provide the person examined with a free copy of the transcript. Hart v. Mechanics & Traders Ins. Co., 46 F. Supp. 166 (La. 1942).

g. Before taking the Examination Under Oath, the claim must not be denied or the right to conduct an Examination Under Oath may be waived. 17A Appleman, "Insurance Law and Practice", §9783 (1970). Lititz Mut. Ins. Co. v. Lengacher, 248 F.2d 850 (7th Cir. 1957).

III. Claim Resolution.

A. Initial decisions.

1. Validity of claim.

2. Extent of coverage.

a. Property covered.

b. "Direct Loss".

c. Business interruption portion of claim requires particular attention. Arrange informal document exchange between insurer and insured accounting representatives prior to Examination Under Oath.

d. Determine what exclusions may apply.

2. Proof of Loss.

a. Provide written notice to insured requesting Sworn Statement in Proof of Loss. Trend is to require insurer to formally notify insured of his policy obligations, particularly concerning Proof of Loss.

b. Normally one should grant insured's requests for reasonable extensions of time to file Proof of Loss and other claim information.

c. Reject Proof of Loss if incomplete or if deficient for technical reasons.

3. Pay mortgagee promptly if mortgagee is uninvolved with loss.

4. Valued policy law.

5. Outside assistance.

a. Experts.

1. Cause and origin.

2. Contractors.

3. Accountants.

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4. Product engineer

B. Decision makers.

1. Attorney recommends to insurer, based on whether evidence is legally sufficient to support arson defense.

2. Adjuster, claim supervisor must make ultimate decision based on recommendations and evidence.

C. Denial Decision.

1. Decision must be made promptly and promptly communicated to the insured. Denial should be formal and in writing by a personal and confidential correspondence to the insured. Letter should preferably be sent by insurer. Reasons for the denial, with reference to policy provisions, must be clearly set forth. There is authority to support the position that a failure to list some defenses in a denial letter constitutes a waiver of the right by the insurer to raise those defenses at a later stage. Morris v. Reed, 510 S.W.2d 234 (Mo. App. 1974); See also Lawndale National Bank v. American Casualty Company, 489 F.2d 1384 (7th Cir. 1973).

D. Insurer should consider filing Declaratory Judgment action.

1. Advantages.

a. Selection of forum.

b. Good faith can be argued in seeking prompt resolution and assistance in resolving controversy.

c. Tactical advantage of arguing first, last and in structuring case.

2. Disadvantages.

a. Assures litigation, where otherwise only possible.

b. Motion to dismiss may be argued, since jurisdictions are split on appropriateness of Declaratory Judgment actions.

1. Cases holding Declaratory Judgment action appropriate: California Union Ins. Co. Trinity River Land Co., 80 C.C.H. Fire & Cas. Cases 1507, 163 Cal. Rptr. 802 (Cal. App. 1980); Farmers Ins. Group of Ore. v. Hanson, 611 P.2d 696 (Ore. 1980); Unigard Mut. Ins. Co. v. Bleumel, 485 F. Supp. 668, 670 (D. Wyo. 1979); Great American Ins. Co. v. K & W Log, Inc., 591 P.2d 457 (Wash. App. 1979); American Home Assur. Co. v. Essy, 3 Cal. Rptr. 586, 179 Cal. App. 2d 19 (1960);

2. Cases holding Declaratory Judgment action inappropriate: State Farm Fire & Cas Co. v. Fuller, 258 S.E.2d 13 (Ga. App. 1979).

c. Insured will contend Declaratory Judgment action is itself bad faith.

IV. Legal Requirements to Establish Arson Fraud and Related Defenses.

A. Arson.

1. Arson may be established by circumstantial evidence. Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187 (7th Cir. 1976); Elgi Holding, Inc. v. Insurance Co. of North America, 511 F.2d 957 (2d Cir. 1975); Mele v. All-Star Ins. Corp., 453 F. Supp. 1338 (E.D. Pa. 1978); Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984); Great American Ins. Co. v. K & W Log, Inc., 591 P.2d 457 (Wash. App. 1979); Quast v. Prudential Prop. & Cas. Co., 267 N.W.2d 493 (Minn. 1978).

2. Burden of Proof. Many states allow the carrier to prove fraud merely by a preponderance of the evidence. Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111 (7th Cir. 1968); Hammann v. Hartford Acc. & Indem. Co., 620 F.2d 588 (6th Cir. 1980); Summer v. Stark County Patrons' Mut. Ins. Co., 26 N.E.2d 1021 (Ohio App. 1940). These rulings are based on the fact that a fraudulent fire insurance claim is a violation of a contract. As a species of contract fraud, it differs from common law fraud. Because the policy itself contains a fraud exclusion (Standard Fire Policy lines 1-6) the insurer is merely attempting to demonstrate a violation of an express contract clause. However, Iowa generally

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requires that fraud be proved by "clear and convincing" evidence. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 155 (Iowa 1984). Given the rationale of the cases supporting the preponderance burden of proof, an argument can be made that the preponderance standard applies in Iowa as well.

3. Incendiary origin.

   a. Absolutely necessary for arson defense. L & S Ent. Co. v. Great American Ins. Co., 454 F.2d 457 (7th Cir. 1971).

   b. Expert testimony may be admissible to establish cause of fire Gichner v. Antonio Troiano Tile & Marble Co., 410 F.2d 238 (D.C. Cir. 1969); Carpenter v. Union Ins. Co., 284 F.2d 155 (4th Cir. 1960).

4. Motive.

   a. Examples of financial motive cases: Elgi Holding Inc. v. Insurance Co. of North America, 511 F.2d 957 (2d Cir. 1975) - threats of foreclosure and outstanding liens, judgments.

   b. Boone v. Royal Indem. Co., 460 F.2d 26 (10th Cir. 1972) - plaintiff was "plagued with financial problems".

   c. Cora Pub Inc. v. Continental Cas. Co., 619 F.2d 482 (5th Cir. 1980) - restaurant losing money and was for sale.

5. Opportunity.

   a. A good statement of what is sometimes mistakenly referred to as "opportunity", is contained in Mele v. All-Star Ins. Co., 453 F. Supp. 1338 (E.D. Pa. 1978):

      "Thus in a civil matter to determine whether a reasonable inference exists that an insured is responsible for the fire which damaged the insured property, a jury should consider a combination of evidence of: (1) an incendiary fire; (2) a motive by the insured to destroy the property and (3) circumstantial evidence connecting the insured to the fire."

See also Sperrazza v. Cambridge Mutual Fire Ins. Co., 459 A.2d 409 (Pa. Super. 1983); Quast v. Prudential Prop. and Cas. Co., 267 N.W.2d 493 (Minn. 1978); George v. Travelers Indem. Co., 265 N.W.2d 59 (Mich. App. 1978).

B. Fraud/False Swearing.

1. Standard Fire Policy, lines 1-6.

2. The misrepresentation must relate to a material fact, defined broadly as one which "might have affected the attitude and action of the insurer" with respect to the claim. Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179 (2d Cir. 1984). Examples of material misrepresentations which have allowed voiding policies include:

   a. Misrepresentations as to the cause of the fire. Miele v. Boston Ins. Co., 288 F.2d 178 (8th Cir. 1961).

   b. Misrepresentations on removal of personal property prior to fire. Mercantile Trust Co. v. New York Underwriters Ins. Co., 376 F.2d 502 (7th Cir. 1967).

   c. Misrepresentations on valuation are the most important type. These are the most frequently made by insureds. A substantial or gross overvaluation voids the policy and has been held to create a presumption of fraud. Lykos v. American Home Assur. Co., 452 F. Supp. 533 (N.D. Ill. 1978), aff'd 609 F.2d 314 (7th Cir. 1979); Gregorys Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Mar. Ins. Co., 536 F.2d 1187 (7th Cir. 1976); Atlas Assur. Co., Ltd. v. Hurst, 11 F.2d 250 (8th Cir. 1926).

3. Fraud and false swearing may occur in the Proof of Loss, at the Examination Under Oath. Some cases have even involved statements made not under oath but during the insurer's investigation and adjustment process. See American Driver's Supply & Mfg. Co. v. Boltz, 482 F.2d 795 (10th Cir. 1973).

C. Increase of Hazard Defense.

1. Standard Fire Policy, lines 28-32.

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2. Insured must be shown and have both knowledge and control of the increased hazard. St. Paul Fire & Mar. Ins. Co. v. Bachman, 285 U.S. 112 (1932); American Manufactures Mut. Ins. Co. v. Wilson-Keith & Co., 247 F.2d 249 (8th Cir. 1957). See generally Collins v. Fireman's Fund Ins. Co., 296 F.2d 562 (7th Cir. 1961); Goldman v. Piedmont Fire Ins. Co., 198 F.2d 712 (3rd Cir. 1952).

D. Failure to preserve and protect property.

1. Standard Fire Policy, lines 11-13 and 21-22.

2. Dearth of case authority.

V. Suggestions for insurers throughout the first party claims process.

A. Know the policy - both the rights and obligations of the company and the insured.

B. Investigate promptly.

C. Respond promptly.

D. Do not prejudge.

E. Be courteous.

F. Record objective facts, not impressions.

G. Do not make derogatory remarks in claim file about the insured.

H. Respond courteously and in writing to all letters of the insured. Make your requests for significant additional information in writing.

I. Admit mistakes if made.

J. Avoid telling the insured he will be hearing from you within a specified time unless you are positively certain you'll be able to do so.

K. Complex matters, particularly unique policy interpretation questions or arson issues, should be reviewed by counsel.

L. Before denial of any claim receive review of property loss manager or supervisor. If you do deny, do so promptly without keeping your decision a secret while requesting

more information.

M. If all or parts of a claim are denied, explain reasons to the insured and provide precise policy language. If some portion of the claim is undisputed, pay it.

N. Do not attempt to settle for less than the amount to which you consider claimant entitled - no "low ball" offers.

O. If the issue is which of two insurers covers the loss, consider payment to the insured and resolve the insurers' dispute later.

P. Overriding Rule - put nothing in the claim file you'll be ashamed to have read on television!

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STANDARD PROVISIONS—IOWA ONLY

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above

STANDARD PROVISIONS—IOWA ONLY
(Continued)

the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

B

STANDARD PROVISIONS—IOWA ONLY
(Continued)

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

EVALUATION OF MEDICAL RECORDS

C

The Search For Truth
by Fred R. Staab, D.C.

Objective: The general objective of this lecture is to provide an organized method of evaluation of medical records with particular emphasis on chiropractic records.

Specific Objectives: The objectives are:

1. To organize the records in a manner by which one may quickly compare the major complaint(s) and objective findings with the diagnosis and then compare the diagnosis with the services rendered (i.e., diagnostic services and treatment).

2. To be able to establish the patient's health status prior to the accident or event in question by clinical records.

3. To recognize clues indicating undisclosed history of pre-existing similar conditions.

4. To recognize evidence of multiple files on the patient by the same provider.

5. To be able to expose an unrealistic diagnosis inconsistent with subjective symptoms and objective findings.

6. To be able to place inflated fees in their proper perspective so that a jury could understand.

I. Work Sheet

A. Statistics

1. Name.
2. Age.
3. Type of case (H&A, Liability, Work Comp., etc.)
4. Third Party.

B. Services

1. Diagnostic or Special Services.
2. Treatment (kind or type).
3. Pattern of treatment (office visits plotted).

II. Diagnosis (include that offered by all treating disciplines)

Describe the diagnosis in terms more descriptive than the ICD-9 codes. Attempt to explain the diagnosis in such a way that a claims person or attorney with some background in medical terminology can better understand the patient's condition. Include any factors which would complicate the diagnosis. You may wish to question the diagnosis; if so, be sure to qualify your comment(s).

III. History of the Condition(s)

A. Onset and mechanism.

B. Immediate factors which may qualify the diagnosis:

1. Emergency services (at the scene).
2. Initial care such as Emergency Room.
   a) Status - evidence of distress, loss of consciousness
   b) Chief complaint
   c) Objective findings and specific areas of concern
   d) Use of orthopedic supports
   e) X-ray reports
   f) Diagnosis
   g) Disposition

C. Any other care provided prior to that in question.

IV. Past History

A. Health status prior to the accident.

B. Any previous accidents or similar conditions.

C. Was the patient an established patient with the physician in question (Note: CPT codes may reflect this)?

D. Are there indications records are missing or information withheld. (Some physicians keep the patient's records in several files.)

V. Medical Records

Address all pertinent records. You may wish to comment on the absence of certain records known to be available, but not in the file.

A. Adequate history?

B. Examinations.

1. Records -vs- fee and level of service implied by the service code(s).
2. Evidence of correlation of findings.
3. Contradictions in testing and findings.

C

VI. Question the Diagnosis

If you question the diagnosis and haven't yet stated so, now is the time to make this known because you have addressed all of the factors which would justify questioning it.

A. Is the diagnosis consistent with the chief complaint(s) and objective findings?

B. Is the diagnosis complete? (i.e., does it explain all complaints and physical findings?)

C. Are there factors which establish the presence of pre-existing conditions?

D. Use terminology which cannot be construed to reflect a bias.

E. Do the records reflect lack of pursuit of significant complaints?

VII. Special Services

Address each diagnostic service and any hard items such as orthopedic supports.

A. Necessity or Appropriateness.

1. Is the service indicated based on the diagnosis and/or information provided?
2. Do the records indicate the service/procedure was technically well done?
3. Is the interpretation correct?
4. Is the physician/facility prepared to deal with potential complications of the procedure?
5. Is the data obtained correctly used in the best interest of the patient? (Reference: Richard D. DeShazo, M.D. Post Graduate Medicine; Vol. 84/No. 8, Dec. 1988)

VIII. Treatment

A. Describe treatment as reflected in the billing -vs- clinical records.

B. Is the type of treatment appropriate?

C. Is there evidence of duplication, redundant or unnecessary utilization?

D. Is there fractionation of billing? ("unbundling" or separate billings for services provided concurrently.)

E. Is the pattern of care usual and consistent with the diagnosis and information provided?

F. Is the duration of care consistent with the diagnosis and other factors involved?

G. Prognose any expected treatment.

IX. Prognosis

A. Is an independent examination indicated? Note: if the patient has been to a specialist, who's records or report is reliable, objective and creditable, recommend the exam be conducted by him or her. If specific question should be addressed, or if specific records should be provided the examiner, this should be mentioned.

X. Recommendations

A. Based on the above factors, recommend what services should be considered appropriate/necessary.

B. Qualify any recommendations which may reflect on your creditability.

1. Benefit of doubt.
2. Recommendations made based on records available/not available.

C. Suggest obtaining any records which might alter your opinion and offer to give additional comments or recommendations should those records be made available.

D. All recommendations should be in the best interest of the patient.

E. If you have made comments regarding the fees, be sure to qualify them.

1. That which you would expect to see for similar services.
2. That reflected by competitive costs of similar hard items or purchased services (i.e., laboratory services, orthopedic supports, or consultant fees.)
3. Unit values and example of conversion factor.
4. Recommend the carrier use their own statistics.

Patients Name	Review Requested By:
Description of Treatment:	Comments:

C

MONTH	TREATMENT DATES
	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
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PATIENTS NAME:			AGE	REVIEW REQUESTED BY:		
ID NO:		LIABILITY	W/C	H/A	ONSET	INITIAL VISIT
ACCIDENT	OPERATOR	PASSENGER	BELTED		ER	

HISTORY:

DIAGNOSIS	CHIEF COMPLAINT(S)

DATE	SPECIAL SERVICES	CHARGES	DATE	SPECIAL SERVICES	CHARGES

C

Personal Injury Seminary

by Fred Staab, D.C.

There are numerous Practice Management Seminars offered to the Chiropractic Profession. There are those which are well organized and clandestine, requiring a signed contract and those conducted by entrepreneurs. It is obviously difficult to obtain specific information from the former, but not impossible. Many of those conducted by entrepreneurs are approved by the State Boards for license renewal credit and sponsored by State Associations and/or the colleges.

In order to better understand the methods used to intimidate, mislead and defraud the third party payers, I have attended a number of "Insurance Seminars." Most of these seminars have certain fundamental characteristics, not all necessarily improper or unethical. They are based primarily on Health and Accident policies. As one of these doctors stated "One times one hundred is less than five times eighty." He also stated, "If the insurance company pays all of your bill, you've done something wrong. Now you don't know how much they would have paid".

I consider this so called "liberal credit practice" a method of using the patient's complaint, the patient's body, and his/her signature to extract large sums of money from the health care plans by preplanned, systematic tactics which include unnecessary services, over utilization and unusually high fees.

The common characteristics of these practice management schemes and essential in their success:

1. Obtaining the patient's assignment;

2. Convincing the patient that he/she has a significant health problem and selling him/her on a proposed amount of services;

3. Convincing the patient there is little or no financial responsibility on his/her part;

4. Maintaining files on all health care plans that are available in the doctor's area;

5. Intimidation of the insurance claims personnel;

6. Claims filing procedures which will result in the least scrutiny by the front line people;

7. Maintaining a White Knight Image with the patients;

8. Assuring a steady flow of new patients to work with.

Money obtained by such schemes is used to:

1. Gain control of State Associations;

2. Eliminate or control peer review committees;

3. Dominate PAC Organizations;

4. Obtain appointments on State Boards;

5. Gain influence in our colleges;

6. Gain access to the students.

In Missouri one individual was able to get appointed on the State Board of Chiropractic Examiners while teaching at a chiropractic college, at the same time he was a trustee on the state association PAC organization, and was one of the principal owners of a practice management organization. In the State of New York one person, while owner of a clandestine type practice management organization, was able to get himself, along with his attorney, appointed to the Board of Trustees of the New York Chiropractic College. The New York Supreme Court eventually removed him, along with eight other individuals from this Board of Trustees. This is not to say that any of these people did anything wrong, but the twelve hundred pages of testimony make for some interesting reading.

I have attended numerous continuing education courses on insurance, some of which were excellent. In addition to these I have attended some seventy-two hours of continuing education on the subject of personal injuries and how to build this type of practice. Among these programs include the following:

1. **Wm. Kelley Seminar** sponsored by Logan College and approved for license renewal credits July 30, 1983, including a lecture by George White, Attorney. I consider this seminar unprofessional, limited in educational content and not in the best interest of the public.

2. **Doctor Sprinkle's Personal Injury Seminar** sponsored by Cleveland Chiropractic College of Los Angeles. This seminar was devoted to appropriate history, examination and care of the injured patient. It emphasized thermography, thermography, thermography, and, considering the otherwise good content, was disappointingly onesided.

3. **The Bruce Hagen Course on Personal Injury** was devoted to demonstrating what a wonderful clinic Doctor Hagen has, practice management, what color you and your wife

or assistant should wear (for an additional fee they will do a color analysis of you), guidelines for your life goals, and a canned narrative report.

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4. **The Haggard Course on Personal Injury**, Chicago, 1990. This seminar was devoted to getting attorneys business, doing most of the attorney's leg work for him/her, taking the $2,000.00 nuisance case and making it a $25,000.00 case, and providing a "package" for presentation in the court room.

5. **The Hillgartner Course on Insurance** was sponsored by Logan College and approved for license renewal credits. This course was devoted to changing the doctor's concept of what is right and what is wrong, manipulation of the patient (psychologically), billing the insurance company well beyond their limits in order to find out what they will pay. I consider this seminar not in the best interest of the public.

6. **The Chafian Insurance Seminar**. This seminar was devoted to practice management, lots of x-rays of the neck, how to use orthopedic supports (sponsored by DeeCee Laboratories, Inc.), billing methods, and service codes.

Out of the programs listed above I must say the most informative was that by Doctor Sprinkle. I considered this course the only one whose content justified license renewal credit. I considered his course rather one-sided toward the plaintiff.

The following information is not offered for the purpose of inflaming anyone, but rather to demonstrate the questionable ethics and lack of professionalism characteristic in these seminars, some of which are sponsored by colleges and approved by the State Boards for license renewal credits.

Most of the insurance seminars involve a lot of time with practice management, office procedures and billing tactics.

I. Comments on case evaluation (value) and how to assure payment: The possible flaws in a case; one which is a year old; one in which there is a long lead time without treatment; no emergency care, no x-rays, no sheet metal damage. Don't get very deep into this type case. Don't run up a bill of $3000 in the above type of case - not if you want to be paid. (Sprinkle.) When the doctor bills are too low, we need some "specials." Get the numbers up. Send them to a "Pain Clinic." This costs $12,000.00. You now have your fee plus $12,000.00 and loss of time from work. (Sprinkle.)

II. Comments about diagnosis codes, (i.e. ICD-9 Codes) and service codes (CPT Codes): One should keep "your claim in the computer" by using billing codes. Some recommend using multiple codes for more than one area of the spine.

Kelly recommended the use of Code 83015 for hair analysis and on all subsequent tests use "gymnastics," i.e., that is, change the "suspected substance." He, in essence, is stating that one should take those minerals or substances listed on the hair analysis individually

and each time a hair analysis is run, change the substance that is suspected to be there in excess or in deficiency. "Make sure the diagnosis fits the number and length of time" (treatment). Use a diagnosis, leaving room to change various factors, such as: level of subluxation, chronic, acute, on the claim. "As you see there is no way that anyone can tell how long it takes to treat this case."

III. Comments about services: Hagen recommends "x-ray every accident victim." Chaffan recommends eleven x-rays of the cervical spine to check the "alar" ligament; Kelly recommends making two additional views (i.e. anterior to posterior open mouth view on rotation to check the atlantal axial ligament for injury). Kelly recommended billing two to three times what the laboratory bills are plus additional fee for reported findings.

Insurance carriers do no like to pay for treatment, they are "potty trained" to examinations. Anytime your treatment versus examination fees exceeds two to one in cost, you are in trouble with the computer. (Kelly.)

Haggard recommends an examination which lasts five days, doing a little more each day.

> First day: Mini-consultation, free spinal screen, taped consultation, scout x-rays of all areas and schedule a thermographic examination.
> Second day: Physical examination, blood and urine lab tests, objective/subjective impairment and stress x-rays of the cervical, thoracic and lumbar areas.
> Third day: Percent of subjective impairment, range of motion studies and oblique x-rays.
> Fourth day: Orthopedic examination, neurological examination.
> Fifth day: Report of findings and treatment schedule.

IV: Comments about the insurance company and claims examiners: "What is an adjuster?" They are, "underpaid misfits who cannot make it in the competitive line; incompetent and lazy. . . . they are jealous of you." "Why do they stay in their field?" "Because they get a company car." (White.) He describes an adjuster as an "unhappy, insecure individual who will never get rich." Their level of authority is based on the amount of a check they are authorized to write. He talks about the "young and green" and the "old and weak". . . . "Those who are green have no consistency. . . they will pay too much on one claim and not enough on the next." "These are the facts of life. . . . women adjusters are mean as snakes, black adjusters are mean as snakes." Bill more frequently, "you reach a dumber level of adjuster." (White.) The prerequisite to be an insurance adjuster: "turn your mama into the I.R.S Insurance companies try $2000 cases and settle $1,000,000 cases." (Sprinkle.)

Doctor Haggard and his attorney brother recommend arranging consultation by out-of-town specialists. "If they have to bring into court fifteen people at $700.00 per hour they will think twice about going to court."

V. Comments about attorneys: They are motivated by money. The general practitioner lawyers are nice guys and usually lose their cases with insurance companies and are usually poor. Bodily injury lawyers are those who try cases. They are usually young and are also those who settle cases. (White.) Plaintiff's attorneys are generally poor. "An attorney is like a pet snake; if you have one long enough he's going to bite you." "The typical attorney goes to court about once a year." (Sprinkle.)

C

VI. Comments about plaintiffs: "Plaintiff's are generally poor." "Patients are afraid to sue insurance companies. . . .they will sue their neighbors, but not the insurance company." (Sprinkle.)

The following statement is made to the patient: "I'm not concerned about your spine healing, I'm only concerned whether it heals right or heals wrong." "Without a doubt, any time you have a tearing of soft tissue, you have 'cicatrix' (scar tissue). It will never have the same strength, pliability, or elasticity. It is a second grade tissue, prone to degeneration. Therefore, you can always say it's permanent." (Haggard.)

VII. Comments about juries: Juries, "think in terms of absolutes. . . are skeptical of the plaintiff. . . watch T.V. all the time . . . have a 16 year-old mentality." (Sprinkle.) "When you talk to a jury, you must assume they have an average 7th grade education. (Haggard.)

VIII. Comments about IMEs: An insurance company doctor has sold his soul to the devil. "An IME is not independent if he is picked by the insurance company. . . he is only independent if our side picks him . . . "It takes three smart people to beat an insurance company. . . a smart lawyer, a smart doctor and a smart patient." (White.) Defense witnesses have a tendency to lie a lot. (Sprinkle.)

I would consider the Haggard Seminar of most concern in that it promotes a very well organized package. You pay $800.00 for the seminar and then must buy a kit containing all of the necessary paperwork for ten personal injury cases. This plus a video tape on how to use it are available through Share International, giving this scheme access to a large number of doctor.

Like all schemes, each has its weakness: The Hagen Seminar is money and personal possessions oriented. The Sprinkle weakness is its emphasis on thermography. The Hillgartner program is nauseatingly money oriented. The Kelly Seminar has no educational content or purpose. The Haggard Seminar overflows with semi-scientific testing and meaningless record keeping designed to be interpreted on the spot by only the treating doctor.

Because of the lack of standard of care from one doctor of chiropractic to another, and in an effort to assure the best interest of the patient, it is my opinion the doctor should be held to the criteria of malpractice and anytime one bills for a service which is not exclusive of chiropractic practice, he/she should be held by the courts to the quality of other disciplines providing the same service. Example: When one bills for a neurological

examination, he/she should be held to that examination and interpretation which would have been afforded by the specialist implied. The specialist should be allowed to comment in court on the examination and conclusions.

D

ROCK AND A HARD PLACE, DEFENSE COUNSEL'S DUTY TO INSURED AND INSURER

Stephen J. Powell
SWISHER & COHRT
Waterloo, Iowa

I. ETHICAL STANDARDS OF COMPETENCE AND LOYALTY

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A. Generally, dual representation of the insured and the insurer is acceptable as long as there does not appear to be a probability of conflicting interest. A possibility of divergent or conflicting interests will not defeat the relationship, however, whenever it becomes apparent to counsel that the interest of one of the clients may be adversely affected, it is counsel's duty to avoid undertaking employment initially or if the conflict presents itself after initial employment, to make full disclosure of the potential conflict to both clients where possible and, in some cases, to withdraw from representation. Kooyman v. Farm Bureau Mutual Insurance Company, 315 N.W.2d 30 (Iowa 1982);Henke v. Iowa Home Mutual Casualty Company, 87 N.W.2d 920 (Iowa 1958); Nandorf, Inc. v. C & A Insurance Co., 134 Ill. App. 3d 134, 479 N.E.2d 988 (1985); Spindel v. Chubb/Pacific Indemnity, 89 Cal. App. 3d 706, 152 Cal. Rptr. 776 (1979); EC 5-14; EC 5-15; EC 5-16; EC 5-17; DR 5-105; DR 5-107.

B. General standards of competence and loyalty are based upon common law principals and ethical considerations which apply to every attorney. Some courts have cited the "Guiding Principals" which were approved by the American Bar Association as a statement of ethical guidelines for liability insurers and their attorneys. These guidelines were adopted by the ABA in 1972, however, they were rescinded in 1980 for political reasons, and therefore, may have reduced value for establishing a standard of ethical conduct. Mallen & Smith, Legal Malpractice, §23.12, 3d Ed. 1989.

C. The preliminary statement to the Iowa Code of Professional Responsibility for Lawyers provides in pertinent part:

> "The ethical considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principals upon which the lawyer can rely for guidance in many specific situations.
>
> "The disciplinary rules, unlike the ethical considerations, are mandatory in character. The disciplinary rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.... The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a disciplinary rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct...."

The Code of Professional Responsibility does set the standard for an attorney's conduct in any transaction in which the attorney's professional judgment is subject to scrutiny. Cornell v. Wunschel, 408 N.W.2d 639 (Iowa 1987).

D. Trial courts, as well as the Supreme Court, have the inherent power to disqualify counsel upon receiving facts which form a reasonable basis to believe that a conflict exists which constitutes a violation of the Code of Professional Responsibility. Meat Price Investigators Ass'n v. Spencer Foods, 572 F.2d 163 (C.A. Iowa 1978).

II. DUTY OF CONFIDENTIALITY

A. Duties to Clients.

1) Canon 4 and the ethical considerations and disciplinary rules which amplify and govern conduct occurring within its purview, clearly indicate that confidences and secrets of both the insured and insurer must remain inviolate. The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his clients. This obligation continues after the termination of the attorney's representation of his client. "Confidence" refers to information protected by the attorney-client privilege under applicable law (Iowa Code Chapter 610.14; 622.10), and "secret" refers to any other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. EC 4-1, EC 4-2, EC 4-4, EC 4-5, EC 4-6, DR 4-101.

2) DR 4-101(b) provides: "A lawyer shall not knowingly: 1) reveal a confidence or secret of his client; 2) use a confidence or secret of his client to the disadvantage of the client; 3) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client can sense after full disclosure.

Subparagraph c of the same disciplinary rule provides: "A lawyer may reveal: 1) confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them; 2) confidences or secrets when permitted under disciplinary rules are required by law or court order; 3) the intention of his client to commit crime and the information necessary to prevent the crime; 4) confidences or secrets necessary to establish or

collect a fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

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3) Defense counsel is not exempted from the confidentiality requirements. When defense counsel is in the position of dual attorney-client relationships between the insured and the insurer, there can be no confidentiality concerning any communications which do not have the potential of creating a conflict of interest. On the other hand, there may be situations which arise even in a non-conflict scenario which require counsel to protect the confidences of one or both of his dual clients. Counsel may protect the confidences of the insurer when discussing the insured's credibility or appearance as a potential witness. Likewise, the insurer may impart counsel with personal concerns about the insured which should necessarily remain confidential from the insured. These confidences do not create a problem for counsel unless disclosure creates a conflict of interest for either party in which case counsel may be required to take further action. Mallen & Smith, Legal Malpractice, §23.5, 3d Ed. 1989.

4) a) Where the attorney selected by the insurer to defend a claim or suit becomes aware of facts or information, imparted to him by the insured under circumstances indicating the insured's belief that such disclosure would not be revealed to the insurance company, but would be treated as a confidential communication to the attorney, which indicate to the attorney a lack of coverage, then as to such matters, disclosures made directly to the attorney, should not be revealed to the company by the attorney nor should the attorney discuss with the insured the legal significance of the disclosure or the nature of the coverage question. Tank v. State Fire & Casualty Company, 715 P.2d 1133 (Wash. 1986); Guiding Principal IV (See Appendix).

b) Where there is a question of coverage or other conflict of interest, the company and the attorney selected by the company to defend the claim or suit should not thereafter continue to defend the insured in the matter in question unless, after a full explanation of the coverage question, the insured acquiesces in the continuation of such defense. If facts or information indicating to the attorney a lack of coverage for the insured should first come to the attention of the attorney after the trial of the lawsuit has begun, the attorney should, at the earliest opportunity, inform and advise the insured and the company of the possible conflicting interest

ethical and legal obligations to the insurer and the Court. It is also apparent that defense counsel cannot undertake to further the interests of the insurer by divulging confidential information imparted to counsel by the insured. In such a case, the only option for defense counsel is to seek withdrawal. State Mutual Automobile Insurance Company v. Walker, 382 F.2d 548 (7th Cir. 1967); Cert. denied 389 U.S. 1045, 88 S.Ct. 789, 19 Lawyer's Ed. 2d, 837 (1968); Kirk v. Home Indemnity Company, 431 F.2d 554 (7th Cir. 1970); Gass v. Carducci, 37 Ill. App. 2d 181, 185 N.E.2d 285 (1962); Spadaro v. Palmasano, 109 S.2d 418 (Fla. App. 1959); and Mallen & Smith, Legal Malpractice, §23.18, 3d Ed. 1989.

B. Insured's Lack of Cooperation.

Counsel for the defense must consider the potential for conflicting interests when the insured refuses to cooperate. Such refusal may constitute a coverage defense on the part of the insurer, therefore, counsel must take every precaution to guard against favoring the insurer under these circumstances. While a lack of cooperation may provide the basis for a contractual disclaimer, counsel's duties are premised on professional and ethical standards, and as such, cannot be compromised to the potential detriment of either client. Under these circumstances, withdrawal may be counsel's only option. Mallen & Smith, Legal Malpractice, §23.18, 3d Ed. 1989.

APPENDIX

1) EC 4-1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

2) EC 4-2. The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing

information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would e revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

3) EC 4-3. Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

4) EC 4-4. The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

5) EC 4-5. A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such

information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

6) EC 4-6. The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

7) DR 4-101. Preservation of Confidences and Secrets of a Client.

A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refer to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

1) Reveal a confidence or secret of his client.

2) Use a confidence or secret of his client to the disadvantage of the client.

3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

C) A lawyer may reveal:

1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

3) The intention of his client to commit a crime and the information necessary to prevent the crime.

4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

8) EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

9) EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discoordinate.

10) EC 5-15. If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing

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interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

11) EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus, before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

12) EC 5-17. Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal case, an insured and his insurer (emphasis supplied), and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will be actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

13) EC 5-19. A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

14) DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair his Independent Professional Judgment.

A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by

his own financial, business, property, or personal interests.

B) A lawyer or the lawyer's partners or associates shall not prepare an instrument in which a client desires to name the lawyer beneficially unless the lawyer is the spouse of, or is the son-in-law or daughter-in-law of, or is otherwise related by consanguinity or affinity, within the third degree, to the client.

C) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

1) If the testimony will relate solely to an uncontested matter.

2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

15) DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

A) In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony, child support or property settlement.

B) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(D).

C) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be

adversely affected by his representation of another client, except to the extent permitted under DR 5-105(D).

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D) In the situations covered by DR 5-105(B) and (C), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation o the exercise of his independent professional judgment on behalf of each.

E) If a lawyer is required to decline employment or to withdraw from employment, no partner or associate of his or his firm may accept or continue such employment.

16) DR 5-107. Avoiding Influence by Others Than the Client.

A) Except with the consent of his client after full disclosure, a lawyer shall not:

1) Accept compensation for his legal services from one other than his client.

2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, it:

1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

2) A nonlawyer is a corporate director or officer thereof; or

3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

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The Burning Question -

A practical demonstration
of the examination and
cross-examination of the
Insurance Company's attorney
in a first party bad faith
arson case.

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HYPOTHETICAL FACTUAL SCENARIO

On the night of October 31, 1989, the Dante's Inferno Lounge and its contents were destroyed by fire. The lounge is owned by Joe and Sally Stryker and insured by United Barroom Risks/National Underwriting Mutual (U.B.R.N.U.M.). On the night of the fire, the Strykers were at home hosting their annual costume party. The lounge was closed by the bartender, Sam Shotglass, who had the only known set of keys to the lounge other than those carried by the Strykers. The fire department concluded that the fire was incendiary in origin. When Mr. and Mrs. Stryker arrived at the fire scene, still in their gorilla costumes, they were advised that the fire was incendiary and interviewed by police and fire department investigators. The next day U.B.R.N.U.M. was advised of the fire and retained John Barsitter to act as legal counsel and to advise them regarding handling of the claim and to coordinate the investigation of the fire. They also retained an investigator to determine the cause and origin of the fire and the responsible party. Later that day both the investigator and a company adjuster interviewed the Strykers about the fire. The Strykers signed a non-waiver agreement and also a release entitling U.B.R.N.U.M. to obtain financial records. The Strykers provided the investigator with a two-page list of suspects that included all current employees, numerous former employees, and also a number of guests from the costume party who had been asked to leave after they pushed the Strykers' grand piano into the swimming pool as a prank.

The investigators' cause and origin investigation confirmed the fire department's conclusion that the fire was incendiary in nature. Several points of origin were detected. Additionally, there were no signs of forced entry to the building. The investigator interviewed the bartender and a number of employees who had worked on the night of the fire. They all testified that Shotglass locked up when they left. Most of the employees said the Strykers were difficult and demanding employers. They did not, however, know of any employees or former employees who had grudges against the Strykers that might lead them to burn the lounge for revenge. Several employees also said that the Strykers frequently joked about burning down the lounge and retiring. Some employees also stated that they noticed that some lounge property, especially personal hunting photographs and stuffed wildlife that was offered for sale at the lounge, was removed from the lounge by the Strykers during the weeks prior to the fire. Several of the employees offered the opinion that the Strykers had burned the property.

A few of the party guests were interviewed by the investigator and all said that no one had any ill feelings about the Strykers or the swimming pool incident, which incident was attributed to excess Halloween revelry.

The investigation into the Strykers' financial affairs revealed that Dante's Inferno had borrowed substantial sums of money during the year prior to the fire and that a major portion of that debt was to fall due after the first of the year. The

lounge was also behind in its payments to several of its suppliers. The Strykers had, however, consistently taken salaries out of the business. The business's income appeared to have remained relatively constant over the past several years. In response to U.B.R.N.U.M.'s request for financial information, the Strykers provided twelve boxes of unorganized receipts and invoices plus corporate and individual tax returns and financial statements for the corporation.

The Strykers had raised their policy limits on Dante's Inferno after a minor kitchen grease fire caused damage a few months prior to the fire under investigation.

Barsitter and police and fire authorities periodically exchanged information pursuant to the relevant state statutory requirements.

On November 29, 1989, Barsitter, on behalf U.B.R.N.U.M., demanded a formal proof of loss. On December 23, 1989, the Strykers provided a list of property that they valued at over $250,000. The list included numerous moose, bear, deer, and other animal heads, as well as other products of taxidermy, including a "rare" stuffed jackalope. The Strykers claimed in notes accompanying the list of property that these were unique and valuable collector's pieces. Because the original list of property provided to Barsitter failed to specifically identify the quantities, purchase prices, and actual values of much of the listed property, Barsitter returned the list to the Strykers and asked that the list be resubmitted using special inventory

forms that had been provided to the Strykers. On January 2, 1990, Barsitter wrote to the Strykers on behalf of U.B.R.N.U.M., advising that their claim was being neither accepted nor rejected at that time, but was still under investigation.

The Strykers resubmitted the inventory list on the forms provided, without more specifically identifying quantities or purchase prices on January 15, 1990.

Mr. Barsitter took Mr. Stryker's statement under oath on February 20, 1989. Mr. Stryker was unable, at that time, to explain what the proceeds of the sizeable loans over the prior year had been used for. He was unable to explain several adjusting entries that had been made to the lounge's financial statements. He was, likewise, unable to provide any information regarding quantities, purchase prices, or suppliers for the stuffed wildlife that was on the lounge's inventory list. He did, however, promise to produce the requested information and referred Barsitter to his accountant to explain the adjustments in the financial statements.

On March 1, 1990, arson charges were filed against Mr. Stryker. During the interim period between charges being filed and the trial, Barsitter periodically sent letters to the Strykers requesting information that Mr. Stryker had promised to provide at his statement under oath. In each letter the Strykers were advised that their claim had neither been accepted nor denied, but was still under investigation. Barsitter received no response to any of his letters. Additionally, when

Barsitter contacted the Strykers' accountant on May 1, 1990, the accountant refused to speak to him.

On June 1, 1990, Mr. Stryker was acquitted of the arson charges.

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On June 15, 1990, Barsitter once again requested, by letter, the information that had been promised by Mr. Stryker. There was no response to the letter.

On June 30, 1990, the Strykers and Dante's Inferno filed suit against U.B.R.N.U.M., requesting the proceeds of their contract of insurance and claiming that the company had acted in bad faith. The company urged the Strykers' noncooperation as a defense to the contract claim. Under the circumstances, it chose not to raise the arson defense.

The Strykers' insurance policy includes the following provisions relating to cooperation by the insured:

> A. EXAMINATION OF YOUR BOOKS AND RECORDS
>
> We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.
>
> B. DUTIES IN THE EVENI OF LOSS OR DAMAGE.
>
> You must see that the following are done in the event of loss or damage to Covered Property:
>
> . . . .
>
> f. Permit us to inspect the property and records proving the loss or damage.

g. If requested, permit us to question you under oath at such times as may be reasonably required about any matter relating to this insurance or your claim, including your books and records. In such event, your answers must be signed.

i. Cooperate with us in the investigation or settlement of the claim.

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C. LEGAL ACTION AGAINST US

No one may bring a legal action against us under the Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part . . .

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Issues Regarding Testimony of the Insurance Company Representative In A First Party Bad Faith Case

I. Who will be the insurance company witness?

A. The Plaintiff will often determine who the company's witnesses will be by calling company personnel who have had involvement in the file as adverse witnesses.

1. The company can prevent some potential problems with Plaintiff's use of relatively inexperienced or weak company witnesses by assigning its more experienced and/or poised people to potentially problematic files.

B. Insurance company witnesses may include not only actual employees, but also attorneys, independent adjusters, and investigators.

1. Outside counsel and investigators should know what the company's claim-handling procedures are and comply with them.

2. There should be a record available to show that the company monitored and supervised outside contractor activities.

II. Use company witnesses as experts.

A. Designate all potential company witnesses as experts.

B. Company witnesses can identify pertinent policy provisions and explain or interpret them for the jury.

C. Company witnesses can be used to establish the company's good faith by showing compliance with the customary standards and practices of the insurance industry.

1. Draw on the company witnesses' background and experience to qualify them as experts as to industry practice and procedures.

2. Have the company witness explain the

way that similar claims are handled in the industry and the importance of particular activities that are part of the investigation (i.e., what type of investigation is usually done; in what order is the investigation done - what are the priorities; how long does the investigation and other aspects of handling such claims usually take).

3. Have the company witness explain how the company's actions comport with the industry standard.

D. Be prepared for Plaintiff to cross examine by using the unfair claims practices act, ICA §507B.4, to establish the relevant duty of care and the company's failure to comply with its provisions.

1. Iowa Code §507B.4(9) sets forth a number of "unfair claim settlement practices" including, inter alia: failure to act reasonably promptly upon communications with respect to claims (§ 507B.4(9)(b)); failing to adopt and implement reasonable standards for prompt investigation of claims (§ 507B.4(9)(c)); refusing to pay claims without conducting a reasonable investigation (§ 507B.4(9)(d)), etc.

2. Although violation of § 507B.4 does not give rise to a private cause of action, Seeman v. Liberty Mutual Insurance Co., 322 N.W.2d 35 (1982), Plaintiff's counsel may attempt to use those provisions to define the company's duty of care and specifically cross examine company witnesses concerning the provisions.

3. Alternatives in defending against such cross examination include:

a. moving in limine to exclude such inquiries or objecting to them on the ground that they contain an improper and unfounded statement of the applicable law and are misleading; and/or

b. having company witnesses prepared to acknowledge the duties implied by §507B.4(9) and explain how the company's practices, in general as well as the handling of Plaintiff's individual claim, are in compliance with the statutory duties.

III. Use company witnesses to introduce those portions of the claim file that are supportive of the company's position.

A. The insurance company's claim file, including the hearsay contents of investigative reports, should be admissible for the limited purpose of establishing the information that the insurance company had before it in deciding how the investigation should be conducted and deciding whether or not to pay the claim at any relevant point in time.

1. To prevail on a claim for bad faith, the Plaintiff must show the absence of a reasonable basis for denying the benefits of the policy and the Defendant's lack of knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Dolan v. AID Insurance Co., 431 N.W.2d 790 (Iowa 1988). Where the claim is fairly debatable, the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. Dolan at 794.

2. It is appropriate, in applying the Dolan test, to determine whether the results of the investigation were subjected to a reasonable evaluation and review. Dolan at 794. The content of the materials evidencing the nature and substance of the investigation itself and upon which the company relied in making its decisions are clearly relevant to determining whether there was bad faith. Even under circumstances such as those demonstrated in the hypothetical, where the insured is acquitted of a criminal charge of arson, the contents of the claim file may establish that the insured's culpability was fairly debatable even after insured's acquittal in criminal case. Mills v. Regent Insurance Co., 449 N.W.2d 294, 296 (Wis. Ct. App. 1989).

B. The Defendant's or even the Plaintiff's own expert may be used to lay foundation regarding the customary practice of the insurance industry to rely upon investigative materials such as those included in the company's claim file. Thomas v. New York Life Insurance Co., 260 N.W. 605 (Iowa 1935) (Expert testimony re: customary practice of insurance company to rely on information in application to set premiums and evaluate risks proper in case regarding Plaintiff's alleged misrepresentations on application for policy.)

C. Hearsay objections can be addressed by use of limited offers of proof during trial and a limiting

instruction. An example of a limiting instruction that has been used in prior cases is:

> Members of the jury, throughout the trial I have admitted into evidence documents for a limited purpose. The limited purpose was so that you, as jurors, would know what the insurance company claimed that it had before it and upon which it relied in governing its conduct in this claim. The Court wants to remind you that it was admitted for this limited purpose and not for you to consider that any of the matters contained in these materials was, in fact, true as many of the matters are based on hearsay evidence that normally would not be admissible in a trial.

IV. Use the company witnesses to establish the company's fulfillment of its own policy responsibilities and exercise of its rights under the policy.

A. The witness should describe in detail the investigation that was conducted and the status of the company's evaluation of the claim at each juncture of the investigation.

B. The witness whould identify, and lay foundation for the introduction of communications with the insured, including, for example:

1. Non-Waiver Agreement.
2. Authorization to obtain records.
3. Demand for proof of loss.
4. Notice of intentions regarding claim.
5. Requests for information for the investigation and responses.
6. Request for a statement under oath.

V. Use the insurance company witnesses to establish the non-cooperation defense to the policy claim and/or a comparative fault defense to the bad faith claim.

A. The non-cooperation defense.

1. An insurer may be in a "catch 22" situation as to potential defenses if it has advised an insured that it needs additional information in order to complete its investigation and the insured fails to provide the information.

a. If the insurer denies the claim based on a policy exemption or exclusion - i.e.

arson, fraud - its own requests to the insured for additional information substantiate the claim that the company's decision was not supported by reasonably sufficient factual information.

b. If the insurer continues to pend its investigation until it receives the requested information it is open to a claim that it unreasonably delayed its decision on the claim.

c. The only alternative (other than payment of a questionable claim) left for the company may ultimately be denial based on the insured's failure to cooperate.

2. The insured must "substantially comply" with the insurance company's investigation of the loss. Hoekstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100 (Iowa 1986) (policy requirement that insured cooperate or comply with insurance company's investigative requests requires only "substantial compliance on the part of the insured".).

3. Specific Cooperation Requirements include:

a. The insured giving a statement under oath, if requested to do so:

(1) An insured's refusal to give a statement under oath is clearly a breach by insured that excuses the company from payment under the policy. See, e.g., West v. State Farm Fire and Casualty Co., 868 F.2d 345 (9th Cir. 1989).

(a) The insured is required to give a statement under oath upon request by the company even if the insured is under criminal indictment and is concerned about the use of his or her statement in the criminal proceeding. Standard Mutual Insurance Co. v. Boyd, 452 N.E.2d 1074 (Ind. App. 1983).

(2) Evasive, incomplete, or other limited participation in the statement under oath may be a breach by the insured. See, e.g., Stover v. Aetna Casualty & Surety Co., 658 F.Supp. 156, 160 (S.D.W.Va. 1987) (Summary judgment for company when insured, though

generally cooperative, either failed to answer or gave evasive answers to questions regarding his financial status in a potential arson case.); Warnlow v. Superior Court, 142 Ariz. 250, 689 P.2d 193 (Ariz. App. 1984) (refused to answer some questions); Dyno-Bite, Inc. v. Travellers Companies, 80 A.D.2d 471, 471 N.Y.S.2d 558 (1981); Kisting v. Westchester Fire Insurance Co., 290 F.Supp. 141 (W.D.Wis. 1968).

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b. Access to the insured's books and records.

(1) The insured is clearly required to produce books and records or other documents that are material to the claim. See Southern Guaranty Insurance Co. v. Dean, 252 Miss. 69, 172 So.2d 553, 556 (1965).

(2) If, however, the insured provides incomplete or confusing records, has it "substantially complied" with its responsibilities? The answer to that question will be a factual determination to be made by the jury. Insurance company witnesses will need to explain specifically what information they did not receive, why the requested information was critical to their decision-making, and that they did, in fact, request the information.

B. Comparative Fault Defense

1. The same evidence that relates to non-cooperation by the insured may also establish that the insured bears a degree of fault for any delays in the company's decision-making or any adverse decisions the company may have made.

2. Although there is no Iowa authority addresing the issue, it is arguable that the defense of comparative fault should be available in Iowa in the first party bad faith context.

a. The concept of comparative fault is employed in situations involving:

One or more acts or omissions that are in any measure negligent

or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.

Iowa Code § 668.1.

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b. In Iowa, fault is not compared in cases involving intentional torts. Tratchel v. Essex Group, Inc., 452 N.W.2d 171 (Iowa 1990).

c. Although the Iowa Supreme Court has classified first party bad faith claims as "intentional", Dolan v. AID Insurance Co., 452 N.W.2d 790, 794 (Iowa 1988), the test for bad faith implies a less stringent standard in that it speaks to "the absence of a reasonable basis for denying benefits . . . and the defendant's knowledge of reckless disregard of the lack of reasonable basis. . . " Dolan, p. 794, and would arguably fall within the category of "fault" to be compared under Iowa Code, Chapter 668.

d. In some states, if the fault of a first party bad faith plaintiff or the plaintiff's representative (i.e., legal counsel) contributes to plaintiff's damages, that fault is compared. See e.g. California Casualty General Insurance Co. v. Superior Court, 173 Cal. App. 3d 274, 284 (1984); Powell v. Trans Pacific Life Insurance Co., 94 Cal. App. 3d 818, 821 (1984).

e. Use the company's witnesses to describe why it was the insured's own conduct (i.e., failure to respond to requests for information in a timely or complete manner, failure to provide any information at all regarding critical issues) that caused delays and/or adverse decisions.

LAWYER ADVERTISING IN TELEPHONE DIRECTORIES

Presented by Carroll J. Reasoner
Outline Prepared by Norman G. Bastemeyer

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By Order dated April 28, 1989, the Iowa Supreme Court struck prior Disciplinary Rules, DR 2-101, DR 2-102, and DR 2-105 and promulgated new Disciplinary Rules concerning lawyer advertising. New Disciplinary Rules, DR 2-101, DR 2-102, and DR 2-105 became effective June 1, 1989.

I. Telephone Directory Advertising may be either by a Lawyer or a Law Firm

A. Telephone or city directory advertisement or listing by a lawyer. DR 2-101(B)(2).

B. Telephone or city directory advertisement of listing by a law firm. DR 2-101(B)(3).

II. Listing Under a Classified Listing.

A. Prior to the 1989 amendments to the Disciplinary Rules governing lawyer advertising only one alphabetical listing was permitted. The 1989 amendments permit listing of either an attorney [DR 2-101(B)(2)(c)] or a law firm [DR 2-101(B)(3)(b)] in a classified listing.

1. The only classifications permitted are those specified in DR 2-105(A)(2).

2. A lawyer whose name appears in the classified listing of a particular area of practice must in fact limit his practice to or practice primarily in that area of law, can be listed in no more than 3 classifications, must have met the requirements to indicate an area of practice, and must have certified his qualification to list areas of practice with the Commission on Continuing Legal Education.

3. A law firm whose firm name appears in the classified listing of a particular area of practice must have one or more of its members who have met the eligibility requirements to indicate an area of practice and who have certified their qualification to list areas of practice with the Commission on Continuing Legal Education.

4. If a lawyer or law firm appears in a classified listing of a particular area of law it must be indicated that the lawyer or law firm either limits their practice to, or practices primarily in, that area of law, unless the directory also contains a box or display ad of that lawyer or law firm so indicating.

5. If the lawyer or law firm does not have a display or box ad which indicates "practice limited to" or "practicing primarily in" the requirement can be met if the publisher of the directory publishes on each page of the listing by areas of law:

> "The following Iowa lawyers or law firms practice primarily in or limit practice to the area of practice in which they are listed."

6. Listing of a lawyer or a law firm in the alphabetical listing for "Lawyers" or "Attorneys" does not require any of the printed disclaimers.

7. Listing by lawyer or a law firm in a classified listing would require the DR 2-105 disclaimer as well as the indication that the listed lawyer or firm practices primarily in or limits practice to the area in which listed (see sub-paragraph 5, infra). The DR 2-105 disclaimer requirement is met if the directory publisher publishes one DR 2-105 disclaimer on each page of classified listings in at least 9 point type. (Committee Opinion 89-53 or May 11, 1990).

III. Required Disclaimers.

If either a lawyer or law firm, has a box or display ad, other than a mere listing, up to four printed disclaimers could be required depending on the content of the ad.

A. Advertising in general

Any advertising permitted by the rules beyond a mere listing of name, address, telephone number and identification as a lawyer requires the general disclaimer required by DR 2-101(A):

> "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."

B. Advertising information as to fee

The content of what can be stated as to fees is set out in DR 2-101(D). If the advertising copy contains any reference to fees the following disclosure is required by DR 2-101(D):

(a) "That stated fixed fees or range of fees will be available only to clients whose matter are encompassed within the described services; and

(b) If the client's matters are not encompassed within the described services, or if an hourly fee rate if stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be changed."

C. Advertising suggesting the institution of litigation

"DR 2-101(F) Content Institution of litigation.
In the event the communication seeks to advise the institution of litigation, the communication must also disclose that filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process."

D. Advertising an Area of Practice

In the event a lawyer limits his practice to or practices primarily in a specified area of practice, meets all the requirements of DR 2-105 to list an area of practice and does advertise that he limits his practice to or practices primarily in that area of practice the following additional disclaimer is required by DR 2-105(A)(3)(b).

"A description or indication of limitation or practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

IV. Requirements to List an Area of Practice

A. You can only list an area of practice if you in fact limit your practice to or practice primarily in that area.

B. You may not list an area of practice and also state you are in the general practice of law. The terms are mutually exclusive.

C. The listing of an area of practice must be preceded by either the words "practice limited to" DR 2-105(A)(3)(a) or "practicing primarily in" Dr 2-105(A)(3)(b).

D. The lawyer listing an area of practice must have met the qualifications in that area.

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(1) must have devoted the greater of 200 hours or 20% of his time spent in actual law practice to each separate area listed for each of prior 2 calendar years.

(2) must have completed at least 10 hours of accredited continuing legal education in each separate indicated field of practice during preceding calendar year. DR 2-105(A)(4).

E. The lawyer must have certified his completion of the time spent in that area and CLE in that area to the Commission on Continuing Legal Education.

(1) regular CLE questionnaire does not provide for that certification

(2) special form for reporting compliance available from Commission on Continuing Legal Education on request.

(3) upon completion of first report Commission on Continuing Legal Education will provide the special reporting form with subsequent annual questionnaires.

F. The lawyer listing areas of practice in his advertisements may list no more than 3 areas, and those listed can only be those specified in DR 2-105(A)(2).

G. If an area or areas of practice are listed the DR 2-105(A)(3)(b) disclaimer must be printed either in the ad or on the page of the publication where the ad appears.

H. Although a firm, one of whose members meets the eligibility requirements, may be listed in a classified listing under the heading of that particular area of practice, a firm may not list an area of practice in a firm advertisement. DR 2-105(A)(2) permits listing of an area of practice to only "an individual lawyer."

APPENDIX A

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ILLUSTRATION OF COMMON VIOLATIONS OF IOWA LAWYER ADVERTISING RULES IN TELEPHONE DIRECTORIES

from material prepared by and reprinted with cooperation of:

Iowa Bar Association Committee on Advertising
and
A. J. Greffenius, Des Moines

The lines footnoted violate the advertising rules of the Iowa Code of Professional Responsibility For Lawyers.

DELAN, FRALER & BEDER

PROVIDING THE HIGHEST QUALITY LEGAL SERVICES FOR OVER 75 YEARS[1]

Practicing Primarily In Personal Injury Law[2]

With Specialties In Slip And Fall, Wrongful Death,[3 & 6] Head Injuries And Nerve Damage

Also, General Practice, Including Domestic Relations And[4] Family Law, Trial Law And Worker's Compensation Law

<u>William Delan</u>

Practicing Primarily In:
Workers' Compensation Law
On-the-Job Injuries[6]
Personal Injury Law
Trial Law
Automobile Accidents[6]
Labor Law[9]

Speaker, 1981,[10] National Association of Union Executives

Author, Personnel[13] Needs of the Injured Worker, 1971

<u>Robert Fraler</u>

Practicing Primarily In:
Criminal Law
Felonies & Misdemeanors[6]
Driving While Intoxicated
Traffic Citations[6]

Attended National[11] Conference on Forensic Investigation, 1979

Member, National[14] Organization for Parole Reform

<u>James Beder</u>

General Practice With[4]
Emphasis On:[5]
Divorces[6]
Decree Modifications[6]
Adoptions[6]
Real Estate Law[7]
Probate Law[8]
Bankruptcy[8]

Over 20 Years[12] Experience in Helping Families

Attended ABA Family[15]
Law Institute, 1979, 1988

Listed in "The Best American Attorneys"[16]
Published in 1982 by Cohander House

PERSONAL SERVICE IS ESSENTIAL TO YOUR NEEDS[12]
AND WE PLEDGE TO PROVIDE IT

Telephone: (123)456-7890
Facsimile: (098)765-4321
Third Floor, Midwest Law Center, City, Iowa 5000[17]

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The determination of the need for legal services and the[18] choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa.

A description or indication of limitation of practice does[18] not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.

NOTE: DR 2-105(C) states that the nature of one's practice, or the type of cases or matters handled, may not be described other than as permitted by DR 2-105 and DR 2-101(E). Thus, an attorney violates this provision by allowing the Yellow Pages to list him or her in the Yellow Pages under practice areas not prescribed in DR 2-105(A)(2) and ISBA Ethics Opinion 89-46 (February 20, 1990). Examples: Agricultural-Livestock, Civil Rights, Condemnation, Driving While Intoxicated and Product Liability. The prescribed wording is not to be expanded upon. See Notes 4 and 7 below.

EXPLANATORY NOTES

1. DR 2-101(A) provides in part that lawyer advertising shall not contain any statement which is self-laudatory, which relates to the quality of services, or which contains any claim that is not verifiable. All such language must be avoided. ISBA Ethics Opinion 89-46, II-8 (February 20, 1990). See DR 2-101(A) for other language which must also be avoided.

2. Only an individual lawyer can use a description or indication of limitation of practice. DR 2-105(A). A law firm may not do so. ISBA Ethics Opinion 89-46, II-3 (February 20, 1990). However, in the case of a telephone or city directory, note that if one or more members of a firm are qualified under DR 2-105(A)(4) to use descriptions or indications of limitation of practice, then that firm can be listed in the classified section under separate classifications or headings which identify those areas of practice in the manner required by DR 2-105(A)(2) and in ISBA Ethics Opinion 89-46, I (February 20, 1990).

3. Areas of practice prescribed in DR 2-105(A)(2) cannot be enlarged upon with descriptive terminology. ISBA Ethics Opinion 89-46, II-2 (February 20, 1990).

4. "General Practice" may not be advertised if areas of practice are advertised and vice versa. DR 2-105(B). ISBA Ethics Opinion 89-46, II-6 (February 20, 1990).

5. A description or indication of limitation of practice must be preceded by the words "practicing primarily in..." or "practice limited to..." DR 2-105(A)(3)(a) and (b). "Emphasis on..." is not permitted. See also ISBA Ethics Opinion 89-53 (May 11, 1990).

6. Areas of law can be described only in the words listed in DR 2-105(A)(2) and in ISBA Ethics Opinion 86-46, I (February 20, 1990). These areas cannot be enlarged upon with descriptive terminology; see Note 3. None of the words and phrases identified with "6" are permissible.

7. While "Real Estate Law" is itself proper, it must be preceded by "practicing primarily in..." or "practice limited to..." and cannot be used with "General Practice". See Notes 4 and 5. Also, any lawyer advertising areas of practice must have filed a compliance report with the Commission on Continuing Legal Education. DR 2-105(A)(4) and DR 2-101(B)(2)(b).

8. Inaccurate wording. Should be "Wills, Estates and Probate Law" or "Wills, Trust, Estate and Probate Law" and "Debt and

Bankruptcy Law". See DR 2-105(A)(2) and ISBA Ethics Opinion 89-46, I (February 20, 1990).

9. Mr. Delan lists four areas of law. An attorney is limited to three. DR 2-101(B)(2)(b) and DR 2-105(A)(2).

10. DR 2-101(C)(9) permits "legal teaching positions" to be listed in lawyer advertising. This item is not such a position; it is not related to expertise in labor law or workers' compensation law; thus, this listing is misleading and prohibited. DR 2-101(A).

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11. DR 2-102(C)(13) permits lawyer advertising to include memberships in scientific, technical and professional associations and societies. Mere attendance does not constitute membership. Also, attendance is not necessarily related to one's capability in the area of criminal law; thus, this reference is misleading and prohibited. DR 2-101(A).

12. DR 2-101(A) provides in part that lawyer advertising must not contain any claim relating to the quality of the lawyer's services or appealing to the emotions or any claim that is not verifiable. The words 'experience' and 'helping' appeal to the emotions, relate to the quality of service and are not verifiable. All such language must be avoided. ISBA Ethics Opinion 89-46, II-8 (February 20, 1990).

13. DR 2-102(C) permits the listing of legal authorships. The listed title does not refer to a legal treatise and is not related to one's capability in labor law; thus, it is misleading and prohibited. DR 2-101(A).

14. See Note 10. The organization for which membership is listed is neither a scientific, technical nor a professional association or society. Affiliation not related to one's capability in criminal law. Misleading and prohibited. DR 2-101(A).

15. Read Note 11 as applicable to 'family law'.

16. The lawyer advertising rules specifically authorize a lawyer to permit the inclusion in reputable law lists and law directories of such information as traditionally has been included in these publications. DR 2-101(C). The title, "The Best American Attorneys", is misleading and not verifiable. (What standards were used?) It is self-laudatory. DR 2-101(A). Further, lawyer advertising is permitted only in newspapers, periodicals, trade journals, "shoppers" and other similar advertising media published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, DR 2-101(B)(1), and in telephone and city directory listings, DR

2-101(B)(2) and (3); thus, the referenced book is not one of the permitted vehicles for advertising. While the lawyer may not have been able to prevent his or her inclusion in the book, the lawyer could and should have prevented the use of its title in the ad. Note that "geographic area" has been defined for Iowa lawyers to be the State of Iowa. ISBA Ethics Opinion 88-29 (June 8, 1989). For the definition of 'reputable legal directory', see "DEFINITIONS (9)" following Canon 9 of the Iowa Code of Professional Responsibility for Lawyers.

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17. "Midwest Law Center" is not acceptable. It is misleading as to its purpose. ISBA Ethics Opinion 78-12 (May 9, 1978) and DR 2-101(A).

18. The disclosure is required by DR 2-101(A) and the notice by DR 2-105(A)(3)(b). Both must be in type size not smaller than 9-point. DR 2-101(B)(1) and ISBA Ethics Opinion 89-46, II-7 (February 20, 1990). Each ad should contain the required disclosure and notice unless they are published at least once in 9-point type or larger on the page where the ad appears. DR 2-101(B)(1), -(2)(b) and (c) and -(3)(c).

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APPLICABLE RULES CONCERNING LAWYER ADVERTISING FROM IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS

DR 2-101	PUBLICITY
DR 2-102	PROFESSIONAL NOTICES, LETTER HEADS, OFFICES, AND SIGNS
DR 2-103	RECOMMENDATION OF PROFESSIONAL EMPLOYMENT
DR 2-104	SUGGESTION OF NEED OF LEGAL SERVICES
DR 2-105	DESCRIPTION AND LIMITATION OF PRACTICE

EC 2-32 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.[Court Order May 6, 1980]

EC 2-33 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.[Court Order May 6, 1980]

EC 2-34 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring a minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of this withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, co-operating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.[Court Order May 6, 1980]

DISCIPLINARY RULES

DR 2-101 Publicity.

(A) Advertising in General. A lawyer shall not, on the lawyer's own behalf, or that of a partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement, which contains any statement or claim relating to the quality of lawyer's legal

services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim that is not verifiable. In all communications under DR 2-101 and DR 2-102, the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable", "moderate", and "very reasonable", but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, "cut-rate", "lowest", "giveaway", "below-cost", "discount", and "special". All such communications shall contain the following disclosure: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."

(B) Method of Dissemination. Subject to the limitations contained in these rules:

(1) General Print Media. Lawyer advertising may be communicated* to the public in newspapers, periodicals, trade journals, "shoppers", and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, PROVIDED THAT the publisher agrees in writing to print all the disclaimers required by these rules in type size not smaller than 9-point on each page bearing the ad.

(2) Lawyer Telephone and City Directory Listings. A lawyer licensed to practice law in Iowa may permit the inclusion of the lawyer's name, address, telephone number, and designation as a lawyer, in a telephone or city directory, subject to the following requirements.

(a) Alphabetical Listings. The lawyer's name, address, and telephone number and designation as a lawyer, only, may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory.

(b) Classified Listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys", except that a lawyer who has complied with DR 2-105(A)(4) may be listed in no more than three classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2).

(c) Display and Box Advertisements. All other telephone or city directory advertising permitted by these rules, including display or box

advertisements, shall include the disclosures required by DR 2-101(A), (D), and (F), unless such disclosures are published in DR 2-101(B)(1).

(3) Law Firm Telephone and City Directory Listings. A law firm, all of whose lawyers are licensed to practice law in Iowa, may permit the inclusion of the firm name, address, and telephone number in a telephone or city directory, subject to the following requirements.

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(a) Alphabetical Listings. The firm name, a list of its members, address, and telephone number, may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory.

(b) Classified Listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys", except that a law firm may be listed in each of the classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2) in which one or more members of the firm are qualified.

(c) Display and Box Advertisements. All other telephone or city directory advertising permitted by these rules, including display or box advertising, may contain the firm name, address, and telephone number, and the names of the individual lawyer members of the firm. All display or box advertisements shall include within the ad the disclosures required by DR 2-101(A), (D), and (F), unless such disclosures are published as provided in DR 2-101(B)(1).

(4) Solicitation.

(a) In-person Solicitation. A lawyer may not engage in the in-person or telephone solicitation of legal business under any circumstance.

(b) Written Solicitation. A lawyer who wishes to engage in written solicitation by direct mail to persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could upon reasonable inquiry be known to the soliciting lawyer shall, prior to the dissemination of the solicitation, file all such proposed written documents or solicitations with the committee on professional ethics and conduct of the Iowa State Bar Association. The soliciting lawyer shall,in

addition thereto, bear the burden of proof regarding:

(i) the truthfulness of all facts contained in the proposed communication;

(ii) how the identity and specific legal need of the potential recipient were discovered; and

(iii) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.

All such written solicitations shall contain the disclosures required by DR 2-101 (A), (D), and (F). No such dissemination shall be made until the committee or its designee shall, upon the facts presented, render a written finding that the solicitation is not false, deceptive, or misleading. No information disseminated by the soliciting lawyer shall make any reference to such submission and finding. Each separate written solicitation intended for dissemination must be submitted for a finding in accordance herewith.

(c) Direct Mail. Information permitted by these rules may be communicated by direct mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. All such communications shall contain the disclosures required by DR 2-101 (A), (D), and (F).

(d) All communications authorized by paragraphs "b" and "c" hereof and the envelope containing the same shall, in addition to other disclosures that my be required hereunder, carry the following disclosure in red ink in 9-point or larger type: "ADVERTISEMENT ONLY". A copy of all direct mail communications shall be filed with the administrator, or the administrator's designee, of the committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, contemporaneously with the mailing of the communications to the general public and shall contain the disclosures required by DR 2-101 (A), (D), and (F).

(5) Electronic Media. Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications, to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, and shall contain the disclosures required by DR 2-101 (A), (D), and (F).

(6) Biographical and Information Brochures. Brochures or pamphlets containing biographic and informational data, as permitted by these rules, shall be disseminated directly only to clients, members of the Bar, or in response to direct request, and shall include the disclosures required by DR 2-101 (A), (D), and (F), and DR 2-105 (A)(3).

(7) Record Retention. Whether or not it contains fee information, a lawyer shall preserve a copy of each advertisement places in a newspaper, the classified section of the telephone or city directory, or periodical, and a tape of the radio, television, or other electronic or telephonic media commercial, or recording, for at least three years and a record of the date or dates and name of the publication in which it appeared or the name of the medium through which it was aired.

(C) Content (Informational). The following information shall be presumed to be informational and not solely promotional:

(1) Name, including name of law firm, names of professional associates, address, telephone numbers, and the designation of "lawyer", "attorney", "law firm", or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments in bar associations;

(11) Memberships and offices in legal fraternities and legal societies;

(12) Technical and professional licenses; and

(13) Memberships in scientific, technical, and professional associations and societies.

Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

All such information shall be presented in a dignified manner.

(D) Content (Fee Information). The following fee information may be communicated to the public in the manner permitted by DR 2-101(B):

(1) Fee for an initial consultation;

(2) Availability upon request of either a written schedule of fees, or an estimate of the fee to be charged for specific services, or both;

(3) Contingent fee rates, subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs and advises the public that in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence; and

(4) Fixed fees or range of fees for specific legal services or hourly fee rates provided that, in print size at least equivalent to the largest print used in setting forth the fee information, the statement discloses:

(a) That the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services; and

(b) If the client's matters are not encompassed within the described services, or if an hourly fee rate is states, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

All such information shall be presented in a dignified manner.

Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone or city directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall within the described services. In that event or if a range of fees is stated, the lawyer shall render the service for the estimated fee given the client in advance of rendering the service.

A lawyer shall not, individually or on behalf of a law firm or association, use the public communication of fee information concerning specific legal services as an indirect means of attracting clients for whom the lawyer performs other legal services not related to the specific legal services publicized.

(E) Content (Specific Legal Services). For purposes of this rule, the term "specific legal services" shall be limited to the following services:

(1) Abstract examinations and title opinions not including services in clearing title;

(2) Uncontested dissolutions of marriage involving no disagreement concerning custody of children, alimony, child support or property settlement [see DR 5-105(A)];

(3) Wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries;

(4) Income tax returns for wage earners;

(5) Uncontested personal bankruptcies;

(6) Changes of name;

(7) Simple residential deeds;

(8) Residential purchase and sale agreements;

(9) Residential leases;

(10) Residential mortgages and notes;

(11) Powers of attorney; and

(12) Bills of sale.

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to these rules expanding or constricting the above list of "specific legal services". In considering such amendments the committee shall apply the following criteria which have guided the supreme court in determining which services should be included in the above list:

(1) The description of the service would not be misunderstood by the average layperson or be misleading or deceptive;

(2) Substantially all of the service normally can be performed in the lawyer's office with the aid of standardized forms and office procedures;

(3) The service does not normally involve a substantial amount of legal research, drafting of unique documents, investigation, court appearances, or negotiation with other parties or their attorneys; and

(4) Competent performance of the service normally does not depend upon ascertainment and consideration of more than a few varying factual circumstances.

The committee shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said committee may further issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule.

(F) Content (Institution of Litigation). In the event that the communication seeks to advise the institution of litigation, the communication must also disclose that the filing of a claim or suite solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.

(G) Content (Designation as Legal Clinic or Center). The term "clinic", "center", or any other similar term shall not be used in any communication to the public unless the practice of the lawyer or the lawyer's firm is limited to specific matters as described in DR 2-101(E) for which costs of rendering the service can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures.

(H) A lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize, permit, or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

(I) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when the professional status is germane to the political campaign or to a political issue;

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients;

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which the lawyer serves as a director or officer;

(4) In and on legal documents prepared by the lawyer;

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-101(B), directed to a member or beneficiary of such organization.

(J) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item nor voluntarily give any information to such representatives which, if published in a news item, would be in violation of DR 2-101(A).

(K) All disclosures required to be published by these rules shall be in 9-point type or larger.

Referred to in DR 2-103, DR 2-105
Referred to in Professional Ethics and Conduct Committee rules 5.1, 5.6, 5.7
Referred to in "Definitions" at the end hereof

DR 2-102 Professional Notices, Letterheads, Offices, and Signs

(A) A lawyer or law firm shall not use professional cards, signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer's law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in the lawyer's association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying the lawyer by name and as a lawyer and giving the lawyer's addresses, telephone numbers, the name of the lawyer's law firm, associates, and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates related to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client.

The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, public, executive, or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(C) A lawyer or a professional corporation shall not be held out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible public communications and listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; provided, however, a firm name may not be used in Iowa unless all those name are or, if deceased, were members of the bar in Iowa.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer's letterhead, office sign, or professional card, nor shall the lawyer be identified as a lawyer in any publication in connection with the lawyer's other profession or business.

(F) The text of a lawyer's letterhead, office sign, professional card, or other authorized notice or listing shall not violate the provisions of DR 2-101(A)."

Referred to in DR 2-101, DR 2-105

DR 2-103 Recommendation of Professional Employment.

(A) A lawyer shall not, except as authorized in DR 2-101, recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

F

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that:

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by the bar association and may pay its fees incident thereto.

(2) He may co-operate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm, except as permitted in DR 2-101. However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed, or paid by, or co-operating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment on behalf of his client:

(1) A legal aid office or public defender office:
(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.
(c) Operated or sponsored by a governmental agency.
(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or its beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at his own expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved.

(f) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that the representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(g) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules or court and other legal requirements that govern it legal service operations.

(h) Such organization has filed with the client security and attorney disciplinary commission at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

Referred to in DR 2-103(B), DR 2-104
Referred to in "Definitions" at the end hereof

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this disciplinary rule. [Court Order February 28, 1977; amended February 17, 1978; September 4, 1981]

Referred to in DR 2-101

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or

sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (4), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder. [Court Order February 28, 1977; amended February 17,, 1978]

DR 2-105 Description and Limitation of Practice.

(A) A lawyer may be identified as practicing in or limited practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms on the lawyer's professional card, letterhead, office sign, professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories, as otherwise allowed by DR 2-101(B).

In addition to use of the designation "Patents," "Patent Attorney," "Patent Lawyer," and "Registered Patent Attorney," a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Law", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on the lawyer's professional card, letterhead, office sign, and professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the

eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents", "Trademarks", or "Copyright Law" or combination thereof.

(2) An individual lawyer who, in fact, limits practice to certain fields of law or who is limiting practice primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or description of practice by listing, in the manner provided by DR 2-105(A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by Dr 2-102(A) and DR 2-101(B):

Administrative Law
Admiralty Law
Alternate Dispute Resolution
Antitrust and Trade Regulation
Appeals
Banking
Commercial and Retail Collections
Constitutional Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Law
Domestic Relations and Family Law
Environmental Law
Health Law
Immigration Law
Insurance Law
International and Foreign Law
International Trade and Investment
Discrimination and Civil Rights Law
Labor Law
Malpractice or Professional Negligence
Military Law
Municipal Law
Pension and Profit Sharing Law
Personal Injury Law
Product Liability Law
Public Utility Law
Real Estate Law
Securities Law
Social Security Disability
Taxation Law
Trademarks and Copyright Law
Trial Law
Wills, Estate, and Probate Law
Worker's Compensation Law.

The Committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of

the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to these rules expanding or restricting the permitted list of fields of law practice.

(3) Description or indication of limitation of practice permitted by DR 2-105(A)(2) shall be only in the following manner.

(a) If the lawyer accepts only legal matters in that lawyer's listed fields of law practice, such listing of fields of law practice shall be preceded by the words "practice limited to . . ."

(b) If the lawyer is practicing primarily in that lawyer's listed fields of law practice, but also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "practicing primarily in . . ." and shall, in the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, newspapers, periodicals, or legal directories contain within such communication, or prominently have displayed on the same page of such communication, the disclosure required under DR 2-101(A) and also a "Notice to the Public" in the following form:

> "A description or indication of limitation of practice which does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description of indication of limitation of practice communicated to the public in the classified section of telephone directories, a lawyer shall not permit that lawyer's name to be listed under a heading of classification other than "Attorneys" or "Lawyers."

(4) Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2) a lawyer shall report the lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or twenty percent of the lawyer's time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and

(b) The lawyer must have completed at least ten hours of accredited Continuing Legal Education courses of study in each separate indicated field of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses ad hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

(B) If advertising uses the term general practice, no reference to limited or restricted areas of practice is permitted. If areas of practice under DR 2-105 are advertised, the term general practice may not be used.

(C) The nature of one's professional practice, or the types of cases or matters handled, may not be described other than as permitted by DR 2-105 and DR 2-101(E).

(D) If, due to hardship or extenuating circumstances, a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by DR 2-105(A)(4)(b), the lawyer may apply to the commission on continuing legal eduction for an extension of time in which to complete the hours. No extension of time shall be granted unless written application therefor shall be made on forms prescribed by the commission. Extensions of time within which to fulfill the minimum educational requirements, may, in individual cases involving hardship or extenuating circumstances, be granted by the commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

Referred to in DR 2-101, DR 2-102, EC 2-16

Referred to in Professional Ethics and Conduct rules 5.1, 5.6
Referred to in "Definitions" at the end hereof

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge or collect a contingent fee for representing a defendant in a criminal case, or either party in any action involving domestic relations.

Referred to in DR 2-101(C)

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

SELECTED ETHICS OPINIONS

COMMITTEE ON

PROFESSIONAL ETHICS AND

CONDUCT CONCERNING

LAWYER ADVERTISING

78-12 May 9, 1978

IMPROPER TO NAME A BUILDING "THE LAW CENTER"

You have requested an opinion whether or not you may call your new building "The Law Center."

It is the opinion of the Committee that it would be improper to name a building "The Law Center." DR2-102 and supportive ethical considerations prescribe exactly what may or may not appear in communications to the public, including signs.

It is the opinion of the Committee that these do not include the proposed language concerning which you have made inquiry and the naming of the building "The Law Center" would be improper.

88-33 June 8, 1989

FIELDS OF PRACTICE: LISTING UNDER DR 2-105

The committee has considered advertising under DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers and issues the following opinion:

It is the opinion of the committee that copy published pursuant to DR 2-105 is restricted to the fields of practice designated in subparagraph (A)(2) or words reasonably descriptive of the fields so listed. (For instance "accidents" instead of "personal injury and property damage claims", "work injuries" instead of "workers compensation", "discrimination" instead of "job discrimination and civil rights", etc., are permissible, but deviation from the specific language must be minimal and must not add to the areas of practice involved nor violate the caveats in DR 2-101).

To the extent that previous Formal Opinions of the committee differ with this opinion they are overruled.

DR 2-101(A)(3)(B) - TELEPHONE DIRECTOR CLASSIFIED HEADINGS (89-15 September 6, 1989)

DR 2-101(A)(3)(b) provides that:

"Classified listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys", except that a law firm may be listed in each of the classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2) in which one or more members of the firm are qualified."

DR 2-105(A)(2) lists the various fields permissible under the Iowa Code of Professional Responsibility for Lawyers.

Formal Opinion 88-33 of the Committee dated June 8, 1989, permits minor deviation from the specific terms listed in DR 2-105 but not to the point of adding to the areas of practice involved.

It is the opinion of the Committee that the publishers of telephone directories in some instances do not use the appropriate terminology contained in DR 2-105.

This opinion is to put the Iowa lawyers on notice not to permit their names to be listed under classified advertising headings which do not comply with the foregoing.

TELEPHONE - YELLOW PAGE ADVERTISING (89-46 February 20, 1990)
Yellow Page Advertising-Headings and Guidelines - Committee Opinion-89-46:

The committee is reviewing current telephone directory advertising with the recently adopted Disciplinary Rules in mind. There appears to be a pattern in what seem to be inadvertent violations, prompting adoption of the following opinions:

1. It is the opinion of the committee that the following words used with the areas of practice indicated clarify the meaning of the DR 2-105 terms and are permissible:

    1. "Job" or "Employment" with "Discrimination and Civil Rights Law." The Rule permits "Discrimination and Civil Rights Law". "Job" or "Employment" can be used in connection with "Discrimination and Civil Rights Law". For example: "Job Discrimination and Civil Rights Law."

    2. "Accident", "Bodily Inquiry" and/or "Property Damage" with "Personal Injury Law." The Rule permits "Personal Injury Law." "Accident," "Bodily Injury" and/or "Property Damage" can be used in connection with "Personal Injury Law." For example: "Accident" Personal Injury and Property Damage Law."

    3. "Trust" with "Wills, Estate and Probate Law". The Rule permits "Wills, Estate and Probate Law. "Trust" can be used with "Wills, Estates and Probate Law." For example: "Wills, Trust, Estate and Probate Law."

2. The following guidelines are published as an opinion to avoid what appear to be the most common violations of the Disciplinary Rules governing yellow-page advertising:

    1. Be certain that listings of areas is in compliance with the listing DR 2-105(A)(2) and the preceding paragraph 1 of this opinion, and any other Rules or opinions published hereafter.

    2. Do not enlarge areas of practice with descriptive terminology i.e. "brain damages," "divorce," "driving while intoxicated," etc., etc.

    3. The firm can not advertise areas of practice but its members can.

    4. Any lawyer advertising areas of practice or who is listed under area headings must have filed a

compliance report with the Commission on Continuing Legal Education. DR 2-105(A)(4) and DR 2-101(B)(2)(b).

5. No more than 3 areas of practice may be listed.

6. "General Practice" may not be advertised if areas of practice are advertised and vice versa. . .

7. Be sure all necessary disclaimers will be published as required and in at least 9 point type. This requires a written commitment from the publisher in certain cases, and you should insist to ensure your ad complies.

8. Be sure to avoid all the language prohibited in DR 2-101(A).

ADVERTISING: Wording in Telephone Classified Ads Under DR 2-105 (89-53 May 11, 1990)

Inquiry has been made whether advertising by lawyers must contain language indicating whether practice is "limited to" or is "primarily in" listed areas, and as to listing by firms by classification or area of practice.

It is the opinion of the committee that:

1. If the lawyer accepts only matters in the listed fields of law the words,

   "practice limited to"

   must precede the list (DR 2-105(A)(5)(a)).

2. If the lawyer practices primarily in listed fields of law, but also in others, the words,

   "practicing primarily in"

   must precede the text (DR 2-105(A))3)(b)).

3. Listings of names of lawyers qualified under DR 2-105 or law firms with such qualified member need not use the foregoing words in classified listings by areas of practice if they appear elsewhere in the directory (in an advertisement of the lawyer or firm); if they do not so appear they must appear in the listing;

   a. This requirement can be met by having each page of the listing by classifications or areas contain the following statement:

      "The following Iowa lawyers or law firms either practice primarily in or limit practice to the areas of practice in which they are listed",

      Such publication is to be in 9 point or larger type.

      Other wording may be submitted to the committee, if desired.

   b. If a lawyer-member of a firm is qualified to limit practice or practice primarily in a designated field or area of practice under DR 2-105, the firm may list its name in the classified section under that area of practice, only if the disclaimer required in DR 2-105 is published either with the

name itself or on the page where the listing is published.

4. Only names and addresses of lawyers and law firms may be published in the alphabetical sections of telephone directories, however individual lawyers may include designation as a lawyer.

5. This opinion in no way lessens disclaimer requirements of the Iowa Code of Professional Responsibility for Lawyers.

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ADVERTISING: CERTIFICATION IN AREAS OF THE LAW

89-55 June 11, 1990

Following the United States Supreme Court decision in Peel v. Attorney Registration and Disciplinary Commission of Illinois, No. 88-1775,_____ U.S. Iowa Code of Professional Responsibility for Lawyers shall be construed that any lawyer who wishes to publicize in any manner that he or she has been certified in any area of the law by any certifying organization or entity shall first submit to the Committee for approval those standards for such certification which standards must demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law, for example, in the judgment of the Committee substantially equivalent to the certification standards of the National Board of Trial Advocates involved in Peel, supra. Where appropriate a disclaimer may be required.

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LEGAL LIABILITY FOR VIOLATION OF CODE OF PROFESSIONAL RESPONSIBILITY

A. The Model Rules - Non-liability

The Model Rules of Professional Conduct reflect that the drafters never intended the Code to set the standard for attorney malpractice, or indeed, that Code provisions would be admissible in such an action. Preamble (6) to the Model Rules provides:

> Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyers self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or a transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

The Model Code also states that it "makes no attempt to...undertake to define standards for civil liability of lawyers for professional conduct."

The assistance of attorney Jeffrey Farrell, a law clerk to the Polk County District Court, is gratefully acknowledged in connection with the preparation of this outline. In addition, portions of the material are from a similar outline presented to the International Association of Defense Counsel.

B. Other Jurisdictions.

In practice, however, this suggested proscription has been ignored. Many courts have referred to the Code of Professional Responsibility or Model Rules of Professional Conduct as evidence of, or relevant to, issues of attorney malpractice. See Cambron v. Canal Insurance Company, 246 Ga. 147, 151 - 152, 269 S.E.2d 426, 430, (1980) -- Code used as portion of jury instruction: Hansen v. Wightman, 14 Wash. App. 78, 94 - 98, 539 P.2d 1238, 1249 - 1251 (1975) -- Code used in definition of professional duty of attorney; Nolan v. Foreman 743 (5th Cir. 1982) -- legal malpractice action based on breach of Code: Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir. 1980) -- ethical rules cited as evidence of malpractice; Citizens State Bank v Shapiro, 575 S.W.2d 375, 386 (Tex.Civ.App. 1978) -- ethical rule violation states cause of action for legal malpractice; Lipton v. Boesky, 110 Mich. App. 589 N.W.2d 107 (1981); Beattie v. Firnchild, 152 Mich. App. 785, 394 N.W.2d 107 (1986) -- breach of ethical rule raises a rebuttable presumption of legal malpractice; Lysick v. Walcom, 258 Cal. App.2d 136, 149, 65 Cal Rptr. 406, 415 (1968) -- standard of care said to be governed by standards of professional ethics; Rogers v. Robson, Masters, Ryan, Brumund and Belom, 74 Ill. App. 3rd. 467, 473, 392 N.E.2d 1365, 1371, (1979) -- Code used to determine whether standard of care met; Chicago Title Insurance Company v. Holt, 36 N.C. App. 284, 292, 244 S.E.2d 177, 182 (1978) -- legal malpractice action dismissed in reliance on ethical rule; Haynes v. First National State Bank, 87 N.J. 163, 184, 432 A.2d 890, 901 (1981) -- Code provision utilized to

invalidate will.

On the other hand, claims the Code of Professional Responsibility is the basis for, or sets the standard for, attorney liability have not been uniformly successful in other jurisdictions. Hilt v. Bernstein, 75 Or. App. 502, 707 P.2d 88 (1985) -- breach of ethical rule unsucessfully argued as negligence per se; Brainard v. Brown, 91 A.D2d 287, 458 N.Y.S.2d 735 (1983) -- ethical regulation held not to be a basis for a cause of action; see to same effect, Tappan v. Ager, 599 F.2d 376, 379 (10th Cir. 1979) and Helmbrecht v St. Paul Insurance Company, 122 Wis.2d 94, 362 N.W.2d 118 (1985).

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C. Iowa - Claims by Clients.

The Iowa Supreme Court has gone beyond mere evidentiary use of disciplinary rules, and has squarely held "that the code of professional responsibility sets the standard for an attorney's conduct in any transaction in which his professional judgment may be exercised." Cornell v Wunschel, 408 N.W.2d 369, 377 (Iowa 1987). The Cornell decision has since been confirmed in the Matter of the Estate of Dankbar 430 N.W.2d 124 (Iowa 1988) and Dessel v. Dessel, 431 N.W.2d 359, 361 (Iowa 1988). Both cases recognized Cornell as authority for the proposition that the Code of Professional Responsibility may be used as the standard by which to measure the attorney's conduct in claims against the attorney by a client.

If the Iowa Code of Professional Responsibility sets a standard of care, the question arises whether expert testimony is necessary in order to establish, or defend, an alleged violation

of the standard. In Cornell, the court also considered whether expert testimony was necessary to establish that the attorney conduct violated the ethical standards. The Cornell court decided that the pertinent provisions in that case were of sufficient clarity to enable the jury to determine what conduct was prohibited. Id. at 378. However, expert testimony is sometimes needed. In Matter of the Estate of Dankbar, 430 N.W.2d 124 (Iowa 1988), the court held that the ethical rule involved, without the help of expert testimony, did not sufficiently explain the standards of conduct so that a lay person could determine whether the attorney's conduct exceeded the bounds of accepted practice. Id. at 129. Therefore, if it is necessary to interpret or clarify the standard, an expert witness must be provided by the party who asks that the standard be considered. Id. However, if the standard is clear, a simple instruction to the jury on the standard is sufficient. Id.

D. Other Jurisdictions - Third Party Claims

Civil actions by third parties against attorneys based upon ethical rule violations have been consistently unsuccessful. In Bush v. Morris, 123 Ga. App. 497, 181 S.E.2d 503 (1971) the defendant was a district attorney who had represented a wife in her divorce action, allegedly in violation of a statute prohibiting a private practice by district attorneys. The ex-husband sued principally upon that statutory violation, and the court held that breach of this ethical rule could not give rise to a civil cause of action. In Tingle v. Arnold, Cate and Allen, 129 GA. App. 134, 199 S.E.2d 260 (1973), suit by a

non-client against a defendant attorney who had allegedly fraudulently conspired to have his client sue to set aside a real property transfer, the court held that a disciplinary rule prohibiting solicitation of legal employment could not sustain the action. In Zanders v. Jones, 680 F. Supp. 1236 (N.D. Ill. 1988), suit by a non-client based, in part, on alleged violation of Illinois Code of Professional Responsibility Rule 4.101, the court cited both the disclaimer language of the Code and the inconsistency of the claim with Illinois common law in upholding dismissal for defendants.

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The reasoning underlying these decisions includes (1) the stated intent of the drafters of ethical rules that they not give rise to civil liability, Bickel v. Mackie, 447 F. Supp. 1376, 1383, (N.D. Iowa), aff'd. 590 F.2d 343 (8th Cir. 1978); (2) the contention that adequate remedies are provided by causes of action for malicious prosecution and abuse of process, Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 848 (1981); and (3) the argument that extending attorney liability to non-clients would be contrary to public policy or the public interest. Friedman v. Dozorc, 83 Mich. App. 429, 268 N.W.2d 673 (1978), aff'd. in part, rev'd. in part 412 Mich. 1.

E. Iowa - Third Party Claims

Iowa is in accord with the majority of jurisdictions in rejecting third party claims by a non-client founded on the Iowa Code of Professional Responsibility. In Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978), the Iowa Supreme Court held that the Code of Professional Responsibility does not create grounds for

imposing liability to a third party for negligence. Id. at 907. The court stated that the Code of Professional Responsibility does not undertake to define standards for civil liability of lawyers. Id. Rather, it is meant to serve as a guideline for lawyers in their relationships with clients, the justice system, and the public in general. Id. In this way, the adversarial process of the litigation system is better served. Id. The same result and reasoning as Brody was also given in a federal case which was decided at approximately the same time. Bickle v. Mackie, 447 F. Supp. 1376, 1383-84 (N.D. Iowa 1978), aff'd 590 F.2d 341 (1978).

Since Brody relied, in part, on a belief that the Code of Professional Responsibility did not define standards for attorney civil liability, a notion later expressly rejected in Cornell and its progeny, the question arises whether Cornell portends the recognition of attorney liability to third parties for negligence. This appears unlikely however, because, Brody also relied on the rationale that lawyers need to be adversarial in order to protect their clients, and to allow suits against lawyers by opposing parties would harm the adversarial process. This remains an important consideration in cases involving third-party suits against attorneys.

F. The Duty to Speak.

Disciplinary Rule 4-101(C)(3) provides that a lawyer may reveal the "intention" of his client to commit a crime and the information necessary to prevent the crime." Further sub-paragraph(C)(2) of the same Rule permits disclosure of the

confidences or secrets of a client when "permitted under disciplinary rules or required by law or court order." Though this is not a express fraud exception, the majority of courts hold that the exception to the attorney/client privilege relating to future illegal activity embraces fraudulent as well as criminal activity. This the exception has been referred to as the "crime-fraud" exception. In Caldwell v. District Court, 644 P.2d 26, 33 (1982); see Annotation, Attorney/Client Privilege as Extending to Communications Relating to Contemplated Civil Fraud, 31 A.L.R. 4th 446, 454 (1984), a case applying the civil fraud exception to compel discovery of privileged correspondence, the court held privilege to be inapplicable where the movant made a prima facie showing of alleged illegal conduct on the following rationale:

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> The policy reasons supporting the attorney/client privilege predicate the need of confidence on the part not only of injured persons, but also of those who, being already wrongdoers in part or all of their cause, are seeking legal advice suitable for their plight. The confidences of such persons may legitimately be protected, wrongdoers though they have been, because, as already noticed (Section 2291 supra), the element of wrong is not always found separated from an element of right; because, even when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress; and because the legal adviser must not habitually be placed in the position of an informer. But these reasons all cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. From that point onward, no protection is called for by any of these considerations.
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> 8 J. Wigmore, Evidence, Section 2298 at 573 (emphasis in original).

Another court has explained the exceptions as follows. Where the client has disclosed a fraudulent purpose and the attorney has refused to be a party to it, no professional relationship exists; if the client fails to disclose his fraudulent purpose, there is no confidential relationship and, finally, if the attorney agrees to participate in the fraud, all communications to him cease to be privileged. Ex parte Griffith, 278 Ala. 344, 178 So.2d 169 (1965). It is also noteworthy that certain defenses to an action for negligent misrepresentation are not so available in a claim of attorney fraud. Zafiris, Inc. v. Moss, 506 So.2d 27 (1987), Excalibur Oil, Inc. v Sullivan, 616 F. Supp. 458 (N.D.Ill. 1985) -- lack of privity will not bar an action for fraud; Grevcas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987) -- contributory negligence not a defense to fraud.

Finally, in explaining the rationale for the "crime fraud" exception the United States Supreme Court has stated;

> The attorney-client privilege is not without is costs.... "[S]ince the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose."... The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection - the centrality of open client and attorney communication to the proper functioning of our adversary system of justice - "ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing."... It is the purpose of the crime-fraud exception to the attorney client privilege to assure that the "seal of secrecy"...between the lawyer and client does not extend to communications "made for the purpose of

> getting advice for the commission of a fraud" or crime. (Citations omitted, Emphasis original).

United States v. Zolin, _____U.S._____ 109 S.Ct. 2619, 2626 (1989).

If the attorney-client privilege does not apply to client communication, in furtherance of prospective fraud, the question arises what liability may there be on the part of an attorney who does not disclose the prospective fraud, in other words, is there a duty to speak the breach of which gives rise to a third party action against the attorney?

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In Zafiris, Inc. v. Moss, 506 So.2d 27 (Fla. App. 1987) the appellate court reversed a summary judgment in favor of the attorney. The attorney had represented a sublessor of a gas station who had failed to inform the sublessee that he (the sublessor) did not own the property and had not received consent to the sublease from the owners as required by the lease. The sublessee's attorney had not conducted a title search. The sublessor pocketed the earnest money and the sublessee was evicted by the owners. The sublessor's attorney, who knew his client did not own the property and knew as well that his client did not have permission to sublease it,was sued by the sublessee on a theory of negligent misrepresentation. The court held the attorney's failure to disclose accompanied by the fact he "facilitated" the transaction i.e., reviewed the paper work, was actionable under Florida law (which evidently does not have a privity rule barring actions by third parties against attorneys). Id. at 28.

In SEC v National Student Marketing Corp., 457 F.Supp. 682 (D.DC. 1978), a case involving claims against the attorneys of a corporate client involved in a merger that the attorneys failed to interfere in the closing of the merger when they knew the merger had been approved on the basis of materially misleading information, the court held the attorneys "at the very least,... were required to speak out at the closing concerning the obvious materality of the information....Their silence was not only a breach of this duty to speak, but in addition lent the appearance of legitimacy to the closing....Id. at 713.

As the National Student Marketing case implies, the issues are often tied up in questions of conflict of interest. For example, in Cornell v. Wunchel, supra it was alleged the attorney had committed a fraudulent misrepresentation of the profitability of a motel complex in which the attorney represented the lessor. 408 N.W.2d at 372-73. The attorney had not revealed material financial information in dealing with the lay party on the other side of the transaction. The existence of a duty to speak apparently hinged on the lessee's successful argument that the attorney's conduct in dealing with her created an attorney-client relationship between the attorney and the lessor. Id. at 376. Presumably had no such relationship been found to exist, the attorney would not have had a duty of disclosure. The case is useful, however, in illuminating the pitfalls whenever an attorney for one side of a transaction, having knowledge of undisclosed material facts, deals with a lay person on the other side of the transaction.

On the present state of the law, it is questionable whether mere knowledge that a client intends to commit a fraud, standing alone and without any act on the part of the attorney in furtherance of the fraud, imposes an affirmative obligation of disclosure to the third party. However, the presence of an obligation may vary according to the context. If in the course of representing a client it appears that attorney-client communications either are in furtherance of or would be evidence of a prospective fraud, it should be realized that said communications are unlikely to be protected by the attorney-client privilege, and it should be recognized as well that a very slippery slope awaits in the event of continued representation of the client in the matter of question. The attorney should searchingly consider the ethical implications in such circumstances.

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OVERVIEW OF THE IOWA DEFENSE COUNSEL TASK FORCE REPORT

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I. Purpose of the IDCA Task Force

- See Iowa Defense Counsel Task Force Report, Introduction

II. Summary of Task Force Report Findings

III. Comment on Selected Instructions and Suggested Revisions

- General Instructions 100.3, 100.11, 100.19
- Damages Instructions 200.1, 200.8, 200.10, 200.12, 200.24, 200.39, 210.1
- Comparative Fault Instructions 400.2, 400.7, 400.9
- Products Liability Instructions 1000.4, 1000.6

IV. Future Work of the Task Force

INTRODUCTION

The "Plain English Redraft" of the Iowa Civil Jury Instructions

On December 2, 1986, the Board of Governors of the Iowa State Bar Association approved the "Plain English Redraft" of the Iowa Civil Jury Instructions, formerly the Iowa Uniform Jury Instructions. The revised instructions are the product of the Committee on Iowa Jury Instructions of the Iowa State Bar Association (the "Committee"). On May 6, 1987, the Iowa Supreme Court, by formal resolution, noted the plain English redraft of the instructions "with a deep sense of appreciation and satisfaction" and commended the instructions for "consideration by the trial bench". Since any jury instruction may be challenged in the usual manner on appeal, this right of review precludes the supreme court from approving in advance any particular instruction.

The guidelines which the Committee states were applied in formulating the plain English redraft are set forth in the Introduction to the Iowa Civil Jury Instructions. Among these are that the instruction should represent an accurate statement of the law but also "look and sound like talk".

The Iowa Defense Counsel Task Force

In October, 1988, the Board of Directors of the Iowa Defense Counsel Association appointed a special task force to review and evaluate the plain English redraft of the Iowa Civil Jury Instructions. The purpose of the Task Force is to analyze the plain English instructions and determine whether any of the revisions resulted in inaccurate statements of the law. This includes identifying omissions from prior Uniform Jury Instructions and applicable case law which make the plain English instructions incomplete and thus inaccurate. It also includes identifying overly simplistic or vague terminology resulting from the use of the plain English format which may render an instruction inaccurate, incomplete, or misleading.

The goal of the Task Force is to provide an authoritative reference source to members of the Iowa Defense Counsel Association and the courts for use in dealing with the plain English redraft of the Iowa Civil Jury Instructions. By having a readily available reference which accurately summarizes the principle of law as expressed in the controlling cases, in addition to a comparison to the prior corresponding Uniform Instruction, it is hoped that counsel will have an effective method of assuring that the court properly instructs on the law, even if in the plain English format.

The Task Force has pursued its work in a manner designed to avoid undue criticism of the Committee on Iowa Jury Instructions. Indeed, the Committee included members of the Iowa Defense Counsel Association during the relevant time period. The members of the Committee are to be commended for the substantial time and effort expended in rewriting the Civil Jury Instructions, even if we disagree with some of the results of their work.

The Philosophy of "Plain English" Instructions

The Task Force does not take issue with the concept that jury instructions should be presented to the jury as clearly and concisely as possible, *provided* that the instructions represent an accurate and complete statement of the law. Avoiding unnecessary legalese and surplusage is a desirable goal. The Iowa Supreme Court has observed, however, that instructions which are not sufficiently specific and impose duties which are not adequately explained may constitute reversible error. *Rinkleff v. Knox, 375 N.W.2d 262, 266-67 (Iowa 1985).*

That the law has often become complex is a fact. The cure for this complexity, however, is not abbreviated, colloquial, or overgeneralized statements of legal principles. Instructing in this manner necessarily sacrifices precision and likely creates prejudice to one or more of the litigants. One faulty premise of many of the plain English redrafts is confusing brevity with clarity. Many of the revised instructions which were evaluated, while shorter, are a less clear and complete explanation of the law than were the prior Uniform Instructions in conveying an accurate understanding of the legal principle to a lay juror. *Compare, e.g.*, ICJI 400.7 *with* UJI 3.30, concerning a plaintiff's duty to mitigate damages.

The desire for simplicity in the plain English redraft has also sometimes led to inaccurate statements of the law, as more fully discussed in the body of this report. *See, e.g.*, ICJI 700.4, concerning sole proximate cause. The revised instruction now states that sole proximate cause "means the only cause". This is not a correct statement of the law of sole proximate cause. Indeed, application of the doctrine of sole proximate cause assumes the existence of more than one cause in fact. As a matter of legal policy, however, certain causes are deemed too remote to constitute the legal cause. The intervening cause which remains becomes the "sole proximate cause". *See, e.g.*, W. Prosser, *Torts,* § 44 (4th ed. 1971) (issue is whether liability will be imposed where a defendant's conduct made a substantial contribution to an injury brought about by a subsequent, intervening cause); *Rest. (2d) Torts,* § 440 (1965) (intervening cause which

prevents liability for antecedent negligence which was a substantial factor in causing the harm). ICJI 700.4 would incorrectly eliminate the defense of sole proximate cause any time defendant's conduct was arguably a cause in fact. It ignores any explanation of intervening causes.

Stating the law so that it "sounds like talk" poses a fundamental philosophical premise which the bench and bar should not address lightly. While a jury instruction represents the court's translation of the applicable legal principles for purposes of the jury's application to the facts before it, instructions are first and foremost a statement of *the law*. The wording of instructions has oftentimes evolved into the exact statement of the legal principle in appellate decisions. It is therefore important to recognize that colloquial "plain English" sometimes does not encompass the precision which defines complex legal principles. The natural progression of the plain English philosophy is that it may attempt to solve a problem of legal complexity by abbreviating or ignoring it.

The paramount concern arising from an eventual triumph of "plain English", overly-simplistic jury instructions is that there necessarily will be a trade-off in terms of precision and completeness in the statemnt of the law. This is candidly recognized by the reviewing editors in one of the reference sources which the Committee has apparently relied on from time to time in the course of the plain English redraft process:

> "Improved juror comprehension is not a costless objective . . . . There has always been an implicit trade-off between legal refinement and jury capability. With these new methodologies [plain English drafting], the extent of that trade-off becomes explicit. Recognition of the trade-off may also force a more careful examination of the role of the jury and what issues it is capable of deciding."

Elwork, et al., *Making Jury Instructions Understandable,* (The Michie Company) p. xxiv. *See,* "Civil Jury Instructions Panel", Workshop Outlines, Annual Meeting of the Iowa State Bar Association, June 28 - 30, 1989, p. DD-4. In some instances, the degree of this trade-off of completeness for the sake of brevity and simplicity may be prejudicial to litigants. For example, there are fine but essential distinctions between gross negligence, recklessness, and willful and wanton conduct. These have been long recognized by the Iowa Supreme Court as the doctrines have different consequences in their application. Plain English drafting suggests these eventually may be ignored or simplistically generalized without regard to the fact that they represent differing degrees of culpable conduct.

The plain English approach to jury instructions also ignores another purpose of jury instructions: they are the statement of the law of the case from which counsel are entitled to argue to the jury. There should be concern that vague, generalized, or abbreviated statements of applicable law only invite mischief in terms of the latitude of counsel in arguing "the law" and its application to the facts of the case.

Finally, it is also a disturbing premise to assume that statements of the law in the courts of this state must be reduced to a lowest common denominator to achieve sufficiently understandable expression. This approach fails to recognize that the intelligence of Iowa juries is a collective one created by the combined analysis of the group. There is no empirical data demonstrating that Iowa juries have been overly confused by the prior Uniform Jury Instructions. Reference works which aparently have been referrede to by the Committee from time to time do not demonstrate applicability to the Iowa Uniform Jury Instructions, nor offer a persuasive rationale for the wholesale revision of the Uniform Instructions which occurred.

Summary of Task Force Findings

In view of the concerns raised by the plain English philosophy employed in the redrafting of the Iowa instructions, and the wholesale revision which the Committee elected to employ, the Task Force in pursuing its analysis was guided by the following:

1. An instruction should be as concise as possible, *provided* that it fully and accurately states the law of Iowa.
2. An incomplete statement of the law may be just as inaccurate or misleading as a misstatement of the law.
3. No instruction should be published which is not supported by existing Iowa authority.
4. Abbreviated phrases, conversational language, and gerneral terminology are often more ambiguous than a lengthier statement of legal principle.
5. Potential prejudice is inherent in the use of vague, generalized, and imprecise terms.

Application of the above guidelines to the plain English redraft demonstrates justifiable concern with respect to many of the revised instructions. It is of concern that stating the law in such a fashion may eventually blur important distinctions or requirements of proof, and may generally tend to favor plaintiffs, especially in cases involving personal injury. Since a defendant's defense may be premised on limitations on duties or damages, precise distinctions, and cautionary

admonitions to the jury, it is of concern that many of these have been omitted or emasculated in the plain English redraft.

Because of the scope of the undertaking in analyzing the entirety of the redraft of the Iowa Civil Jury Instructions, and with due regard to the importance of publishing an analysis of some of the changes as soon as practical, the Task Force report will be published in consecutive volumes. Volume I has been devoted to the general instructions (Chapter 100), damages (Chapter 200), comparative fault (Chapter 400), and products liability (Chapter 1000). The format of this report will hopefully make it convenient for use by defense counsel. It includes a complete recitation of the Iowa Civil Jury Instruction, with the corresponding Prior Uniform Instruction set forth in the accompanying appendix. A summary of the changes which have been made in the instruction, and a comment and analysis section evaluating the revised instruction are also set forth. Where appropriate, an alternative instruction is also proposed.

Several of the prior Uniform Jury Instructions certainly were deserving of revision. What has been discovered by the Task Force, however, is that the plain English revisions often went beyond semantic changes and have resulted in some instructions which inaccurately state the law. Where substantive revision occurred in the absence of appropriate case authority, it is of course improper. The function of the Committee has traditionally been limited ot drafting pattern instructions based on existing Iowa case authority. This has achieved consistency in instructions given to Iowa juries. The role of the Committee is not, and should not be, that of *Restatement* editors in shaping or interpreting unsettled law. As the chairman of one previous Committee has observed:

> "It is not the privilege or purpose of the Committee to establish, change, or modify the law. The Committee has attempted to provide a basis for uniformity of instructions, convenience of reference, and freedom from error under existing law."

Foreword, *Uniform Jury Instructions,* Special Committee on Uniform Court Instructions, Honorable George G. Fagg, Chairman, January 4, 1982.

Many of the revised instructions are notably lacking in citation to Iowa case authority. Where this characterizes an instruction which has been substantially revised, the Task Force has noted this and supplied a discussion of the applicable case law where appropriate.

In comparing the plain English redraft with the prior Uniform Jury Instructions, The Task Force was most surprised by the many significant omissions. These are noted in the comment section

following the specific instructions affected. Also notable is the elimination of extensive cautionary language which appeared throughout the prior Uniform Jury Instructions, *e.g.*, the importance of a fair and impartial consideration of the evidence, defining and explaining burdens of proof, and similar admonitions traditionally a part of the court's instructions designed to emphasize to the jury the solemnity of its task. The revised instructions delete phrases such as "will fairly and reasonably compensate" in referring to damages, and substitute the term "fully compensate". *Compare* UJI 3.8 - 3.17 *with* ICJI 200.15 -200.24. "Damages" are now referred to as "plaintiff's damages", utilizing a possessive and presumptive form of phraseology. "Damages" is also now used in place of terms such as "the accident" or " the occurrence" in referring to the matter at issue. *See, e.g.*, ICJI 400.2 ("Damages may be the fault of more than one person . . .").

General introductory language which explained a particular legal concept to the jury and placed the jury's consideration of that concept in context with the other issues in the case has been largely eliminated. The plain English instructions, in their abbreviated format, primarily use only brief identification of the particular theory or defense, with an accompanying reference to "factors" which are to be considered. They often lack precise definition or narrative explanation as to how the concept relates to the overall claims in the case or the particular results which should flow in the verdict form from the findings.

In some instances, new concepts or legal terms of art have been substituted in the plain English redraft without any intervening Iowa Supreme Court cases which have adopted the new terminology or principle. *See, e.g.*, damages instructions 200.10 and 200.11, which employ the new terminology "loss of full mind and body" in place of the prior and long-standing concept of "disability". *See also,* ICJI 1000.4, defining unreasonably dangerous in products liability cases, which adds as a permitted alternative definition of unreasonably dangerous the "risk/utility" test despite the fact that it has never been expressly adopted as an alternative definition of unreasonably dangerous by the Iowa Supreme Court.

Finally, inconsistencies in application of the plain English "guidelines" are apparent in certain instructions. For example, while most liability instructions have been abbreviated and elements combined or eliminated, the damages instructions have been expanded. Many damage elements previously included within traditional categories have been separated and new instructions devoted to them. *See, e.g.*, ICJI 200.12 "Physical and Mental Pain and Suffering", which now devotes separate description to "mental

pain" and includes a list of over a dozen descriptive types of "mental pain", many of which are repetitious, and at least one of which is not separately compensable under Iowa law (loss of enjoyment of life).

It is of course difficult to predict the impact of the plain English redraft of the pattern instructions, and any prejudice resulting from their use will be difficult to empirically measure. Much of their effect may be produced by the general tenor of the instructions. Many of the changes, viewed individually, are too subtle to likely result in reversible error. Only actual use of the instructions in the trial courts and the testing of their accuracy on appeal will determine whether they should justifiably be followed in the future.

The Iowa Defense Counsel Task Force on Civil Jury Instructions

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ICJI 100.3 Burden of Proof, Preponderance of Evidence

Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

Authority

Mabrier v. A.M. Servicing Corp., 161 N.W.2d 180 (1968)

Prior corresponding instruction. UJI 1.2 (first paragraph); 1.11

Changes. The new instructions make no effort to define "burden of proof", which is the first paragraph of UJI 1.2.

The definition of "preponderance" is simplified, in essence, to the phrase "more convincing", which is just one of the phrases used in UJI 1.11. Deleted are the phrases "stronger impression", and "greater weight or strength", 100.3 simplifies the reference to "greater number of witnesses".

Comment. While it may be simpler to draft all of the instructions by simply listing what a particular party has to prove, rather than stating who has the burden of proof whith respect to certain isues, the deletion of the definition of burden of proof seems to lighten the plaintiff's burden as the instigator of litigation. The simplification of the definition of "preponderance" seems, at first reading, to lessen the burden, but the true test of "preponderance" is, in fact, evidence that merely is "greater", or "more convincing", than opposing evidence. The supreme court opinions consistently refer to "greater weight".

IDC PROPOSED INSTRUCTION 100.3
Burden of Proof, Preponderance of Evidence

A party who makes an allegation that is denied by the opposing party must prove the truth of the allegation. Whenever a party must prove something thay must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

UJI 1.2 BURDEN OF PROOF. By "burden of proof" is meant the obligation resting upon a party to prove the truth of an allegation made by him which is denied by the opposing party.

"Evidence" is whatever is admitted in the trial of the case as a part of the record, whether it be an article or document marked as an exhibit, or other matter formally introduced and received, a stipulation, or the testimony of witnesses, (in person or by deposition)

Watters v. State Traveling Men's Assn., 246 Iowa 770, 69 N.W. 211 (1955)

UJI 1.11 PREPONDERANCE OF EVIDENCE. By "greater weight of evidence" Or "preponderance of evidence" is meant, not necessarily the greater number of witnesses nor the greater array of facts narrated by them, but rather the greater weight or strength of the proof. When it is said that the burden rests upon either party to establish any particular fact or proposition by a greater weight or preponderance of the evidence, it is meant that the evidence introduced in support thereof, to entitle such party to a finding in his favor, should produce the stronger impression upon the mind and be more convincing when weighed against the evidence introduced in opposition thereto.

Authority

Mabrier v. A.M. Servicing Corp., 161 N.W.2d 180 (Iowa 1968)

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ICJI 100.11 Hypothetical Question, Expert Testimony

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

Authority

Prior corresponding instruction. UJI 1.8

Changes. 100.11 deletes the last sentence of the first paragraph of UJI 1.8: "The value of such evidence depends upon whether the facts stated in the hypothetical question are correct and true...." UJI 1.8 provided that if the facts in the hypothetical were not established, "then the answers or opinions based thereon should not be given any weight or consideration". 100.11 permits the jury to decide if a failure of proof with respect to a fact in the second paragraph of UJI 1.8, which instructs the jury to give an opinion based on a "proven" hypothetical "just such weight and credit as you believe [it] entitled to receive".

Comment. The Committee cited the same opinion in support of its instruction as was cited in support of UJI 1.8: *Cody v. Teller Drug Co., 232 Iowa 475, 5 N.W.2d 824 (1942).* Unfortunately, *Cody* is in direct contradiction with the new text of 100.11:

The rule is that answers to hypothetical questions should be disregarded if the facts assumed have not been proven and juries are not permitted to pass on the materiality of such facts.

Cody, 5N.W.2d at 827. More recently, the Iowa Supreme Court has held that an opinion "based on a faulty assumption....goes th the weight to be given the opinion, not to its admissibility". *Preferred Marketing Associates Co. v. Hawkeye National Life Insurance Co., 452 N.W.2d 389, 393 (Iowa 1990).* The opinion does not overrule *Cody,* and cites no authority in support of the holding, so it appears that *Preferred Marketing* and *Cody* are in conflict. This presents district courts with a real dilemma. Because of the failure in *Preferred Marketing* to discuss or reconcile *Cody,* the Task Force takes the position that *Cody* is still the law and that ICJI 100.11 is a misstatement of current Iowa law.

100.11's failure to instruct that the *jury* decides what weight to give an opinion that is based on a hypothetical, even when all of the facts assumed in the hypothetical are found to be true, is an omission that should be remedied. Even when an expert's testimony is uncontradicted or uncontroverted, the court has held that the jury is not bound to find the facts consistent with the expert's opinion. *See, Eventide Lutheran Home v. Smithson Electric and General Construction, Inc. N.W.2d 789, 791-92 (Iowa 1989). 100.11's silence on this issue does not advise the jury as to the parameters of its role and permits a jury to conclude, incorrectly, that it is bound by an opinion that is based on a hypothetical found to be true.*

IDC PROPOSED INSTRUCTION 100.11
Hypothetical Question, Expert Testimony

An expert witness was asked to assume certain facts to be true and to express his or her opinion, based on that assumption. This is called a hypothetical question.

The value of the expert's opinion as evidence depends first on whether the facts being assumed are, in fact, true. If you find that any of the facts in the assumption are not true, then you shall give no consideration to the opinion.

If you find that the facts in the assumption are true, then you shall consider the opinion as evidence and give it whatever weight you believe it merits.

UJI 1.8 HYPOTHETICAL QUESTION - EXPERT TESTIMONY. A hypothetical question is one which assumes a certain state of facts to have been proved by the evidence, and calls upon the witness to assume all the facts stated in the question to be true, and express his opinion thereon. The value of such evidence depends upon whether the facts stated in the hypothetical question are correct and true, and established by the evidence.

If the facts stated in the hypothetical question are established by the evidence, then the opinions based thereon may and should receive just such weight and credit as you believe them entitled to receive.

But, if you find that the facts stated in the hypothetical question are not established by the evidence, then the answers or opinions based thereon should not be given any weight or consideration by the jury.

Stutzman v. Sharpless, 125 Iowa 335, 101 N.W. 105 (1904)
Ingwersen v. Carr & Brannon, 180 Iowa 988, 164 N.W. 217 (1917)
Lemon v. Kessel, 202 Iowa 273, 209 N.W. 393 (1926)
Anspach v. Littler, 215 Iowa 873, 245 N.W. 304 (1932)
Wilcox v. Crumption, 219 Iowa 389, 258 N.W. 704 (1935)
Cody v. Teller Drug Co., 232 Iowa 475, 5 N.W.2d 824 (1942)

ICJI 100.19 Clear Convincing and Satisfactory Evidence

Evidence is clear, convincing and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

Authority

Prior corresponding instruction. None.

Changes. No previous instruction.

Comment. The Iowa Supreme Court consistently defines "clear and convincing" in recent cases only by comparison to the two other standards of proof: "more than a preponderance..., but less than beyond a reasonable doubt". *See, e.g., In re Henderson, 199 N.W.2d 111, 121 (Iowa 1972).* Earlier cases suggested, however, that clear and convincing was closer to reasonable doubt than a mere preponderance. Ironically, the case cited by the Committee quotes these earlier, more stringent requirements. *See, Sinclair v. Allender, 238 Iowa 212, _____, 26 N.W.2d 320, 326-27 (1947)* ("the evidence must be clear, satisfactory, and unequivocal.... A mere preponderance is not sufficient. It must be explicit, decisive, and leave the existence of no essential element to conjecture or to remote or uncertain inference..... [O]ne...must do so by evidence that is clear, convincing, and practically overwhelming..... [T]he evidence must be clear, satisfactory and conclusive.....[T]he proof should be clear, unequivocal, and without doubt and uncertainty").

The Committee has drawn its language from an Iowa Court of Appeals decision, *Raim v. Stancel, 339 N.W.2d 621, 624 (1983),* that does not cite *Sinclair* or any of its predecessors, and relies instead on *Words and Phrases.* Even then, the Committee does not apply *Raim* verbatim. The Court of Appeals held:

> For evidence to be "clear and convincing", it is merely necessary that there be no serious or substantial doubt about the correctness of the conclusion drawn from it.

339 N.W.2d at 624. The Committee replaces "doubt" with "uncertainty". The committee also fails to adopt the Court of

Appeals' prefatory reference to *Henderson* and its placement of "clear and convincing" between the other two standards of proof.

While *Raim* is citable authority, the Task Force submits that the instruction should be tailored to satisfy *Henderson* and the earlier Iowa Supreme Court opinions, quoted in *Sinclair*.

IDC PROPOSED INSTRUCTION 100.19
Clear, Satisfactory, and Convincing Evidence

Clear, satisfactory, and convincing evidence means evidence that is more than a preponderance but less than "beyond a reasonable doubt". It is evidence that is explicit, unequivocal, and conclusive, leaving no serious or substantial doubt about the conclusions to be drawn from it.

ICJI 200.1 Elements - Personal Injury and Vehicle Damage

If you find [injured party] is entitled to recover damages, you shall consider the following items:

[Enter applicable elements from Instructions 200.2-200.13, 200.39.]

The amount you assess for [physical and mental pain and suffering in the past and future] [future earning capacity] cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant(s) as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. (Similarly, damages awarded to one party shall not be included in any amount awarded to another party.)

Add together the amounts, if any, you find for each of the above items and the total will be used to answer the special verdicts.

Prior corresponding instruction. UJI 3.1; see also UJI 3.23

Changes. UJI 3.1's instruction that the jury was to determine the amount of "recovery for damages, if and," has been changed in 22.1 to "you shall consider the following items...". ICJI 200.1 instructs the jury to "consider the following items" and then proposes that all submitted categories of damages be separately listed in this marshalling instruction.

The reference in UJI 3.1 to "after a careful and impartial consideration of all the evidence", in considering whether to award damages at all, is eliminated. The only reference in 200.1 to "impartial consideration" is with respect to the amount of pain and suffering or future damages to be considered, in paragraph 2.

The second paragraph of 200.1 is taken largely from cautionary language which appeared in the various individual element instructions of Chapter 300 of the prior Uniform Jury Instructions, including UJI 3.23. 3.23 was a general cautionary instruction which was to be given in all cases. There is no separate corresponding instruction in revised Chapter 200.

ICCJI 200.1 omits the following statement contained in UJI 3.23: "These statements by the court as to items and amounts of recovery are not an indication of whether your verdict should be for the plaintiff, or the defendant, or the amount of recovery in the event your verdict is for the plaintiff."

UJI 3.23 also stated:
"You must not allow plaintiff *any recovery* for damages which you do not find proven by the greater weight or preponderance of the evidence, proximately resulting from the accident in this case, as a direct result of the negligence of defendant." (emphasis supplied)

ICJI 200.1 changes the above statement to provide only that "the *amount* you assess for any item of damage must not exceed the amount caused by the defendant as proved by the evidence".

Revised instruction 200.1 introduces as a separate category of damages the term "mental pain and suffering". The prior Uniform Jury Instructions referred only to pain and suffering generally. *See* UJI 3.9. Revised Chapter 200 also proposes separate instructions as to past mental pain and future mental pain, in addition to instructions on physical pain and suffering. *See* ICJI 200.12, 200.13. ICJI 200.1 adds future earning capacity as a type of damage not measurable by an exact standard. UJI 3.23 referred only to pain and suffering and future disability in this regard.

Comment. ICJI 200.1 now instructs the jury it "shall consider" all items of damages defined in 200.2 - 200.13 and proposes listing these categories of damages in the marshalling instruction. Prior UJI 3.23 specifically stated that no damages were to be awarded which were not proven by a preponderance of the evidence to be the direct result of defendant's conduct. 200.1 de-emphasizes this limitation by applying the limitation only to the "amount" to be awarded.

The result of these subtle changes is a marshalling instruction which contains a laundry list of plaintiff's damages categories in the first instruction, which are then repeated in the separate explanatory instructions on each element contained in 200.2 - 200.13. There is no

limiting instruction or clear explanation that these are only categories of damages to be considered, not necessarily awarded. There is no adequate caution that no recovery is allowed for any element not proved and directly caused by defendant. A new damage category of "mental pain" is created with separate instructions, without specific case authority that this is necessary or appropriate.

These changes result in an over-emphasis of damages, particularly when it is considered that many of the liability instructions have been substantially abbreviated.

IDC PROPOSED INSTRUCTION 200.1

If after fair and impartial consideration of the evidence you find plaintiff is entitled to recover damages, you will then determine the amount. You may consider the items defined in instructions ___ through ___, but you must not award any damages for items not proved by the evidence and directly caused by defendant's fault.

Damages, if any, for pain and suffering or future disability cannot be measured by any exact or mathematical standard. The amount must rest in your sound discretion. You must not exercise this discretion arbitrarily, or out of passion, sympathy, or prejudice, for or against the parties. Your judgment must be based on a fair, intelligent, and impartial consideration of the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. (Similarly, damages awarded to one party shall not be included in any amount awarded to another party.)

Add together the amounts, if any, you find for each item awarded, and the total will be used to answer the special verdicts.

UJI 3.1 DAMAGES

In all cases:

If, after a careful and impartial consideration of all the evidence in the case, you find plaintiff entitled to recover, it will then be your duty to determine the amount of his recovery for damages, if any, sustained by him for loss and injury.

Kisling v. Thierman, 214 Iowa 911, 243 N.W. 552 (1932)
Miller v. McCoy Truck Lines, 243 Iowa 483, 52 N.W.2d 62 (1952)

ICJI 200.8 Loss Of Time - Earnings

The reasonable value of [lost wages] [time from business] from the date of injury to the present time.

Authority

Amelsburg v. Lunning, 234 Iowa 852, 14 N.W.2d 680 (1944)

Comment

Note: If claim for time from business is made, the following paragraph may be needed.

Loss of time from business is not measured by loss of profits from a business, but is measured by the value of a person's own labor. Profits represent the gain from an investment in capital or business and the labor of others, after payment of expenses. You will not consider evidence of loss of profits, unless the evidence proves the value of plaintiff's services to their business as distinct from the profits of the business.

Prior corresponding instruction. UJI 3.8

Changes. The revised instruction deletes language which clearly indicated that the lost time must have been caused by the accident or injury. UJI 3.8 permitted an award of earnings lost "because of the injuries"; this has been changed in 200.8 to simply "from the date of injury to the present time".

As with all revised instructions, the qualifying phrase "if any", referring to damages, is eliminated.

The revised instruction substantially abbreviates the explanation of UJI 3.8 concerning the difficult issue of loss of business profits in relation to an individual's loss of time from business. 200.8 omits the specific statement contained in UJI 3.8 that "there can be no recovery for profits". 200.8 states only that loss of time is "not measured" by loss of profits, and gives a limited explanation of the circumstances under which evidence of loss of profits may be considered.

Comment. Deletion of the phrase "because of the injury" renders this instruction silent in terms of the requirement of causation.

The brevity of the proposed instruction on the role of lost business profits belies the potential complexity of this issue. It is an example of an

issue which, if accurately instructed upon, cannot easily be summarized in a short paragraph for the jury.

The note to 200.8 is essentially a correct statement of Iowa law in injury cases, derived from *Amelsburg v. Lunning, 234 Iowa 852, 14 N.W.2d 680 (1944)*. The final sentence, however, incorrectly paraphrases *Amelsburg* and should be slightly modified to confirm that it is a limiting instruction, not an invitation to the jury that it has discretion as to when to "consider" or not consider evidence of loss of profits.

Analysis of the Iowa cases dealing with loss of business profits in relation to a plaintiff's loss of earnings indicates the issue is not primarily a problem of jury instructions, but a threshold question of admissibility of evidence for the trial court to determine. Once the court determines whether the case is an appropriate one permitting evidence of past profits, the court must simply submit a cautionary instruction which limits the consideration of that evidence consistent with the parameters enunciated by the Iowa Supreme Court.

For a proper understanding of the treatment of loss of business profits in connection with loss of earnings or earning capacity, one must read carefully *Iowa-Des Moines National Bank v. Schwerman Trucking Co., 288 N.W.2d 198, 201-204 (Iowa 1980)*, and the polestar Iowa case which it extensively discusses, *Mitchell v. Chicago, Rock Island & Pacific Railway, 138 Iowa 283, 290-91, 114 N.W. 622, 625 (1908)*. Careful analysis of these cases, and *Amelsburg v. Lunning, 234 Iowa 852, 14 N.W.2d 680 (1944)*, cited as authority under ICJI 200.8, reveals several key distinctions which must be drawn in order to formulate a proper jury instruction.

First, the court needs to distinguish between loss of past earnings and loss of future earning capacity. As applied to loss of future earning capacity, the final sentence of the note to 200.8 was found in *Schwerman* to be reversible error. *Schwerman, 288 N.W.2d 198, 203-204*. Next, a distinction must be drawn between evidence of the general characteristics and operations of the plaintiff's business compared to loss of profits. Evidence concerning general business operations is generally admissible, evidence of loss of profits generally is not. *Id at 202, citing Mitchell, supra*. Third, a distinction in the evidence must be drawn as to whether a sufficient showing has been made of the value of plaintiff's individual service to the business in generating profits, as opposed to profits attribu-

table to investment of capital, the labor of others, and other factors. See *Schwerman, 288 N.W.2d 198, 202-203.*

Three general rules derive from *Mitchell v. Chicago, Rock Island, Pacific Railway, supra*, confirmed by *Schwerman*: (1) projection of loss of future business profits cannot be used to estimate an individual's loss of future earning capacity, as too speculative; (2) evidence of past profits is not admissible as tending to show what future profits would have been but for the injury; and (3) evidence of *past* profits may be admissible in limited cases where plaintiff demonstrates that the profits from the business resulted primarily from the personal endeavors, skill, and attention of the plaintiff as opposed to investment of capital or labor of others.

Once the foregoing distinctions are recognized, the trial court must then determine whether the case before it is an appropriate one so as to permit evidence of business profits relevant to plaintiff's loss of earnings claim. In *Amelsburg v. Lunning, supra*, an injury case, the court permitted evidence of profits in the plaintiff's farming operation "in order to establish the value of plaintiff's services in his business ... not as a distinct element of damage, but as showing the value of plaintiff's time and services". *Amelsburg, supra, 14 N.W.2d at 681-682.* In *Schwerman*, a wrongful death case, the court found that plaintiff's evidence dramatically detailed his "full-time efforts and success in making a volatile business prosper" and that it was therefore "within the trial court's discretion" to permit evidence of *past* profits of the business as demonstrating plaintiff's earning ability. *288 N.W.2d at 202.* Specifically, the court found "... the unusual circumstances here remove this case from the general rule [that evidence of loss of profits is inadmissible] even though earnings left in the business may have been paid employees and general capital which enhanced these profits...". *Id.*

Even if evidence of loss of profits is admissible in circumstances such as found in *Amelsburg* and *Schwerman*, the jury must clearly be told that there is no recovery permitted for loss of profits as such, and that it is used solely to measure the value of plaintiff's own labor, separated from capital assets and the efforts of others. Additional restrictions on this evidence are applicable when the issue is loss of future earning capacity, discussed in the Comment to 200.9, *infra*.

IDC PROPOSED INSTRUCTION 200.8
Loss of Time - Earnings

The measure of damages for loss of earnings [loss of time] is the fair and reasonable value of the time lost because of plaintiff's injuries.

Note: If a claim for loss of time from business is made, add the following:

Loss of time from business is not measured by loss of profits from the business, but is measured by the value of plaintiff's own labor. In connection with plaintiff's claim for loss of time, you have heard evidence concerning the operation, character, and profits of plaintiff's business both before and after the accident. If the profits from a business result primarily from the personal skill and effort of the owner, rather than from the investment of capital or the labor of others, business profits are a proper factor to consider in determining the value of the business owner's loss of time. You may not, however, award any damages for loss of profits from plaintiff's business. This evidence of business operations and profits has been received solely for the purpose of assisting you in determining the value of plaintiff's services to the business as distinct from the profits of the business.

Authority

Iowa-Des Moines National Bank v. Schwerman Trucking Co., 288 N.W.2d 198, 201-204 (Iowa 1980)
Amelsburg v. Lunning, 234 Iowa 852, 14 N.W.2d 680 (1944)
Mitchell v. Chicago, Rock Island & Pacific Railway, 138 Iowa 283, 290-91, 114 N.W. 622, 625 (1908)

UJI 3.8 LOSS OF TIME - EARNINGS. The measure of damages for loss of earnings, (time), if any you find, will be the fair and reasonable value of the time lost because of the injuries; but not exceeding $_____ being the amount (claimed therefor) (shown by the evidence).

In connection with this claim for loss of time, evidence has been received tending to show the extent of plaintiff's business, (farming) operations, the amount of his business income and earnings both before and after the injury, the amount and character of his investment and the type of duties which he has performed. This evidence should not be regarded as establishing a measure or rule for ascertaining the damages that may be awarded, but is submitted as tending to show the decrease, if any, of his capacity to work and continue the business (farming) operations. You are instructed that there can be no recovery for profits but such evidence may be considered in determining the fair and reasonable value of any loss of time which plaintiff has sustained.

Amelsburg v. Lunning, 234 Iowa 852, 15 N.W.2d 680 (1944)
Miller v. McCoy Truck Lines, 243 Iowa 483, 52 N.W.2d 62 (1952)

NOTE: The first sentence should be adapted to the evidence.

ICJI 200.10 Loss Of Full Mind And Body - Past

Loss of function of the [mind] [body] from the date of injury to the present time.

Authority

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)

Prior corresponding instruction. New, *but see* UJI 3.9 (disability)

Changes. The terminology employed for this category of damages is new. It replaces the damages concept of disability, which was contained within prior UJI 3.9. UJI 3.9 defined pain and suffering, past and future, and disability, in a single, two-paragraph instruction.

Comment. ICJI 200.10 represents a questionable and unjustified revision of the prior Uniform Jury Instructions. The prior concept of "disability" has been displaced with a new concept entitled "loss of full mind and body". The immediate question is whether the term "disability" is ambiguous so as to require re-definition. Certainly "disability" cannot be considered prolix or confusing. Even if loss of "function" is intended as the key descriptive term, it should be used in reference to "disability" so as to remain consistent with terminology employed in the vast majority of Iowa Supreme Court decisions. A further question is whether the term "loss of full mind and body" is a more confusing and ambiguous concept, and a less confining definition of disability to a plaintiff seeking damages.

The phrase "loss of full mind and body" traces to language of the supreme court appearing in *Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)*. An exhaustive search of Iowa law fails to reveal any other origin or further use of this term in Iowa case law as a damages concept. It appears only in *Schnebly* and, in a modified form, in the Iowa Court of Appeals decision of *Burkis v. Contemporary Ind. Midwest, 435 N.W.2d 397 (Iowa App. 1988)*.

A close reading of *Schnebly v. Baker* demonstrates that the court employed this phrase in part as a description of the particular disability characterizing the plaintiff in that case (a tragically brain-damaged infant), not as a new definition of "disability" as a concept in Iowa damages law. The exact quotation from *Schnebly* states:

> "Another item of damage recognized by the law is for *disability of mind and body*, impairment of physical functions, and deprivation of mental powers. *See, e.g., Yance v. Hoskins, 225 Iowa 1108, 281 N.W. 489* (disability of arm); *Smithson v. Mommsen, 224 Iowa 307, 276 N.W. 47* (back disability) [citing further authorities]. This item is for the deprivation of full mind and body, separate and apart from impairment of earning capacity. It is for *this item* that the trial court apparently allowed damages when it made an award for "injuries to the person and total disability" *Schnebly* at 726 (emphasis supplied).

"Deprivation of full mind and body" was obviously the particular disability which affected the plaintiff in *Schnebly*.

The brief mention of a similar phrase by the Court of Appeals in *Burkis supra*, is not illuminating, and in fact, also employed the term disability:

> "The law recognizes damages for *disability* of mind and body, impairment of physical functions, and deprivation of mental powers." *Burkis* at 399, citing *Schnebly, supra* (emphasis supplied).

Legions of Iowa court decisions over the last several decades have treated loss of function of mind and body within the concept of "disability". *See, e.g., Becker v. D & E Distributing Co., 247 N.W.2d 727, 731 (Iowa 1976); Tucker v. Tolerton & Warfield Co., 249 Iowa 405, 86 N.W.2d 822, 826-27 (1957); Gatewood v. Cooper, 245 Iowa 1281, 66 N.W.2d 472, 479 (Iowa 1954).* Disability is employed in the prior jury instructions, UJI 3.9. Even the passage from *Schnebly* employing the term of "loss of full mind and body" did so as a description of disability. In view of this history and the fact that "disability" is a commonly understood term with which the average juror is familiar, it is difficult to understand the removal of disability from the new instructions.

Use of the new term "loss of full mind and body" as the definition of loss of physical and mental function, without reference to disability, should be seriously questioned. In the absence of more demonstrable authority for substituting this phraseology in lieu of "disability", this is an inappropriate and unsupported revision of Iowa law.

IDC PROPOSED INSTRUCTION 200.10
Disability

As one element of damages, plaintiff claims [physical] [mental] disability. "Disability" means loss of physical or mental function as a result of the injury claimed.

If you find plaintiff has been disabled in the past as a result of the injury claimed, you will award an amount that will fairly and reasonably compensate for that disability.

If you find that the injury claimed is permanent or will to some extent disable the plaintiff in the future, you will award the present value of an amount which will fairly and reasonably compensate the plaintiff for that future disability.

Damages for future disability cannot be measured with exact or mathematical certainty. The amount must rest in your discretion based on a fair and impartial consideration of the evidence.

UJI 3.9 PAIN AND SUFFERING - PAST - FUTURE - FUTURE DISABILITY. The measure of damages for injuries to his person, pain and suffering, and (future disability), if any you find, will be such amount as will fairly and reasonably compensate therefor. If you find that injuries are permanent or will to some extent disable him in the future, (or require further medical or hospital expense), or hereafter cause pain and suffering, you should determine and allow such further sum as paid now in advance will fairly and reasonably compensate for any such items as the evidence shows, with reasonable certainty, will result in the future from such injuries.

The damages, if any you find, for injuries to the person, for pain and suffering in the past and future, and future disability, cannot be measured by any exact or mathematical standard but the amount must rest in the sound discretion of the jury. Such discretion must not be exercised arbitrarily, or out of passion or sympathy or prejudice for or against the parties, but based upon a fair, intelligent, dispassionate and impartial consideration of the evidence.

In no event can the allowance for these items exceed $_____, being the amount claimed therefor.

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Tissue v. Durin, 216 Iowa 709, 246 N.W. 806 (1933)
Winter v. Davis, 217 Iowa 424, 251 N.W. 770 (1933)
Pestotnik v. Balliet, 233 Iowa 1047, 10 N.W.2d 99 (1943)
Smith v. Pine, 234 Iowa 256, 12 N.W.2d 236 (1943)
Jackson v. C.M.St.P., 238 Iowa 1253, 30 N.W.2d 97 (1947)
Tucker v. Tolerton, 249 Iowa 405, 86 N.W.2d 822 (1957)

NOTE: If death case involved, see Fitzgerald v. Hale, 247 Iowa 1194, 78 N.W.2d 509 (1956).

ICJI 200.12 Physical And Mental Pain And Suffering - Past

Physical and mental pain and suffering from the date of injury to the present time.

Physical pain and suffering may include, but is not limited to, unpleasant feelings, bodily distress or uneasiness, bodily suffering, sensations or discomfort.

Mental pain and suffering may include, but is not limited to, mental anguish, nervousness, worry, anxiety, irritability, disappointment, depression, confusion, disorientation, apprehension, embarrassment, loss of enjoyment of life, a feeling of uselessness or emotional distress.

Authority

Poyzer v. McGraw, 360 N.W.2d 748 (Iowa 1985)
Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa Ct. App. 1977)

Comment

Caveat: Use only the items which are supported by the evidence.

Corresponding prior jury instruction. 3.9

Changes. ICJI 200.12 creates a separate category for damages for "mental pain and suffering". Prior UJI 3.9, and the case law, treat this element within the general concept of pain and suffering. UJI 3.9 contained no specific reference to "mental pain", apparently assuming "pain and suffering" was self-explanatory.

200.12 introduces a laundry list of "factors" which are used to describe physical and mental pain and suffering.

Limiting and cautionary language contained in prior UJI 3.9 has been eliminated.

Comment. 200.12 is perhaps the most unwarranted of the revisions to the Uniform Jury Instructions. The revision is particularly inappropriate in view of the fact that the "guidelines" for "plain English" drafting set forth in the preamble to the Civil Jury Instructions are abandoned in 200.12 and related instructions 200.13 and 200.24. Prior UJI 3.9 instructed on pain and suffering, past and future, and future disability, in a single, two-paragraph

instruction. These damages elements have been separated in instructions 200.10 through 200.14, including providing separate instructions for both past and future damages of this type.

200.12 twice uses the phrase "may include, but is not limited to" in referring to the laundry list of factors the jury is told to consider on "physical and mental pain and suffering". This is directly contrary to the proposed elimination of such phraseology in the "guidelines" for the plain English redraft. It is obvious that most of the factors listed are repetitious, also contrary to the Committee's own guidelines. They serve only to over-emphasize this category of damages.

Another concern posed by the separate category of "mental pain" damages is that the instruction may be used as an attempt to submit damages for mental pain or emotional distress without regard to whether they arise from physical injuries. With limited exceptions not applicable to personal injury negligence cases, *e.g., Niblo v. Parr Mfg. Inc., 445 N.W.2d 351 (Iowa 1989)*, the Iowa Supreme court has not permitted recovery in negligence cases for purely mental distress in the absence of physical injury or where the separate tort of intentional infliction of emotional distress is not established. *See, e.g., Wambsgans v. Price, 274 N.W.2d 362, 365 (Iowa 1979)*. Care must be taken to distinguish between allowance of damages for mental distress arising from physical injury and the independent tort of intentional infliction of emotional distress, which requires establishment of additional elements of proof.

In addition to creating a separate instruction devoted to "mental pain", 200.12 also specifically includes the factor of "loss of enjoyment of life". Great care must be taken in dealing with the concept of "loss of enjoyment of life", since the Iowa Supreme Court has specifically held that it is not properly submissible as a separate element of damages. *Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985)*. In *Poyzer*, the trial court had submitted as a separate and independent element of damages plaintiff's claim of a "diminished capacity for enjoying life". *360 N.W.2d at 752*. After specifically noting that its prior opinions had "assiduously guarded against duplicate damage awards", the Iowa Supreme Court stated:

> "We recognize loss of enjoyment of life as a factor to be considered as a part of future pain and suffering [citing authorities]. *To whatever extent recovery for such a loss should be allowed it is already recognized ... as a factor in other elements of damages. It would be*

plainly duplicative to allow a separate award for loss of enjoyment of life. Although we recognize there is a contrary view, we join the states which refuse to allow the submission of loss of enjoyment of life as a separate element of damages" 360 N.W.2d at 753 (emphasis supplied).

Since numerous liability instructions throughout the plain English redraft have been abbreviated so as to eliminate extended explanations of various "factors" which might affect the particular concept, it can be questioned whether it is appropriate to specifically instruct on "loss of enjoyment of life" and a myriad of other "factors" in regard to the instruction on pain and suffering Indeed, the supreme court in *Poyzer* specifically cautioned against the submission of the concept in a separate instruction. It seems that a jury instruction which references pain and suffering, past and in the future, and makes provision for recovery of mental anguish, where appropriate and arising from the physical injury, adequately informs the jury of this element of damages consistent with the plain English format of brevity and simplicity.

The inconsistency in form and content of 200.12 cannot be justified.

IDC PROPOSED INSTRUCTION 200.12
Pain and Suffering

As one element of damages, the plaintiff claims damages for pain and suffering. Damages for pain and suffering are not confined to physical pain, but may include mental anguish which may arise from physical injury.

Damages for pain and suffering cannot be measured by any exact or mathematical standard, but must rest in your discretion based on a fair and impartial consideration of the evidence.

Authority

Tucker v. Tollerton and Warfield Co., 249 Iowa 405, 86 N.W.2d 822 (1957)

Pestotnik v. Balliet, 233 Iowa 1047, 10 N.W.2d 99 (1943)

Rice v. Council Bluffs, 124 Iowa 639 100 N.W.2d 506 (1904)

UJI 3.9 PAIN AND SUFFERING - PAST - FUTURE - FUTURE DISABILITY. The measure of damages for injuries to his person, pain and suffering, and (future disability), if any you find, will be such amount as will fairly and reasonably compensate therefor. If you find that injuries are permanent or will to some extent disable him in the future, (or require further medical or hospital expense), or hereafter cause pain and suffering, you should determine and allow such further sum as paid now in advance will fairly and reasonably compensate for any such items as the evidence shows, with reasonable certainty, will result in the future from such injuries.

The damages, if any you find, for injuries to the person, for pain and suffering in the past and future, and future disability, cannot be measured by any exact or mathematical standard but the amount must rest in the sound discretion of the jury. Such discretion must not be exercised arbitrarily, or out of passion or sympathy or prejudice for or against the parties, but based upon a fair, intelligent, dispassionate and impartial consideration of the evidence.

In no event can the allowance for these items exceed $_____, being the amount claimed therefor.

Tissue v. Durin, 216 Iowa 709, 246 N.W. 806 (1933)
Winter v. Davis, 217 Iowa 424, 251 N.W. 770 (1933)
Pestotnik v. Balliet, 233 Iowa 1047, 10 N.W.2d 99 (1943)
Smith v. Pine, 234 Iowa 256, 12 N.W.2d 236 (1943)
Jackson v. C.M.St.P., 238 Iowa 1253, 30 N.W.2d 97 (1947)
Tucker v. Tolerton, 249 Iowa 405, 86 N.W.2d 822 (1957)

NOTE: If death case involved, see Fitzgerald v. Hale, 247 Iowa 1194, 78 N.W.2d 509 (1956).

ICJI 200.24 Pre-Death Physical And Mental Pain And Suffering

Physical and mental pain and suffering from the date of injury to the date of death.

Physical pain and suffering may include, but is not limited to, unpleasant feelings, bodily distress or uneasiness, bodily suffering, sensations or discomfort.

Mental pain and suffering may include, but is not limited to, mental anguish, nervousness, worry, anxiety, irritability, disappointment, depression, confusion, disorientation, apprehension, embarrassment, loss of enjoyment of life, a feeling of uselessness or emotional distress.

Authority

Poyzer v. McGraw, 360 N.W.2d 748 (Iowa 1985)
Lang v. City of Des Moines, 194 N.W.2d 557 (Iowa 1980)
Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa Ct. App. 1977)

Comment

Caveat: Only use the items which are supported by the evidence.

Prior corresponding instruction. New, but see UJI 3.9

Changes. There is no prior corresponding instruction. Previously, UJI 3.9 concerning pain and suffering generally was used where appropriate, and tailored accordingly.

Comment. See Comment to 200.22, *supra*.

ICJI 200.24 raises a specific concern as to whether a separate instruction on pre-death mental pain could elevate its use into an attempted independent claim for pre-death mental suffering, "pre-impact terror", fear of death from future disease, or the like, in the absence of physical injury. Permitting the traditional recovery for pain and suffering caused prior to death by related physical injury is consistent with Iowa law. However, in the absence of physical injury and distinguishing special circumstances of intentional tort or public policy violations, *e.g., Niblo v. Parr Mfg. Inc., 445 N.W.2d 351 (Iowa 1989)*, recovery for "pre-death" mental pain in personal injury negligence cases is not supported by existing Iowa law. *See, e.g., Wambsgans v. Price, 274 N.W.2d 362, 365 (Iowa 1979)*.

The appropriateness of separate instructions concerning the concept of "mental pain" and other criticism of the substance of this instruction has been previously discussed in the Comment to section 200.12, *supra*.

UJI 3.9 PAIN AND SUFFERING - PAST - FUTURE - FUTURE DISABILITY. The measure of damages for injuries to his person, pain and suffering, and (future disability), if any you find, will be such amount as will fairly and reasonably compensate therefor. If you find that injuries are permanent or will to some extent disable him in the future, (or require further medical or hospital expense), or hereafter cause pain and suffering, you should determine and allow such further sum as paid now in advance will fairly and reasonably compensate for any such items as the evidence shows, with reasonable certainty, will result in the future from such injuries.

The damages, if any you find, for injuries to the person, for pain and suffering in the past and future, and future disability, cannot be measured by any exact or mathematical standard but the amount must rest in the sound discretion of the jury. Such discretion must not be exercised arbitrarily, or out of passion or sympathy or prejudice for or against the parties, but based upon a fair, intelligent, dispassionate and impartial consideration of the evidence.

In no event can the allowance for these items exceed $_____, being the amount claimed therefor.

Tissue v. Durin, 216 Iowa 709, 246 N.W. 806 (1933)
Winter v. Davis, 217 Iowa 424, 251 N.W. 770 (1933)
Pestotnik v. Balliet, 233 Iowa 1047, 10 N.W.2d 99 (1943)
Smith v. Pine, 234 Iowa 256, 12 N.W.2d 236 (1943)
Jackson v. C.M.St.P., 238 Iowa 1253, 30 N.W.2d 97 (1947)
Tucker v. Tolerton, 249 Iowa 405, 86 N.W.2d 822 (1957)

NOTE: If death case involved, see Fitzgerald v. Hale, 247 Iowa 1194, 78 N.W.2d 509 (1956).

ICJI 200.39 Medical Malpractice - Lost Chance Of Survival

(Name)'s lost chance of survival.

Lost chance of survival means (name)'s life expectancy was reduced because [he] [she] failed to receive early treatment for (name of condition). Damages are the present value of the difference between (name)'s life expectancy had [he] [she] received earlier treatment and [his] [her] life expectancy as a result of delayed treatment.

Authority

Sanders v. Ghrist, 421 N.W.2d 520 (Iowa 1988)
DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Comment

This additional element of damage should be submitted with the general marshalling instruction if supported by the evidence in medical malpractice cases as directed by the Court in the above cases.

Prior corresponding instruction. New

Comment. ICJI 200.39 incorrectly interprets the holding of the controlling cases it cites, *DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)*, and *Sanders v. Ghrist, 421 N.W.2d 520 (Iowa 1988)*. The instruction defines the measure of damages as the shortening of plaintiff's life expectancy. This is an incorrect measure of recovery, at least under circumstances similar to those presented in *DeBurkarte*. In *DeBurkarte*, the supreme court explicitly rejected the proposition that plaintiff could recover for shortening of her life due to the fact that plaintiff did not produce substantial evidence on causation. Specifically, since there was no evidence that the plaintiff's cancer spread after she first consulted with the defendant doctor, she could not recover on the basis that the doctor's negligence shortened her life. *DeBurkarte, 393 N.W.2d at 135*. The recovery allowed was solely for the reduction in her *chance* to survive the cancer had earlier treatment been instituted. The key passage from the court's opinion states:

> "We recognize that the plaintiff's injury may be viewed as a shortening of her life, in which case we would agree with the defendant that the plaintiffs did not produce substantial evidence on causation: there was no evidence that plaintiff's cancer probably spread after September, 1981, preventing her from being cured.... On the other hand, as the *Restatement* indicates, her injury may also be viewed as a *lost chance* to survive the cancer. The jury could then find from the evidence that

the defendant's failure to diagnose and treat the cancer probably caused a substantial reduction in the plaintiff's chance to survive it." *DeBurkarte*, *supra* at 135 (emphasis supplied).

As drafted, 200.39 improperly permits recovery for shortened life expectancy rather than merely the value of the loss of chance of survival, contrary to *DeBurkarte*. *Sanders v Ghrist, supra*, also cited by the Committee, confirmed that the correct standard under *DeBurkarte* is recovery solely for the loss of chance:

"Liability under *DeBurkarte*, however, is not measured by the totality of the resulting physical harm, but, rather, is limited to the reduction in chance of surviving that harm." *Ghrist*, *supra*, at 522-23, *citing DeBurkarte*, *supra*.

At a minimum, the trial court should be prepared to give an alternative instruction depending on whether there is sufficient evidence of proximate cause of the shortening of plaintiff's life expectancy, *i.e.*, in a situation such as *DeBurkarte*, ICJI 200.39 is incorrect. UJI 200.39 would be appropriate only in a proper case where there is substantial evidence that defendant's negligence proximately caused the shortening of plaintiff's life.

It should be noted that the Committee's proposed instruction is merely an interpretation of *DeBurkarte* and *Ghrist*, *supra*, as the actual instruction given in both of those cases was based on *Restatement (2d) Torts*, § 323(A) (1965). This section states that one who renders services is subject to liability for harm arising from failure to exercise reasonable care if that conduct *increases the risk* of such harm. The actual instructions given in *DeBurkarte* and *Ghrist* did not speak of "loss of chance" or "shortened life expectancy" in such terms. *See*, *DeBurkarte*, *supra*, 393 N.W.2d at 138, n. 3.

Finally, it should be noted that any instruction on lost chance of survival should include more than a simple explanation of the measure of recovery. In order to properly explain the doctrine to the jury, the instruction should include an explanation of duty and proximate cause, as did the instruction in *DeBurkarte*, *supra*, taken from *Restatement* § 323(A). Alternatively, a separate instruction focusing on liability under this theory of recovery should be given.

IDC PROPOSED INSTRUCTION 200.39
Medical Malpractice - Lost Chance of Survival

Lost chance of survival means reduction in the chance to survive the underlying disease because plaintiff failed to receive earlier treatment. Damages recoverable are limited to the value of this loss of chance. This is measured by the difference between the chance of survival if treatment had been given at the earlier time, and the chance of survival at the present time. Plaintiff may not recover for harm caused by the pre-existing condition to which defendant's negligence did not contribute.

Authority

Sanders v. Ghrist, 421 N.W.2d 520 (Iowa 1988)
DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Note: The last sentence is particularly important and appropriate in a case similar to DeBurkarte, supra, where the evidence demonstrates that plaintiff's chance of survival is not better-than-even, even if earlier treatment had been instituted. DeBurkarte, supra, 393 N.W.2d at 136-137

ICJI 210.1 Punitive Damages.

Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:

1. The nature of defendant's conduct.
2. The amount of punitive damages which will punish and discourage like conduct by the defendant in view of [his] [her] [its] financial condition.
3. The plaintiff's actual damages.

Authority

Iowa Code section 668A.1
Nelson v. Restaurants, 338 N.W.2d 881 (Iowa 1983)
Suss v. Schammel, 375 N.W.2d 252 (Iowa 1985)

Prior corresponding instruction. UJI 3.28

Changes. ICJI 200.10 omits the statement that "the law permits but does not require a jury to allow punitive damages in certain cases...". It also omits that portion of UJI 3.28 which instructed the jury that it should be guided in this determination by its "careful and well-considered judgment".

Most important, it deletes the requirement set forth in UJI 3.28 that punitive damages must be reasonably proportionate to the actual damages.

Comment. ICJI 210.1 is essentially a correct statement of the standard for punitive damages now statutorily defined in § 668A.1. Omission of cautionary language found in UJI 3.28 is typical of the approach in the plain English redraft.

Significantly, however, 210.1 omits the requirement set forth in prior UJI 3.28, and confirmed by well-settled law, that the amount of punitive damages awarded must be reasonably proportionate to the actual damages. Merely stating that the jury should consider "plaintiff's actual damage" as one factor gives no particular guidance to the jury as to how this element bears upon its determination. It does not explain that it should, of course, be used as a guide for proper measurement of any punitive damage award which is given.

ICJI 210.1 can be used as an essentially correct instruction on punitive damages if element 3 is clarified as to the proportionate relationship between actual damages and the punitive award.

UJI 3.28 PUNITIVE DAMAGES. The plaintiff seeks to recover over and above his actual damages what is known in law as punitive damages. The law permits but does not require a jury to allow punitive damages in certain cases if the jury finds that the act of the defendant causing the injury was (grossly negligent) (reckless) (wanton) (malicious).

Punitive damages are not compensatory in the ordinary sense, but are allowed by way of punishment to restrain and deter the defendant and others from the commission of like acts in the future.

The Court can give you no exact rule to follow in determining the amount of punitive damages, if any, you should award. However, your careful and well considered judgment should guide you, and you should allow, if any, such an amount as you find plaintiff entitled to receive in addition to his actual damages under all the facts and circumstances shown by the evidence and under these instructions.

In arriving at an award of punitive damages, you may consider the following together with all the other facts and circumstances shown by the evidence:

1. The particular nature of the defendant's acts in light of the evidence,

2. The amount of punitive damages which will punish and have a deterrent effect on the defendant in the light of defendant's financial condition,

3. The punitive damages must be reasonably proportionate to the actual damage as shown by the evidence.

Authority

Campbell v. Van Roekel, 347 N.W.2d 406 (Iowa 1984)
Dickerson v. Young, 332 N.W.2d 93 (Iowa 1983)
Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979)
Hall v. Montgomery Ward & Co., 252 N.W.2d 421 (Iowa 1977)
Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954)

CAVEAT: This instruction should be modified in cases where actual malice is required as a basis for damages. See Moser v. County of Black Hawk, 300 N.W.2d 150 (Iowa 1981).

ICJI 400.2 Comparative Fault

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of the [plaintiff] [defendant(s)] [third party defendant(s)] [persons who have been released][1] and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages. Defendants [name] and [name] are to be treated as a single party for the purpose of determining their percentage of fault.[2]

Authority

Iowa Code § 668.3(3)

Comment

Note: 1. Select the appropriate phrases. It is suggested that the names of the persons be used along with the position in the lawsuit, i.e., "Plaintiff, George Jones," or "James Jones, who has just been released."
Note. 2. Use only where the Court has determined two or more persons are to be considered as a single party, see Iowa Code § 668.3(2)(b). For example: The owner and driver of a motor vehicle

Prior corresponding instruction. UJI 17.2

Changes. ICJI 400.2 employs the term "damages" rather than "the accident" or "the occurrence". The use of "damages" in this manner is repeated throughout the revised instructions, and is a point of criticism explained elsewhere in this report. *See Introduction, supra, p. ix.*

Comment. ICJI 400.2 tells the jury how fault should be compared. Consistent with the statute and the overall scheme of comparative fault, however, the jury should first be told to determine which parties were at fault, and whether the fault was a proximate cause of the occurrence, before engaging in a comparison of this fault. IDC Proposed Instruction 400.2 sets forth a suggested way of doing this.

The Iowa Comparative Fault Act is a comparative *causation* statute; the comparison is the causal relationship each party's respective fault bears to the occurrence. Chapter 400, however, contains no proximate cause

instruction. Therefore, it is suggested that prior UJI 2.6, or ICJI 700.3, be used within the comparative fault instructions to provide a definition of proximate cause. The jury is thereby properly instructed that it should first find whether fault has been established, determine which fault was a proximate cause of the occurrence, and then engage in the comparison defined in 400.2. This is consistent with the proper order of analysis contemplated by the statute.

Consistent with the above, the following additional sentence may also be inserted after the introductory sentence of 400.2:

> "If you find that fault of more than one party was a cause of the accident, you will then compare the fault of these parties."

Instruction 400.2 tells the jury it should consider "all the surrounding circumstances" in comparing fault. While this phrase was also utilized in prior UJI 17.2, this language is not found in § 668.3(3). The statute requires that the jury "consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed". § 668.3(3). Culpability or non-culpability should be assessed and not just causal relationship of the conduct to damages. "All the surrounding circumstances" is unnecessarily vague and may invite argument of improper factors related to the assessment of fault. Avoiding this broad terminology would reduce any temptation for the parties or the jury to focus on acts which have not in fact been proven to constitute "fault".

Instruction 400.2 includes appropriate language for treatment of multiple parties as a single party for purposes of determining a percentage of fault, such as where one party is vicariously liable for the fault of another. As worded, however, 400.2 incorrectly indicates this applies only to defendants. Obviously, in an appropriate case, two or more plaintiffs may be treated as a single party for purposes of comparison of fault, such as where a principal-agent relationship exists. Likewise, it is possible that a non-party may be treated with a party as a single entity for purposes of assessment of fault, such as where a vicariously liable defendant is a settling party

UJI 3.30 MITIGATION OF DAMAGES IN PERSONAL INJURY CASES. If under the evidence and these instructions you find that the plaintiff is entitled to recover damages herein, you are instructed that it was the duty of the plaintiff to make use of reasonable means to effect as speedy and complete a cure of his injuries as could be reasonably accomplished under all the circumstances. If you find from the evidence that plaintiff failed to act as a reasonable prudent person to make use of reasonable means to effect as speedy and complete a cure of his injuries as could be reasonably accomplished under all the circumstances, he cannot recover for any injuries, suffering, or disability caused or induced by such failure.

You are further instructed that evidence has been introduced in this case that plaintiff's disability or suffering would have been relieved to some degree or extent by plaintiff submitting to a surgical operation. You are instructed that plaintiff has no duty to undergo a serious or speculative surgical operation; however, if by slight expense and by slight inconvenience, plaintiff acting as a reasonable prudent person might have avoided the consequences of his injury, if any, it was the duty of plaintiff to alleviate his injury, and if you find from the evidence that he failed and neglected to do so, he cannot recover for suffering, inconvenience or disability that might thus have been avoided.

The burden of proving that plaintiff failed to minimize his damages lies with the defendant.

Authority

Bailey v. City of Centerville, 108 Iowa 20, 78 N.W. 831 (1899)
White v. Chicago NW Ry Co., 145 Iowa 408, 124 N.W. 309 (1910)
Udegraff v. City of Ottumwa, 210 Iowa 382, 226 N.W. 928 (1929)
Shewry v. Heuer, 243 Iowa 567, 121 N.W.2d 529 (1963)

UJI 17.6 COMPARATIVE FAULT - MITIGATION OF PERSONAL INJURY DAMAGES. (Defendant) (Plaintiff) alleges that (plaintiff) (defendant) was guilty of fault for failing to mitigate damages. It is the duty of an injured person to exercise ordinary care to obtain reasonable medical treatment. Failure to do so constitutes fault.

Evidence has been introduced that damages could have been reduced to some degree or extent if the injured person had submitted to (medical treatment in issue). The injured person had no duty to undergo serious or speculative medical treatment. However, if by slight expense and by slight inconvenience, such person exercising ordinary care could have mitigated his damages, if any, it was his duty to do so.

ICJI 400.9 Unreasonable Assumption of Risk Not Constituting an Enforceable Expressed Consent - Definition

Fault is assigned to a party who unreasonably assumes a risk of harm from the [negligent] [reckless] conduct of another. However, a party does not assume a risk of harm arising from the conduct of another unless the party:

1. Knows the existence of danger.
2. Understands and appreciates the nature, character and extent of the danger.
3. Unreasonably chooses a course of conduct that indicates a willingness to accept the risk created by the danger.

In this case defendant claims that plaintiff unreasonably assumed the risk by: [Set out the particulars.]

Authority

Iowa Code § 668.1
Rest. (2d) Torts § 496A, et. seq., § 496G

Prior corresponding instruction. The Committee identifies this as a new instruction, although prior assumption of risk instructions included UJI 5.1A (assumption of risk in automobile passenger-intoxicated driver cases) and UJI 24.9 (assumption of risk in product liability cases). Both state the elements of assumption of risk as traditionally defined by the Iowa Supreme Court.

Changes: Comparing new ICJI 400.9 to the elements recited in the prior instructions demonstrates changes in the language employed. The prior instructions, and controlling cases, simply require proof that plaintiff was aware of the risk, understood the nature of the risk, and voluntarily and freely proceeded to encounter the risk. The expansion of these elements by ICJI 400.9 is discussed below.

Much of the explanatory language found in prior UJI 5.1A and 24.9 is eliminated from ICJI 400.9. This is discussed in further detail in regard to the assumption of risk instruction in the product liability chapter, ICJI 1000.9, *infra*. It should be noted that the definition of assumption of risk set forth in ICJI 400.9 is not the same as the assumption of risk definition contained in the product liability instructions, 1000.9. There is no explanation given by the Committee as to the reason for this difference.

Comment. The new instruction exaggerates the elements the defendant must establish in comparison to actual statements of this defense by the Iowa Supreme Court. This is best illustrated by comparing the revised instruction to the precise test set forth in *Martin v. Heddinger, 373 N.W.2d 486 (Iowa 1985),* and *Gremmel v. Junnie's Lounge, Ltd., 397 N.W.2d 717 (Iowa 1986),* the two Iowa cases cited as authority for the instruction. The elements of assumption of risk were defined identically in both in *Martin* and *Gremmel* as:

> "[quite narrowly confined and restricted by two or three elements or requirements: First, the plaintiff must know that the risk is present, and he must further understand its nature; and second, his choice to incur it must be free and voluntary." *Martin, supra, at 489; Gremmel, supra, at 720."*

The revised instruction adds the requirements that the plaintiff also understand and appreciate the "character and extent of the danger", as well as its nature. It also requires that plaintiff "unreasonably chooses a course of conduct that indicates a willingness to accept the risk created by the danger". Given the stated themes of brevity and clarity in the "plain English" instructions, the threshold question is whether the phrase "unreasonably chooses a course of conduct that indicates a willingness to accept the risk created by the danger" is clearer than the previous statement in prior UJI 5.1A, and the cited cases, which simply required that "plaintiff voluntarily chose to accept the risk". It is suggested that the prior instruction is obviously much cleares. The departure from the elements stated in the cases results in expansion of defendant's burden. The additional requirement of a "willingness to accept the risk" does not appear as a stated element of the defense in the cases cited.

Inclusion of the requirement that defendant prove that the plaintiff understood the "character and extent of the danger" as well as its nature is not supported by the cited cases. This language ap-parently has been taken from *Rest. (2d) Torts § 496D,* cited by the Committee. While [8] 496D has been cited for various general propositions by the supreme court, *see, e.g., Greenwell v. Meredith Corporation, 189 N.W.2d 901, 907 (Iowa 1971); Knudtson v. Swenson, 155 N.W.2d 756, 773 (Iowa 1968),* it has not specifically adopted the "character and extent" language in any case located.

The addition of the requirement that acceptance of the risk be "unreasonable" also is not found in either *Martin* or *Gremmel*. This element can be found in prior UJI 24.9, which, however, does not use the additional term "freely". While the "unreasonable" requirement finds support in some Iowa cases, *see, e.g., Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 544 (Iowa 1980),* it may be suggested that "unreasonably" relates to voluntariness, and is therefore redundant of the voluntariness element. *See Rest. (2d) Torts, § 496E* (plaintiff's acceptance of a risk is not voluntary if no reasonable alternative course of conduct was available).

Additionally, much of the explanatory language found in prior UNI 24.9 and 5.1A has been omitted from 400.9. Most important, factors which the jury was previously told to consider in weighing assumption of risk, including plaintiff's age, experience, knowledge, and understanding, as well as the "obviousness of the defect and the danger it poses", has been eliminated from 400.9.

An equally important change is the manner in which 400.9 is drafted. It is another example where a duty attaching to the plaintiff has been de-emphasized by stating the duty merely in terms of an apparent exception to, ao a corollary of, a general rule of law. In this case, after a brief statement that the defendant claims assumption of risk, the instruction states that "however, a party does not assume a risk .... *unless* ....", and then lists the elements of the defense. The defense was not stated in this fashion in either prior UJI 24.9 or 5.1A, nor in any of the cases cited.

Plaintiff's fault should of course be stated in the same definitional manner as any other form of fault, such as defendant's negligence. If this format of 400.9 is appropriate, then a defendant should be entitled to an instruction that the defendant "is not negligent unless ....". Instruction 400.9 as drafted is inconsistent and inappropriately de-emphasizes this defense. *See also* ICJI 1000.3 (de-emphasizing limits on a defendant's duty regarding defective products) and instruction 400.7 (de-emphasizing plantiff's duty to mitigate damages).

It should also be noted that the word "danger" has been substituted for the word "risk" from prior instructions. The case law, including the cases cited by the Committee, utilize the term "risk". There is a difference between mere recognition of risk and appreciation of a particular danger, as "danger" is actually the ultimate consequence of encountering the risk. The only requirement for establishment of the defense is that a known risk could be

assumed. *Martin, supra; Gremmel, supra.* To accept the revised instruction as correct would require an assumption that there is no difference between "danger" and a "risk of danger". The cases require only that the plaintiff be aware of a known risk.

As previously discussed in section 400.1, *supra,* the term "not constituting and enforceable express consent" is a correct term because taken from the statute, § 668.1(1), but has technical meaning only to the court in determining which kind of assumption of risk is involved in the case. Once the court has determined whether primary assumption of risk or secondary assumption of risk is at issue under the facts, this instruction should be tailored acordingly. ICJI 400.9 as proposed by the Committee seems clearly limited to assumption of risk in its secondary form. This is probably justified by the fact that determination of primary assumption of risk is usually a matter of law for the court and not a jury question.

For the distinction between primary assumption of risk and secondary assumption of risk, see *Nichols v. Westfield Industries, Ltd., 380 N.W.2d 392 (Iowa 1985),* and *Parsons v. National Dairy Cattle Congress, 277 N.W.2d 620 (Iowa 1978).* For purposes of clarity in instructing the jury, this instruction should simply be defined as "assumption of risk".

Characteristic of many other revised instructions, 400.9 contains no reference to proximate causation.

PROPOSED IDC INSTRUCTION 400.9
Assumption of Risk

As one of its defenses, defendant claims that plaintiff assumed the risk. Assumption of risk constitutes fault.

To establish assumption of risk, defendant must prove all of the following:

1. **Plaintiff knew the risk was present;**
2. **Plaintiff understood the nature of the risk;**
3. **Plaintiff freely and voluntarily encountered the risk;**
4. **Plaintiff's assumption of risk was a proximate cause of the accident.**

If defendant has established all of the foregoing propositions, defendant has established the defense of assumption of risk, and you will include this as part of plaintiff's fault in your comparison of fault. If defendant has not established all of the foregoing, defendant has not established the defense of assumption of risk, and you will not assign fault to the plaintiff on this basis.

CJI 1000.4 Definition of Unreasonably Dangerous

A defective product is unreasonably dangerous if:

1. The danger is greater than an ordinary consumer with knowledge of the product's characteristics would expect it to be.
2. The danger outweighs the utility of the product.
3. The benefits of the design do not outweigh the risks.

In determining the issue, you may consider:

a. The seriousness of the harm posed by the design.
b. The likelihood that such danger would occur.
c The mechanical feasibility of a safer alternate design.
d The cost of an improved design.
e. The adverse consequences to the product and the user that would result from an alternate design.
f. Any other facts or circumstances shown by evidence having any bearing on the question.

Authority

Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973)
Rest. (2d) Torts, § 402A, Comment i
Chown v. U.S.M. Corp., 297 N.W.2d 218, 220, 221 (Iowa 1980)

Comment

Note Use paragraphs 1, 2 or 3 as they apply to the case.

Prior corresponding instruction. 24.4

Changes. 1000.4 adds two "alternative" definitions of unreasonably dangerous, which are both actually the same risk/utility test.

1000.4 slightly revises the language of the traditional consumer expectations test by replacing the phrase "...which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge *common to the community*..." with "...an ordinary consumer *with knowledge*...", deleting reference to the community standard.

1000.4 omits the following statement contained in prior UJI 24.4:

"Some danger may be involved in the use of some products because of the nature or characteristics of the product itself, and where such

dangers are commonly known or recognized by users or consumers, the product is not unreasonably dangerous."

ICJI 1000.4 includes as part of the newly added "risk/utility" test various factors which the jury is to consider. These factors were not listed in prior UJI 24.4 because they derive from the risk/utility analysis, not the traditional consumer expectations test of unreasonably dangerous.

Comment. ICJI 1000.4 contains the most glaring errors in the products liability chapter. It omits much of the definition of unreasonably dangerous contained in prior UJI 24.4. What is retained is subtly restated and suggests a more subjective standard than the objective test of UJI 24.4 and *Rest. (2d) Torts, § 402A, Comment i.*

Most important, 1000.4 erroneously states that the risk/utility test is an appropriate alternative definition of unreasonably dangerous under Iowa law. Additionally, it over-emphasizes the risk/utility test by repeating it, since definition number 3 is simply another way of stating the risk/utility test identified as number 2. The revised instruction also totally omits the statement of UJI 24.4 concerning open and obvious dangers above quoted.

The risk/utility test is a separate and distinct test of defectiveness which has been adopted in jurisdictions which have abandoned the "consumer expectations" test of unreasonably dangerous, mostly at the urging of plaintiffs. It in fact is not a definition of unreasonably dangerous, but a different way of defining whether a product is defective. It eliminates the requirement that plaintiff prove the product was unreasonably dangerous.

The consumer expectations test of unreasonably dangerous is derived from *Rest. (2d) Torts, § 402A, Comment i*, and has been adopted by the Iowa Supreme Court. In two cases, the supreme court has expressly rejected plaintiffs' challenges which urged that the "consumer expectations" test of unreasonably dangerous be eliminated. *Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 830 (Iowa 1978); Eickelberg v. Deere & Co., 276 N.W.2d 442 (Iowa 1979).*

Plaintiffs across the country have repeatedly attempted to remove the unreasonably dangerous requirement from the elements of strict liability, largely because the "consumer expectations" test allows a defense in many cases where the alleged defect is an open and obvious characteristic of the product. Notably, this is a defense recognized under Iowa law. *Nichols v.*

Westfield Industries, Inc., 380 N.W.2d 392, 401 (Iowa 1985); § 402A, Comment j; prior UJI 24.4. In this regard, it should be noted that the Committee also eliminated from 1000.4 the previous limitation of UJI 24.4 concerning open and obvious dangers.

Some jurisdictions, most notably California, solely for the admitted purpose of making it easier for plaintiffs to recover, have adopted a "risk/utility" test and abandoned the unreasonably dangerous requirement in design defect cases. The seminal case is *Barker v. Lull Engineering Co., Inc., 573 P.2d 443 (Cal. 1978).* Under *Barker*, once the plaintiff proves an injury has occurred as the result of the product (as designed), the burden shifts to the defendant to justify the utility of the design as outweighing the risks posed by the product.

Other jurisdictions have adopted a different "risk/utility" test, at the urging of defendants, because they equate strict liability with a negligence standard in design cases. *See, e.g., Kallio v. Ford Motor Co., 407 N.W.2d 92, 95 (Minn. 1987)* (negligence reasonable care standard applies in design defect product liability cases). The Iowa Supreme Court, however, has maintained a distinction between negligence and strict liability in defective design cases. *Aller v. Rodgers Machinery Mfg. Co., supra, 268 N.W.2d at 835.* Many jurisdictions which have adopted alternative forms of the risk/utility test, such as Minnesota, criticize and reject *Barker v. Lull, supra,* because of its loose standard. As stated by the Minnesota Supreme Court:

> "...[W]e concur in the observation made by the Oregon Supreme Court in refusing to adopt the *Barker* rationale:
>
> 'Under that decision [*Barker*] it appears that a design defect case will always to go the jury if only the plaintiff can show that the product caused the injury.'
>
> In this jurisdiction, however, it is part of the plaintiff's case to show that a product which caused an injury was dangerously defective."

Kallio, supra, at 95, citing Wilson v. Piper Aircraft Corp., 282 Ore. 411, 413, 579 P.2d 1287-88 (1978).

In view of the incompatibility of the *Barker v. Lull* risk/utility test with the traditional consumer expectations test adopted by the Iowa Supreme Court, it must be emphasized that the factors listed under paragraph 3 of

1000.4 by the Committee are taken directly from *Barker*, even though the case is not cited in the authorities listed under the instruction.

It cannot be claimed that the Iowa Supreme Court has ever expressly adopted the risk/utility test as an alternative definition of unreasonably dangerous to the exclusion of the traditional consumer expectations test of *Aller* and *Eickelberg*, *supra*, as 1000.4 suggests. Indeed, the *Barker v Lull* analysis was expressly rejected by the supreme court in *Eickelberg*, *supra*, where Justice Allbee wrote:

> "[Plaintiff] finds a support for this contention [that the unreasonably dangerous element should be eliminated] from other states which developed the strict liability doctrine *to exclude this element* [citing *Barker v. Lull Engineering, supra*] ...
>
> *This court recently refused to eliminate the "unreasonably dangerous" element from strict liability cases.* ... We have re-examined and re-considered the authorities involved and have determined that this court's recent announcement in *Aller* must be followed here ..."

Eickelberg, supra, 276 N.W.2d 442, 444 (emphasis supplied).

Despite its clear adherence to the consumer expectations definition of unreasonably dangerous, the Iowa Supreme Court's decision in *Chown v. U.S.M. Corp., 297 N.W.2d 218 (1980)*, included some unfortunate dicta, which has possibly produced confusion relating to ICJI 1000.4. After recognizing the "consumer expectations" test of *Aller*, *supra*, the court in *Chown* went on to state that "another test" of unreasonably dangerous is whether the risk of a product outweighs its utility. *Chown at 220.* This statement was unfortunate and unnecessary to its decision. The court could have affirmed the trial court's finding that the product was not defective under the traditional consumer expectations test without resort to a risk/utility analysis. Most important, the court in *Chown* failed to state or recognize that the risk/utility test derived from *Barker v. Lull, supra*, is an *alternative* test to the consumer expectations test. As defined in *Barker*, it is a test which is inconsistent with the consumer expectations test previously enunciated in *Aller* and *Eickelberg*.

The court in *Chown* cited *Barker v. Lull* in support of its statement, without noting that *Barker* eliminates the unreasonably dangerous

requirement. It thus espoused a standard directly at odds with Iowa law as pronounced in *Aller* and *Eickelberg*. The opinion in *Chown* contains no discussion whatsoever about the importance differences between the two tests and the ramifications of the *Barker v. Lull* analysis which it applied.

Chown was decided in 1980. That this case was not seen as a startling new definition of unreasonably dangerous in Iowa is evidenced by the fact that prior UJI 24.4 remained unchanged, and defined "unreasonably dangerous" in the traditional consumer expectations terms, for years after the *Chown* decision. Even the original "plain English" redraft of 24.4 in 1986 applied the same test. Without any intervening court decision, the Committee in November 1988 issued now-effective 1000.4 which includes the "risk/utility" test derived from *Barker* as an apparently acceptable *alternative* definition of unreasonably dangerous. Under this instruction, a plaintiff could therefore argue to the court that the risk/utility test should be submitted to the *exclusion* of the consumer expectations test, which is clearly not supported under existing Iowa law.

In view of the pronouncement in *Aller* and *Eickelberg*, *supra*, and the directly contrary philosophy and rationale of *Barker v. Lull Engineering*, it was plainly wrong for the Committee to lift dicta from *Chown v. U.S.M.* and proffer it as an acceptable alternative definition of unreasonably dangerous in Iowa. At a minimum, further explanation by the supreme court would be necessary before proposing such a radically different instruction.

The potential impact of the risk/utility test as derived from *Barker v. Lull Engineering* should not be underestimated. Under the traditional consumer expectations test, for example, a convertible car is not defective and unreasonably dangerous simply because it has a greater propensity to cause injuries during a roll-over, since the potential danger is one which the ordinary consumer would reasonably expect. *Delvaux v. Ford Motor Co., 764 F.2d 469, 475 (7th Cir. 1985).* Under the risk/utility test of *Barker*, however, the convertible could be found defective if a particular jury finds that the "risk" posed by convertibles outweighs any "utility" the manufacturer proves they have to society. Under *Barker*, the burden of proof would shift to the defendant to justify the "utility" of the convertible once the plaintiff was proven to have been injured due to a roll-over of the car. Plaintiff essentially need prove nothing more than he or she was injured by the product to create a jury question on defective design, and it

is this criticism of *Barker* which has caused many courts to reject its analysis. *See, e.g., Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987).*

The extreme position enunciated by the California Supreme Court in *Barker* is not the law of Iowa. It is inappropriate that revised instruction 1000.4 states the risk/utility test as an acceptable alternative definition of unreasonably dangerous, and lists factors taken from *Barker* as the relevant test.

Finally, the omission of the statement from prior UJI 24.4 that some danger may be involved in the use of some products because of the nature of the product itself effectively deprives defendants of a specific instruction concerning the open and obvious danger issue in product design cases.

IDC PROPOSED INSTRUCTION 1000.4
DEFINITION OF UNREASONABLY DANGEROUS

A defective product is unreasonably dangerous if the danger is greater than would be expected by an ordinary user, with knowledge common to the community as to the product's characteristics. Some products present dangers of use because of the nature of the product itself. Where such dangers are commonly known, the product is not unreasonably dangerous.

Authority

Rest. (2d) Torts, § 402A, Comment i
Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830 (Iowa 1978)
Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973)

UJI 24.4 DEFINITION OF UNREASONABLY DANGEROUS. A defective condition "unreasonably dangerous" to a user or consumer means a defect in the product not contemplated by the user or consumer which would be unreasonably dangerous to him in the normal and innocent use or consumption thereof. To be unreasonably dangerous, a defective product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Some danger may be involved in the use of some products because of the nature or characteristics of the product itself, and where such dangers are commonly known or recognized by users or consumers, the product is not unreasonably dangerous.

The burden is upon the plaintiff to establish that the defective condition of the product, if any, was unreasonably dangerous, as defined herein.

Restatement, Torts 2nd, Sec. 402A, Comment i
Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973)

ICJI 1000.6 Directions or Warning

Some products may have inherently dangerous qualities which are not generally known to the user or consumer. In such cases the seller is required to give warnings or directions concerning use, and failure to do so is a defect

In determining if a warning is necessary you should consider the following matters as shown by the evidence:

1. The likelihood that harm will occur if the warning is not passed on to the final user.
2. The seriousness of the probable harm.
3. The probability that the warning will be passed on.
4. The ease or burden of the giving of a warning by the manufacturer to the final user.

A defendant is not required to warn about products, or their ingredients which are only dangerous, or potentially so, when consumed in excessive quantity or over a long period of time; or when the danger, or potential danger, is generally known and recognized

Where an adequate warning or direction is given, the seller may reasonably assume that it will be read and heeded. A product bearing a warning or direction, which is safe for use if the warning is followed, is not in a defective condition, nor is it unreasonably [sic] dangerous

Authority

Henkel v. R and S Bottling Co., 323 N.W.2d 185 (Iowa 1982)
Strict Liability In Tort, 20 Drake Law Review 528, 542 (1971)
Rest. (2d) Torts, § 402A, Comment j (1965)

Prior corresponding instruction. 24.6

Changes. 1000.6 deletes the following statement from prior UJI 24.6: "Whether a warning is required is to be determined by the standard of reasonable care". Other changes are minor or semantic.

Comment. This instruction also contains a significant omission. The Iowa Supreme Court in strict liability cases equates a defect based on lack of warnings with a negligence standard, and has applied *Rest. (2d) Torts, § 388*, which sets forth a negligence standard for failure to warn. *See Moore*

v. Vanderloo, 386 N.W.2d 108 (Iowa 1986); Henkel v. R & S Bottling Co., 323 N.W.2d 185, 188 (Iowa 1982); Cooley v. Quick Supply Co., 221 N.W.2d 763, 771 (Iowa 1974). Prior UJI 24.6 recognized this standard and stated specifically: "Whether a warning is required is to be determined by the standard of reasonable care".

This key statement has been deleted from ICJI 1000.6. After stating that the failure to give warnings may constitute a defect, the instruction simply lists factors which should be considered as bearing on whether a warning was necessary. It gives no definition of the duty to warn or when it is breached.

The factors listed under this instruction are most applicable in a situation where a product has passed through a chain of distribution before reaching the final user. Instruction on all of these factors may not be necessary where the product was sold directly to the ultimate user by the defendant in its original condition and packaging.

It should also be noted that prior UJI 24.6 stated that a seller was required to give warning against the particular dangerous quality or characteristic which was at issue. The revised instruction is more ambiguous and generalized. It states that the seller is required to give warnings or directions "concerning use", not limiting the requirement of warning to the particular danger at issue.

This instruction should contain a clear statement that the burden of proof is on the plaintiff to prove failure to warn and that the lack of a warning was a proximate cause of the occurrence. The only mention of proximate cause in the elements instruction, 1000.1, is insufficient since that instruction does not mention failure to warn.

IDC PROPOSED INSTRUCTION 1000.6
FAILURE TO WARN

Some products may be inherently dangerous qualities which are not generally known to the user or consumer. In such cases, the [manufacturer] [seller] may be required to give warnings or directions concerning use. The absence of required warnings or directions is a defect.

Whether a warning is required is to be determined by the standard of reasonable care. To prove liability for failure to warn, plaintiff must prove all of the following:

1. Defendant knew or had reason to know that the product was likely to be dangerous for the use supplied;
2. Defendant had no reason to believe that the user would realize the danger;
3. The defendant failed to exercise reasonable care to inform the user of the dangerous condition; and
4. The lack of a warning was a proximate cause of injury to the plaintiff.

In determining reasonable care, you should consider the following factors shown by the evidence:

1. The likelihood that harm will occur if the warning is not given;
2. The seriousness of the probable harm;
3. The probability that the warning will be passed on [if applicable]; and
4. The ease or burden of giving the warning by the defendant to the user.

A defendant is not required to warn about products, or their ingredients, which are only dangerous, or potentially so, when consumed in excessive quantity or over a long period of time; or when the danger, or potential danger, is generally known and recognized.

Where an adequate warning or direction is given, the seller may reasonably assume that it will be read and heeded. A product bearing a warning or direction which is safe for use if the warning is followed is not in a defective condition, nor is it unreasonably dangerous.

Authority

Moore v. VanderLoo, 386 N.W.2d 108, 116 (Iowa 1986)
Henkel v. R & S Bottling Co., 323 N.W.2d 185, 188-190 (Iowa 1982)
Rest. (2d) Torts § 402A, Comment j
Rest. (2d) Torts § 388

UJI 24.6 DIRECTIONS OR WARNING. Some products may have inherently dangerous qualities or characteristics which are not generally known to the user or consumer. In such cases the seller is required to give warning against it or directions to avoid the dangerous consequences. In such cases the absence of a warning or directions for use of the product will constitute a defect unreasonably dangerous to the user or consumer.

Whether a warning is required is to be determined by the standard of reasonable care. Among those factors which may be considered in determining whether reasonable care requires a warning are the likelihood or unlikelihood that harm will occur If the warning is not passed on to the ultimate user, the trivial or substantial nature of the probable harm, the probability or improbability that the warning will be passed on, and the ease or burden of the giving of a warning by the manufacturer to the ultimate user.

A seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized.

Where an adequate warning or direction is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning or direction which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous.

Authority

Henkel v. R and S Bottling Co., 323 N.W.2d 185 (Iowa 1982)
Restatement (Second) of Torts Section 402A, Comment j (1965)

UJI 24.9 ASSUMPTION OF RISK. The law provides that the plaintiff cannot recover for injuries sustained because of a defect or dangerous condition if he knob of the defect or condition, is aware of the danger, and nevertheless voluntarily and unreasonably proceeds to make use of the product to his injury.

The defendant claims the plaintiff assumed the risk, if any, by (state defendant's theory as supported by the evidence).

The burden of proof is upon the defendant to establish this defense by a preponderance of the evidence.

You are to determine this matter not only on the basis of plaintiff's statements, but upon your assessment of all of the facts established by the evidence. You may and should consider the plaintiff's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses.

You will first consider this affirmative defense. If the defendant has established by a preponderance of the evidence (1) that the plaintiff knew of the defect or condition and was aware of the danger involved and (2) that he nevertheless voluntarily and unreasonably proceeded to make use of the _____ to his injury, then your verdict should be for the defendant. If the defendant fails to establish one or both of the foregoing propositions, then you should proceed to consider whether or not plaintiff is entitled to recover in accordance with other instructions given to you herein.

Williams v. Brown Manufacturing Co., 261 N.E.2d 305, 312 (Illinois 1970). Cited specifically in Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373 (Iowa 1972).
See also: Restatement, Torts 2nd, Sections 496A, B, C, D, E and F. 60 Iowa Law Review 1.

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

June 5, 1990

To: **Defense Bar Leaders**

We are delighted that you were in attendance at last weeks *National Conference of Defense Bar Leaders* at the Salishan Lodge in Gleneden, Oregon.

You will recall that President Elect Jay Tressler made a presentation of the newly released IADC **In-House Defense Lawyer Training Program**. The video preview you saw at that time gave an overview of the entire program. What may have been overlooked in that tape is the complete integration of *all* of the elements of this "state of the art" training program.

The **Defense Counsel Training Manual**, which was introduced very successfully (it is currently in its fourth printing!) to the defense bar in the Spring of 1989 has proven to be a useful resource for both experienced defense counsel and the associate, was created *primarily* to act as the basic text for this comprehensive program.

The **Defense Counsel *Teaching* Manual** was created by many of the same contributors as the **Training Manual** and follows closely the same qualitative guidelines which have helped to make the **Training Manual** a great success.

The video portion has been produced *expressly* for use with this program and covers topics such as direct and cross examination of witnesses; opening and closing statements; deposing the lay and expert witness; and the admission of evidence.

We hope your Association will alert your members to this valuable tool for the training of young lawyers. The District of Columbia Defense Lawyers Association has *itself* already purchased the program for the training of its members. Perhaps your organization would have the same use for this program.

We have enclosed a Press Release for the IADC **In-House Defense Lawyer Training Program**, which you might use in your publications, as well as brochures you may distribute.

If you have any questions concerning this program, please contact Warren Sampson, Jr. at the IADC office in Chicago at (312)368-1494.

Cordially,

Morris R. Zucker

MRZ:wjr
Enclosures

INTRODUCING
the IADC In-House
Defense Lawyer Training Program

---------0---------

The International Association of Defense Counsel is proud to announce the completion and immediate availability of **The IADC In-House Defense Lawyer Training Program**. This *state of the art* program enables law firms and legal departments to stage their own instructional programs covering the 28 lessons, each of which is simply and directly presented.

This three-part program includes the previously available and highly praised **DEFENSE COUNSEL TRAINING MANUAL**. The **TRAINING MANUAL** is a useful resource for both experienced defense counsel and the associate, but was created primarily to be used as a basic text for the program and includes valuable information on all aspects of the trial.

A newly published **DEFENSE COUNSEL TEACHING MANUAL** is the second component in the program. This manual acts as a comprehensive course coordinator's and instructors' manual, which lays out 28 lessons on fundamental litigation subjects. Designed to enable law firms to teach basic litigation skills to young lawyers with a minimum of time and effort, the lesson plans are laid out in a step-by-step fashion. The lesson plans include such items as the purpose of the lesson, preparatory assignments, and suggested class time to be spent, as well as the actual topics for lecture, discussion and evaluation. The lesson plans cover a wide variety of subjects, from "Pretrial Conferences" to "Post-Trial motions."
The third portion of the program is a series of demonstration videotapes. Along with certain of the lessons mapped out in the **TEACHING MANUAL**, come actual demonstrations of the points laid out within the lesson plan. Topics aided by video demonstration are: *the deposition of both lay and expert witnesses, direct and cross examination, opening and closing statements, and demonstrative evidence.*

These three elements combine with the wisdom and experience of the instructors to create what every client is looking for . . . the finest possible trial attorney.

Now available is a ten minute video "PREVIEW" of the program, for your inspection. For additional information, contact Warren Sampson at the IADC office: 20 North Wacker Drive, Suite 3100, Chicago, IL 60606.

Most states with mandatory CLE requirements will accredit this program upon application by the individual firms administering the program.

revised: June 6, 1990

IADC In-House Defense Lawyer Training Program

International Association of Defense Counsel

INTERNATIONAL ASSOCIATION
OF DEFENSE COUNSEL
20 North Wacker Drive Suite 3100
Chicago Illinois 60606

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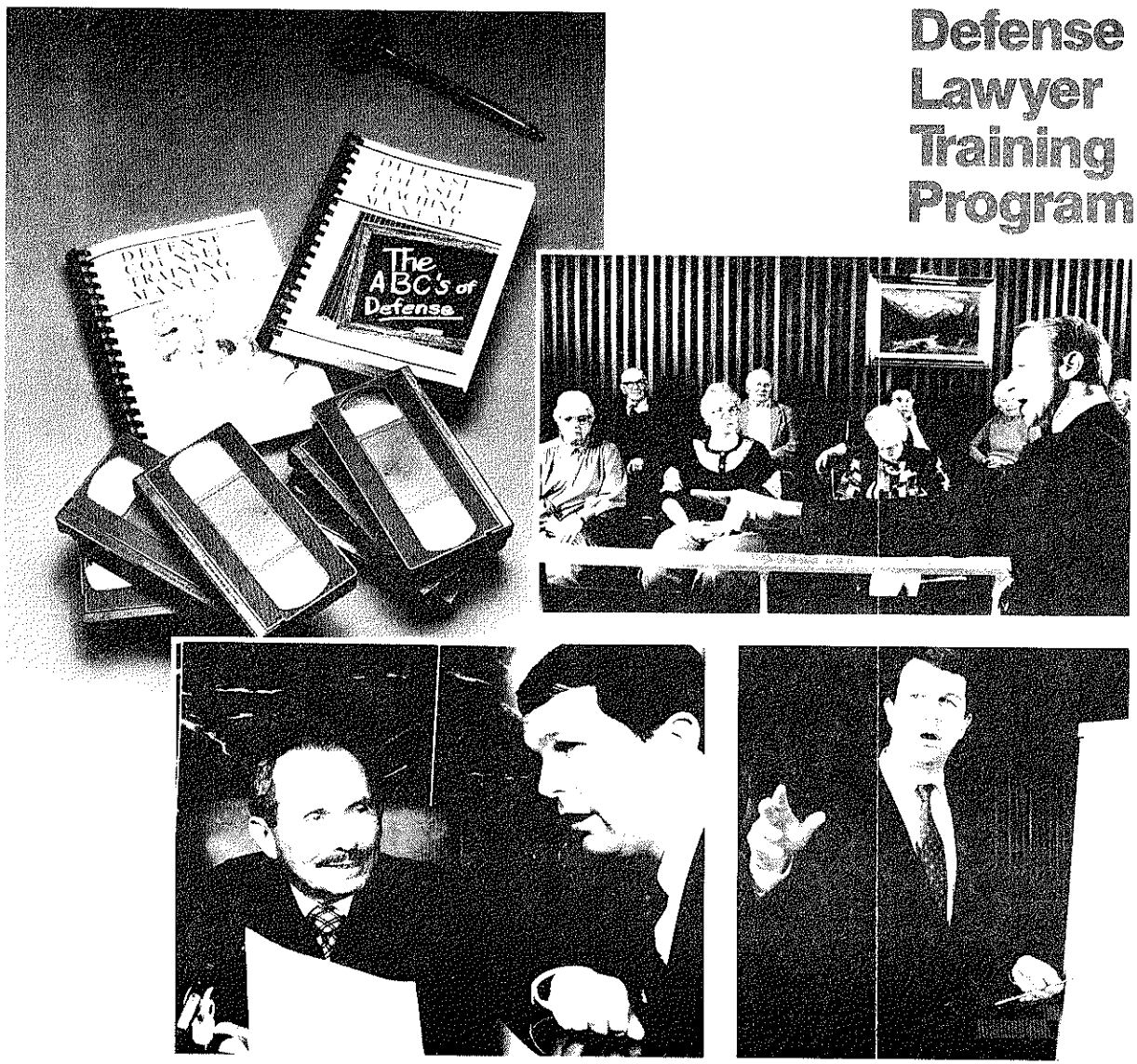
The International Association of Defense Counsel presents the

IADC In-House Defense Lawyer Training Program



This Training Program enables law firms and legal departments to stage their own instructional programs covering the 28 lessons, which are simply presented. The basic advocacy subjects include:

- Introduction to Litigation
- Strategies in Responding to Complaints
- Written Discovery
- Factual Investigations
- Witness Interviews
- Client Interviews
- Depositions and Preparing for Them
- Preparing Clients for Deposition Testimony
- Representing Clients during Depositions
- Deposing Lay Witnesses—Friendly, Hostile and Adverse (with demonstration videotape)
- Selection and Retention of Expert Witnesses
- Deposing Opponents' Experts (with demonstration videotape)
- Sanctions
- Case Evaluation, Negotiations and Settlement Documentation, including ADR
- Pretrial Conferences
- Pretrial Motion Practice
- Arguing Motions
- Trial Notebooks
- Demonstrative Evidence (with demonstration videotape)
- Voir Dire
- Non-verbal Communication
- Opening Statements (with demonstration videotape)
- Objections to Testimony, Offers of Proof and Preserving the Record
- Direct Examination and Rehabilitation of Witnesses (with demonstration videotape)
- Cross-Examination and Impeachment (with demonstration videotape)
- Preparation and Use of Jury Instructions
- Closing Arguments (with demonstration videotape)
- Post-trial Motions and Perfecting Appeals

(Application for state continuing legal education accreditation pending.)

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Communication Development Company

C D C

CASE CONCEPT DEVELOPMENT

THE JURY:

IS WHAT YOU SAY

WHAT THEY HEAR?

Attorneys can go through a trial meaning one thing and running the risk of having the jury understand another.

The question is, given your case, what will the jury understand?

1. **Ideas being presented**

   When you present your case, what ideas will occur in the minds of the jurors?

   "SAFE" = "try to make it safe."

   "try to reduce negative effects."

   "followed the rules."

   "safe to a point and person warned about dangers."

   "advised about danger and person is responsible."

2. **Structuring the argument**

   How does the order of presentation alter the message they get?

   initial order

   1. asbestos causes cancer
   2. plaintiff didn't follow regulations
   3. plaintiff didn't wear face mask
   4. plaintiff was aware of risk of cancer
   5. plaintiff's heredity--problems of cancer in family
   6. plaintiff smoked

   revised order

   1. asbestos causes cancer
   2. plaintiff was aware of risk of cancer
   3. plaintiff smoked
   4. plaintiff didn't follow rules
   5. plaintiff didn't wear face mask
   6. plaintiff's heredity--problems of cancer in family

Success ratio using initial order = 5 losses 1 win

Success ratio using revised order = 1 loss 6 wins

FAX (515) 225-9094 2910 Westown Parkway, #100 West Des Moines, Iowa 50265 (515) 225-2500

3. **Overall themes**

Original positioning:
"Manville didn't know at that time that asbestos causes lung cancer."

Final positioning:
"Smoking causes lung cancer when asbestos is inhaled."

Case Concept Development

- Prospective jurors are given the case to react to overall and part by part.
- The prospective juror is psychiatrically probed to fully understand what the ideas mean.

  Using the Four Rules of Active Listening:

  Generalizations: "This is a good pen." What are they referring to? What is meant by "good?"

  Deletions: "You know" is a classic example. Anytime someone leaves something out.

  Distortions: Anytime someone gives you a list of reasons why they do something, you also want to ask why they wouldn't. The world is not black and white, but rather, shades of gray.

  Contradictions: It is socially impolite to catch people in contradictions, but we do anyway.

- The interview is tape-recorded with their permission.
- The interview is entered into computer-readable form and the actual text is run through a series of computer programs for preliminary analysis.
- The analyst then does a full language analysis of the text.
- The results are written up with both reactions and recommendations.
- The results are also delivered in a give-and-take working session.
- The working session and report will provide an analysis of the case content line-by-line, word-by-word.

THE KEY IS IN THE ANALYSIS -- SEMIOTIC ANALYSIS

Semiotics is the study of signs and symbols.

An idea is communicated through words.

Traditional Communication Model

Attorney has an argument for a case
Attorney chooses words
Juror hears those words
Juror translates words into argument

A = B

Semiotics Communication Model

Attorney has an argument for a case
Attorney chooses words
Attorney checks words
Juror hears words
Juror translates words into argument

A = B

SEMIOTIC ASSUMPTION

The way your target audience (prospective jurors)
uses language is the best predictor
of what they will understand
your words to mean.

Use their words for your arguments

Semioticians study how your audience (prospective jurors) uses words to represent:

- ideas being presented — Semantics
- structuring the arguments — Syntactics
- overall themes — Pragmatics

J

C
D
C

Semantic Analysis

Ideas being presented:

"I represent the XYZ CORPORATION,
and we began MARKETING that product
to the public in 1964."

A Corporation is:
(according to the dictionary)

an entity recognized by law as
constituted by one or more persons,
having rights and duties
with goals and a purpose.

Therefore, the jury heard the lawyer say:

I represent a LARGE, UNFEELING,
COLD, INHUMAN ENTITY that began
MANIPULATING the public in 1964."

Changing words:

"I represent the XYZ COMPANY
and we began SELLING that
product to the public in 1964.

J

C
D
C

Syntactic Analysis

Structuring the argument:

Initial Order

1. Purpose of jury and their duty
2. Information about company and product
3. Case before the jury
4. Plaintiff's claims - refuted
5. Differing opinions of experts
6. Company warned public of problem
7. Closing remarks

Revised order

1. Purpose of jury and their duty
2. Case before the jury
3. Information about company and product
4. Company warned public of problem
5. Differing opinions of experts
6. Plaintiff's claims - disregarded
7. Closing remarks

J

Pragmatics Analysis

Overall themes:

If two firms are competing against each other,

they cannot be conspiring with each other.

C
D
C

CASE CONCEPT

J

Attorneys can go

through a trial

meaning one thing

and running

the risk

of having the jury

understand another.

Past experience. Polling. Shadow Juries. Mock Juries. Bouncing ideas off other people — partners, secretaries, legal assistants. These are some of the ways attorneys can get a better understanding of how their jury could react to the arguments they intend to make

When the jury is overloaded with information they can't fit together or don't understand, normal human beings then fall back on their preconceived notions, their past experiences, their prejudices and biases. We call this state "***cranial shutdown.***"

No matter how much the facts are in your favor... no matter how completely you have anticipated and prepared for the legal arguments of the opposing attorney.... ***if the jury does not understand what you mean, they <u>may not</u> render a verdict in favor of your client.***

What *Case Concept* Is

Although it is very difficult to keep people from deciding based on their past experiences, Communication Development Company's tool called *Case Concept* offers you the opportunity to make sure your message is clear when you deliver it in front of the jury. You can decrease the chance of "***cranial shutdown***" when it is your turn to present the facts, your witnesses and your arguments.

CDC has developed the *Case Concept* tool to help attorneys understand the range of meaning potential jurors could have for the arguments the attorney intends to present during the trial. CDC's *Case Concept* cannot tell you what to say or what to do to win, because when it really comes down to it, it's in the hands of the jury. But, this tool can help you understand what different mind-sets operate in the pool from which your jury is to be drawn. With that knowledge, you can position your arguments and even your examination of expert witnesses knowing the ballpark, so to speak, the jury lives in given the facts of your case.

How it Works

Case Concept gives you more than just the types of words to use and to avoid. It is often too cumbersome to remember to say this word or not say that word. Instead, this tool helps you have more control over the message your future jury will understand when they hear the words you use. This is accomplished by applying the science of analyzing signs and symbols — called *Semiotics*.

In terms of legal communication to juries, Semiotics focuses on:

- ***structuring arguments*** in a manner that potential jurors understand and are persuaded (*Syntactics* issues),
- ideas (***arguments***) that have clear, unambiguous ***meaning*** for potential jurors and can motivate or persuade (*Semantics* issues), and
- the ***overall themes*** for the arguments that can ***clearly communicate*** to potential jurors and not just to the judge and other attorneys (*Pragmatics* issues).

The Procedure

The process begins when CDC receives from the attorney the basic facts and arguments (for both sides) to be used in the examination. (See enclosed example). CDC then conducts in-depth interviews with 20 people from the area where the trial will be conducted. These "respondents" are selected in one of two ways as determined by the attorney: (1) randomly based on the qualifications prospective jurors must meet given the specifications of the court system, or (2) based on specific demographic or other qualifications as requested by the attorney.

Each person is then individually interviewed by telephone by a CDC trained investigator. Each respondent is presented the basic concept of the case. Arguments for both sides are then presented. The case and its arguments are then broken into parts and the respondent is interviewed relative to the meaning communicated by and reactions to each of the parts under examination.

The interview is not a polling or an asking of questions and a getting of answers. Instead, the CDC trained investigator engages each respondent in a conversation about the case. The respondent is fully probed to provide a clear understanding of mind-set, the meaning behind the words the respondent uses, and therefore the meaning that each respondent takes away from hearing the case's concept — the *words* and *arguments* the attorney intends to use.

Each interview is tape-recorded, transcribed verbatim into machine readable form and then semiotically analyzed for content.

What You Get

The results, from potential jurors' points of view, is an understanding of:

- what ordering or ***structuring of arguments*** can make the message more clear and persuasive to the potential jurors
- the ***range of meaning*** and interpretation potential jurors have for the arguments in the case as currently conceptualized
- alternative ***language usage*** suggestions to make the message clearer to the potential jurors
- what arguments have ***motivational/ persuasive potential,*** and
- possible ***overall themes*** for the case

The attorney receives results 8 to 10 days after CDC's receipt of the case concept (the facts and arguments to be used). A final written report is delivered in approximately 15 working days. Special arrangements can be made for emergency situations.

Eliminating Cranial Shutdown

Case Concept is another tool to add to your arsenal in your goal to be understood by the jury — regardless of its mix, biases or preconceived notions. *Case Concept* helps you structure legal arguments taking potential jury mind-set into consideration.

For more information about what the tool can help you do, call 1-800-373-1445.

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In communication analysis we discover three truths:

1. **There is no meaning in a message.**
   There is only the meaning that the listener gets from hearing and/or seeing the message. Effective communication helps the respondent get the intended message. Semiotic analysis determines what the meaning is that the respondent is getting.

2. **Very few messages really motivate.**
   The message may create an awareness, but it does not necessarily motivate. To motivate, a message must remove a respondent's thoughts that BLOCK action, fill in a respondent's GAPS in understanding and hook into a respondent's thoughts that SUPPORT action. Motivlinguistic analysis determines the degree of motivation.

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3. **Most messages start where the mind of the respondent isn't.**
   The message that is most persuasive follows the respondent's *"train of thought."* It follows the track the respondent follows when that respondent is making a decision. Trains of thought go from idea to idea. Each idea is a station. To be meaningful and provide input for a decision, a message needs to get on that *"train of thought"* at one of those stations. Neurolinguistic analysis determines where the stations are and where the *"train of thought"* goes when it moves from station to station.

Communication Development Company works for law firms, service companies, products goods companies, business to business companies as well as high tech companies producing such goods as computers and pharmaceuticals. If there is a need to communicate, CDC has the expertise and the tools to help make sure that communication is meaningful and motivates.

Communication Development Company

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Rev 04/06/90

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Fax:

CASE CONCEPT EXAMPLE
CASE CONCEPT DEVELOPMENT

The law that applies to the case:

In the United States, anti-trust laws are designed to preserve and protect the right to competition among businesses. Anti-trust laws are violated whenever a business interferes with the free workings of the marketplace. If there is a conspiracy between two businesses to restrict competition for another business, the anti-trust laws have been violated. Conspiracy can be proven by a set of conditions and by circumstantial evidence. In other words, if the evidence shows that two companies have a "meeting of the minds," that they intended to conspire together then there was conspiracy. If, on the other hand, the evidence shows that two companies merely had similar business practices or the same behavior, but they were not working together, then there was no conspiracy

The parties involved in the lawsuit:

Marjorie Tate is a business woman. She is the owner of a radio station and also owns five business buildings and several clothing stores. Ms. Tate makes her money from the other businesses she owns.

John Blake owns a radio station in the same city as Ms. Tate. The radio station is Mr. Blake's only source of income.

Lawrence Murray owns a radio station in a city 30 miles away from the one where Ms. Tate's and Mr. Blake's stations are located.

The facts of the case:

Ms. Tate is suing Mr. Blake. Ms. Tate is claiming that Mr. Blake and Mr. Murray conspired together to get a large advertising account from Ms. Tate.

Ms. Tate and Mr. Blake each have a radio station. Ms. Tate's and Mr. Blake's radio stations are the only two in the county and directly compete against each other for advertising. Advertising provides about 75% of the income to each of the stations

Ms. Tate is suing the Blake radio station. She is accusing the Blake radio station of conspiracy with the Murray radio station (a radio station in a nearby city) to take away the advertising account of a large car dealership from the Tate radio station. The dealership is the largest advertiser in the county.

Ms. Tate says that the owners of the Blake and Murray radio stations met at the car dealership and discussed getting the advertising of that dealership

The car dealership decided to place its advertising through the Blake radio station and Murray radio station instead of with the Tate radio station where it had been.

Ms. Tate also says that the Blake radio station sent a letter to the car dealership saying they would coordinate the areas in which the two stations, Murray's & Blake's, were to broadcast.

The arguments to be examined:

1. What if Ms. Tate says that the sales director of the Blake radio station conceived of a plan together with the sales director of the Murray radio station and that two years earlier they both met and planned to take the car dealership advertising account away from Ms. Tate, they wrote a proposal and discussed the plan.

2. What if the telephone records from the Blake radio station show that there were a lot of telephone calls between the Blake radio station and the Murray radio station during the time when the decision was made by the car dealership to switch to a different radio station.

3. What if Mr. Blake says that the proposal was merely a note, handwritten two years ago and they did discuss it, but it was rejected because they realized it was a mistake and their actions might be illegal. It was not presented to the large car dealership.

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4. What if Mr. Blake also says that the Blake radio station acted on its own and did not agree to anything with the Murray radio station.

5 What if Ms. Tate says that the sales director of the Blake radio station called the car dealership and suggested that they use Murray radio station instead of the Tate radio station to get better advertising coverage.

6. What if Tate's radio station had given OTHER businesses lower rates that she gave the large car dealership?

7. What if the advertising manager of the large car dealership said that the car dealership invited Mr. Blake and Mr. Murrary to come and discuss advertising and that during the meeting, Blake and Murray were actually competing against each other for the car dealership's advertising business.

8. There is one remaining set of information.

   What if Ms. Tate had tried to buy out Mr. Blake and she threatened to drive Mr. Blake out of business.

   What if Ms. Tate was able to give lower rates for advertising and subscriptions because of the money she had available from her local business buildings and clothing stores.

The arguments or potential testimony for both sides to be examined:

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The Facts and Arguments for Your Case

The law that applies to the case:

The parties involved in the lawsuit:

The facts of the case:

DEFENDING THE AGENT/BROKER:

SERVING TWO MASTERS

by MR. GALE E. JUHL
MORAIN, BURLINGAME, PUGH, JUHL & PEYTON
5400 University Avenue
West Des Moines, Iowa 50265

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DEFENDING THE AGENT/BROKER: SERVING TWO MASTERS

> **No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to the one and despise the other. Matthew 6:24.**

Agents/brokers are often confronted with the difficult task of serving loyally he interests of both the insurer and the insured.

> Insurance agents occupy a very curious and anomalous position. Legally, and in fact, they are agents for the companies, and must protect the companies' interest, but at the same time their personal relationship with the insured makes them equally solicitous for his own best interest. Add to this fact that the agent represents not one, but several companies and that he is called upon to distribute his favors among them all, and we have a notable example of a man who is serving many masters. That the system works as well as it does is remarkable and particularly when the equally anomalous condition is noticed that, in general, agents are paid a commission upon premium receipts, so that a large volume of business and particularly hazardous high-rated business is for the benefit of the agent irrespective of whether the results are favorable or unfavorable to the company.

I, Report of the Joint Commission of New York (Hughes Report 92 (1910)).

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I. "AGENT" v. "BROKER".

A. Both an "agent" and a "broker" produce insurance business. Traditionally, an "agent" is the representative of the insurer, while the "broker" is a representative of the insured. The traditional distinction between the "agent" and "broker" has been obfuscated to a large degree since the courts tend to look at the course of dealing surrounding the specific transaction. This can give rise to agent being the representative of the insured, Sandbulte v. Farm Bureau Mutual,

343 N.W.2d 457, 464 (Iowa 1984), and a "broker's" conduct giving rise to an agency relationship with the insurer. Ledbetter v. Crudup, 114 Ill. App. 3d 401, 449 N.E.2d 265 (1983).

B. Iowa's statutory modification of traditional concept of "agent"/"broker":

1. Iowa Code § 515.125 (1989).

> Any officer, agent or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses, or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of the agent's employment, anything in the application, policy, contract, bylaws, or articles of incorporation of such company to the contrary notwithstanding.

2. Iowa Code § 515.124 (1989).

> The term "agent" used in the foregoing sections of this chapter shall include any other person who shall in any manner directly or indirectly transact the insurance business for any insurance company complying with the laws of this state.

3. Iowa Code § 515.123 (1989).

> Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy, or contract to the contrary notwithstanding.

C. Dual Agency.

As a general rule, the same person cannot act as an agent for both the company and the insured unless he does so with the consent of both parties. Nertney v. National Fire Ins. Co., 203 N.W. 826 (Iowa 1925).

II. Dual Theories of Recovery.

A. Contract.

1. Express contract.

2. Implied warranty of fitness for a particular purpose.

a) "The elements for recovery under the theory of implied warranty are: (1) that the insurer had reason to know of the particular purpose for which a policy is purchased; (2) that the insured relied upon the company's skill or judgment in furnishing such coverage; and (3) that the resulting implied warranty was breached." Farm Bureau Mutual v. Sandbulte, 302 N.W.2d 104, 110 (Iowa 1981). See also Carper v. State Farm Mutual Insurance Co., 758 F.2d 337, 340 (8th Cir. 1985).

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B. Tort.

1. Standard of care: Salesperson or Professional.

a) General Salesperson.

i) A producer owes a general duty to use reasonable care, diligence, and judgment. Sandbulte v. Farm Bureau Mutual, 343 N.W.2d at 464.

ii) Traditionally, the purchase of insurance is an arm's length transaction involving no confidential or fiduciary relationship between the insured and agent. Lazovick v. Sun Life Insurance Company of America, 586 F. Supp. 918 (E.D. Pa. 1984).

b) Professional or Specialist.

i) " . . . [W]here an agent holds himself out as a consultant and counselor, he does have a duty to advise the insured as to his insurance needs, particularly where such needs have been brought to the agent's attention. And in doing so, he may be held to a higher standard of care than that required of the ordinary agent since he is acting as a specialist." Sandbulte v. Farm Bureau Mutual, 343 N.W.2d 464 (citing 16A Appleman, Insurance Law and Practice, § 8836 at 64-66 (1981)).

ii) Compensation for consultation and advice apart from premium paid may increase standard of care. Nowell v. Dawn-Leavitt Agency, Inc., 127 Ariz. 48, 51-52, 617 P.2d 1164, 1168 (Ct. App. 1980).

iii) "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Restatement (Second) of Torts § 299A.[1]

c) "Professional" Designations and Associations.

i) In Menzel v. Morse, 362 N.W.2d 465 (Iowa 1985), the Iowa Supreme Court permitted the introduction of Realtor's Code of Ethics to establish a standard of care.

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[1]The current Iowa law eliminates the words "in similar communities" and substitutes "under like circumstances" with the locality merely being one circumstance. Speed v. State, 240 N.W.2d 901, 908 (Iowa 1976).

"Standards of conduct and practice may be evidenced by expert testimony [citations omitted], by licensing and accreditation standards of hospitals [citations omitted], by the by-laws of a treatment center [citation omitted], by the accreditation requirements of professional associations [citations omitted] and by the Code of Professional Responsibility of Lawyers [citations omitted]. Id. at 471.

ii) "The violation of these standards is only evidence of negligence and not negligence per se as in the case of a violation of a statute or regulation." Id. at 473.

iii) Many agents belong to associations which have established conduct standards for their members.

(a) Life Office Management Association (LOMA).

"In the case of life insurance, the agent has a special responsibility to counsel and help the prospect obtain the coverage most suitable for his or her needs. In fact, the relationship is called a fiduciary relationship, one involving special trust and confidence" (emphasis added).

(b) American Society's Code of Ethics Guide 1.1, Comment A: "A member shall provide advice and service which are in the client's best interest." Comment B "In a conflict of interest situation, the interest of the client must be paramount."

(c) National Association of Life Underwriters (NALU) Code:

"Those engaged in life underwriting occupy the unique position of liaison between the purchasers and the suppliers of life and health insurance and closely related

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financial products. Inherent in this role is the combination of professional duty to the client and to the company, as well. Ethical balance is required to avoid any conflict between these two obligations. Therefore, I believe it to be my responsibility:

1. To hold my professional in high esteem and strive to enhance its prestige.
2. To fulfill the needs of my clients to the best of my ability.
3. To maintain my clients' confidence.
4. To render exemplary service to my clients and their beneficiaries.
5. To adhere to professional standards of conduct in helping my clients to protect insurable obligations and attain their financial security objectives.
6. To present accurately and honestly all facts essential to my clients' decisions.
7. To perfect my skills and increase my knowledge through continuing education.
8. To conduct my business in such a way that my example might help raise the professional standards of life underwriting.
9. To keep informed with respect to applicable laws and regulations and to observe them in the practice of my profession.
10. To cooperate with others whose services are constructively related to meeting the needs of my clients." (emphasis added)

III. Duties Owed the Insured.

A. Duty to Procure Coverages.

1. Once an insurer's agent agrees to procure coverage, the agent should do his best to place the desired insurance with reasonable care and in a reasonably prompt manner. See Town and Country Mutual Insurance Company v. Savage, 421 N.W.2d 704, 707 (Ind. Ct. App. 1981). An insurance agent owes a duty to exercise reasonable skill, care and diligence in effecting insurance coverage requested. Smith v. State Farm Mutual, 248 N.W.2d 903 (Iowa 1976). See also Wolfswinkel v. Gesink, 180 N.W.2d 452 (Iowa 1970).

2. An agent will not, however, be found liable when noncoverage results from the insured's failure to accept the insurer's offer of coverage or when the insured actually rejects coverage. See Arinder v. Professionals Transportation Co., 383 S.2d 1294 (La. App. 1980).

3. An agent will not be liable for the insured's loss when the loss is wholely due to the insured's failure to provide full and accurate information. See Bush v. Mayerstein/Burnell Financial Services, 499 N.E.2d 755 (Ind. Ct. App. 1986).

B. Liability for Giving Expert Advice.

1. In Hardt v. Brink, 192 F. Supp. 879 (W.D. Wash. 1961) (cited by the Iowa Supreme Court in Sandbulte v. Farm Bureau Mutual, 343 N.W.2d 457, 464 (Iowa 1984)). An insured sued his insurance broker for a fire loss at a leased plant. The court found the broker had worked with the insured for a considerable period of time and had counseled the insured previously on coverages. The insured told his broker he was going to lease a place in California. The insured's policy of insurance excluded coverage for damage to property rented by the insured. The court determined that if the broker had read the lease he would have realized that the insured was not protected by the lessor's fire policy and would have advised his client to obtain separate fire insurance for the leased premises. Judgment was rendered in favor of the insured against the broker.

2. In Knox v. Anderson, 159 F. Supp. 795, 162 F. Supp. 338 (D. Hawaii 1958), 297 F.2d 702 (9th Cir. 1961) cert. denied, 370 U.S. 915 (1962), a life insurance agent persuaded an insured with an income of $10,000.00 to convert his existing $35,000.00 worth of insurance coverage and purchase a policy for $100,000.00 with an annual premium of $7,265.00 to be financed by an annual bank loan. The program was based upon the agent's representation that it would be a tax advantage to the insured because of the deductibility of interest payments. The agent indicated this was a suitable plan for the insured. The insured lost considerable cash value from the existing policies when converted. The court found that the program implemented by the agent was inappropriate for the insured's financial and personal circumstances. Verdict for the insured.

3. The sales of insurance products may be considered a "security", and the conduct of the agent is governed by the securities law applicable to dealers.

   i) Investment Advisory Act of 1940, 15 U.S.C. § 80b-1 et seq.

   ii) Iowa Admin. Code § 50.9(2).

4. The employee benefit field has changed dramatically since the enactment of ERISA which not only increases the agents' responsibilities to their clients but also increases their liability exposures.

C. Duty to Advise Promptly of Rejection or Lack of Coverages.

An agent may be liable where he fails to advise his customers seasonably that he has been unable to obtain the requested coverage, even though he did not guarantee to get it. See American Handling Equipment v. T.C. Moffatt & Co., 184 N.J. Super. 131, 445 A.2d 428 (1982).

D. Duty to Notify Insured of Cancellation.

When an agent has obtained insurance for a client, the agent's obligation normally ends unless the agent agrees to keep the insurance in force. Watts v. Talladega Federal Savings & Loan, 445 S.2d 316 (Ala. Civ. App. 1984). See also Kitching v. Zamora, 695 S.W.2d 553 (Tex. 1985).

E. Duty to Renew or Service Policies.

1. In Blonsky v. Allstate Insurance, 128 Misc. 2d 281 (N.Y. Sup. Ct. 1985). The insured sued his broker due to a $150,000 liability gap between the insured's underlying auto policy and the insured's umbrella policy. The insured, without telling his broker, obtained a replacement auto policy with limits insufficient to meet the retention requirements of the umbrella policy. The court found that the broker "owed no continuing duty to advise, guide or direct in insured's coverage after a broker has complied with his obligation to obtain insurance coverage on behalf of the insured."

2. Compare Woodham v. Moore, 428 So. 2d 280 (Fla. Dist. Ct. App. 1983). In Woodham, the insureds had high auto liability limits but because of accident frequency were forced to accept lower limits. Subsequently, the insureds became eligible for higher limits, but the agent failed to inform the insureds of their eligibility. The evidence showed the agent conducted periodic reviews of the insured's files. These facts were determined to generate a question of fact, making summary disposition inappropriate.

F. Independent or Joint Liability with Insurer.

1. Generally, when an agent of the insurer acts within the scope of authority, the agent cannot be held personally liable for the acts undertaken on behalf of a disclosed principle. See Reedon of Fairbault v. Fidelity and Guaranty, Inc., 418 N.W.2d 488 (Minn. 1988). See also Restatement (Second) of Agency § 140 (1958).

2. Reformation of a contract based upon a mutual mistake may place the ultimate responsibility on the carrier. "If a mistake of fact as to the contents of a writing or conveyance, or by

CONFLICTS OF INTEREST - INSIDE COUNSEL'S PERSPECTIVE

Introduction

The unique environment of insurance defense confronts both the insurer and the defense attorney with numerous actual and potential conflicts of interest. The law in this area is not static. It is important to look at the duties and obligations running between the defense attorney and the insured, the attorney and the insurer, and the insured and insurer, and to be aware of potential conflicts.

Iowa law in this field is not well developed. This outline, therefore, does not pretend to predict how Iowa courts would rule in a given situation. Its purpose is to provide examples of situations in which other courts have held insurers or their counsel accountable for failing to identify conflicts or for failing to address identified conflicts appropriately.

The outline examines the nature of the tripartite relationship in general, and then considers the more frequent conflicts that may arise from each of the individual relationships contained therein.*

I. The Tripartite Relationship.

This section of the outline examines the basis for each of the relationships among the insurer, the insured, and defense counsel, the duties flowing from those relationships, and the question whether defense counsel is the agent for the insurer.

A. Duties of insurer to insured.

The basis for this relationship is the insurance contract. In addition to the specific contractual duties, however, courts have heightened the obligations of the insurer to the insured.

1. Explicit contractual duties.

The contract provides that the insurer will provide the insured with a defense against claims for damages to which the contract applies. This contractual duty to defend requires not only that the insurer retain a lawyer to defend the insured; if a conflict

* Any opinions expressd in this outline are those of the author only and not her employer.

arises, "the insurer's duty to defend requires it to notify the insured of that conflict." Bogard v. Employers Casualty Co., 164 Cal. App. 3d 602, 210 Cal. Rptr. 578, 584 (1985). If the conflict is such that one attorney cannot represent the interests of both insurer and insured, the insurer's duty requires that it retain counsel to represent only the insured's interest or allow the insured to select counsel of his choice, to be compensated by the insurer. Nandorf, Inc. v. CNA Ins. Co., 134 Ill. App. 3d 134, 479 N.E.2d 988 (1985)

2. Covenant of good faith and fair dealing.

An implied covenant of good faith and fair dealing is read into every contract. Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198 (1958). Because of the "elevated level of trust" underlying insureds' dependence on their insurers, the insurer's duty of good faith implies more than the "honesty and lawfulness of purpose" which comprises a standard definition of good faith. In the insurance context, the insurer is required to give "equal consideration" to the insured's interests, a considerably higher burden than that imposed in non-insurance contracts. Tank v. State Farm Fire & Casualty Co., 105 Wash. 2d 381, 715 P.2d 1133 (1986). Indeed, courts have held that because of the fiduciary nature of the relationship between insurer and insured, the insurer is required to put the insured's interests ahead of its own. See, e.g., Lieberman v. Employer's Insurance of Wausau, 84 N.J. 325, 419 A.2d 417, 422-23 (1980) ("While the insurer is not compelled to disregard its own interests in representing or defending an insured, the insured's interests must necessarily come first.")

3. Fiduciary obligation.

The fiduciary obligation of the insurer providing a defense for the insured is equal to the fiduciary obligation of the attorney retained to provide that defense. Manzanita Park, Inc. v. Insurance Co. of North America, 857 F.2d 549, 555 (9th Cir. 1988).

B. Duties of insured to insurer.

The duties flowing from the insured to the insurer are limited to those spelled out in the contract,

normally the duties to provide timely notice of a claim and to cooperate with the insurance company and assist in matters concerning claims or suits.

C. Duty of the defense counsel to the insurer.

1. Absent a conflict of interest between the insured and the insurer, an attorney hired by the insurer to represent the insured represents both. Nandorf, Inc. v. CNA Insurance Cos., 134 Ill. App 3d 134, 479 N.E.2d 988, 991 (1985) ("The attorney hired by the insurance company to defend in an action against the insured owes fiduciary duties to two clients: the insurer and the insured.") Henke v. Iowa Home Mutual Cas. Co., 87 N.W.2d 920 (Ia. 1958); Gray v. Commercial Union Ins. Co., 191 N.J. Super. 590, 467 A.2d 721, 725 (1983) ("There is no dispute that as a fundamental proposition a defense lawyer is counsel to both the insurer and the insured. . . . He owes to each a duty to preserve the confidences and secrets imparted to him during the course of representation.") See ABA Model Rules of Professional Conduct, Rules 1.7, 1.8(f); Iowa Code of Professional Responsibility, DR 4-101; DR 5-105; EC 5-17.

NOTE: Although it appears to be aberrational, a Michigan Court of Appeals decision, Atlanta International Ins. Co. v. Bell, 448 N.W.2d 805 (Mich. App. 1989), held that no attorney-client relationship existed between an insurance company and the attorney representing its insured, loyalty and duty being owed to the insured only.

D. Duties of defense counsel to the insured.

Courts have consistently held that an insured is the client of the defense attorney hired by the insurer in every respect, as if the attorney had been hired personally by the insured. Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984); Crum v. Anchor Casualty Co., 119 N.W.2d 703 (Minn. 1963). An attorney retained by the insurer to represent an insured is thus subject to all of the ethical and fiduciary obligations that would apply had the insured hired the attorney personally. It is incumbent on any defense attorney to assure that both the insurer and the insured are completely aware of the implications of dual representation. Betts, supra, 201 Cal. Rptr. at 545.

E. Agency of attorney.

Jurisdictions are split on the issue of whether a defense attorney is the agent of the insurer by whom he or she is retained. In Petersen v. Farmers Casualty Co., 226 N.W.2d 226 (Ia. 1975), defense counsel failed to perfect an appeal from an adverse judgment in excess of policy limits. The insured sued the insurer as principal. The court held that under the facts of this case, the insurer, having undertaken to appeal the decision, appropriately had the negligence of the attorney imputed to it. The court did state that it was not deciding whether the insurer would be liable for any negligence of the attorney in the actual defense of the claim. See Smoot v. State Farm Mutual Automobile Ins. Co., 299 F.2d 525 (5th Cir. 1962); Boyd Brothers Transportation Co. v. Firemen's Fund Insurance Companies, 729 F.2d 1407 (11th Cir. 1984). Contra, Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973).

If the attorney is the agent of the insurer, the attorney's malfeasance can have significant implications for the carrier. In Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. and Trust Co., 141 Ariz. 363, 687 P.2d 371 (Ariz. App. 1984), defense counsel wrote to Arizona Title to inform it that the insured hospital was attempting to negotiate a settlement of the underlying action so as to leave the carrier open to a subsequent damage action, thus continuing to represent the insured while acting for the benefit of the carrier. Holding the carrier liable to the insured for compensatory and punitive damages, the Court stated:

> While acting as counsel for Community Hospital, Joseph Miller divulged confidential and privileged information of the client to Arizona Title which could adversely affect the client's interests. Such conduct constitutes a reckless indifference to the interests of Community Hospital. Arizona Title is liable for such damages under the doctrine of respondeat superior.

687 P.2d at 385.

If defense counsel acts negligently and causes the insurer to be liable for an amount greater than that for which it would have been liable for absent the negligence, the carrier has a cause of action

B. Cases in which a coverage dispute is present.

1. Jurisdictions differ in the requirements imposed on an insurer when a possibility exists that the claim as presented by the plaintiff may not be covered and the insurer chooses to defend the action under a reservation of rights. In some states, the existence of a reservation alone calls for the carrier to pay for the insured's independently retained counsel. Other states permit the carrier to choose defense counsel to represent the insured only. Various positions are described below.

a. The Cumis position.

In 1984, the California Court of Appeals decided San Diego Naval Federal Credit Union v. Cumis Insurance Society, Inc., 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984), holding that whenever the insurer raises a coverage issue, the insured has the right to select independent counsel at the insurer's expense, and to control the litigation.

The decision appears to be premised on the assumption that an attorney, whenever hired by an insurer to represent an insured, will be unable to exercise independent judgment on behalf of the insured as required by Rules 1.7 and 1.8(f) of the ABA Model Rules, and will act to protect the insurer. See, e.g., Purdy v. Pacific Automobile Ins. Co., 157 Cal. App. 3d 59, 203 Cal. Rptr. 524, 534 (1984) ("In reality, the insurer's attorneys may have closer ties with the insurer and a more compelling interest in protecting the insurer's position, whether or not it coincides with what is best for the insured.") The California courts have somewhat retreated from the Cumis ruling, as discussed in section b. below. Illinois follows a rule only slightly less stringent. In Illinois, a conflict is deemed to exist, requiring that the insured be permitted to select independent counsel at the insurer's expense, "whenever a comparison of the allegations of the complaint and the terms of the policy reveal that the interests of the insured would be furthered by its manipulation of the proceedings or by providing a less than vigorous defense against the allegations so

as to shift liability from itself to the insured." Illinois Masonic Medical Center v. Turegum Ins. Co., 168 Ill. App. 3d 158, 522 N.E.2d 611, 615 (1988); Murphy v. Urso, 88 Ill. 2d 444, 430 N.E.2d 1079 (1981).

b. The McGee position.

In decisions since Cumis, the California court has provided for exceptions to the rule announced therein. In McGee v. Superior Court (Pedersen), 176 Cal. App. 3d 221, 221 Cal. Rptr. 421 (1985), the insured moved to disqualify insurer-appointed defense counsel because the defense was being provided under a reservation of rights based on a resident relative exclusion. The court denied the motion because the exclusion would not be relevant to any issue presented in the insured's defense. See also Native Sun Investment Group v. Ticor Title Ins. Co., 189 Cal. App. 3d 1265, 235 Cal. Rptr. 34 (1987).

A number of courts have held, conversely, that a conflict exists and the insured is entitled to select independent counsel if a material factual issue necessarily presented in the defense would have a direct bearing on coverage. See, e.g., Fireman's Fund Ins. Co. v. Waste Management of Wisconsin, Inc., 777 F.2d 366 (7th cir. 1985); Maneikis v. St. Paul Ins. Co., 655 F.2d 818 (7th Cir. 1981); Executive Aviation, Inc. v. National Ins. Underwriters, 16 Cal. App. 3d 799, 94 Cal. Rptr. 347 (1971); Prahm v. Rupp Construction Co., 227 N.W.2d 389 (Minn. 1979).

A few states have legislated some protection for insurance companies in providing that an attorney selected by the insured must be "mutually agreeable to the parties" (West's Fla. Stat. Ann. § 627.426); or that the attorney must have substantial defense experience and carry errors and omissions coverage (West's Ann. Cal. Civ. Code § 2860(c)). The statutes also provide that the fees charged by independent counsel must be "reasonable" (West's Fla. Stat. Ann. § 627.426) or

> relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy in the garnishment proceeding, we hold that such conduct constitutes a waiver of any policy defense, and is so contrary to public policy that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy.

550 P.2d at 99. The Court also noted that the attorney, upon first discovering information detrimental to the insured's coverage under the policy, should have advised the carrier that he could no longer represent its interests. Id. at 98. See also Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. and Trust Co., 141 Ariz. 363, 687 P.2d 371 (Ariz. App. 1984); Medical Mutual Liability Ins. Society v. Miller, 451 A.2d 930 (Md. App. 1982).

4. Declaratory judgment actions.

When a coverage issue has been properly identified, it is not bad faith for an insurer to institute a declaratory judgment action and refuse to pay the claim pending the outcome thereof, provided the insurer has an objectively reasonable basis for believing that no coverage is provided under the policy. Mills v. Regent Ins. Co., 152 Wis. 2d 566, 449 N.W.2d 294, 299 (Wis. App. 1989). The fact that coverage is ultimately determined to exist does not result in a determination of bad faith, as long as the coverage issue is "fairly debatable." Mowry v. Badger States Mut. Cas. Co., 129 Wis. 2d 496, 385 N.W.2d 171, 182 (1986). See also Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191 (Ia. 1990); Conti v. Republic Underwriters Ins. Co., 782 P.2d 1357 (Okl. 1989).

Some courts have permitted the insurer to recoup costs of defense if it provides a defense under a reservation of rights, receives a subsequent ruling that there was no duty to defend, and can show that a clear understanding had been reached between the insurer and the insured that the insurer would attempt to recoup any defense costs after such a ruling. See, e.g., Omaha Indemnity Ins. Co. v. Cardon Oil Co., 687 F. Supp. 502 (N.D. Cal. 1988).

Cf. Insurance Co. of the West v. Haralambos Beverage Co., 195 Cal. App. 3d 1308, 241 Cal. Rptr. 427 (1987).

5. File handling.

Plaintiffs have argued that when a coverage dispute exists, the insurer should not be permitted to consider the coverage issue in response to a demand to settle within policy limits, but must separate the handling of the coverage issue from the defense of the underlying claim. In State Farm Fire & Casualty Co. v. Superior Court (Durant), 265 Cal. Rptr. 372 (Cal. App. 4th Dist. 1989), State Farm's adjuster, Ted Krempa, directed both the defense of the insured Durants and State Farm's coverage defense, maintaining only one file and communicating with both counsel for the insureds and counsel for State Farm. The Durants, in the coverage action, asked for all communications between Krempa and State Farm's coverage counsel, arguing that since State Farm had not separated internal handling of the defense from the coverage action, it had waived any privilege that might apply. The Court resolved the issue in favor of the insurer as follows:

> The insurance adjuster is the agent of the insurer. . . . That the adjuster can under particular fact situations become also the agent of the insured is clear, and this most usually will occur when no issue as to coverage arises. Where coverage is in issue, however, it is obvious that the adjuster's loyalties are divided and the insured and his counsel cannot reasonably expect that he represents only the interest of the insured. Indeed, it is to remedy this problem that the concept of the Cumis counsel has been created.
>
> The existence of independent Cumis counsel adequately protects, we believe, the interests of the insured. In these days of ever-increasing costs in the processing of insurance settlements, we conclude it would be unwise to impose yet another layer of administration.

265 Cal. Rptr. at 375.

C. Conflicts concerning settlement.

The major source of conflicts concerning settlement, i.e., an excess verdict potential, a demand within the insured's limits, and the insurer's unwillingness to meet the demand, has been discussed at section II. A. of this outline In addition, however, conflicts can arise concerning whether settlement should be effected at all and the manner of settlement.

1. Consent to settlement.

In Lieberman v. Employers Ins., 84 N.J. 325, 419 A.2d 417 (1980), the plaintiff physician sued his medical malpractice insurer and insurance defense counsel for settling a malpractice action against him after plaintiff had revoked his consent to the settlement. The insurer and attorney argued that the revocation was ineffective. The court held that the revocation was effective; that the insurer had breached its contractual obligation to the insured; and that defense counsel had failed to advise his insured client of the conflict of interest inherent in the representation and had committed malpractice by continuing to represent the insured despite the conflict. See also Rogers v. Robson, Masters, Ryan, Brumund and Belom, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979) (law firm breached ethical and fiduciary duty to insured by failing to inform client of conflict of interest and by continuing to defend and settle claim when insured did not consent to settlement, even though terms of policy did not require insured's consent). But see Gardner v. Aetna Cas. & Surety Co., 841 F.2d 82 (4th Cir. 1988) (settlement permitted because counsel had duty to insurer as well as insured).

2. Manner of settlement.

An insurer may be liable to its insured if harm is inflicted on the insured by a settlement procedure and the insured has not been independently represented and fully informed of all negotiations. In Ivy v. Pacific Automobile Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958), defense counsel stipulated to a judgment of $75,000 against the insured, without so informing the insured. Counsel received in exchange for the stipulation a covenant not to execute against the insured;

the target was another insurance company that had refused to defend the insured. The insured proved, however, that his credit rating was impaired as a result of the stipulation, and both the insurer and the defense attorney were held liable.

D. Conflict based on insured's collusion or lack of cooperation.

1. An insurer and insured may conflict when the carrier's opinion is that the insured is not at fault when a friend or relative is injured but the insured wishes to help the injured party recover damages. Defense counsel may encounter an insured whose courtroom or deposition testimony differs from statements given to the insurance company shortly after the loss, bringing counsel's fiduciary obligation to the insured directly into conflict with his obligation as an officer of the court. Counsel may not argue that the insured and plaintiff are conspiring to defraud the insurance company. Spadaro v. Palmisano, 109 So. 2d 418 (Fla. App. 1959). If the insured is impeachable, the attorney's only choice is to withdraw from representation of both the insured and the carrier. See, e.g., Friedman v. Berkewitz, 206 Misc. 2d 889, 136 N.Y.S.2d 81 (1954).

2. An insured may fail to cooperate with counsel during defense of an action by refusing to appear for meetings with counsel, failing to answer correspondence, or failing to appear for a deposition or even trial. Counsel is justified in seeking assistance from the carrier in obtaining the insured's cooperation. The insured must be made aware of the serious consequences of failure to cooperate. Counsel or the insurer may not seize on such failings and immediately declare the insurance contract breached. In Van Dyke v. White, 55 Wash. 2d 601, 349 P.2d 430 (1960), the insured failed to appear at trial. Plaintiff offered a setover of the trial date. The insurer was required to accept the offered setover rather than claiming that its obligation to defend was terminated.

E. Conflicts caused by insured's affirmative claim.

Cases in which the insured has a potential cross-claim or counterclaim pose difficulties for defense counsel because of the risk that the

insured may be unwilling to compromise his claim when the insurer wishes to settle. Full disclosure of all such risks must be made and the consent of the insurer should be obtained before such representation is undertaken. If defense counsel undertakes to represent the insured, he must do so competently. See, e.g., Strauss v. Fost, 209 N.J. Super. 490, 507 A.2d 1189 (1986)(failure to protect insured's cross-claim).

Similarly, a carrier must be sure in litigating a subrogation claim, that it does not compromise its insured's affirmative claim by splitting the cause of action.

III. Conflicts Between Insurers and Defense Counsel.

Most cases of conflict of interest concerning carriers and attorneys involve the carrier's claim that an attorney for plaintiff must be disqualified because of prior representation of the insurer on a related matter.

In Gray v. Commercial Union Ins. Co., 191 N.J. Super. 590, 468 A.2d 721 (1983), Gray, the regional claims manager for Commercial Union, sued the company for breach of his contract of employment. Gray's attorney was Robert Colquhoun, who had formerly been defense counsel for Commercial Union in personal injury actions, but who at the time had only one active case for the company. Commercial Union moved to disqualify Colquhoun, contending that his prior representation of Commercial Union had given him access to company confidential information, including its claims and litigation philosophy and methods and procedures for handling claims. Colquhoun argued that he did not actually receive such information and that the information was in any case not pertinent to an employment claim. Colquhoun also argued that he did not have a "true" attorney-client relationship with Commercial Union because he represented insureds and not the carrier itself. The Court held that Colquhoun's disqualification was required because (1) Colquhoun did have an attorney-client relationship with Commercial Union; (2) there was a substantial relationship between the matters involved in Colquhoun's current representation of Gray and his prior representation of Commercial Union because the litigation represented a "climate for disclosure of relevant confidential information," 468 A.2d at 725; and (3) Colquhoun had had access to the confidences of Commercial Union, whether or not they were actually given. But see Buysse v. Baumann-Furrie & Co., 428 N.W.2d 419 (Minn. App. 1988) (carrier's motion to

disqualify judgment creditor's counsel in garnishment action because of knowledge of carrier's workings from representation of carrier's insureds denied where counsel associated other firm on insurance issues).

V. Conflicts Involving Multiple Insureds.

When more than one insured is a defendant, the carrier faces issues such as whether the insureds can be defended jointly and whether special treatment regarding file handling is required.

A. Separate defense requirement.

A distinction exists between cases in which two insureds have divergent interests and those in which insureds' interests truly conflict. In Spindle v. Chubb/Pacific Indemnity Group, 89 Cal. App. 3d 706, 152 Cal. Rptr. 776 (1979), the carrier insured the plaintiff, a neurosurgeon, and an orthopedic surgeon under malpractice policies providing different limits of coverage. The doctors were both sued in a single action alleging different errors by each and the carrier retained a single law firm to represent both. The plaintiff sued Chubb for fraud and bad faith for representing that one firm could adequately represent both doctors' interests. Upholding Chubb's motion to dismiss, the court stated that a divergence in interest requires only that the insurer disclose to each insured the information necessary to enable him to make "intelligent, informed decisions regarding the subject matter of their joint representation." 152 Cal. Rptr. at 780. A true conflict exists only if the insureds' "common lawyer's representation of the one is rendered less effective by reasons of his representation of the other." Id.

Such true conflicts would exist in any situation involving apportionment of negligence to two or more insureds, owner-driver situations in which permissive use is disputed, and employer-employee cases in which scope of authority is at issue.

B. Separation of files.

Little case law exists on the duty of an insurer to protect insureds with conflicting interests other than through separate counsel. Prudence dictates, however, that in claims involving a liability assessment as to separate insureds, different

adjusters should prepare separate investigations with respect to each insured and maintain separation of the respective files through conclusion of the claim.

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RELATIONS WITH OUTSIDE COUNSEL

Thomas C. Farr, General Counsel
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I. THE CHALLENGE FACED BY INSURERS

A. Insurers are becoming more cost conscious

1. Competitive Pressures

2. Regulatory Pressures

3. Ordinary Profit Motive

B. Legal fees are an area for cost control

1. Use of in-house counsel

a. Ethics Committee Opinions 87-16 and 88-14

2. Loss Adjustment (Claims) Expenses

C. Issues to examine in this presentation are locating and supervising counsel, and billing practices

D. Not taught in law school, and probably not taught well by senior partners, but absolutely essential

E. Lawyers are also pressured by competition, and in the anomalous position of being both a profession and a business

F. Corporate policy makes a real difference, e.g., try for early settlements or litigate each case

II. LOCATING OUTSIDE COUNSEL

A. Ethical Prohibitions - Canon 2

A Lawyer Should Assist The Legal Profession in Fulfilling Its Duty To Make Legal Counsel Available

B. Restrictions on Advertising

1. EC 2-10, 2-11, 2-12, 2-13, 2-14, 2-15, 2-16
   DR 2-101, 2-102, 2-105

C. Marketing vs. Soliciting

1. DR 2-103, 2-104

D. Differences between claims and nonclaims work

1. Claims - large volume of similar, routine cases; losses limited to policy limits

2. Nonclaims

   a. Minor cases, such as subrogation

   b. Major outside work, such as securities, contract litigation, employment law, tax, ERISA - losses may be significant; each case can set poor precedent.

E. Sources used for selection

1. Martindale-Hubbell or similar sources

2. Referrals from existing outside counsel

3. Referrals from other insurers

4. Brochures, marketing letters, announcements

5. Personal contact

III. SUPERVISION OF OUTSIDE COUNSEL

A. Once counsel is retained, how does the company supervise the work

B. Conflict - who is the client

1. Nonclaims work - the insurer is the client

2. Claims - the insured is the client

a. Duties of insurer

i. Numerous judicial decisions reflect the obligation of the insurer with respect to the defense of an insured:

Priester v. Vigilant Ins. Co., 268 F. Supp. 156 (S.D. Iowa 1967)(insurer must defend all insureds and hire separate counsel in event of conflict); First Newton Nat. Bank v. General Casualty Co., 426 N.W.2d 618 (Iowa 1988)(insurer must defend both covered and uncovered causes of action); McAndrews v. Farm Bureau Mutual Ins. Co., 349 N.W.2d 117 (Iowa 1984)(duty to defend determined by pleadings and all other admissible and relevant facts in record); Kooyman v. Farm Bureau Mutual Ins. Co., 315 N.W.2d 30 (Iowa 1982)(insurer's power to control defense imposes concomitant obligation to give proper consideration to the interests of the insured); Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443 (Iowa 1970)(facts extraneous to the pleadings known to the insurer impose duty to defend).

b. Duties of counsel

i. Code Of Professional Responsibility - Canon 5:

A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client

ii. EC 5-23 and DR 5-107

iii. Ethics Committee Opinion 88-14

C. Written Outside Counsel Policies

1. How many have them?

2. Areas to cover

a. analysis and reporting

b. discovery

c. experts

d. expenses

e. copies to insurer

D. Suggestions

1. Make a trip to the home or regional office

2. Invite claims or other personnel to your office

3. Invite claims or other personnel to sit in on depositions or at trial

4. Offer to perform minor services at no charge

E. Problems To Avoid

1. Lack of communication

2. Overworking cases

3. Underworking cases

IV. BILLING PRACTICES

A. Now you have been retained and supervised, how do you bill for your services?

B. Hourly rates and expenses - for claims, probably negotiated. For nonclaims, probably not.

C. Explain billing practices which include standardized charges, for example, .2 for any phone call.

D. Interim nature of bills - monthly, quarterly, semi-annual, annual, conclusion. Ask about any special needs, such as getting bills paid right before the end of the year.

E. The bill itself - adequate descriptions

1. "staff conference," "legal research," "call John Doe,"

2. Work requested or performed but not delivered

3. Inconsistent entries

V. CONCLUSION

A. Strive to achieve and maintain the best possible level of professional competence and reputation.

B. Try and evaluate your legal services from the point of view of the consumer, both your client and the insurer.

C. Law is a "service" oriented activity, but companies need to see results, both in expenses and performance.

D. Feel free to discuss fees and expenses in advance and during the course of handling the case.

E. Do not hesitate to advise of conflicts of interest that arise during the case, or to turn down referrals that are not within your area of competence.

APPENDIX

1. Iowa State Bar Association Ethics Committee Opinion 87-16

2. Iowa State Bar Association Ethics Committee Opinion 88-14

3. Code of Professional Responsibility Canon 2, Ethical Considerations and Disciplinary Rules

4. Code of Professional Responsibility Canon 5, Ethical Considerations and Disciplinary Rules

5. Outside Counsel Policy

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87-16 INSURANCE - IN-HOUSE COUNSEL - REPRESENTING INSURED

You have requested an opinion as to whether it is proper for an insurance company to instruct its employee-lawyer to provide the defense to its insured as required under the terms of its liability policy with that insured who has been involved in an accident out of which litigation against him has ensued. You also have inquired whether or not such representation constitutes unauthorized practice of law by the insurance corporation. These questions will be handled separately.

Concerning defense of insured by employee-lawyer of the carrier:

> EC 5-1 provides "the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

The question here concerned involves not only the foregoing EC but the following: 5-2, 5-13, 5-18, 5-21, 5-23, 5-24 and DR 5-107(B) and 5-105(B), all contained in the Iowa Code of Professional Responsibility for Lawyers.

In August 1964 in ABA Informal Opinion C-476, under the old canons and before the Model Code was adopted by the State of Iowa, the ABA Committee on Ethics and Professional Responsibility considered the question whether it would be unethical for an attorney, full time, salaried employee of a corporation to represent fellow employees in their individual legal matters and the opinion began with the following statement:

> "...In answer to your inquiry we assume that these individual legal matters do not in any way involve the corporation or the employee's relationship to it. In such a case a conflict of interest would obviously exist, and Canon 6 would prohibit such dual representation...(emphasis added)."

In ABA Informal Opinion 1402 (November 3, 1977) an insurance company which insured architects and engineers for professional liability had made arrangements for in-house counsel to defend its insureds and in an elaborate billing scheme sought to recover part of its fees for their services from the insured. The question raised to the Committee was as to the appropriateness of the billing scheme. The Committee did not respond directly to that question, considering it to be based on the contract which existed between the parties, but went on as follows:

> "...We point out, however, that a lawyer employed by an insurance company to represent and defend an insured, in accordance with the company's contractual obligation, is bound by the same rules of ethics and professional responsibility that would apply if the lawyer were employed directly by the insured.
>
> These include a duty not to undertake or continue a representation if the exercise of the lawyer's professional judgment on behalf of the client is or reasonably may be adversely affected by his other interests or representations, or if it would be likely to involve him in representing differing, conflicting, or inconsistent interests which would adversely affect either his judgment or his loyalty to the client, unless the client consents to the representation after full disclosure. Citing DR 5-101(A) and 5-105...A lawyer employed by an insurance company to represent both the insured and the company may encounter difficult and conflicting circumstances in meeting these obligations fully, especially when the lawyer is a full time, salaried employee of the company. The essential point of ethics is that the lawyer so employed shall represent the insured as a client with undivided fidelity ... therefore, it is important that the lawyer fully disclose to the client the lawyer's relationship to the insurer, and remain sensitive to any divergence of interests between the insured and the insurer, and at all times act in such fashion that the insured has no basis to believe his interests are not fully and fairly represented. See Informal Opinion 1310 (1976)."

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This committee believes the caveat contained in the above opinion is almost impossible to follow. At such time as conflict might appear after litigation might have been undertaken, even after full disclosure, counsel would have to disassociate himself either from the insured or the insurance company. This would not be desirable. "Full disclosure" in the opinion of this committee would not solve the problem of conflict or potential conflict which this committee believes should be avoided.

A lawyer cannot serve two masters. Particularly when the interests of those two masters are or may become divergent. In the question at hand, in-house counsel cannot be expected to separate allegiance to his employer from his allegiance to the insured if he is representing both, and he cannot give allegiance to both if their interests diverge.

On the basis of the foregoing and the review of the above cited provisions of the Iowa Code of Professional Responsibility for Lawyers the committee is of the opinion that it is improper for such an employee-lawyer to serve both the insurance company as in-house-lawyer-employee and also to serve as defense lawyer for the insurance company's insured.

There having been no previous published opinion or rule concerning this question the committee does not believe disciplinary action for past assignment of employed insurance counsel in such circumstances is required by the Committee at this time.

Concerning the question of unauthorized practice of law:

Whether or not the insurance company is engaged in unauthorized practice of the law is a question for the Committee on Unauthorized Practice of the Law or for the Courts, but the ABA Committee on Ethics and Professional Responsibility did peripherally touch on the question in Informal Opinion 973 (August 26, 1967). In considering whether or not there was unauthorized practice of the law by the corporation having its employed counsel assigned also to represent subsidiary corporations, the Committee said:

> "...We believe it is settled that, generally speaking, a corporation cannot lawfully supply legal services to any individual or corporate member of the public, and that the presence or absence of monetary compensation or other financial or other profit of advantage is not necessarily determinative of the existence or non-existence of unauthorized practice of law on the part of a corporate or other lay agency person."

Though this committee concurs with the foregoing statement it does not issue an opinion on the question of whether or not such representation constitutes unauthorized practice of the law by the insurance corporation.

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88-14 January 12, 1989

CONFLICT: IN-HOUSE INSURANCE COUNSEL REPRESENTING INSUREDS - MODIFICATION OF 87-16

You have requested the committee to reconsider its Formal Opinion 87-16, February 12, 1988. You were joined in this request by the _____ Association. You both have submitted briefs and arguments which have been considered by the committee.

Contrary to assertions contained in briefs and arguments, the committee understands and believes that in-house counsel are able to recognize and deal with actual conflict when it arises and the committee has made and makes no presumptions that in-house counsel will use knowledge of confidential client

information in a subsequent action brought by the insurer against the insured. These questions are not in issue.

The committee's primary concern is with the potential damage visited upon a client when faced with loss of counsel, down the road, in the process of representation when the parties actually are faced with acknowledged conflict. Particularly is this a concern when, in fact, it can so simply be avoided.

There is no question concerning the responsibility of counsel to represent the insured with undivided loyalty once such representation is assumed. See, for example, ABA/BNA 51:308:

> "A lawyer hired or employed by an insurance company to represent an insured must represent the insured as his client with undivided loyalty. See Philadelphia Bar Opinion 86-108 (2/9/87). See also ABA Formal Opinion 282 (May 27, 1950); R. Mallen & V. Levit, Legal Malpractice 263 (1977); Brodsky, Duty of Attorney Appointed by Liability Insurance Company, 14 Clev.-Mar. L. Rev. 375 (1965); Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136 (1954); Roos, The Obligation to Defend and Some Related Problems, 13 Hastings L.J. 206 (1961); Stern, Dilemmas for Insurance Counsel - Coping with Conflicts of Interest, 65 Mass. L. Rev. 127 (1980); Carpenter & Williamson, Open Forum - Conflict of Interest Problems in Insurance Practice, 37 Ins. Couns. J. 4997 (1970). See also Hawkins v. State Bar, 23 Cal3d 622, 591 P2d 524, 153 CalRptr 234 (1979); Wong v. Fong, 60 Hawaii 601, 593, P2d 386 (1979); Shelby Mutual Insurance Co. v. Kleman, 255 NW2d 231 (Minn 1977).
>
> "Problems arise when a course of action would be beneficial to the client-insured, but would be detrimental to the insurer that employs or pays the lawyer. E.G., Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 IllApp3d 467, 392 NE2d 1365 (1979), aff'd 81 Ill2d 201, 407 NE2d 47 (1980). Where a conflict arises between an insured and the insurer, the lawyer may not continue with the dual representation. See Lieberman v. Employers Insurance, 171 NJSuper, 39, 407 A2d 1256 (AppDiv 1979), modified and remanded, 84 NJ 325, 419 A2d 417 (1980)."

The committee has considered various examples of potential conflict which can arise for in-house counsel designated to represent insureds. When counsel is the in-house employee of the company and not an outside, independent lawyer, the appearance of impropriety, proscribed by Canon 9, is a serious potential problem.

To meet this problem and all other possible conflicts would require either a rewriting of the insurance company's policies or written specific waiver of all potential conflicts given to the insured at the time in-house counsel assumes such representation.

Your recognition of one potential conflict by guaranteeing to the insured that any recovery over policy limits "would be" (your language) assumed by the

insurer indicates recognition of one inherent, potential conflict. But there are others.

Predicated upon the foregoing and under the provisions of the Iowa Code of Professional Responsibility for Lawyers, the committee is of the opinion that its Formal Opinion 87-16, February 12, 1988 should be and it is modified by adding the following:

It is not improper for employed, in-house counsel of the insurer to represent the insured if:

Prior to commencement of such representation the insurer executes a written agreement with the insured:

1) Guaranteeing that insurer will raise no objection to coverage of insured, and,
2) The insurer will not invoke any defenses in insurer's behalf against the insured, and
3) The insurer will assume insured's full financial responsibility including "over limits" recovery if any, and,
4) The insurer will agree that its employed in-house counsel may prosecute the rights of the insured against all parties, if desired by insured and upon terms agreed to between counsel and insured, and,
5) The insurer will make available insured's files to the insured upon written demand.

Caveat: The committee is of the opinion that both this and Formal Opinion 87-16 are directed only to the question of whether it is ethical for in-house-counsel to represent the insureds of counsels' employer. The question of whether such employment results in the insurer-employer illegally being engaged in the practice of law is not addressed except for the pertinent-reference-language in Formal Opinion 87-16. The legality or propriety of the contemplated in-house-counsel representation of insureds should be determined either by the Committee on Unauthorized Practice of Law if it has jurisdiction, or by the courts, before such in-house-counsel representation is undertaken, because if it is illegal it also is unethical for counsel to participate.

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88-15 May 12, 1989

LAWYER: ALSO BANK OFFICER

You have requested an opinion as to whether it is proper for you as president of a bank, officing in the bank also to practice law from that office or from another office.

You have referred to Committee Formal Opinion 70-8, which hereby is confirmed.

You also have referred to American Bar Association committee Informal Opinion 987, which hereby is determined to be applicable in this matter and therefore adopted for these purposes.

EC 2–9. Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in reputable legal directories, telephone directories, or newspapers, should be formulated to convey only information that is necessary to make an appropriate selection.

Amended Feb. 17, 1978; May 6, 1980.

Selection of a Lawyer: Lawyer Advertising

EC 2–10. Competency may be a factor in the selection of a lawyer. However, competency cannot be determined from an advertisement. The cost of legal services may also be a factor in the selection of a lawyer. It might aid a layperson in the selection of a lawyer if the costs of legal services were available for comparison or could be considered in an atmosphere conducive to logic, reason, and reflection. This factual information can be made available through advertising. Care must be exercised to insure that there is a proper basis for the comparison of costs communicated in a manner that will truthfully inform, and not mislead, a prospective client as to the total costs. For example, to state an hourly charge and to characterize it as a "reasonable fee" is misleading because the total cost or fee can vary greatly depending upon the number of hours spent.

Amended May 6, 1980.

Library References

Attorney and Client ⇐23, 32(2), (9).
C.J.S. Attorney and Client §§ 44, 47 et seq., 137.

WESTLAW Electronic Research

See WESTLAW guide following the Preface of this volume.

EC 2–11. The lack of sophistication on the part of many members of the public concerning legal services, and the importance of the interests affected by the choice of a lawyer require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits to the public of lawyer advertising depend upon its reliability and accuracy. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographi-

cal information, does not provide that public benefit. Fee advertising involves special concerns. With rare exception, lawyers render unique and varied services for each client, even as to so-called "routine" matters. When consulted about any matter, whether or not "routine", a lawyer should make relevant inquiries which may uncover the need for different services than those which the client originally sought. These factors make it difficult to set a fixed fee or a range of fees for a specific legal service in advance of rendering the service and provide temptation to depart from an advertised fee or to fail to render a needed service. Thus, a lawyer who advertises a fee for a service should exercise particular caution to avoid misleading prospective clients and should include appropriate disclaimers. He should also scrupulously avoid the use of fee advertising as an indirect means of attracting clients for whom he hopes to perform other, more lucrative, legal services. If any doubt exists as to the propriety of a proposed advertisement by a lawyer he should seek the opinion of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, acting as a commission of the Supreme Court pursuant to court rule 118, and, if he disagrees with such opinion, he may follow the provisions of its Rules of Procedure regarding proposed changes in rules concerning lawyer advertising.

Amended Feb. 17, 1978; May 6, 1980.

United States Supreme Court

Advertising by lawyers, see Bates v. State Bar of Arizona, 1977, 97 S.Ct. 2691, 433 U.S. 350, 53 L.Ed.2d 810.

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EC 2-12. A lawyer should ensure that the information contained in any advertising which the lawyer publishes, or causes to be published is relevant, is dignified, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to make an informed choice of a lawyer to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Appeal should not be made to the prospective client's emotions, prejudices, or personal likes or dislikes. Care should be exercised to ensure that false hopes of success or undue expectations are not communicated. The desirability of affording the public access to information relevant to legal rights has resulted in some relaxation of the former restrictions against advertising by lawyers. Historically, those restrictions were imposed to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine public confidence in the legal system, and all lawyers should remain vigilant to prevent such results. Only unambiguous information relevant to a layperson's decision regarding his legal rights or his selection of counsel, provided in ways that comport with the dignity of the profession and do not demean the administration of justice, is appropriate in public communications.

Amended Feb. 17, 1978; May 6, 1980.

EC 2–13. The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership or the name of a professional corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

Amended Feb. 17, 1978; May 6, 1980.

EC 2–14. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

Amended May 6, 1980.

EC 2–15. In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

Amended May 6, 1980.

EC 2–16. In some instances a lawyer limits his practice to, or practices primarily in, certain fields of law. In the absence of controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability other than in the fields of trademark and patent law where a holding out as a specialist historically has been permitted. However, a lawyer who complies with DR 2–105 may hold himself out publicly as practicing in, or limiting his practice to, certain fields of law.

Amended Feb. 17, 1978; May 6, 1980.

DR 2–101. Publicity

(A) A lawyer shall not, on the lawyer's own behalf, or that of a partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim that is not verifiable. In all communications under DR 2–101 and DR 2–102 the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable", "moderate", and "very reasonable", but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, "cut-rate", "lowest", "give-away", "below-cost", and "special". All such communications shall contain the following disclosure: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."

(B) Subject to the limitations contained in these rules, lawyer advertising may be communicated to the public in newspapers, periodicals, trade journals, "shoppers", and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, or in the classified advertising section of the telephone directory distributed in the geographic area in which the lawyer maintains offices or in which a significant part of

the lawyer's clientele resides, or in reputable legal directories generally available in such area. The same information may be communicated by direct mail, in which case the direct mail communication and the envelope containing the same shall, in addition to other disclosures that may be required hereunder, carry the following disclosure in red ink in type approximately two times the size used in the communication sent: "ADVERTISEMENT ONLY". A copy of all direct mail communications shall be filed with the administrator, or the administrator's designee, of the committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, contemporaneously with the mailing of the communications to the general public. The same information, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. The following information shall be presumed to be informational and not solely promotional:

(1) Name, including name of law firm, names of professional associates, addresses, telephone numbers, and the designation "lawyer", "attorney", "law firm", or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments in bar associations;

(11) Memberships and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

(13) Memberships in scientific, technical, and professional associations and societies;

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Subject to DR 2-103, prepaid or group legal service programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours; and

(20) Race, sex, religion, or ethnic background.

Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

All such information shall be presented in a dignified manner.

(C) The following fee information may be communicated to the public in the manner permitted by DR 2-101(B):

(1) Fee for an initial consultation;

(2) Availability upon request of either a written schedule of fees, or an estimate of the fee to be charged for specific services, or both;

(3) Contingent fee rates, subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs and advises the public that in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence; and

(4) Fixed fees or range of fees for specific legal services or hourly fee rates provided that, in print size at least equivalent to the largest print used in setting forth the fee information, the statement discloses:

(a) That the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services; and

(b) If the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

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All such information shall be presented in a dignified manner.

(D) For purposes of this rule, the term "specific legal services" shall be limited to the following services:

(1) Abstract examinations and title opinions not including services in clearing title;

(2) Uncontested dissolutions of marriage involving no disagreement concerning custody of children, alimony, child support or property settlement [see DR 5-105(A)];

(3) Wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries;

(4) Income tax returns for wage earners;

(5) Uncontested personal bankruptcies;

(6) Changes of name;

(7) Simple residential deeds;

(8) Residential purchase and sale agreements;

(9) Residential leases;

(10) Residential mortgages and notes;
(11) Powers of attorney;
(12) Bills of sale.

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to the Code, expanding or constricting the above list of "specific legal services". In considering such amendments the committee shall apply the following criteria which have guided the supreme court in determining which services should be included in the above list:

(1) The description of the service would not be misunderstood by the average layperson or be misleading or deceptive;

(2) Substantially all of the service normally can be performed in the lawyer's office with the aid of standardized forms and office procedures;

(3) The service does not normally involve a substantial amount of legal research, drafting of unique documents, investigation, court appearances or negotiation with other parties or their attorneys; and

(4) Competent performance of the service normally does not depend upon ascertainment and consideration of more than a few varying factual circumstances.

The committee shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said committee may further issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule.

(E) Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall into the described services. In that event or if a range of fees is stated, he shall render the service for the estimated fee given the client in advance of rendering the service.

(F) A lawyer shall not, on behalf of himself, his partners, associates or any other lawyer affiliated with him or his firm, use the public communication of fee information concerning specific legal services as an indirect means of attracting clients for whom he performs other legal services not related to the specific legal services publicized; nor may the term "clinic" or any similar term be used in any communication to the public unless the practice of the lawyer or his firm is limited to routine matters for which costs of rendering the service can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures.

Whether or not it contains fee information, a lawyer shall preserve in his office a copy of each advertisement placed in a newspaper, the classified section of the telephone directory, or periodical and a tape of the radio or television commercial or recording for at least three years and a record of the date or dates and name of the publication in which it appeared or the name of the station upon which it was aired.

(G) A lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue;

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients;

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer;

(4) In and on legal documents prepared by him;

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-101(B), directed to a member or beneficiary of such organization.

(I) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item nor voluntarily give any information to such representatives which, if published in a news item, would be in violation of DR 2-101(A).

(J) In the event that the communication seeks to advise the institution of litigation, said communication also must disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.

Amended Feb. 28, 1977; Feb 17, 1978; amended and effective July 24, 1979; amended May 6, 1980; amended and effective Oct. 10, 1984; Nov. 8, 1985.

DR 2–102. Professional Notices, Letterheads, Offices and Signs

(A) A lawyer or law firm shall not use professional cards, signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2–105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2–105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2–105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2–105. A letterhead of a law firm may also give the names of members and associates, and names and dates related to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(5) An alphabetical listing of the office of a lawyer or law firm in the alphabetical section and classified section of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which the lawyer's or the firm's office is located may be in the usual bold face type permitted by the publisher. A law firm may have a listing in the firm name which also lists the names and individual telephone numbers, if any, of its members and associates. With respect to listings in compliance with DR 2–105, one disclaimer per page, prominently displayed, shall be adequate. Nothing in this subparagraph (5) prohibits advertising permitted by DR 2–101.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer or a professional corporation shall not hold himself or itself out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners.

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(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible public communications and listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; provided, however, a firm name may not be used in Iowa unless all those named are or, if deceased, were members of the bar in Iowa.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) The text of a lawyer's letterhead, office sign, professional card or other authorized notice or listing shall not violate the provisions of DR 2-101(A).

Amended Feb. 17, 1978; amended and effective Aug. 12, 1980; Sept. 4, 1981; March 12, 1984.

DR 2–103. Recommendation of Professional Employment

(A) A lawyer shall not, except as authorized in DR 2–101, recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2–103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2–101, and except that:

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by the bar association and may pay its fees incident thereto.

(2) He may co-operate with the legal service activities of any of the offices or organizations enumerated in DR 2–103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm, except as permitted in DR 2–101. However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or co-operating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment on behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or its beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at his own expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved.

(f) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that the representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(g) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(h) Such organization has filed with the client security and attorney disciplinary commission at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

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(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this disciplinary rule.

Amended Feb. 28, 1977; Feb. 17, 1978; amended and effective Sept. 4, 1981.

Library References

Attorney and Client ⇐32(9).
C.J.S. Attorney and Client § 47 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Preface of this volume.

DR 2–104. Suggestion of Need of Legal Services

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2–103(D)(1) through (4), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2–103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Amended Feb 28, 1977; Feb. 17, 1978.

Library References

Attorney and Client ⇐32(9).
C.J.S. Attorney and Client § 47 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Preface of this volume.

DR 2–105. Description and Limitation of Practice

(A) A lawyer may hold himself or herself out publicly as practicing in or limiting his or her practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on his professional card, letterhead, office sign, professional notice or announcement, and telephone directory listings, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories, as otherwise allowed by DR 2-101(B).

In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Matters", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on his professional card, letterhead, office sign, professional notice or announcement and telephone directory listing, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents, Trademarks or Copyright Matters" or combination thereof.

(2) An individual lawyer who, in fact, limits practice to certain fields of law or who is limiting practice primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or description of practice by listing, in the manner provided by DR 2-105(A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by DR 2-102(A) and DR 2-101(B):

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Administrative Agency Matters
Admiralty
Antitrust and Trade Regulation
Appellate Practice
Banking and Creditor Law
Commercial and Retail Collections
Constitutional Law
Consumer Claims and Protection
Corporate Finance and Securities Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Matters
Domestic Relations and Family Law
Environmental Law
Health Law
Immigration and Customs
Insurance
International and Foreign Law
International Trade and Investment

Job Discrimination and Civil Rights
Labor Law
Legislative Matters
Military Law
Municipal and Local Government Law and Finance
Pension, Profit Sharing and Employee Benefit Plans
Personal Injury and Property Damage Claims
Public Utility Matters
Real Estate Law
Social Security Disability
Taxation Law
Trademarks and Copyright Matters
Transportation Law
Trial Practice
Wills, Estate Planning and Probate Matters
Workers Compensation

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to the Code expanding or restricting the permitted list of fields of law practice.

(3) Description or indication of limitation of practice permitted by DR 2–105(A)(2) shall only be in the following manner:

(a) If the lawyer accepts only legal matters in that lawyer's listed fields of law practice, such listing of fields of law practice shall be preceded by the words "Practice limited to . . ."; or

(b) If the lawyer is practicing primarily in that lawyer's listed fields of law practice, but also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "Practicing primarily in . . .";

and shall, in the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, newspapers, periodicals, or legal directories, contain within such communication, or prominently have displayed on the same page of such communication, the disclosure required under DR 2–101(A) and also a "Notice to the Public" in the following form:

"A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, a lawyer shall not permit that lawyer's name to be listed under a heading or classification other than "Attorneys" or "Lawyers".

(4) Prior to communication of a description or indication of limitation of practice permitted by DR 2-105(A)(2), a lawyer shall report his compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or 20 percent of his time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and

(b) The lawyer must have completed at least ten hours of accredited Continuing Legal Education courses of study in each separate indicated field of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

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(B) A lawyer may communicate the name of state and federal courts in which he or she is currently permitted to practice on his professional card, letterhead, office sign, professional notice or announcement, and telephone directory listings, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories, as otherwise allowed by DR 2-101(B).

If, due to hardship or extenuating circumstances, a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by DR 2-105(A)(4)(b), the lawyer may apply to the Commission on Continuing Legal Education for an extension of time in which to complete the hours. No extension of time shall be granted unless written application therefor shall be made on forms prescribed by the commission. Extensions of time within which to fulfill the minimum educational requirements may, in individual cases involving hardship or extenuating circumstances, be granted by the commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

Amended Feb. 17, 1978; Oct. 11, 1978; March 5, 1979; May 29, 1979; Dec. 31, 1979; amended and effective Oct. 10, 1984; amended Nov. 8, 1985; amended July 28, 1986, effective Sept. 2, 1986; July 27, 1987, effective Sept. 1, 1987; Sept. 28, 1987, effective Nov. 2, 1987.

Desires of Third Persons

EC 5–21. The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5–22. Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5–23. A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC 5–24. To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a nonlawyer. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written

agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

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DR 5-107. Avoiding Influence by Others Than the Client

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer thereof; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

PREFERRED RISK GROUP

LEGAL DEPARTMENT POLICY STATEMENT

EMPLOYMENT OF OUTSIDE COUNSEL

The Preferred Risk Group and its member companies strive to obtain legal services of the highest quality and, at the same time, maintain control over legal fees and expenses. In order to better accomplish this, the Preferred Risk Legal Department has adopted the following policies and billing requirements which shall govern Preferred Risk's relationships with outside counsel.

I. Policies and Procedures

A. When contacting outside counsel, the Legal Department attorney will define the scope of the assignment as specifically and narrowly as possible. The referring attorney will be an active participant in discovery and case/project development. All matters between Preferred Risk and outside counsel are to be handled through the referring Legal Department attorney. Outside counsel shall not contact Preferred Risk's employees without the Legal Department attorney's prior approval.

B. Facts relating to the litigation should be gathered as early as possible so that a preliminary opinion on liability can be formed. In that regard, documents, statements, etc. should be obtained. In the event that Preferred Risk's Claims Department can be utilized for any such investigation, all efforts will be made to make that assignment. Any other investigative service must be approved by the Legal Department attorney.

C. Prior to undertaking any major activity including the initiation of any depositions, outside counsel will be expected to consult with and obtain the approval of the Legal Department attorney responsible for the matter. Furthermore, independent consultants, expert witnesses, etc., shall not be engaged without prior approval of the referring attorney.

D. With respect to each case/subject for which outside counsel is engaged, the Legal Department will require that a quarterly status report be submitted to the referring Legal Department attorney which includes estimates of anticipated activity and expenditures for the next quarter.

E. It is expected that the specific outside attorney engaged for a particular matter will perform the required legal services. However, Preferred Risk encourages outside counsel to rely upon junior attorneys and/or paralegals when appropriate and cost effective. Notwithstanding the above, outside counsel will be expected to help control fees by exercising discretion regarding the necessity of participation by more than one attorney in meetings, depositions, hearings, telephone conversations, etc.

F. Outside counsel will be expected to forward to the Legal Department attorney copies of all memoranda of fact or law, correspondence, pleadings, and other work products pertaining to the subject for which outside counsel was engaged.

G. There may be times when it is appropriate for Legal Department attorneys to enter an appearance as counsel of record in the litigation. This will be rare, but if it occurs outside counsel will assist in the motion for admission for the case. Outside counsel will remain as lead counsel and first chair at trial in any such case. There may also be occasions when the Legal Department may assist in research and drafting, and outside counsel are encouraged to consider the assistance to be rendered by the Legal Department.

II. Billing Requirements

A. Fee Statements - All outside counsel will be required to submit quarterly itemized fee statements to the Legal Department attorney. Said statements are to include the following information for each matter referred to the outside law firm:

1. Name of each attorney/paralegal performing service.

2. Brief description of each service performed, including an hourly itemization of the time each attorney spends on each service.

3. A summary of legal fees that states the classification, total hours, and hourly rate for each attorney and/or paralegal.

4. An itemized listing of disbursements and billable operating expense.

5. Total amount due.

It is understood that a fee statement will not be issued in the event that a firm incurs no billable time or expenses in a quarter. Such an occurrence will be reflected in the quarterly status report.

B. Legal Fees - Charges for legal service will be paid on the basis of an attorney's and or paralegal's hourly rate agreed to by the Legal Department attorney. Any rate change must be agreed to in advance by the referring Legal Department attorney.

C. Disbursements/Billable Operating Expenses - The Quarterly Fee Statement must include an itemized accounting of disbursements and billable operating expenses that lists the date, a summary description and an amount for each expense.

Major disbursements such as independent consultant and expert witness fees must be approved in advance by the Legal Department attorney. Reimbursement for operating costs such as photocopying and computerized research shall be on an actual cost basis. Unless previously agreed upon, Preferred Risk will not reimburse outside counsel for word processing, staff overtime, special publications or similar operating expenses that are considered as overhead expenses and, therefore, included in the attorney's hourly charge.

Disbursements over $250.00 may be sent to the Legal Department for direct payment. Disbursements under $250.00 should be paid by the outside counsel and billed as part of the quarterly statements, unless disbursements accumulate to more than $1,000.00, in which case counsel may send a separate disbursement statement.

D. Travel Expenses - With regard to reimbursable travel expenses, the Legal Department attorney must approve all out-of-town travel not required for court appearances or depositions noticed by other parties. Outside counsel shall be required to itemize travel expenses on the fee statement. Such expenses must be supported with copies of airline tickets or hotel bills. Expenses for air fare, ground transportation, hotel accomodations, meals and miscellaneous costs should be listed. Unless otherwise agreed upon in advance, Preferred Risk will reimburse only for coach or economy-class air fare.

Preferred Risk will also compensate outside counsel for travel time outside of the normal working hours

(7 a.m. - 7 p.m.) but it is expected that such time should be utilized to the benefit of Preferred Risk. In the event that travel time is devoted to work for more than one client, Preferred Risk expects to be billed proportionately.

Any variation in these policies and requirements must receive the prior written approval of Preferred Risk.

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IOWA DEFENSE COUNSEL ASSOCIATION

October 19, 1990

THE LABYRINTH OF CONFLICTS BETWEEN PRIMARY AND EXCESS INSURERS*

Eugene J. Connor

1. THE PRIMARY - EXCESS (UMBRELLA) RELATIONSHIP.

A. Absence of Privity of Contract and the ORIGIN of a "legal" duty by the primary to an excess or umbrella carrier. American Fidelity and Cas. Co. v. All American Bus Lines 190 F.2d 234 (10th Cir. 1951).

B. Is there a DIRECT DUTY of good faith (by operation of law) by a primary to an excess carrier? Recognized in Transit Casualty v. Spink Corp. 156 Cal. Rptr. 360 (1979); Hartford A. & I. Co. v. Michigan Mutual Ins. Co. 463 N.E. 2d 608, 61 N.Y. 2d 569 (1984); U.S. Fire Ins. Co. and U.S.F.G. v. Nationwide Mutual Ins. Co. et al. 735 F. Supp. 1320 (No. Car. April 3, 1990); American Centennial Ins. Co. v. American Home Assurance Co. 729 F. Supp. 1228 (N.D. Illinois 1990)

C. The Excess insurer does not have a legal duty to monitor the primary carrier's acts but can waive its "rights" by affirmative conduct in assuming defense of the action. Nationwide supra; Continental Cas. Co. v. Royal Ins. Co. (219 Cal. App. 3d 111, April 2, 1990).

1. Participation by excess carrier in the defense may preclude recovery by excess v. primary. Commercial Union Ins. Co. v. Mission Ins. Co. 835 F.2d 587 (5 Cir. 1988).

2. Approval of primary's acts by the insured precludes the insured or excess carrier from recovery. Puritan Ins. Co. v. Canadian Universal Ins. Co. 775 F.2d 76 (3 Cir. 1985).

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* This outline does not cover the "drop down" problems of insolvency of primary carriers.

D. The Implied Covenant of Good Faith and Fair Dealing creates a DUTY by the primary to the excess - umbrella carrier. See Royal, supra; Kaiser Foundation Hospitals v. North Star Reins. Corp. 153 Cal. Rptr. 678 (1979).

The good faith obligation of the primary to the excess carrier includes a duty to investigate and defend. Hartford A & I. Co. v. Continental Nat'l. Amer. Ins. 861 F.2d 1184 (9 Cir. 1988)

E. The doctrine of Equitable Subrogation and its role in primary - excess relationships.

1. What is it? The same duty owed by the primary to its insured?
   a). Valentine v. Aetna Ins. Co. 564 F.2d 292,298 (9th Cir. 1977).
   b). Peters v. Travelers Ins. Co. 375 F. Supp. 1347 (C.D. Cal. 1974); Ranger Ins. Co. v. Traveler's Ins. Co. 389 S.2d 272 (Fla. App. 1980).
   c) Great Southwest Fire Ins. Co. v. CNA Ins. and Transportation Ins. Co. 547 So.2d 1339 (La. 1989) holding no separate direct duty owed to an excess carrier.

2. A fiduciary duty by operation of law? Continental Cas. Co. v. Reserve Ins. Co. 238 N.W.2d 861 (Minn 1976)

3. An "excess" carrier owes the same duty to its insured. Kelley v. British Com'l Ins. Co. 221 Cal.App. 2d 554 (1963).

F. Criticism of the Equitable Subrogation Doctrine.

1. Unjust enrichment by excess carrier?

2. Application of bad faith law may create inequities to an excess carrier's benefit in assuming the "sole rights" of an insured? Fireman's Fund Ins. Co. v. Continental Ins. Co. 519 A.2d 202 (MD. 1987). Puritan Ins. Co. v. Canadian Universal Ins. Co., Inc. 775 F.2d 76 (3 Cir. 1985).

3. In most jurisdictions the equitable subrogation doctrine is the basis for recovery by the excess against the primary. Continental Cas. Co. v. Reserve Insurance Co. 238 N.W.2d 862 (Minn 1976) was a landmark decision.

But see Continental Ins. Co. v. Royal Ins. Co., supra. An excess carrier has no duty to monitor a primary carrier's actions. Passive behavior by an excess carrier is rewarded?

E. The only defenses may be the defenses that could have been raised by the insured. Certain Underwriters at Lloyds v. General Accident Ins. Co. 699 F. Supp. 732 (S.D. Indiana 1988).

IV. HOW TO AVOID LIABILITY IN THE EXCESS PRIMARY RELATIONSHIP AVOIDING CONFLICT AT THE INCEPTION.

Continental Cas. Co. v. U.S.F.G. 516 F. Supp 384 (ND Cal 1981); Wooster v. Farmer's Ins et al. 90 D.A.R. 8364 Cal App. Div. Two, July 26, 1990.

A. Verify on a continuing basis that the primary has fulfilled all of its obligations owed to the insured, including "good faith."

V. EXHAUSTION OF THE POLICY LIMITS AND THE DUTY TO DEFEND

A. Commercial Union Ins. Co. v. Pittsburg Corning Corp. 789 F.2d 215 (3 Cir. Pennsylvania 1986); Hartford A. & I. Ins. Co. v. Continental et al. 861 F.2d 1184 (9 Cir. Calif 1988); Utah Power and light Co. v. Fed. Ins. Co. 711 F. Supp. 1544 (D. Utah 1989)

B. Does the primary have the duty to appeal and can an excess carrier recover its attorney fees incurred for the appeal? Yes, where good faith grounds existed. Aetna Ins. Co. v. Borrell-Bigby Electric Co. et al. 541 S.2d 139 (Fla. App. 1989).

VI. GENERALLY THE EXCESS CARRIER HAS NO DUTY TO CONTRIBUTE TO DEFENSE COSTS UNLESS PRIMARY CARRIER'S LIMITS HAVE BEEN COMPLETELY EXHAUSTED BY SETTLEMENT OR JUDGMENT.

Nordby v. Atlantic Mutual Ins. Co. 329 N.W.2d 820 (Minn. 1983); Molina v. U. S. Fire Ins. Co. 574 F.2d 1176 (4 Cir. W. Virg. 1978)

Exceptions: Celina Mut. Ins. Co. v. Citizens Ins. Co. 343 N.W.2d 547 (Mich 1984).

A. An excess carrier should not be held "directly or indirectly" liable for defense costs. Ford Motor Co. v. Northbrook Ins. Co. 838 F.2d 829 (6 Cir. 1988). However, see Bituminous Cas. Co. v. Iowa National Mutual Ins. Co. 477 N.E.2d 694 (Ill App. 1985).

B. Some states allow an "equitable allocation" of defense costs between primary and excess carriers of a particular risk. American Excess Ins. Co. v. MGM Grand Hotels 729 P.2d 1352 (Nevada 1986).

C. A "drop down" duty may exist where "mental or emotional distress is covered under an excess policy and the primary only covers "bodily injury". Continental Ins. Co. v Synalloy Corp. 667 F. Supp. 1523 (S.D. Ga. 1983 826 F.2d 1024 11 Cir. 1986).

D. Endorsements (in excess policy) may expand coverage of primary (e.g. definition of "personal injury". Interstate Fire & Cas. Co. v. Stuntman, Inc. 861 F.2d 203 (9 Cir. Cal 1988); First Newton Nat'l Bank v. General Cas. Co. 426 N.W.2d 618 (Iowa, 1988).

VII. A GENERAL RULE: EXCESS INSURERS OWE NO DUTY TO CONTRIBUTE TO A SETTLEMENT UNLESS PRIMARY POLICY LIMITS ARE EXHAUSTED.

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A. However a duty may exist if policy periods are different. Associated International Ins. Co. v. St. Paul Fire & Marine et al. 269 Cal. Rptr. 485 (California, May 23, 1990).

B. Aggregate limits (annual indemnity liability) or deductible features change the "limits" of the underlying primary and the duties of the excess carrier. U.S. Elevator Corp. v. Associated International Ins. Co. 263 Cal. Rptr. 760 (Cal. App. 1st Dist. 1990) Ambiguities in a primary policy could not be construed to trigger coverage of excess policy.

C. A general rule exception or a refinement?

To every rule there is an exception or, depending on your view, a mere refinement of the rule. California seems to be a proving ground of "creativity" in this and other coverage disputes. For many years, the rule in California was that an excess carrier had no duty to defend or indemnify (or "drop down") until the limits of the primary policy had been exhausted.

See, e.g., Oil Base, Inc. v. Transport Indemnity Co., 143 Cal.App.2d 453, 567 (1956); North River Insurance Co. v. American Home Assurance Co., 210 Cal.App.3d 108, 114-115 (1989); Continental Casualty Co. v. Royal Insurance Co., 219 Cal.App.3d 111, 118-119 (1990). That exhaustion could happen only through the payment of a settlement or judgment. Chubb/Pacific Indemnity Group v. Insurance Company of North America, 188 Cal.App.3d 691, 698 (1987).

This rule was simple to apply when the loss fell within only one policy term, such as an airplane accident. For example, in Olympic Insurance Co. v. Employers Surplus Lines Insurance Co., 126 Cal.App.3d 593, 598 (1981), the court rejected an attempt by a primary carrier to shift its defense and indemnity obligations to an excess carrier for numerous claims arising out of a single aviation accident. The court applied the usual rule and held that the excess carrier had no obligation to pay on any claim until all primary coverage had been exhausted.

The more troublesome question is what happens when a claim or claims arguably invoke several policy periods, as insureds typically contend in long-term exposure or continuous loss cases. For example, insureds strongly argue that soil subsidence claims, pollution claims, and asbestos claims "trigger" coverage over several years, or even decades. See, e.g., Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981). Excess carriers usually contend in such cases that, if the loss is spread over several policy terms, the insured must exhaust all primary coverage, whether that coverage is scheduled under the excess policy, or whether the primary coverage is in force during a different policy term. (The horizontal-vertical dichotomy).

The argument of the excess carriers in Associated International Insurance Co. v. St. Paul Fire & Marine Insurance Co., supra, was no different. What was different was that the court of appeal rejected the argument, perhaps the first appellate court to do so. The court held that Associated, an excess carrier, had a duty to indemnify its insured when coverage scheduled directly under its policy was exhausted. It could not wait until all other applicable

primary coverages were exhausted, whether scheduled under its policy or not. See, Associated, supra.

The Associated case arose out of a number of silicosis suits against a manufacturer of allegedly defective face masks and respiratory equipment. The years of coverage "triggered" by the claims fell between 1952 and 1983. Associated had issued a second-level excess policy effective between October, 1978 and October, 1979, which was over a first-level excess policy and primary policy. Those policies had been exhausted by the settlement of a construction accident case.

Given the exposure its insured faced, Associated filed a declaratory relief action requesting that the court find that it had no duty to pay or defend until "all underlying (primary) coverage over the full period of exposure and manifestation had been exhausted by payment of policy limits." See Associated at P. 487. The trial court agreed with Associated and granted summary judgment, but was reversed by the court of appeal.

The court of appeal focused on the definition of "ultimate net loss" in the Associated policy, which provided that ultimate net loss included "settlement of losses for which the insured is liable after making deductions for all recoveries, salvages, and other insurance..." [Emphasis added.] The court interpreted the words "other insurance" to include only "other insurance within the policy period for which Associated... agreed to provide coverage." Under the court of appeal's analysis, Associated had to "drop down" once coverage beneath it in that single policy year had been exhausted. It could not force primary carriers on the risk at any other time between 1962 and 1983 to exhaust their policies first. See Associated supra, at p.488.

It is a considerable understatement to say that the Associated result comes as a shock to many excess carriers. Many have relied in long-term exposure cases on the proposition that all primary coverage must be exhausted, whether that coverage falls within their policy term or not [Emphasis mine]. It is now possible that excess carriers on the second, third, or even fourth levels will have to exhaust their limits before a primary insurer in a different policy year need pay anything.

This result may not be so strange as it first appears. The Associated court is correct in concluding that most California cases (and other states) have not considered the "drop down" issue in the context of a loss which encompassed several policy terms.

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Earlier cases, with one exception, involved a loss that took place at a discreet and easily identified time. For example, in Oil Base, Inc. v. Transport Indemnity Co., supra, the loss was an automobile accident that took place on a certain day. In Olympic Insurance v. Employers Surplus Lines Insurance, supra, the loss involved was an aviation accident also on a particular day. In Continental Casualty Co. v. Royal Insurance Co., supra, the loss was explosion and fire on a certain date.

The one exception to these discreet date of loss cases was not discussed in the Associated opinion. Yet, it was the one California case which involved dates of loss over more than one policy term. That case, North River Insurance Co. v. American Home Assurance, 210 Cal.App.3d 108 (1989), arose out of a malpractice action against lawyers for Howard Hughes and Summa Corporation. The acts of malpractice took place over several years, and over a number of policy periods. The primary carrier, American Home, although it issued a "claims made" policy in 1979, refused to pay anything towards settlement. North River, which had issued an excess policy in effect between 1973 and 1976, made a substantial settlement contribution and sued American Home for reimbursement. The appellate court ruled in favor of the excess carrier, finding that it had no duty to pay until all primary coverage had been exhausted, and particularly the policy issued by American Home. See, 210 Cal.App. 3d at 114-115. Certainly, the same principle could have been applied to the silicosis claims analyzed by the Associated court, but it was not.

There are other explanations for the Associated court's conclusion that an excess carriers must "drop down" merely when coverage scheduled under its policy is exhausted. The Associated court implied that losses arising out of silicosis are discrete and can be confined to one policy term. In short, although a worker may be exposed to irritants for a number of years in a silicosis claim, it is possible to determine with precision the extent of injury he suffered during each policy term. See, e.g., Dupre v. Mine Safety Appliance Co., 645 F.Supp. 708, 713-714 (E.D.La 1986).

Assuming the ability to apportion losses is present, the Associated court is correct. Even the idea of "continuous loss" suggested in California Union Ins. Co. v. Landmark Ins. Co., 145 Cal.App.3d 462 (1983), imposes joint and several coverage liability on a carrier only if covered injury is sustained by a plaintiff during its policy term. If, for example, bodily injuries to a plaintiff are so distinct that they can be segregated into distinct policy terms, there is no truly "continuous loss" and a carrier is responsible only for the loss which occurs during its policy term. See, e.g.,

Snapp v. State Farm Fire & Casualty Co., 206 Cal.App.2d 827 (1962). Further, if an injury-in-fact test coupled with the "loss-in-progress" rule dictates that a loss falls within a single policy year, as happens in property damage cases, the insured can invoke primary and excess coverage only for that year.

Even if an insured invokes a "continuous loss" theory and "triggers" coverage over many policy terms, he cannot "stack" policies for each claim. Rather, he must pick the year or "block" of coverage he wishes to use for a particular claim. Keene Corp. v. Insurance Co. of North America 667 F.2d at 1049-1050; In re Asbestos Insurance Coverage Cases, Phase IV Issues, pp. 69-70 (San Francisco Superior Court, August 28, 1988). By choosing a specific "block" of coverage for a specific claim, an insured can exhaust primary coverage, reach his layers of excess coverage, and yet leave primary policies for other policy years untouched. Keene, supra. This result is not that different from that reached in the Associated case. To refer to this perspective as a "labyrinth" is a gross understatement.

Ultimately, however, none of these explanations is satisfactory, because the Associated decision is deeply flawed. First, it assumes that in most long-term exposure cases discrete injuries can be apportioned among policy terms. In the context of bodily injury claims, however, it is the rare case in which such apportionment is possible. Rather, most "continuous loss" bodily injury claims involve cumulative injuries over many years which, rather than taking place at a discrete time, become progressively worse. Will other states make this distinction?

Second, excess carriers, because their coverage attaches at a higher level, charge much lower premiums. Primary carriers, conversely, charge much greater premiums because their risks are greater. North River Insurance Co. v. American Home Assurance Co., 210 Cal.App.3d at 113-115. To say that an excess carrier must "drop down" when other primary coverage is available for a particular claim is to give an insured far more than he paid for. (Another Court may ignore this fact). Primary carriers also have large claims staffs to deal with significant numbers of claims. Excess carriers, by contrast, have smaller claims staffs and may be unprepared to handle the large number of claims they will be compelled to cover if the Associated decision stands.

Third, many excess policies are written on an "ultimate net loss" basis, which means that defense costs are charged against policy limits. See, e.g., Mead Reinsurance Co. v. Granite State Insurance Co., 873 F.2d 1185, 1188-1189 (9th Cir. 1989). Primary policies, however, typically do not charge defense costs against policy limits. By forcing excess carriers to step into a claim much sooner, the Associated court may be limiting the protection available to insureds. Excess carriers, in defending a claim, will erode the amount of money available to pay settlements or judgments. In addition, it will be difficult at any one time to determine how much is left in an excess carrier's policy because the carrier may not have current information on how much it has spent in defense costs.

Fourth and finally, the Associated court ignored the "other insurance" and "limits of liability" clauses in the Associated excess policy and focused on the definition of "ultimate net loss." The "other insurance" and "limits of liability" clauses in excess policies, rather than their definitions of "ultimate net loss", make it clear that all primary coverage must be exhausted. These clauses state that the policy is excess over all of the insurance available to the insured, except for insurance written on a level above that of the excess policy. Other similar clauses may state that the policy is excess over all other insurance available to the insured, whether scheduled under the excess policy or not.

By forcing excess carriers to "drop down" much sooner than they anticipated, the Associated decision will mean an increase in premiums charged by excess carriers to reflect increased risks if followed in other states.

This is just an example of the multi-insurance complexity--a multi-dimensional problem. The problems are three fold:
(1) Primary - Excess dimensions,
(2) The protracted injuries dimensions, and
(3) The recent toxic claims dimensions.

VIII. WHAT IS AN "ACTUAL CONTROVERSY" OR "A REAL AND PRESENT DISPUTE" BEFORE THE COURT WILL EXERCISE JURISDICTION TO DETERMINE THE DUTY TO DEFEND

See Zurich Ins. Co. v. Raymark Industries Inc. 494 N.E.2d 630 (III App. 3d 1986) involving three excess insurers.

IX. EXHAUSTION OF LIMITS BY POLICY "PERIODS" BY "LAYER" OR BY YEAR.

Illinois Emcasco Ins. Co. v. Continental Cas. Co., 487 N.E.2d 110 (Ill. App 1985)

X. DOES AN EXCESS INSURER OWE A DUTY TO PAY PART OF POST JUDGMENT INTEREST INCURRED IN ORIGINAL ACTION?

No. Hartford Accident And Indemnity Co. v. Aetna Ins. Co. 547 N.E.2d 114 (Ill 1989).

XI. A REINSURER IS NOT OBLIGED TO PAY DEFENSE COSTS OF A PRIMARY OR EXCESS INSURER ABOVE THE REINSURANCE POLICY LIMITS

Bellefonte Reins. Co. v. Aetna Cas. and Surety Co. (Civ. Case No. 85-2706, (S.D.N.Y. Sept. 5, 1989).

However, a primary or excess insurer's defense costs are not subject or limited by indemnity policy limits. This defense coverage is separate and distinct from indemnity limits. However, if a ceding insurer "has no liability under original policy", the reinsurer owes no duty to indemnify a ceding insurer for payments made to an insured. Miller's Mutual Ins. Co v. North American Reinsurance Corp. 452 N.W.2d 841 (Mich. App. 1990).

A. A duty of good faith (full disclosure without inquiry) and fair dealing exists between the ceding carrier (reinsured) and the reinsurer. American Reinsurance Co. v. MGIC Investment Corp. 391 N.E.2d 532 (Illinois 1987); Mutuelle Generale Francaise Vie v. Life Assurance 688 F. Supp. 386 (N.A. Ill. 1988). But see Old Republic Fire Ins. Co. v. Castle Reins Co. 507 F. Supp. 46 (E.D.MO. 1981), Aff. 665 F.2d 239 (8 Cir. 1981).

XII. "THE NARROWER THE MIND, THE BROADER THE STATEMENT"

A. Excess-umbrella insurance is no longer just an "esoteric field". See Excess Insurance in the 1990's: From Back Room To Center Stage, Michael A. Pope and William K. Blanchard, Defense Law Journal, April 1990, Pages 162-179.

B. The changing role of the excess insurer as an active participant in litigation. A dilemma for the excess carrier (or umbrella insurer)?

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C. Will more conflict and litigation develop in the 1990's? The explosion has begun.

D. Will internecine wars prove self destructive? Is another "rate increase" forced upon excess insurers by the complex problem presented by the Associated International Ins. Co. case, supra?

E. "Next to death or fatal illness, the one thing I fear more than anything else in this world is being a litigant in our courts."

Judge Learned Hand

INFORMATION FOR IOWA SPEECH

1. Frye vs. United States, 293 F. 1013 (D.C. 1923) Establishes standard for admission of scientific testimony. (F13)

2. U.S. v. Brown, 557 F.2d 541 (6th Cir. 1977) Doesn't involve thermography itself but does involve scientific testing. Court holds that "expert testimony on a critical fact . . . . is not admissable unless the principle upon which it is based has attained general acceptance in the scientific community and is not mere speculation and conjecture." (F5)

3. Paulk v. Skaggs Alpha Beta, Inc., Oklahoma District Court Case (8/22/86) U.S. District Court, Western District, CIV-85-3006-W; case excludes thermographic evidence based on Frye vs. United States, 293 Federal 2d 1013 (DC Cir. 1923) and Federal Evidence Rule 702. (F39)

4. *Initial*, Vol. 9, No. 1, March 1988. Hobbins Newsletter - Says thermo has problems with reimbursement and peer acceptance. . . . It is a minority of Orthopaedics using thermography .... discusses internal differences between thermographers. (States, "Less than 2 percent of physicians are using thermography") (B32b)

5. Ash's survey of thermo use by orthopaedic surgeons (original draft with raw data and graphs). Survey shows that over 95% of orthopaedic surgeons do not consider thermography useful or valid in the diagnosis or treatment of painful conditions of the neck and back. (E9)

6. Frymoyer, John - "Thermography, A Call for Scientific Studies to Establish Its Diagnostic Efficacy". This article states that thermography may be useful in the diagnosis of lower back pain in the future but for the moment it must remain speculative. (E16)

7. 3/14/83 AMA DATTA REPORT First position statement against thermography Also explanation of function of DATTA program (Diagnostic and Therapeutic Technology Assessment) (A8)

8. Resolution 108 and related material including newspaper article. Useful names in article. "AMA avoids official statement on thermography." (A7)

9. Jacob Green handout at San Francisco seminar (shows immense income from thermography; broken down by No-fault, workers' comp, etc.) (G70)

10. Survey by Dr. Charles Ash of Medical School centers clinically using thermography. Believe this was incorporated into later article published in *For The Defense*. (63)

11. Announcement by Dr. Jacob Green regarding Neurothermography Seminar, March 1989. States that Dr. Michael Aminoff, Dr. Yuen So, Dr. Bhagwan Shahani, Dr. Dedier Cros and Dr. Ken Nudleman have withdrawn from the faculty of the scheduled course. Reasons given were that their own testing of thermography showed it has having no value and that they did not want to participate in a course that showed it as an established technique.

    Dr. Green compelled to send this to every Neurologist in the United States (B34)

12. Copy of *Thermograhy* Volumne 19, No. 2

THERMOGRAPHY -- AN UPDATE

A. WHAT IS THERMOGRAPHY?

B. BRIEF HISTORY

1. BREAST CANCER 1970's
2 JOINT STUDY M.D. ANDERSON AND SLOAN KETTERING
3. PUBLIC WARNING BY AMERICAN COLLEGE OF RADIOLOGY

B. WHAT DOES THERMOGRAPHY CLAIM TO DIAGNOSE

1. ALTHOUGH CLAIMS BY THERMOGRAPHERS THAT THEIR DEVICE CAN DIFFERENTIATE BETWEEN A SOFT TISSUE INJURY AND NERVE ROOT IMPINGMENT (E.G. DISK) THESE COLORFUL THERMOGRAMS ARE CLAIMED TO DETECT MANY PROBLEMS.

C. FIRST PROPOSED FOR DIAGNOSIS OF NECK AND BACK PROBLEMS

1. 1963--DR JACK EDEIKEN
2. EDEIKEN NOW A MAJOR OPPONENT OF USE OF THERMOGRAPHY
3. THUS THERMOGRAPHY HAS BEEN AVAILABLE FOR 27 YEARS
   a. MACHINES AVAILABLE -- ALL THOSE BREAST CANCER CLINICS OUT OF BUSINESS HAD THERMOGRAPHY EQUIPMENT

D. GENERAL ACCEPTANCE
1. SIGNIFICANCE
   a. LOGIC
   b. FRYE RULE
      (1) Frye vs. United States 293 F2 463 (D.C.App. 1923)
      (2) More clearly stated in United States vs. Brown, 557 F2d 541, 556 (6th Cir. App 1977)
   c. FEDERAL RULE 702
      (1) "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 qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

   d. **IMPORTANT:** THE FACT THAT A STATE HAS REJECTED THE **FRYE** STANDARD DOES NOT MEAN THE COURTS WILL ADMIT THERMOGRAMS INTO EVIDENCE. ONE EXAMPLE:
      (1) Skaggs v. Alpha Beta
         (a) "... it appears to the Court that thermography is not sufficiently reliable to meet either the standard

articulated in Frye vs. United States 293 F.2d 1013 (DC Cir. 1923) (whether a scientific principle is sufficiently established who have gained general acceptance in their particular field to which it belongs), or the standards set forth in Rule 702 (whether evidence would aid jury in understanding evidence or determining ultimate issues)."

e. IMPORTANCE OF ACCEPTANCE:

f. AMA PRINCIPLES OF MEDICAL ETHICS
2.16 UNNECESSARY SERVICES: It is unethical for a physician to provide or prescribe unnecessary services or unnecessary ancillary facilities.
2.17 WORTHLESS SERVICES: A physician should not seek compenation for providing services that he knows or should know are generally regarded by reputable physicians as worthless.

2. EVIDENCE OF LACK OF ACCEPTANCE IN THE MEDICAL COMMUNITY

a. The Use of Thermography by Orthopaedic Surgeons
b. Ash, C.; Othopaedic Review, Vol. XVII, No.6, June 1988
c. Initial, Vol. 9, No.1 (March 1988)
A quarterly newsletter for thermographers published by Dr. William Hobbins (Thermal Image Analysis, Inc) Madison, Wisc.,_made the following admission:

"Less than 2% of physicians are using thermography"_

d. NOT PART OF CORE CURRICULUM IN ANY COLLEGE OF MEDICINE OR ANY RESIDENCY PROGRAM.

E. DOES IT WORK? SCIENTIFIC STUDIES

There are countless "studies" published which suggest thermography is best thing since x-rays were discovered. Usually these studies are published in "throwaway" medical journals. It is helpful to learn the essentials of a valid scientific study in order to assess its validity.

1. ELEMENTS OF A VALID SCIENTIFIC STUDY:

a. THERE SHOULD BE CONTROL GROUP OF "NORMALS"

b. STUDY SHOULD BE PROSPECTIVE, NOT RETROSPECTIVE
c. NOT ANECDOTAL
   (1) IF EXAMPLES GIVEN WHERE DOCTOR MADE A CORRECT DIAGNOSIS THROUGH THERMOGRAPHY, THIS IS ANECDOTAL AND HAS NO SCIENTIFIC VALUE.

   (2) MANY REASONS FOR THIS -- E.G. GOOD DOCTOR MIGHT HAVE MADE SAME DIAGNOSIS USING ACCEPTED TESTS.

d. SELECTIVITY MUST BE PROVEN
e. SENSITIVITY MUST BE PROVEN
f. STUDY MUST BE BLINDED
g. RESULTS MUST BE REPRODUCIBLE
h. PHYSICIANS DOING STUDY SHOULD HAVE NO FINANCIAL INTEREST IN OUTCOME OF STUDY

2. STUDIES CLAIMING TO SHOW DIAGNOTISTIC VALIDITY OF THERMOGRAPHY ARE DEFECTIVE IN TWO MORE OF THESE ESSENTIAL ELEMENTS.
Thermography: A Call for Scientific Studies to Establish its Diagnostic Efficacy: Frymoyer J., Orthopaedics, 1986: Vol.9, No. 5
"A review of thermography literature reveals that studies performed to date are flawed by ...most commonly two or more of the criteria outline in the previous section of his article."

3. IMPORTANT STUDIES OF USEFULNESS OF THERMOGRAPHY
a. MAHONEY, MCCULLOUGH STUDIES
   (1) Relation of Thermography to Back Pain, Mahoney, L., McCullough, J.
      (a) Vol 1, #1 Thermology
   (2) Thermography as a Diagnostic Aid in Sciatica, Mahoney, L., McCullough, J
      (a) Vol 1, # 1 Thermology
b. AMINOFF STUDIES
   (1) Evaluation of Thermography in the Diagnosis of Selected Entrapment Neuropathies; Sol, Olney, Aminoff
   (2) Clinical Utility of Thermography in Patients with Lumbosacral Radiculopathy; So, Aminoff, Olney

4. IMPORTANT STUDIES OF USEFULNESS OF THERMOGRAPHY
a. MAHONEY, MCCULLOUGH STUDIES
   (1) First blinded studies of Thermography
   (2) Suppressed until attached to Palma trial court opinion
   (3) Relation of Thermography to Back Pain, Mahoney, L., McCullough, J.

O

(a) Vol 1, #1 Thermology

(4) Thermography as a Diagnositic Aid in Sciatica, Mahoney, L., McCullough, J
(a) Vol 1, # 1 Thermology

b. AMINOFF STUDIES
(1) Evaluation of Thermography in the Diagnosis of Selected Entrapment Neuropathies; Sol, Olney, Aminoff
(2) Clinical Utilityof Thermography in Patients with Lumbosacral Radiculopathy; So, Aminoff, Olney

c. STUDIES FAVORABLE TO THERMOGRAPHY--WHICH TO BELIEVE?
(1) "Thermography, A Call for Scientific Studies to Establish Its Diagnostic Efficacy"
(a) Frymoyer, John
(2) Every study favorable to thermography lacks two or more esssentials of a scientific study.

d. THE MCCULLOUGH PROJECTED STUDY

F. POSITION STATEMENTS--MEDICAL AND OTHER ORGANIZATIONS

1. DATTA REPORT
a. ATTACHMENT

2. AMA COUNCIL ON SCIENTIFIC AFFAIRS
a. UNDER RECONSIDERATION -- FOREVER

3. AMA HOUSE OF DELEGATES RESOLUTION 108
a. ATTACHMENT

4. OTHROPAEDIC

a. AMERICAN ACAD. ORTHOPAEDIC SURGERY
(1) NO FORMAL POSITION
(2) OCT 1989 BULLETIN, CLINICAL POLICIES
b. OBTAIN FROM:

5. NEUROLOGY

a. POSITION STATEMENT NOV 1989
(1) THERMOGRAPHY UNPROVEN
(2) **MAY** BE OF USE IN RSD

OTHER AREAS OF INTEREST CONCERNING THERMOGRAPHY AND WHICH MAKE EXCELLENT TOPICS FOR CROSS EXAMINATIONS ARE:

G. CHARGES AND PROFITABILITY--REVENUE GENERALTION
   1. AGEMA STUDY
   2. GREEN
   3. NORFOLK DOCTOR $540,000 1989 FROM THERMOGRAPHY ALONE

H. TRAINING AND CERTIFICICATION:

   a. AT LEAST TWO GROUPS CERTIFY
   b. NOT RECOGNIZED BY AMERICAN BOARD OF MEDICAL SPECIALTIES.
   c. NO POST-GRADUATE 2 YEARS RESIDENCY PROGRAM AS OTHER SPECIALTIES HAVE.

   1. CHARGES FOR THERMOGRAPHY--INCOME TO DOCTOR

      a. IS GENERATION OF REVENUE ONE OF THE REASONS YOU DO THERMOGRAPHY?
      b. WHAT TO YOU CHARGE FOR THERMOGRAM OF THE BACK?

         (1) HOW DID YOU ARRIVE AT THAT FIGURE
         (2) COMPARE COSTS CT SCAN AND THERMOGRAM
            (a) CALL LOCAL HOSPITAL FOR COSTS OF CT SCAN TO BACK
         (3) CT SCAN EQUIPMENT ($1,500,000 PLUS NOW)
         (4) COST OF HIS MACHINE
            (a) DOES HE TAKE PICTURES OR DOES HE HAVE NURSE DO IT?
            (b) A REAL NURSE? AN RN?
            (c) WHAT TRAINING? HOW MANY DAYS? WHAT SALARY
         (5) CT SCAN TAKEN BY X-RAY TECHINCIAN
            (a) TWO YEARS OF TRAINING
            (b) FOUR MONTHS OF CT SCAN TRAINING (TO TAKE CT SCANS)
            (c) SIX MONTHS MRI TRAINING (TO TAKE MRI SCANS)
            (d) (The lady to takes the thermogram may have had a weekend training)
         (6) HOW MANY THERMOGRAMS --AVERAGE--EACH PATIENTS
         (7) HOW MANY PER WEEK?
         (8) COST OF THERMOGRAPH MACHINE ($54,000 - 90,000)
      c. AGEMA ECONOMIC ANALYSIS (ABOVE)
      d. Name of equipment
      e. Name of salesman
      f. Discussion of profitiability

   2. LACK OF GENERAL ACCEPTANCE IN MEDICAL-SCIENTIFC COMMUNITY

      a. LACK OF ACCEPTANCE IN YOUR COMMUNITY

b. BY WHOM? Those who treat musculoskeletal disease

(1) orthopaedic medicine
(2) neurolgy
(3) family practitioners
(4) radiologist (don't treat but they specialize in imagery)
(5) neurosurgeons
(6) physical medicine and rehabilitation
(7) rheumatologists

c. How many others in **his** community
(1) How many don't. (Get telephone book and count.)

d. DO ANY ORTHOPAEDIC SURGERONS REFER CASES FOR THERMOGRAPHY ON A REGULAR BASIS? WHO? WHEN LAST REFERRAL?

e. Not recognized by the American Board of Medical Specialties

f. DOCTOR MAY SAY: HAVE TO DO THERMOGRAPHY TO HAVE AN OPINION ON IT.

(1) DOCTOR, DO YOU HAVE AN OPINION ON ACAPUNCTURE? LEECHES? APRICOT PITS AS A CURE FOR CANCER? TRIED THEM ALL?

(2) MANY NEW METHODS OF DIAGNOSIS, TREATMENT, PUBLISHED IN MEDICAL JOURNALS EVERY WEEK.

(3) DOCTOR, IN DECIDING WHETHER TO BUY DIAGNOSITIC EQUIPMENT DO YOU CONSIDER WHETHER THE PHYSICIANS IN THE COMMUNITY YOU RESPECT USE THIS TOOL?

g. COVER LACK OF ACCEPTANCE THROUGHT UNITED STATES
(1) GET HIM TO ACCEPT "INITIAL" NEWSLETTER
(a) MOST THERMOGRAPHERS KNOW DR. BILL HOBBINS
i) EDITOR OF INTIAL
ii) MADISON, WISCONSIN

(2) IF THEY DISAGREE WITH 2% WHAT % USE IT

(a) BASIS FOR THAT FIGURE?
(b) TRUE IN DES MOINES, SIOUX CITY?
i) NAME THEM (TEAR OUT PAGE FROM

TELEPHONE BOOK--WHICH ONES USE IT)

ii) YOU ATTEND COUNTY MEDICAL MEETINGS, HOSPITAL STAFF MEETINGS, ETC.

iii) NEVER HAS THE SUBJECT ARISEN?

(3) ASH STUDY. accepted by 2-4% of physicians dealing with musucloskletal disease.

(4) code of medical ethics

FRYE v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted November 7, 1923. Decided December 8, 1923.)

No. 3968.

1. Criminal law ⊕=472—Expert testimony, explaining systolic blood pressure deception test, inadmissible.

The systolic blood pressure deception test, based on the theory that truth is spontaneous and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure, *held* not to have such a scientific recognition among psychological and physiological authorities as would justify the courts in admitting expert testimony on defendant's behalf, deduced from experiments thus far made.

2. Criminal law ⊕=472—Principle must be generally accepted, to render expert testimony admissible.

While the courts will go a long way in admitting expert testimony, deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Appeal from the Supreme Court of the District of Columbia.

James Alphonzo Frye was convicted of murder, and he appeals. Affirmed.

Richard V. Mattingly and Lester Wood, both of Washington, D. C., for appellant.

Peyton Gordon and J. H. Bilbrey, both of Washington, D. C., for the United States.

Before SMYTH, Chief Justice, VAN ORSDEL, Associate Justice, and MARTIN, Presiding Judge of the United States Court of Customs Appeals.

VAN ORSDEL, Associate Justice. Appellant, defendant below, was convicted of the crime of murder in the second degree, and from the judgment prosecutes this appeal.

A single assignment of error is presented for our consideration. In the course of the trial counsel for defendant offered an expert witness to testify to the result of a deception test made upon defendant. The test is described as the systolic blood pressure deception test. It is asserted that blood pressure is influenced by change in the emotions of the witness, and that the systolic blood pressure rises are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear, as the exam-

ination touches the vital points in respect of which he is attempting to deceive the examiner.

In other words, the theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure. The rise thus produced is easily detected and distinguished from the rise produced by mere fear of the examination itself. In the former instance, the pressure rises higher than in the latter, and is more pronounced as the examination proceeds, while in the latter case, if the subject is telling the truth, the pressure registers highest at the beginning of the examination, and gradually diminishes as the examination proceeds.

Prior to the trial defendant was subjected to this deception test, and counsel offered the scientist who conducted the test as an expert to testify to the results obtained. The offer was objected to by counsel for the government, and the court sustained the objection. Counsel for defendant then offered to have the proffered witness conduct a test in the presence of the jury. This also was denied.

Counsel for defendant, in their able presentation of the novel question involved, correctly state in their brief that no cases directly in point have been found. The broad ground, however, upon which they plant their case, is succinctly stated in their brief as follows:

"The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence."

[1, 2] Numerous cases are cited in support of this rule. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

The judgment is affirmed.

the scientific community and is not mere speculation or conjecture.[18] We are not convinced on the present state of the record that ion microprobic analysis of human hair has yet reached the level of general acceptance in its field or that the experiments conducted in this case have been shown to be sufficiently reliable and accurate to provide an acceptable basis for expert identification in a criminal trial.

[26] The final issue raised by Appellant is the constitutionality of 18 U.S.C. § 844(f), malicious destruction by means of an explosion of an institution receiving federal financial assistance. We affirm the constitutionality of § 844(f) as applied to the Planned Parenthood Association for the reasons stated in the District Court's opinion. *United States v. Brown*, 384 F.Supp. 1151 (E.D.Mich.1974). The judgment of the District Court is reversed.

NATIONAL LABOR RELATIONS BOARD, Plaintiff-Appellant,

v.

HARDEMAN GARMENT CORPORATION, and Lauderdale Garment Corporation, Defendants-Appellees.

Nos. 76-1392, 76-1393.

United States Court of Appeals, Sixth Circuit.

Argued April 15, 1977.

Decided June 22, 1977.

On appeal by the National Labor Relations Board from an order of the United States District Court for the Western District of Tennessee, Harry W. Wellford, J., 406 F.Supp. 510, compelling disclosure of affidavits obtained from employees during investigation of unfair labor practice charges lodged against appellees, the Court of Appeals, Celebrezze, Circuit Judge, held that the Board's policy of withholding an employee's affidavit from the employer until after he testifies does not violate the Freedom of Information Act; such affidavits obtained during investigation of pending unfair labor practice proceedings are exempt from disclosure under the Act as "investigatory records compiled for law enforcement purposes * * *".

Reversed.

1. **Records** ⇐14

General policy of the Freedom of Information Act is to provide for liberal disclosure of information contained in governmental files unless it falls within a specific exemption in the Act; however discovery for litigation purposes is not an expressly indicated purpose of the Act. 5 U.S.C.A. § 552.

2. **Records** ⇐14

Freedom of Information Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. 5 U.S.C.A. § 552.

3. **Records** ⇐14

A litigant's rights under the Freedom of Information Act are neither increased nor decreased by reason of the fact that the litigant claims an interest in the document sought greater than that shared by the average member of the public. 5 U.S.C.A. § 552.

4. **Labor Relations** ⇐517

Enforcement of the National Labor Relations Act depends on a charge filed with the NLRB by knowledgeable individuals; the NLRB cannot initiate its own proceedings. National Labor Relations Act § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

5. **Records** ⇐14

National Labor Relations Board's policy of withholding an employee's affidavit

18 In the discovery of secret things and in the investigation of hidden causes stronger reasons are obtained from sure experiments and demonstrated arguments than from probable conjectures and the opinions of philosophical speculators of the common sort.
William Gilbert, De Magnate (1600).

Before PECK, McCREE* and ENGEL, Circuit Judges.

ORDER

The earlier judgment of this court, *United States v. Lee*, 542 F.2d 353 (6th Cir. 1976), was vacated by the Supreme Court of the United States, 430 U.S. 902, 97 S.Ct. 1168, 51 L.Ed.2d 578 (1977) and remanded for further consideration in the light of *United States v. Donovan*, 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977).

[1, 2] Upon reconsideration, it appears that upon the authority of *United States v. Donovan*, *supra*, the intercepted communications of Lee were properly admissible as evidence. Nor do we find defendant's rights under the Fourth Amendment infringed by the subsequent search of defendant's premises.

[3, 4] Defendant further claims that the stipulated facts at his trial are insufficient to support his conviction for the violation of 18 U.S.C. §§ 2 and 1955. The court notes that, contrary to the circumstances in *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), the evidence of Lee's participation in the gambling business through the furnishing of "line" information necessary to its successful operation is far more extensive. Thus on November 1, 1974, it is stipulated that Lee had supplied Wells, a member of the stipulated gambling business "line" information on 18 intercollegiate and five professional football games; on November 2, 1974, Lee again furnished Wells with information on 13 professional football games and promised further information later in the day which was supplied when he furnished Wells with "line" information on 12 professional football games; likewise on November 11, 1974, Lee supplied Wells with "line" information on 32 intercollegiate and 9 professional football games. This extensive activity is ample evidence of Lee's "participation in the operation of a gambling business". See *United States v. Leon*, *supra* at 676 and cases cited therein. While as we noted in our earlier opinion *United States v. Lee*, *supra* at 356 it was not proper for the trial court to have considered in connection with the finding of defendant's guilt any admission or arguments made for the purposes of the motion to suppress, it appears that such comments by the trial court, while supportive of its decision did not produce it. Therefore the error was harmless and remand for reconsideration on this account is not required. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff-Appellee,

v.

Hayward Leslie BROWN, Defendant-Appellant.

No. 76-1576.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 20, 1976.

Decided June 14, 1977.

Rehearing Denied Aug. 16, 1977.

The United States District Court for the Eastern District of Michigan, Southern Division, Cornelia G. Kennedy, J., 384 F.Supp. 1151 and 436 F.Supp. 2825, denied defendant's motions to dismiss count of indictment charging him with bombing planned parenthood clinic and to suppress oral admissions made after arrest, and, following his conviction of possession of three 'Molotov cocktails" and damaging by means of explosive device an institution receiving federal financial assistance defendant appealed. The Court of Appeals

* The Honorable Wade H. McCree, Jr., resigned March 28, 1977, and did not participate in this order.

Celebrezze, Circuit Judge, held that (1) defendant's confession to fire bombing while placed between two officers in back seat of patrol car transporting him to police headquarters was not voluntary but was induced by his overwhelming fear that he would be beaten by police and (2) Government failed to fulfill threshold requirement of demonstrating that ion microprobic analysis of human hair had reached level of general acceptance in its field or to show that experiments conducted in instant case were sufficiently reliable and accurate to provide acceptable basis for expert identification of hair.

Reversed.

1. **Federal Courts** ⇐**416**

Question whether confession of defendant, who was being prosecuted on federal indictment for violating federal criminal statutes, should be admitted in federal prosecution was matter of federal law and the district court was not bound by decisions of state court in related cases but was required to render independent judgment on voluntariness of confession.

2. **Habeas Corpus** ⇐**90**

Even in habeas corpus cases, federal courts are required to make independent determination on ultimate issue of voluntariness of confession. 28 U.S.C.A. § 2254.

3. **Criminal Law** ⇐**1134(3)**

Appellate courts have duty to examine entire record and make independent determination on voluntariness of a confession.

4. **Criminal Law** ⇐**519(1)**

In determining whether a confession was voluntary, courts focus on state of mind of accused at time confession was made.

5. **Criminal Law** ⇐**519(1)**

Central inquiry of court concerning voluntariness of a confession is whether confession was product of free and rational choice.

6. **Criminal Law** ⇐**736(2)**

Voluntariness of a confession is a mixed question of law and fact.

7. **Criminal Law** ⇐**1158(4)**

On review of trial court's findings on issue whether confession was voluntarily made, great deference is afforded trier of fact as to findings of historical fact because of its ability to observe witnesses' demeanor, and resolution of testimonial conflicts and specific findings of fact by trial court will not be disturbed unless it is clear that error has been committed; however, in reviewing second and third phases of inquiry, determining the mental state of accused and assessing its legal significance, appellate courts are granted greater leeway.

8. **Criminal Law** ⇐**1158(4)**

Whether defendant, who claimed at suppression hearing that he did not make incriminating statements attributed to him and that any statements he did make were coerced by beatings and threats of beatings, made statements and whether he was beaten by police were questions of fact which would not be disturbed on appeal unless clearly erroneous.

9. **Criminal Law** ⇐**519(3)**

In light of manifest hostility of police toward defendant and inherent coerciveness of backseat of patrol car as setting for a confession, incriminating statements made by 19-year-old defendant, who had been subject of massive manhunt because of his suspected involvement in gun battles with police that had left one officer dead and several wounded, who confessed to fire bombing following violent arrest while placed between two officers in backseat of patrol car transporting him to police headquarters, who was extremely distraught and described as crying, screaming and thrashing about, and who was struck by one officer in car at time he made incriminating statements, were not voluntary but were induced by his overwhelming fear that he would be beaten by police. 18 U.S.C.A. § 3501.

10. **Criminal Law** ⇐**519(1)**

It is affirmative presence of [illegible] indicating an overbearance of an accu-

violation of 18 U.S.C. § 844(f) (1970). Appellant moved to suppress the confession. After holding an evidentiary hearing, the District Court ruled that the confession was voluntary under the totality of the circumstances and denied the suppression motion. The Court also denied a motion for rehearing. At trial, Appellant was convicted by a jury on both counts and was sentenced to eight years on each offense, to run concurrently.

[1, 2] Prior to the federal prosecution, Appellant had been tried in state court on arson charges stemming from the firebombing incident. The arson indictment was dismissed after the state judge concluded that the confession was involuntary and ordered it suppressed.[1] Appellant contends that the state court's finding of involuntariness estopped the District Court from holding an evidentiary hearing and from finding the confession voluntary. The District Court ruled that it was not bound by the state court's decision and that it was required to render an independent judgment on the voluntariness of the confession. We agree. Appellant was being prosecuted on a federal indictment for violating federal criminal statutes. The question of whether a confession should be admitted in a federal prosecution is a matter of federal law and district courts are not bound by the decisions of state courts in related cases. *See Elkins v. United States*, 364 U.S. 206, 223-24, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States v. Beigel*, 370 F.2d 751, 756 (2d Cir. 1967). *See also Boyle v. United States*, 395 F.2d 413, 415 (9th Cir. 1970). This is not a habeas corpus case where a petitioner is seeking review of a state conviction so the standards enunciated in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and 28 U.S.C. § 2254 (1970), are not applicable. Even in habeas corpus cases, federal courts are required to make an independent determination on the ultimate issue of the voluntariness of a confession. *Davis v. North Carolina*, 384 U.S. 737, 741-42, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966). *See LaVallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973).

[3-7] The District Court found that Appellant was given *Miranda* warnings so the admissibility of the confession turns on whether it was voluntary. *Davis v. North Carolina*, 384 U.S. at 740, 86 S.Ct. 1761. For standards of voluntariness we refer to a pre-*Miranda* line of cases beginning with *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936) which held that the admission of an involuntary confession in a criminal prosecution violates due process.[2] Appellate courts have a duty to examine

1. Appellant was also prosecuted in state court for murder and assault with intent to murder without success.

2. For a partial list of these decisions see *Miranda v. Arizona*, 384 U.S. 436, 507 & n. 3, 86 S.Ct. 1602, 16 L.Ed.2d 694 (Harlan, J., dissenting) (1966); *Spano v. New York*, 360 U.S. 315, 321 n. 2, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). *See generally Developments in the Law of Confessions*, 79 Harv.L.Rev. 935, 962-81 (1966).

A number of rationales have been offered for excluding involuntary confessions. *See generally* 79 Harv.L.Rev. at 964-74. In *Stein v. New York*, 346 U.S. 156, 192, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953), the Supreme Court indicated that coerced confessions are excluded from evidence because of their inherent unreliability. In *Rogers v. Richmond*, 365 U.S. 534, 542-44, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), the Supreme Court departed from unreliability as a reason for excluding involuntary confessions and held that such confessions were excludable regardless of their truth or falsity and regardless of other evidence tending to establish guilt. *See Lego v. Twomey*, 404 U.S. 477, 484-85 & nn. 12, 13, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). Another rationale offered for the exclusion of involuntary confessions is that often they result from illegal police conduct. *See Spano v. New York*, 360 U.S. 315, 320-21, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). More recent cases have focused on the state of mind of the accused and the effect of the surrounding circumstances on his ability to make a rational judgment. These decisions have held that fundamental fairness requires the exclusion of confessions which are not the product of a free will but are made when an accused's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854 (1973), *citing Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

the entire record and make an independent determination on the voluntariness of a confession *Davis v North Carolina*, 384 U S at 741–42, 86 S Ct 1761; *United States v Dye*, 508 F 2d 1226 1232 (6th Cir 1974) In determining whether a confession was voluntary courts focus on the state of mind of the accused at the time the confession was made *See e g, Culombe v Connecticut*, 367 U S 568, 602, 81 S Ct 1860 6 L Ed 2d 1037 (1961) The central inquiry of a court considering the voluntariness of a confession is whether the confession was the product of free and rational choice:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him If it is not, if his will has been overborne and his capacity for self-determination critically impaired the use of his confession offends due process

Culombe v Connecticut, 367 U S at 602, 81 S Ct at 1879 *See also Schneckloth v Bustamonte*, 412 U S 218, 225–26, 93 S Ct 2041, 36 L Ed 2d 854 (1973)[3] In deciding whether an accused's will has been overborne courts have looked to the totality of the circumstances surrounding the confession, both the characteristics of the accused and the details of the interrogation, and determined their psychological impact on an accused's ability to resist pressures to confess *Schneckloth v Bustamonte*, 412 U S at 226, 93 S Ct 2041; *Culombe v Connecticut* 367 U S at 602 81 S Ct 1860[4] The

3 Although *Schneckloth* is a consent search case, the majority opinion reviews at some length the concept of voluntariness in confession cases

4 In *Schneckloth* the Supreme Court listed some factors which courts have considered in finding confessions to be involuntary:

> In determining whether a defendant's will was overborne in a particular case the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation Some of the factors taken into account have included the youth of the accused, *e. g., Haley v Ohio* 332 U S 596 68 S Ct 302 92 L Ed 224; his lack of education, *e g Payne v Arkansas* 356 U S 560 78 S Ct 844 2 L Ed 2d 975; or his low intelligence, *e g Fikes v Alabama*, 352 U S 191 [77 S Ct 281 1 L Ed 2d 246]; the lack of any advice to the accused of his constitutional rights, *e g Davis v North Carolina*, 384 U S 737 [86 S Ct 1761 16 L Ed 2d 895]; the length of detention *e g., Chambers v Florida, supra* [309 U S 227 60 S Ct 472 84 L Ed 716]; the repeated and prolonged nature of the questioning, *e g, Ashcraft v Tennessee* 322 U S 143 [64 S Ct 921 88 L Ed 1192]; and the use of physical punishment such as the deprivation of food or sleep, *e g Reck v Pate* 367 U S 433 [81 S Ct 1541 6 L Ed 2d 948] In all of these cases the Court determined the factual circumstances surrounding the confession assessed the psychological impact on the accused and evaluated the legal significance of how the accused reacted *Culombe v Connecticut supra* at 603 [81 S Ct at 1879] 412 U S at 226 93 S Ct at 2047 (footnote omitted)
>
> In *Culombe v Connecticut* Justice Frankfurter commented on the impossibility of setting a single standard for voluntariness and listed some factors relevant to that determination
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> > It is impossible for this Court in enforcing the Fourteenth Amendment to attempt precisely to delimit, or to surround with specific all-inclusive restrictions the power of interrogation allowed to state law enforcement officers in obtaining confessions No single litmus-paper test for constitutionally impermissible interrogation has been evolved: neither extensive cross-questioning—deprecated by the English judges; nor undue delay in arraignment—proscribed by *McNabb* [*v United States* 318 U S 332 63 S Ct 608 87 L Ed 819]; nor failure to caution a prisoner—enjoined by the Judges Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect—prohibited by several state statutes See *Lisenba v California* 314 U S 219 [62 S Ct 280 86 L Ed 166]; *Crooker v California*, 357 U S 433 [78 S Ct 1287 2 L Ed 2d 1448] *Ashdown v Utah*, 357 U S 426 [78 S Ct 1354 2 L Ed 2d 1443]
> >
> > Each of these factors in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him his physical and mental state the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant The ultimate test remains that which has been the only clearly established test in Anglo-American courts for

voluntariness of a confession is a mixed question of law and fact. Justice Frankfurter once described the notion of voluntariness as an "amphibian" because "[i]t purports at once to describe an internal psychic state and to characterize the state for legal purposes" *Culombe v. Connecticut*, 367 U.S. at 605, 81 S.Ct. at 1880. The unique mixture of law and fact involved in a voluntariness determination is reflected in our standard of review. The Government contends that we may only overturn the District Court's conclusion that the confession was voluntary if we find clear error. That statement is not entirely correct. Justice Frankfurter separated a court's inquiry on voluntariness into three phases:

> The inquiry whether, in a particular case a confession was voluntarily or involuntarily made involves at the least a three-phased process. First there is the business of finding the crude historical facts, the external "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.
>
> *Culombe v. Connecticut*, 367 U.S. at 603, 81 S.Ct. at 1879.

As to the first phase, findings of historical fact, great deference is afforded the trier of fact because of its ability to observe the witnesses' demeanor. Resolution of testimonial conflicts and specific findings of fact by the trial court will not be disturbed on appeal unless it is clear from the record that an error has been committed. *Id.* at 603, 81 S.Ct. 1860. In reviewing the second and third phases of the inquiry, determining the mental state of the accused and assessing its legal significance, appellate courts are granted greater leeway:

> The second and third phases of the inquiry—determination of how the accused reacted to the external facts, and of the legal significance of how he reacted—although distinct as a matter of abstract analysis, become in practical operation inextricably interwoven. This is so, in part, because the concepts by which language expresses an otherwise unrepresentable mental reality are themselves generalizations importing preconceptions about the reality to be expressed. It is so, also, because the apprehension of mental states is almost invariably a matter of induction, more or less imprecise and the margin of error which is thus introduced into the finding of "fact" must be accounted for in the formulation and application of the "rule" designed to cope with such classes of facts. The notion of "voluntariness" is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes. Since the characterization is the very issue "to review which this Court sits," *Watts v. Indiana*, 338 U.S. 49, 51, [69 S.Ct. 1347, 1348, 93 L.Ed. 1801] (opinion of Frankfurter, J.), the matter of description, too, is necessarily open here. See *Lisenba v. California*, 314 U.S. 219, 237–238, [62 S.Ct. 280, 290, 86 L.Ed. 166]; *Ward v. Texas*, 316 U.S. 547, 550, [62 S.Ct. 1139, 1141, 86 L.Ed. 1663]; Haley v. Ohio, 332 U.S. 596, 599, [68 S.Ct. 302, 303, 92 L.Ed. 224]; *Malinski v. New York*, 324 U.S. 401, 404, 417, [65 S.Ct. 781, 783, 89 L.Ed. 1029].

two hundred years: the test of voluntariness is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Rogers v. Richmond*, 365 U.S. 534, [81 S.Ct. 735, 5 L.Ed.2d 760]. The line of distinction is that at which governing self-direction is lost and compulsion of whatever nature or however infused propels or helps to propel the confession.

367 U.S. at 601–02, 81 S.Ct. at 1878, 1879 (footnote omitted).

See also 18 U.S.C. § 3501 (1970).

> No more restricted scope of review would suffice adequately to protect federal constitutional rights For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is by inference; and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel

Id at 604-05, 81 S.Ct at 1880

With the above in mind we now proceed to an independent determination of the voluntariness of Appellant's confession

[8] Appellant's claims at the suppression hearing were twofold: he denied making the incriminating statements attributed to him and he contended that any statements he did make were coerced by beatings and the threat of beatings The District Court found that Appellant had made the statements attributed to him; that he was not beaten by police either at the time of his arrest or in the patrol car where he confessed; and that his confession viewed in the totality of the circumstances, was voluntary Whether Appellant made the statements and whether he was beaten by police are questions of fact which will not be disturbed on appeal unless they are clearly erroneous *See United States v. Montos*, 421 F 2d 215, 219 n 1 (5th Cir 1970) After reviewing the record we are not convinced that the Court's findings on these issues are clearly erroneous and they are hereby affirmed

[9, 10] We cannot affirm, however, the District Court's finding on the ultimate issue of voluntariness On review of the record, we are inescapably led to the conclusion that the confession was not voluntary in the sense that it was not the product of a free and rational choice but was induced by Appellant's overwhelming fear that he would be beaten by police A number of factors dictate this conclusion, among which are the manifest hostility of the police toward Appellant; his age; his physical condition and emotional state at the time of the confession; the proximity of the confession to a violent arrest; his expressed fears that he would be beaten by police; the inherent coerciveness of the back seat of a patrol car as a setting for a confession; and the fact that Appellant was struck by one of the officers in the car at the time he made the incriminating statements Under the totality of the circumstances, the statements cannot be deemed "the product of a rational intellect and a free will "[5] *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct 274, 280, 4 L.Ed.2d 242 (1960) *See also Schneckloth v. Bustamonte*, 412 U.S at 225.

5. In ruling that the confession was voluntary under the totality of the circumstances the District Court remarked that "Defendant does not claim that he was held incommunicado, subjected to prolonged questioning, had any mental problems was lacking in intelligence or that he was tricked into giving the confession This is a reference to some of the factors listed in *Culombe* and *Schneckloth* which courts have taken into account in determining whether an accused's will has been overborne *See* note 3 *supra* The implication from the Court's remarks is that somehow the absence of these factors refutes Appellant s contention that his confession was involuntary The Government s argument on appeal is based on the same premise It treats the factors mentioned in those cases and in 18 U.S.C § 3501 (1970) as a mandatory checklist which must be affirmatively established by a defendant before a confession may be found involuntary. This simply is not the case Neither the cited cases nor 18 U.S.C § 3501 purports to exhaust all the factors which may bear on the voluntariness of a confession viewed in the totality of circumstances of a particular case It is the affirmative presence of factors indicating an overbearance of an accused s will which is significant and not the absence of other factors which may be irrelevant to the defendant's claim or to the circumstances surrounding the particular confession For instance here the Appellant confessed in the back seat of a patrol car transporting him to police headquarters The fact that there was no delay in arraignment or that he was not deprived of food or sleep is not controlling under the facts of this case Similarly while the lack of prolonged questioning may have some relevance the fact that Appellant was not tricked by police does not have a mental problem or is not lacking average intelligence has little bearing on his claim that his confession was coerced by fear of being beaten Elsewhere in the opinion we highlight factors which are relevant to the circumstances of this case and which support Appellant's contention that his confession was involuntary

93 S.Ct. 2041; *Culombe v. Connecticut* 367 U.S. at 602, 81 S.Ct. 1860.

At the time of his arrest, Appellant was nineteen. Although he had prior contact with juvenile authorities, nothing in his background could have prepared Appellant for the furor surrounding him in December of 1972. The search for the three suspects in the December shootings was intense and highly emotional.[6] The shootings and the search for the suspects received a great deal of attention in the Detroit area and were widely publicized by the media. The testimony of the police officers at the suppression hearing reflected the high priority placed on locating the three suspects by the Detroit Police Department and the personal feelings of individual officers involved in the search. Officer Gregory Ciaglo, one of the arresting officers, testified that the December shootings were a matter of great concern to the Department and to him; the arrest of the three suspects, Brown, Boyd and Bethune, was his number one priority; he made himself aware of their identities and carried their photographs on a clipboard in his patrol car; he wanted them caught, he was not concerned about their versions of the incident, and he didn't care if they were brought in dead or alive. Similar sentiments were expressed by other officers who testified. Almost all of the officers testified that they carried a photograph of Appellant, either on their person or on the visor of their patrol cars, including the car in which Appellant was riding when he made the statements.

[11] Appellant's arrest was, by all accounts, a violent one. Although the court discounted testimony that Appellant was beaten and kicked during the arrest, the descriptions of the arrest offered by police officers at the scene indicated that Appellant was grabbed by the back of the neck, had his legs kicked out from under him, and was flung to the sidewalk where he landed on his face.[7] Once on the sidewalk, between three and four officers subdued the kicking and thrashing suspect and handcuffed his hands behind his back. During the struggle, he was struck with a closed fist once and "nudged" on the back of the head or neck with the butt of a shotgun. It was during arrest that the Court found that Appellant sustained most of the injuries described by witnesses who saw him later in the day. The circumstances of the arrest and the amount of force employed have relevance to determining Appellant's state of mind when he made the incriminating statements a short time afterwards. During the arrest, a number of other police officers arrived on the scene, some carrying shotguns. Although testimony as to their numbers varied, it appears that there were between fifteen and thirty officers present at the scene of the arrest. The District Court made a finding that the officers who were present did not know that the suspect being arrested was Hayward Brown.[8] The

6. A state court issued an injunction restraining the Detroit Police Department from employing certain search tactics in the hunt for the suspects in the shootings.

7. Appellant claimed that he was beaten, kicked and struck with rifle butts and flashlights during the arrest. His account of the arrest was corroborated by two witnesses. The prosecution presented eleven Detroit police officers present at the scene of the arrest who testified that Appellant was not beaten. This was corroborated by four persons from the neighborhood to the extent that they could observe the events while the suspect was surrounded by police.

8. This finding was made in response to the Government's argument that the arresting officers would have no motive to beat Appellant at the time of his arrest because they were not aware that he was Hayward Brown. The Court found that the officers were not aware of Appellant's identity until he was placed in the patrol car. Because the Court concluded that the attitudes of police officers who were not present in the patrol car were not relevant, the Court made no finding concerning the manifest attitudes of police at the scene of the arrest. It appears from the record that at least some of the officers at the scene were aware that the suspect being arrested was Hayward Brown. Officer Mato Yaukovich testified that he recognized Appellant and probably mentioned it to someone before the patrol car pulled away. Steven Dest heard someone say "That's Hayward Brown ... that looks like Hayward Brown" as Appellant was picked up from the sidewalk.

Court concluded that their manifest attitude was not relevant to a determination of Appellant's mental state. However, the fact remains that the officers present at the scene had been involved in the search for a man who had fired on university police officers and they knew that the individual struggling on the sidewalk with the arresting officers was being arrested for shooting at policemen at a time when the Department was particularly sensitive about attacks on police. The manifest attitude of the police toward an accused is a relevant factor to consider in attempting to reconstruct the accused's state of mind. *See Culombe v. Connecticut*, 367 U.S. at 602, 81 S.Ct. 1860. Any hostility shown by police at the time of arrest is relevant to the extent that it colors the accused's appreciation of the circumstances. Thus the number of police present at the scene of the arrest and their manifest attitude toward Appellant must be viewed from his perspective and according to his knowledge of the circumstances. Appellant was certainly aware that he was wanted for the murder of a police officer and the wounding of several others. A show of force by police at the time of his arrest could only confirm what he may already have suspected, that his was a case of special interest and concern for the Department and the individual officers.

Another salient factor which indicates the hostility of the police toward Appellant is the extraordinary precaution taken by supervisory officers to protect him from being beaten while in custody. Inspector Bensmiller, who arrived on the scene following the arrest, asked Appellant his name while he was seated in the back seat of the patrol car. Appellant answered with the last name "Brown" but he gave a different first name. The Inspector asked Appellant whether he was Hayward Brown. Appellant denied his true identity, claiming that he was Hayward Brown's brother. An officer on the other side of the patrol car was looking at a photograph of Hayward Brown and said, 'that's Hayward Brown.' The police officer had opened the rear door and the Inspector came around the car to shut it. The Inspector then ordered a sergeant, Sergeant Studer, to accompany Appellant to police headquarters, 'follow him through the arrest procedures and see that nothing happens to him.' The Inspector explained that he wanted the sergeant to escort Appellant to headquarters because he felt it was necessary to have a "restraining influence" in the patrol car. The obvious inference from the Inspector's remark is that the sergeant's presence was intended to restrain the other officers in the car. The Inspector admitted that he was anxious to avoid brutality charges. He ordered the driver to take the prisoner straight to homicide. Another indication of unusual concern for Appellant's safety after he was taken into custody is to be found in the testimony of Sergeant Awe of the homicide division. When the patrol car bearing Appellant arrived in the garage at police headquarters, Sergeant Awe was instructed by one of his superiors to go down to the garage "to insure the safety of one Hayward Brown who was being brought up from the garage at the Police Headquarters building at the time." Once again the inference is clear that supervisory officers were fearful that Appellant would suffer violence while in custody. The extraordinary measures taken to protect Appellant after his arrest are commendable but they also provide compelling evidence of widespread hostility toward Appellant among the officers of the Detroit Police Department.

[12] Appellant admitted to the firebombing while placed between two officers in the back seat of the patrol car transporting him to police headquarters.[9] The back

9. The oral statements made in the patrol car were presented into evidence through the testimony of Sergeant Studer. No written statement was presented at trial and Appellant apparently never executed a written waiver of rights form. The Sergeant testified that Appellant admitted that he and Bethune, another suspect in the shootings, had firebombed the clinic "to get something started like down at New Orleans to free the people." Sergeant Studer recalled that Appellant denied shooting anyone; that Bethune shot at the police offi-

seat of a patrol car is an inherently coercive setting for a confession. *Cf. Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).[10] The prisoner and police officers are in close contact within a confined area. Often, the inside door handles are removed and the front and back seats are separated by wire mesh or a plastic divider. Invariably, the prisoner is handcuffed. He is effectively cut off from the world outside the patrol car. As a practical matter, he has no access to friends or counsel. If the prisoner has just been arrested, he may still be disoriented and apprehensive in an often hostile and alien setting. In short, the back seat of a patrol car as the setting for a confession conforms in all respect to the "incommunicado, police-dominated" atmosphere which led the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 456, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), to recognize the need for special procedures to minimize the inherent coerciveness of custodial interrogation. A confession made in such a setting even where *Miranda* warnings are given, is suspect and courts called on to determine its voluntariness must carefully sift the surrounding circumstances to discern any signs that the statement supposedly "volunteered" by a prisoner was actually obtained under duress.

[13] The evidence is clear that Appellant was emotionally distraught when he was placed in the patrol car following his arrest. According to Officer Thomas Arutoff, Appellant was crying with "tears coming down his face. He was sobbing and calling out something. It wasn't coherent." Officer David Gilbeau, who rode with Appellant in the patrol car, agreed that Appellant was "sobbing" immediately after he was placed in the car. Officer Steven Dest added that Appellant appeared quite nervous and was either crying or perspiring. On the trip to the stationhouse, Officer Ciaglo was driving. He was separated by a thick plastic divider from the back seat where Appellant was seated between Sergeant Studer and Officer Gilbeau. Appellant's hands were handcuffed behind his back. There is no doubt that the officers in the patrol car knew that their prisoner was Hayward Brown. Officer Ciaglo testified that he had asked Appellant his name before the patrol car had left the scene and Appellant had blurted out: "My name is Hayward Brown and I'll tell you everything you want to know."[11] Officer Gilbeau confirmed Appellant's identity by examining a flyer with a photograph of Hayward Brown which was in his jacket pocket. Sergeant Studer, who testified that he was unaware of Appellant's identity when he entered the car, asked Appellant his name and he answered: "My name is Hayward Brown and I will tell you everything you want to know."[12] It was about this time Sergeant Studer testified, that Appellant began to cry. The Sergeant described Appellant as breathing heavily,

cers chasing them and that Bethune shot the STRESS officers. Appellant also gave the Sergeant an address for Boyd and Bethune which he later admitted to be false.

10. In *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), the Supreme Court held that a confession made by a prisoner while riding in a police car had to be suppressed because the prisoner was denied the right to have counsel present during the interrogation. 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424. Justices Marshall and Powell in separate concurring opinions commented upon the inherent coerciveness of a police car as a setting for a confession. 430 U.S. at 408, 97 S.Ct. 1232 (Marshall, J., concurring); *id.* at 410, 97 S.Ct. 1232 (Powell, J., concurring).

11. This exchange between Officer Ciaglo and Appellant apparently occurred within a very short time of Appellant's denial of his identity when asked by Inspector Bensmiller. One possible explanation for this apparently inconsistent behavior is that in the interim Appellant had been positively identified as Hayward Brown by officers at the scene.

12. Testimony by police officers that a suspect volunteered the incriminating information does not foreclose our inquiry into the voluntariness of the confession. That the accused rather than the police may have initiated that conversation is a relevant fact to consider, but it certainly is not conclusive of the question. *See generally Schneckloth v. Bustamonte*, 412 U.S. at 224, 93 S.Ct. 2041. *See also* discussion in text at 5–9.

sweating profusely and that he appeared nervous or excited. The only injury that the Sergeant noticed was an abrasion on Appellant's right cheek that was covered with smeared blood. After the Sergeant became aware that Appellant was Hayward Brown he gave Appellant *Miranda* warnings which Appellant interrupted at least twice. According to the Sergeant's testimony after he gave the warnings but before Appellant made any statements, Appellant's facial expression looked as if he were crying and he shouted: 'Don't let them beat me Sarge.' The Sergeant replied, "No one is going to hit you." It was about this time however that Officer Gilbeau admits that he struck Appellant. The exact sequence of events is not clear from the record. Officer Gilbeau testified that at some point he struck Appellant with the back of his hand. He said that he was reasonably sure but not positive, that it was after Appellant admitted the firebombing. He also testified that he thought that he struck Appellant before he screamed to the Sergeant not to let anybody get him but he wasn't certain. Neither of the other officers in the car saw Officer Gilbeau strike Appellant so the exact timing of the event cannot be determined. Sergeant Studer testified that Appellant expressed the fear that he would be beaten before he admitted the firebombing. If that is true and if Officer Gilbeau's recollection that the incident occurred before Appellant asked the Sergeant not to let anyone get him is accurate then Appellant was struck before he made the incriminating statements. In any event Appellant was struck at about the time he was making the statements. When asked why he struck Appellant Officer Gilbeau replied that Appellant "was screaming screaming real loud and I just wanted to shut him up." Officer Gilbeau testified that during this period Appellant was "screaming and moving around considerably in the back seat." He also admitted to 'moving around considerably in the back seat' with Appellant. We assume that he was seeking to restrain Appellant from moving about. Sergeant Studer also testified that Appellant was thrashing around the back seat of the patrol car. He stated that Appellant "thrashed around periodically in the car moving around quite a bit throwing his shoulders around." At the police garage Appellant resisted getting out of the patrol car. He had to be pulled from the car and wrestled to the elevator where he was forcibly subdued. Sergeant Awe testified that as Appellant was being brought up to homicide from the garage he began screaming for no apparent reason 'don't beat me don't beat me.' The Sergeant commented that "[h]is entire demeanor changed suddenly ... for a moment, I had the impression he was going to go beserk or something." Appellant's conduct in the patrol car and in the police garage is not that of a man eager to cooperate with police.

Appellant's physical condition is another important factor to weigh in determining his mental state. Testimony about his physical condition came from four sources: police officers who were present at the arrest and in the patrol car; police officers and two attorneys who observed him at police headquarters; two doctors who examined him at Wayne County Jail; photographs and a clip from a television news film taken at the arraignment. The officers at the scene of the arrest testified that Appellant had an abrasion on his right cheek. Two of the arresting officers, Boice and Ciaglo, testified that they noticed the abrasion before Appellant was forced to the ground. The District Court found that Appellant suffered the abrasion when he fell while running from police. The abrasion on his cheek was the only injury testified to by police officers at the scene of arrest. The injuries observed by witnesses at police headquarters were more extensive. The defense offered the testimony of two police officers, Lieutenant Robert Taylor and Sergeant Gilbert Hill and two attorneys Richard Soble and Geoffrey Taft concerning Appellant's physical and emotional condition at police headquarters. The two attorneys and Sergeant Hill testified that Appellant was crying and distraught at various times and appeared to have been severely

beaten Lieutenant Taylor recalled that Appellant was nervous and excited with abrasions on his face and some swelling Sergeant Hill testified that Appellant's whole face appeared to have swelling and bruises and little specks of blood in different places According to Sergeant Hill Appellant's lip was split and something was wrong with his tongue because he could hardly speak and had trouble getting a cigarette in his mouth Richard Soble, one of Appellant's attorneys, arrived at police headquarters shortly after Appellant was brought in Mr Soble testified that Appellant's face was generally puffed his cheekbones puffed and almost distorted, and that it looked like his nose had been broken He said that there were several abrasions and blood on Appellant's face and that he was crying He described Appellant's lips and jaw as puffed and swollen so that he had difficulty speaking He testified that Appellant was bent over and sobbing his body moving up and down and when a police officer offered him a cigarette Appellant had great difficulty closing his fingers because his hands and body were shaking Geoffrey Taft corroborated the description given by Mr Soble

Medical testimony concerning Appellant's physical condition came from two doctors, Dr Mounir Guindi and Dr Milas W Lebedovych, both of whom had treated Appellant the day of the arrest Dr Guindi, the first doctor to examine Appellant after the arrest, is employed at the Wayne County Jail and testified for the prosecution Dr Guindi testified that Appellant had abrasions on the cheek nose chin upper lips and a laceration of the wrist and tongue He characterized the injuries as minor He gave Appellant some pain medication Dr Lebedovych, who examined Appellant later in the day, was called by the defense Dr Lebedovych testified that he gave Appellant a tetanus shot and sutured a laceration on his chin He recalled Appellant's face as badly beaten swollen with multiple abrasions and contusions He described Appellant as 'frightened and "shook up" Although Dr Lebedovych believed that the injuries were the result of a beating he conceded that they might have occurred during a violent struggle where Appellant's face was pushed and scraped along the sidewalk He rejected the possibility that the injuries could have been sustained in a fall because if that had been the case the swelling and lacerations would have been localized and he remembered that 'most of the face was badly beaten" When asked whether he agreed with Dr Guindi's description of the injuries as 'minor Dr Lebedovych said that he did defining minor injuries as those that are not 'life endangering" in that they would not lead to death without medical treatment He also stated his belief that the injuries were not self-inflicted The District Court characterized the injuries as 'minimal' and 'relatively minor."[13] An examination of the photographs included in the record reveals abrasions of Appellant's right cheek and nose, and a marked swelling of the right side of the face and lips While the injuries appear relatively minor, they are extensive, covering half the face and were undoubtedly painful The description of Appellant's emotional state is consistent throughout the period of custody The prisoner described as crying, screaming and thrashing about the back seat of the patrol car is also described as crying screaming and shaking at police headquarters The consistency in the description of Appellant's emotional state at the time of arrest, in the patrol car and at the police headquarters belies the Government's contention that for a brief period in the patrol car while he was being transported to headquarters Appellant regained sufficient composure to rationally and freely choose to incriminate himself

13. The District Court found that Appellant had not been beaten by police but had sustained the injuries in a fall while escaping and in the struggle with police at the arrest The Court found no inconsistency in the testimony of the officers at the scene and in the patrol car that the only injury they observed was the abrasion on Appellant's right cheek and the testimony of witnesses at police headquarters who observed more extensive injuries The Court noted that "it is common knowledge that it takes time for swelling to appear"

[14] From the undisputed testimony in the record it is clear that Appellant was extremely distraught at the time he made the incriminating statements The depiction of Appellant's conduct in the rear of the patrol car is that of someone in near hysterics He is described as crying, screaming and thrashing about To dismiss this conduct as the normal nervousness and behavior of someone recently taken into custody is to indulge in understatement and to ignore the totality of the circumstances We also cannot accept the Government's theory that Appellant was overcome by remorse for his past misdeeds The more reasonable explanation for Appellant's behavior is that he was seized by an overwhelming fear that he would suffer violence at the hands of police This was not an ordinary arrest Appellant was wanted for the murder and wounding of Detroit police officers His capture was the culmination of an intense and highly emotional manhunt that was widely publicized in the community Feelings against Appellant in the Detroit Police Department ran high as amply demonstrated by the officers testimony at the suppression hearing In this milieu apprehensions Appellant may have harbored about his safety in custody were reasonable and apparently shared by some officers in the Department That Appellant actually was fearful of being beaten by police is evident from the statements made to Sergeants Studer and Awe with the former statement occurring immediately prior to the confession Other factors appear in the record which may have influenced Appellant's belief that he would be beaten by police He had just received injury at the hands of police during a violent arrest His injuries, while described as minor, were extensive and obviously painful His expressed fear that he would be beaten in the patrol car was confirmed when he was struck by Officer Gilbeau Although a single blow would not necessarily require the suppression of a confession absent additional circumstances the infliction of physical violence during an interrogation is a weighty factor to consider in determining whether a contemporaneous confession was voluntary *See Stein v New York*, 346 U S 156 182-84 73 S Ct 1077 97 L Ed 1522 (1953) The blow struck by Officer Gilbeau, in conjunction with all the attendant circumstances, could well have influenced Appellant to make statements intended to mollify the officers in the patrol car which given the opportunity for reflection he would not have made The setting of the confession was conducive to the overbearance of Appellant's will He was situated between two officers in the back seat of a patrol car with his hands cuffed behind his back If he had any doubts that he was at the mercy of the officers escorting him they were dispelled when he was struck by Officer Gilbeau

In the final analysis, we simply cannot conclude that incriminating statements made by a crying, screaming nineteen-year old thrashing about the back seat of a patrol car were the product of a free and rational choice *See Culombe v Connecticut* 367 U S at 465, 81 S Ct 1860 [A]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible." *Townsend v Sain* 372 U S at 308 83 S Ct at 754 (emphasis in original)[14] Under the totality of the circumstances the Government has not borne the burden of demonstrating that the confession was voluntary *See Lego v Twomey*, 404 U S 477 92 S Ct 619 30 L Ed 2d 618 (1972)

Appellant raises two additional issues which we will address due to the likelihood of retrial on remand Appellant contests the admission of expert testimony comparing a sample of his hair with three hairs of unknown origin found on a bottleneck discovered at the site of the firebombing Testimony comparing the hair samples was

14. Thus a defendant need not show that the police consciously manipulated the circumstances to extract a confession so long as it is apparent from a review of the totality of the circumstances that the confession was in fact involuntary *See generally* 79 Harv L Rev at 974.

given by three prosecution witnesses: Kenneth Snow of the Bureau of Alcohol Tobacco and Firearms, Michael Bayard and Dr Robert Muggli of the McCrone Institute in Chicago Illinois. Mr Snow is a forensic chemist at the Bureau's laboratory in Washington, D C He was qualified by the Court as an expert in hair comparison Mr Snow conducted the initial tests on the samples using an optical microscope to compare the physical appearance of the hair He testified on direct examination that the samples were similar in eleven characteristics, although on cross-examination he conceded that the samples were also dissimilar in eleven characteristics He admitted that visual comparison of hair is a subjective test, but he explained that the sample of unknown hairs was too small to conduct meaningful tests using neutron activation analysis Appellant does not dispute the admissibility of Mr Snow's testimony The controversy surrounds tests on the hair samples conducted by Mr Bayard and Dr Muggli using a technique known as ion microprobic analysis Ion microprobic analysis is a technique for measuring the trace element content of a sample matrix Both ion microprobic analysis and neutron activation analysis proceed from the theory that matrices from a common source will have similar trace element contents and that matrices from different sources will exhibit dissimilar trace element contents The techniques are quite different however In neutron activation analysis the sample matrix is irradiated by bombarding it with neutrons The trace element content is determined by measuring gamma rays emitted from the now-radioactive sample *See United States v. Stifel*, 433 F 2d 431 436 (6th Cir 1970).[15] *See also Note, The Evidentiary Uses of Neutron Activation Analysis*, 59 Cal L Rev 997, 998–1010 (1971) In ion microprobic analysis the trace element content of a sample matrix is measured by the number and mass of the ions it releases when pierced by an ion beam The device for conducting ion microprobic analysis the ion microprobe mass analyzer, essentially consists of two mass spectrometers The first mass spectrometer generates a magnetic field which separates ions according to their mass A beam composed of one type of ion is then projected toward the sample matrix The ion beam's striking the matrix causes it to cast off ions of varying mass and numbers which are collected and measured by a second mass spectrometer The data collected by the ion microprobe mass analyzer indicates the concentration of trace elements in the matrix Although the initial use of ion microprobic analysis was to test metals and inorganic materials experiments have been conducted using organic matrices as well[16] At the McCrone Institute Mr Bayard and Dr Muggli have been experimenting with human hair as a matrix In the course of their experiments they have used the ion microprobe mass analyzer to trace the element content of approximately 130 samples of human hair Each sample was tested for 25 to 40 elements Comparisons of the samples were made by charting the data supplied by the mass analyzer and visually comparing the charts of elements for each sample against charts of other samples tested Mr Bayard and Dr Muggli were commissioned to test the hair samples in this case Based on a comparison of charts prepared on the hair samples supplied by the prosecution and the samples they had previously tested, Mr Bayard and Dr Muggli reached the conclusion that the hairs were of common origin After holding a special evidentiary hearing the District Court ruled that the technique of ion microprobic analysis was well accepted in the field and that expert testimony based thereon was admissible The District Court allowed the witnesses to testify on the findings of their experiments on human

15. In *United States v. Stifel* 433 F 2d at 435 41 we upheld the admission of expert testimony concerning identification of the source of bomb fragments by use of neutron activation analysis

16 The use of organic matrices like hair for mass spectrometry testing is complicated by the complexity of constituent elements in organic material and the lack of established absolute standards of comparison *See* Note 59 Cal L Rev at 1038 & n 232

hair and the results of the tests conducted on the hair samples in this case but the District Court would not permit the prosecution's experts to state their ultimate conclusion that the unknown hairs belonged to Appellant Appellant contends that it was error to admit any testimony based on ion microprobic analysis of human hair

[15–20] Traditionally the permissible limits of expert testimony are left to the sound discretion of the District Court and the decision to permit expert testimony will not be disturbed on appeal unless it is manifestly erroneous *United States v Green* 548 F 2d 1261 1268 (6th Cir 1977) However, expert testimony is not permissible in every case where the witness purports to base his testimony on an ostensibly scientific principle A necessary predicate to the admission of scientific evidence is that the principle upon which it is based must be sufficiently established to have gained general acceptance in the particular field to which it belongs *Frye v United States* 54 App D C 46 293 F 1013 1014 (1923) In *United States v Franks* 511 F 2d 25 33 n 12 (6th Cir 1975) we equated general acceptance in the scientific community with a showing that the scientific principles and procedures on which expert testimony is based are reliable and sufficiently accurate However "[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility" *United States v Baller* 519 F 2d 463 466 (4th Cir 1975) Conflicting testimony concerning the conclusions drawn by experts so long as they are based on a generally accepted and reliable scientific principle ordinarily go to the weight of the testimony rather than to its admissibility *United States v Franks* 511 F 2d at 33 As we stated in *United States v Stifel* 433 F 2d at 438 neither newness nor lack of absolute certainty in a test suffices to render it inadmissible in court Every new development must have its first day in court The clear trend in federal court is toward the admission of expert testimony whenever it will aid the trier of fact See Fed R Evid 702 However a strong countervailing restraint on the admission of expert testimony is the defendant's right to a fair trial *See United States v Green* 548 F 2d at 1268

> There are good reasons why not every ostensibly scientific technique should be recognized as the basis for expert testimony Because of its apparent objectivity an opinion that claims a scientific basis is apt to carry undue weight with the trier of fact In addition it is difficult to rebut such an opinion except by other experts or by cross-examination based on a thorough acquaintance with the underlying principles In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts

United States v Baller, 519 F 2d at 466 A courtroom is not a research laboratory The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an "aura of special reliability and trustworthiness," although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field *See e g, United States v Amaral* 488 F 2d 1148, 1152 (9th Cir 1973); *Frye v United States* 293 F at 1014 In recognition of the inherent danger that expert testimony admitted without proper foundation may tend to confuse or mislead the trier of fact and thus defeat a defendant's right to a fair trial in *United States v Green* 548 F 2d at 1268, we adopted the four criteria for reviewing a district court's decision to admit expert testimony set down in *United States v Amaral*, 488 F 2d at 1152 Four factors must appear in the record to uphold the admission of expert testimony: 1 qualified expert; 2 proper subject; 3 conformity to a generally accepted explanatory theory; and 4 probative value compared to prejudicial effect" *United States v Green* 548 F 2d at 1268 *citing United States v Amaral* 488 F 2d at 1152

It is the third criteria conformity to a generally accepted explanatory theory which Appellant claims was not met in this case

[21] Appellant admits that ion microprobic analysis is not a new technique and has attained a sufficient degree of acceptance in the field of mass spectrometry However Appellant contends that ion microprobic analysis when used to make hair comparisons is a new technique which has yet to be accepted by the scientific community He also criticizes the procedures followed by the prosecution's experts in conducting their hair experiments and he claims that certain theories on the properties of human hair propounded by the witnesses during their testimony are novel and unsupported Appellant cites the rebuttal testimony of two expert witnesses at trial Dr Charles A Evans Senior Research Chemist at the Illinois Materials Research Laboratory who was qualified as an expert in mass spectrometry in general and ion microprobic spectrometry in particular and Dr Adon A Gordus Professor of Chemistry at the University of Michigan and an expert in trace element analysis of hair Although the testimony of rebutting experts normally goes to the weight of the evidence, their testimony concerning currently accepted views in their field and the accuracy and reliability of procedures followed by opposing experts may be of invaluable assistance to the trial court in determining the adequacy of the foundation laid for the admission of scientific evidence [17]

[22, 23] After extensive review of the record we are inclined to agree with Appellant that the Government failed to fulfill the threshold requirement of demonstrating that ion microprobic analysis is a generally accepted procedure for comparing samples of human hair and that the experiments conducted by their experts carry sufficient indicia of reliability and accuracy to be said to cross "the line between the experimental and demonstrable stages" *Frye v United States* 293 F at 1014 Research has failed to disclose a single reported case where testimony based on microprobic analysis of hair has been admitted into evidence and the parties have not cited any cases reported or unreported where a court has admitted evidence based on ion microprobic analysis Neither Mr Bayard nor Dr Muggli claimed to be an expert on human hair The sole bases for their claimed expertise in the field are the experiments they performed on the 130 hair samples using the ion microprobe mass analyzer Both concede that their test results have not been duplicated elsewhere and neither was able to cite any authority in the field in support of their positions Mr Snow testified that the three hairs of unknown origin found at the scene of the firebombing were too small a sampling to conduct a meaningful examination using neutron activation analysis Mr Bayard and Dr Muggli stated that a valid comparison of known and unknown human hairs may be made by ion microprobe mass analysis using a smaller sample than is necessary to obtain a valid comparison using neutron activation analysis They grounded this belief on the theory that ion microprobic analysis unlike neutron activation analysis measures only the sub-surface trace element composition of the hair and that this factor is relatively constant in all hairs derived from a common source They conceded that there was no published authority to support this position but they discounted differing spectrographic analysis results as being affected by surface contamination Dr Gordus in rebuttal

17 The defense did not present rebuttal testimony at the special evidentiary hearing but chose rather to present its expert witnesses for the first time at trial before the jury Therefore the District Court did not have the benefit of their testimony at the time it made its ruling In denying the motion for a new trial the District Court described the defense's delay in presenting rebuttal witnesses as a "deliberate strategy" and found that there was an adequate basis to admit the evidence at the time it was admitted Defendants should be wary of deliberately bypassing the opportunity to present rebutting experts at a special hearing to assist the District Court because they run a grave risk that an appellate court will focus on the state of the record at the time the evidence was admitted in deciding whether the trial court abused its discretion

testified according to the prevailing view that trace element concentrations vary significantly across a person's head and along the length of a hair. *See* Note, 59 Cal. L. Rev. at 1039 & n. 240. There thus appears to be nothing in the record except unsupported assertions by the prosecution's experts to indicate that ion microprobic analysis may achieve a reliable and meaningful result using a quantitatively smaller sampling of hair than that which would be needed for neutron activation analysis. The procedures employed by the prosecution's experts in testing the hair samples also militate against the admission of testimony based on the results of their experiments. The witnesses' conclusion that the unknown hairs and Appellant's hairs derived from a common source was reached by comparing charts compiled on tests of those samples against the charts prepared on the samples they had previously tested. The comparisons were subjective and based on visual calculation. Both witnesses conceded that there were no standards with which to assess the accuracy of their measurement of trace element presence, and they agreed that their measurements were relative rather than absolute. The National Standard Bureau has listed absolute standards for a number of materials tested by ion microprobic analysis, but no standard has been developed for trace element analysis of human hair. *Cf.* Note, 59 Cal. L. Rev. at 1038. Where there is no absolute standard by which to gauge the accuracy of the tests it is incumbent on the proponents to demonstrate that the relative standards of comparison they employ in their experiments are sufficiently reliable and accurate. The most troubling aspect of the testing done here is that no attempt was made to match the test samples against a statistically valid test group. The witnesses admitted that their samples were gathered in no particular manner and they were not seeking to obtain a random sample of the general population or of a relevant sub-group. Of the 130 samples collected, only 20 were from black people and two-thirds of the test group were from the metropolitan Chicago area. Demographic data about the individuals who supplied the hair samples were incomplete and apparently not treated as a matter of great import by the prosecution's experts. However the prevailing view in the field is that a number of factors peculiar to the individual and his background, including diet, metabolism, occupation, locale and environment, have a definite bearing on the trace element content of human hair. *See generally* Note, 59 Cal. L. Rev. at 1038, 1048. There is a clear danger of misidentification where a test compares the hair of a black defendant from Detroit with hairs taken from a predominantly white test group collected primarily in Chicago. *See id.* at 1049. The reliability and accuracy of the tests are further drawn in question by the fact that only four of the 130 samples tested involved comparison of hairs from the same subject. The small number of test samples where actual comparisons were made of hairs taken from verifiable sources provides scant support for the prosecution's claim that the experiments conducted by its experts prove that ion microprobic analysis can reliably and accurately match hair samples from known and unknown sources.

[24, 25] The District Court would not permit the prosecution experts to state their ultimate conclusion that the hair samples were of common origin, presumably because of a lack of proper foundation. This ruling did not go far enough. The clear implication from the experts' testimony was that the hairs found at the scene of the firebombing belonged to Appellant. The limitation on the scope of testimony imposed by the District Court could not cure the prejudice to Appellant from exposing the jury to scientific evidence linking him to the crime which failed to satisfy threshold requirements for admissibility. *See United States v. Green*, 548 F.2d at 1268; *Frye v. United States*, 293 F. at 1014. While it is a truism that every useful new development must have its first day in court, *see United States v. Stifel*, 433 F.2d at 438, expert testimony on a critical fact relating to guilt or innocence is not admissible unless the principle upon which it is based has attained general acceptance in

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

GENE PAULK, Plaintiff,	)	
vs.	)	No. CIV-85-3006-W
SKAGGS ALPHA BETA, INC., Defendant.	)	

O R D E R

This matter comes before the Court on the Motion in Limine of the defendant, Skaggs Alpha Beta, Inc., wherein it is argued that thermograms of the plaintiff, Gene Paulk, and testimony relating to the same should not be admitted into evidence during the trial of this action. The plaintiff has responded in opposition to the motion.

After reviewing the authorities cited by the parties in the instant submissions as well as those arguments and authorities advanced by the parties in their trial briefs, it appears to the Court that thermography is not sufficiently reliable to meet either the standard articulated in Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923)(whether scientific principle is sufficiently established to have gained general acceptance in particular field to which it belongs), or the standard set forth in Rule 702, F.R.E. (whether evidence would aid jury in understanding evidence or determining ultimate issues).

Therefore, the Court finds that testimony regarding these tests, or the results thereof, will not be deemed admissible and

the defendant's Motion in Limine is GRANTED in this regard. The plaintiff will be permitted to make an offer of proof as to this matter outside the presence of the jury without waiving any rights to present such evidence.

ENTERED this 22d day of August, 1986.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

INITIAL

QUARTERLY NEWSLETTER FOR THERMAL IMAGE ANALYSIS: MADISON, WISCONSIN

VOL 9, NO 1 MARCH 1988

DIRECTOR'S LINE

THERMOGRAPHIC CONTROVERSY 1988

After 17 years of working with thermography in breast disease, neuromusculoskeletal pathology and exercise physiology, I am convinced of the extreme importance of the obtained data from a thermographic examination.

Great arguments, pro and con, as to the significance of these observations have occurred over the years. Thermography is now established as important medical data! (See AMA report.)

As only a minority of physicians are using it and understand it, the majority is posturing itself against the technology. After all, if one sports clinic is using it, the others have to decide whether or not to become involved. If the non-user group's decision was positive, thermographic usage would increase like all natural science observations in medicine. Instead they have to protect their practice by taking an active role against thermography.

We have seen this with Paps and mammograms. Some accepted the data early and others resisted actively with many biases. Only the fear of losing patients to the more important complete examinations forced the non-believers into performing these necessary tests.

Thermography as practiced in 1988, is the territorial measurement of temperature of the skin as an expression of the microcirculation of the dermis. Thermography is the measurement of the skin's main function, thermal regulation of the body.

Many physicians who routinely use oral and rectal temperatures have a great difficulty in realizing that surface territorial measurement could be significant. Thermography is currently participating in our understanding and patient management in several important areas, increasing our understanding of:

1. FEVER - PRODUCTION, MAINTENANCE, DISSIPATION
2. EXERCISE - THERMAL AND CIRCULATORY PHYSIOLOGY
3. NEUROLOGY OF COLLATERAL CIRCULATION IN VASCULAR PATHOLOGY
4. AUTOIMMUNE PHENOMENA: A) ALLERGY, B) ENDOTOXIN, C) NEOPLASIA
5. TISSUE INJURY - BOTH SKIN AND DEEP STRUCTURES
6. INFLAMMATION - PART I: NOCICEPTIVE SPINAL REFLES. PART II: LOCAL ALPHA RECEPTOR PARTICIPATION
7. ARTHRITIS - STUDY OF NEUROGENIC REFLEXES INVOLVED IN PATHOLOGIC PROCESS
8. PAIN SYNDROMES WITH HYPERALGESIA

The current practicing physician has great difficulty in integrating and utilizing this information in patient management. Thus, he wants to deny its existence and resists the opportunity to understand thermography. Less than 2 percent of physicians are using thermography.

The thermographer is as important as the scientific aspect we have just discussed. His or her problems are obtaining new instruction, using the data to the patients' benefit, being reimbursed and peer acceptance.

More and more published articles on observed thermographic findings are occurring. (See Dr. Stess, page 8 , Dr. Sherman, page 7 , Dr. Gautherie, page 10). The American Academy of Thermology, through the efforts of Brad Abernathy, has accumulated an inch-thick bibliography index, (Thermology, Vol 2, No 3). We at Thermal Image Analysis, Inc. continue to offer the latest in technical advances and physiological explanations. New faculty who have special areas of interest add much to the knowledge of our special seminars.

Practical use of thermographic monitoring is a needed area of growth in the practice of thermography. The biggest areas of growth this past year are more answers to: Why do it? How does it help? How important is its significance? Can I practice without it?

Problems of reimbursement have lessened as thermographers document the necessity in each individual case. Much further education of claims, agents, insurers, and other third-party payers is needed. As a physiological test, few of the above understand why we need the thermographic data. It is up to us to show them. Keep good records!

The peers of the various specialties which thermography helps need greater understanding provided by us, the thermographers. An example is an orthopedic clinic that uses thermography and one that does not. As most clinics are in competition, new advances and technological improvements must be included to service the patients' needs. Orthopedists using thermography are diagnosing "sympathetic maintained pain" earlier and, thus, instituting therapy appropriately.

It is a minority of orthopedists using thermography, but the contribution is so important that most should be using it in ten years. This tension needs professional cooperation, not competition, between users and non-users. (See Dr. Manuel Alexander, page 4).

Thermography's greatest danger is not from the outside, but from the inside. Groups and cliques have formed and are actually fighting between themselves. Some who believe thermography is dynamic and needs special integrating in "pain states", others who think it is static and a correct examination is three studies in one hour. Some who say only electronic thermography is worthwhile and others who say liquid crystal thermography is equally effective. Some who say there is only one explanation for what is seen and what it means, and others who say it is a correlative test and adds to differential not otherwise possible.

Thermography will not be destroyed from the outside (insurance carriers, courts, panels, AMA and other medical groups), but it will be destroyed from the inside.

We thermographers must learn tolerance toward others in the field. All of the thermographic organizations must cooperate with each other. Internal conflicts even to such matters as protocol guidelines and correlative interpretation must be resolved by tolerance in such a new science. Only a small part of the scientific knowledge of thermography is in.

The present societies should meet with physiologists, biomedical engineers and various subspecialty groups. They should provide the leadership for our expanded knowledge.

Thermography will become more rapidly accepted by more physicians if the thermographers become united. This is my hope for 1988.

Because He is I am,

William B. Hobbins, M.D
Director

plication for Scientif

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

Fifty-fifth Annual Meeting, Atlanta, Georgia, February 4-9 1988. This application must be submitted to: Frederick A. Matsen, III, MD, American Academy of Orthopaedic Surgeons, 222 S. Prospect Ave., Park Ridge, IL 60068 by **April 15, 1987.**

TITLE: The Usefulness of Thermography for Neck and Back Dysfunction

AUTHOR: Charles J. Ash, M.D., 1443 N. Robberson, Suite 308, Springfield, MO 65802
(complete name, academic degree, street, city state and zip)

CO-AUTHORS: 1. Melvin V. Foster, Ph.D., Professor, Dept. of Computer Science, Southwest
2. 'issouri State Univ., Springfield,
3.
4.

PRESENTER: Charles J. Ash, M.D. Phone (417) 836-8800

ABSTRACT

Abstract is to be typed in the space below. Extra pages will not be considered when grading. A TWO year minimum follow-up is required for all papers describing the results of reconstructive procedures. Use English only. Do not enclose any photographic material.

Purpose: To accurately determine if orthopaedic surgeons consider thermography useful or valid in the evaluation and treatment of neck and back injuries.

Conclusion: In a statistically significant, random sampling, over 95% of orthopaedic surgeons do not consider thermography useful or valid in the diagnosis or treatment of painful conditions of the neck and back.

Significance: Although thermography has been recommended as a highly reliable method of objectively documenting injuries of the neck and back, this survey indicates that thermography should not be used in the courtroom at this time.

Summary of methods, results, and discussion: METHODS AND RESULTS: A questionnaire was mailed to a simple random sample of the 1986 active A.A.O.S. membership list. The sample was created by utilizing a uniform random number generator to generate a page number between 1 and 200 and a line number between 1 and 65. If the individual was not an active member, he was bypassed. The sample size calculation of 407 considered incorrect addresses, 50% non responders (actual response over 63%), and estimated the percentage of users of thermography within 2%. Questions and responses were:

1. Do you evaluate or treat patients with neck or back problems? Yes 237, no 17.
2. Do you perform or prescribe or refer patients for any of the following: X-ray 237, CT scan 235, NMR 197, EMG 215, Thermography 15.
3. How would you describe thermography in your practice? Helpful 7, No value 149, Undecided 81.
4. In your opinion, is thermography (for neck and back) a valid test? Valid: Yes 11, No 102, No firm opinion 120.
5. Do you practice in a pain clinic setting? Yes 11, No 202, Not primarily 24.

DISCUSSION: Recent articles and presentation on thermography and the musculoskeletal system have claimed strong correlation of thermograms with myelograms, CT scans, and EMG. However, the scientific basis for thermography in these conditions has been seriously questioned. The lack of basic laboratory research and controlled clinical trials has been documented. Of those polled, 62% have responded, indicating a very high degree of interest. 93% treat back and neck conditions. 100% use x-ray and 99% use CT scan. 83% use NMR. 91% use EMG. 6% use thermography and only 4% consider it valid. Only 3% (half of those using thermography) consider it helpful. 51% are uncertain as to its validity. It is apparent from this study that the opinions of thermographers regarding the usefulness of thermography are not shared by over 95% of the orthopaedic surgeons.

Circle one category which best describes your paper: Adult Reconstruction | Basic Research | Spine | Trauma | Upper Extremity | Lower Extremity | Tumor | Sports Medicine | Other

Has this material been presented previously in whole or in part No If so when where

Will your material have been published before the Annual Meeting No (If yes paper cannot be accepted) If your paper is accepted will you present a related scientific or poster exhibit No

APR 2 7 1987

Suggested Discussors (designate two by name and address):

1. John A. McCulloch, M.D., F.R.C.S., Orthopaedic Surgeons, Inc., Ste. 10, 75 Arch St., Ak
2. Robert A. Harway, M.D., 1941 Johnson Ave., #301, San Luis Obispo, CA 93401 \Ohio 443

BREAKDOWN OF THOSE THAT USE THERMOGRAPHY
ASH AND FOSTER
TOTAL OLLED 407 RESPONSES 260 April 19, 1987

CODE	AAOS YR	STATE	THERM USE IT	HELPFUL	VALID TEST	
358	69	NY	Y	Y	Y	
390	74	MN	Y	Y	Y	
72	81	PA	Y	Y	Y	
131	81	MA	Y	Y	Y	
159	81	AL	Y	Y	Y	
146	79	CA	Y	Y	M	
178	81	PA	Y	Y	M	
314	81	VA	Y	N	N	
294	59	TN	Y	M	N	
272	72	VA	Y	M	M	
303	68	FL	Y	M	M	
139	81	PA	Y	M	M	
124	84	FL	Y	M	M	
116	83	CT	Y	M	M	
403	86	MD	Y	M	M	
381	81	NJ	Y	M	M	
339	79	CA	Y	M	M	
155	56	NM	N	N	Y	
164	71	OK	N	N	Y	
211	82	GA	N	N	N	
20	81	MN	N	N	N	
373	67	FL	N	N	N	
209	64	OH	N	N	N	
18	79	OH	N	N	N	
13	84	VA	N	N	N	
332	67	MO	N	N	N	
105	68	MD	N	N	N	
130	83	PA	N	N	N	
208	63	MO	N	N	N	
336	76	CA	N	N	N	
337	71	MO	N	N	N	
32	63	NJ	N	N	N	
66	66	IA	N	N	N	UNEXPECTED FINDING
10	83	CO	N	N	N	17 USE THERMOGRAPHY
290	75	NC	N	N	N	Of these only 7
342	78	VA	N	N	N	(41%) find it
12	73	NJ	N	N	N	helpful!!!
63	86	NJ	N	N	N	Only 5 (29%) think
129	85	IL	N	N	N	it's valid!!!
295	85	CA	N	N	N	
143	64	LA	N	N	N	So actually in this
42	75	VA	N	N	N	entire series, we
247	65	MI	N	N	N	only have
120	78	PA	N	N	N	2%
						that USE IT AND
						LIKE IT!!!!

= YES
= NO
= UNDECIDED OR NOT SURE

PAIN DOCTORS WHO USE THERMOGRAPHY
ASH AND FOSTER
TOTAL OLLED 407 RESPONSES 260 April 19, 1987

	PAIN MD	Helpful	Use it	VALID	
1	Y	M	N	N	
167	Y	N	N	N	
396	Y	N	N	N	
299	Y	N	N	N	
119	Y	M	N	M	FULL TIME PAIN CLINIC MDs
108	Y	M	N	M	11
59	Y	N	N		
45	Y	M	N	M	NONE USE THERMOGRAPHY!!!
306	Y	M	N	M	
297	Y	N	N	N	PART TIME PAIN CLINIC MDs
122	Y	N	N	N	
4	N	M	N	M	USE THERM 3/28 11%
10	N	N	N	N	HELPFUL 2/28 7%
13	N	N	N	N	VALID 1/28 4%
105	N	N	N	N	
220	N	M	N	M	THIS CAME AS A COMPLETE
11	N	N	N	N	SURPRISE TO ME. I EXPECTED
12	N	N	N	N	MORE THERMOGRAPHY IN THE
211	N	N	N	N	PAIN CLINICS.
209	N	N	N	N	
9	N	N	N		
226	N	N	N	N	
23	N	N	N	N	
126	N	N	N	N	
229	N	N	N	M	
2	N	N	N	N	
15	N	M	N	M	
130	N	N	N	N	
29	N	N	N	N	
18	N	N	N	N	
337	N	N	N	N	
32	N	N	N	N	
72	N	Y	Y	Y	
85	N	N	N	M	
290	N	N	N	N	
36	N	M	N	M	
139	N	M	Y	M	
242	N	M	N	M	
129	N	N	N	N	
142	N	N	N	M	
143	N	N	N	N	
30	N	M	N	M	
43	N	M	N	Y	

Y = YES
M = PART TIME OR ?HELPFUL OR ?VALID
N = NO

BREAKDOWN OF THOSE THAT THINK THERMOGRAPHY IS HELPFUL
3H AND FOSTER
TOTAL PC ED 407 RESPONSES 260 April 19, 1987

CODE	AAOS YR	STATE	THERM HELPFUL	USE IT	VALID TEST	
358	69	NY	Y	Y	Y	
390	74	MN	Y	Y	Y	
72	81	PA	Y	Y	Y	
131	81	MA	Y	Y	Y	
159	81	AL	Y	Y	Y	
146	79	CA	Y	Y	M	
178	81	PA	Y	Y	M	
314	81	VA	N	Y	N	
164	71	OK	N	N	Y	
155	56	NM	N	N	Y	OF THE 7 THAT CONSIDER
209	64	OH	N	N	N	IT HELPFUL, ONLY 5(71%)
12	73	NJ	N	N	N	THINK IT'S VALID!!
10	83	CO	N	N	N	
14	67	TN	N	N	N	
105	68	MD	N	N	N	
373	67	FL	N	N	N	
17	73	TN	N	N	N	
18	79	OH	N	N	N	
211	82	GA	N	N	N	
20	81	MN	N	N	N	
66	66	IA	N	N	N	
226	73	FL	N	N	N	
23	81	AL	N	N	N	
126	73	MS	N	N	N	
13	84	VA	N	N	N	
332	67	MO	N	N	N	
129	85	IL	N	N	N	
130	83	PA	N	N	N	
208	63	MO	N	N	N	
336	76	CA	N	N	N	
337	71	MO	N	N	N	
32	63	NJ	N	N	N	
366	85	TX	N	N	N	
340	83	WI	N	N	N	
290	75	NC	N	N	N	
342	78	VA	N	N	N	
11	68	PA	N	N	N	
63	86	NJ	N	N	N	
243	63	CO	N	N	N	
295	85	CA	N	N	N	
143	64	LA	N	N	N	
42	75	VA	N	N	N	
247	65	MI	N	N	N	
120	78	PA	N	N	N	

= YES
= NO
M = NOT SURE

BREAKDOWN OF THOS THAT THINK THERMOGRAPHY] VALID
ASH AND FOSTER
TOTAL .OLLED 407 RESPONSES 260 April 19, 1987

CODE	AAOS YR	STATE	VALID TEST	THERM USE IT	HELPFUL	
358	69	NY	Y	Y	Y	
390	74	MN	Y	Y	Y	
72	81	PA	Y	Y	Y	
131	81	MA	Y	Y	Y	
159	81	AL	Y	Y	Y	
164	71	OK	Y	N	N	
155	56	NM	Y	N	N	OF THOSE THAT CONSIDER
249	79	WA	Y	N	M	IT VALID (11), ONLY
377	71	CA	Y	N	M	5 (45%) ACTUALLY HAVE
189	84	IN	Y	N	M	USED IT!!!
43	75	NC	Y	N	M	
314	81	VA	N	Y	N	
294	59	TN	N	Y	M	
211	82	GA	N	N	N	
10	83	CO	N	N	N	
13	84	VA	N	N	N	
373	67	FL	N	N	N	
209	64	OH	N	N	N	
299	77	LA	N	N	N	
17	73	TN	N	N	N	
105	68	MD	N	N	N	
226	73	FL	N	N	N	
23	81	AL	N	N	N	
12	73	NJ	N	N	N	
127	75	FL	N	N	N	
332	67	MO	N	N	N	
66	66	IA	N	N	N	
130	83	PA	N	N	N	
208	63	MO	N	N	N	
336	76	CA	N	N	N	
337	71	MO	N	N	N	
32	63	NJ	N	N	N	
129	85	IL	N	N	N	
340	83	WI	N	N	N	
290	75	NC	N	N	N	
126	73	MS	N	N	N	
11	68	PA	N	N	N	
63	86	NJ	N	N	N	
14	67	TN	N	N	N	
295	85	CA	N	N	N	
143	64	LA	N	N	N	
42	75	VA	N	N	N	
18	79	OH	N	N	N	
120	78	PA	N	N	N	

= YES
= NO
=NOT SURE OR UNDECIDED

Thermography: A Call for Scientific Studies to Establish Its Diagnostic Efficacy

John W. Frymoyer, MD
Larry D. Haugh, PhD

ABSTRACT: Thermography is reported to provide objective evidence of physiologic dysfunction in patients with low back pain and sciatica. This diagnostic test is appealing because it is painless, non-invasive, has no known adverse biologic effects, presents comprehensible graphic information, requires only a moderate investment in equipment, and should be an inexpensive procedure to perform. Unfortunately, the complete scientific information necessary to assess its diagnostic reliability is not available. This article discusses other experiments which have been performed to assess the diagnostic accuracy of tests for low back pain and sciatica and outline some features of an experimental protocol which would be essential to establish the reliability of thermography in the diagnosis of low back pain and sciatica due to herniated nucleus pulposus.

Literature Review

The literature contains many representative examples of clinical experimental approaches to assess diagnostic accuracy when dealing with the spine. Published information is available for physical examination,[1] plane spinal radiography,[2,3] discography,[4] myelography,[5,6] CT scans,[7] and electrophysiologic tests. Desirable characteristics of such studies are as follows: 1) the investigators have attempted to perform the test in question using state-of-the-art techniques. 2) Attempts have been made to perform the test in groups of symptomatic and asymptomatic subjects who were matched for relevant other variables, such as age and sex, and who were sufficient in numbers to give statistical reliability to the obtained data.[6,7] 3) The observers have been unaware of the disease diagnosis, ie, blinded to eliminate observer bias. 4) Comparison of differences in test interpretation by different observers has permitted estimation of interobserver reliability. 5) Often a rerandomized sample has been reviewed again by the same observers to permit the calculation of intraobserver repeatability.[2] 6) The test results have been compared to some other objective standard, most commonly operative findings.

After the data have been obtained, calculations are made of the sensitivity, specificity and predictive value of the test. These statistical terms are defined as: "Accuracy is a measure of a test's ability to measure a quantity or quality."[8] "Sensitivity is the ability of a test to give a positive finding when the person tested truly has the disease under study."[9] Sensitivity is usually expressed as the fraction or percent of all persons with a condition who will have a positive test:

$$\frac{\text{Diseased person with a positive test}}{\text{All diseased subjects tested}} \times 100 \text{ percent}$$

This means that if the sensitivity of a particular test is 95%, then 95% of all patients with a specific condition will have a positive test (true positive), while 5% will have a negative test (false negative). "Specificity is the ability of the test to give a negative finding, when the person tested is free of the disease under study."[9] It is expressed as the fraction or percent of all persons free of a condition who will have a negative test (true negatives):

$$\frac{\text{Non-diseased person negative to the test}}{\text{All non-diseased subjects tested}} \times 100 \text{ percent}$$

A test with 95% specificity applied to a group of 100 persons, who do not have the disease, is expected to be negative in 95 and positive in five (false positive). The predictive value of a test is particularly useful when studies are being done in a large, unselected population, where one is attempting to find the prevalence of the disease in question in that total population. A different statistical expression is used to estimate predictive value and can be found in Vecchio's classic article.[9]

When a population is being studied because there is a clinical suspicion of the disease process in question being present, these terms are often substituted by the more common terms (false positive rate, false negative rate, true positive rate, true negative rate). In more sophisticated statistical analyses, a range of results is calculated which accounts for the interobserver errors.

In the diagnosis of low back pain, with or without sciatica, it has been sometimes necessary to combine more than one study to obtain an estimate of this statistical information. For example, Hitselberger's[10] landmark study of asymptomatic subjects who underwent myelography, established that 24% of these normal subjects had an abnormality. Later these data were utilized to redefine the sensitivity, specificity, and predictive value of that test.[5]

Such scientific studies have defined and redefined the value of tests for the diagnosis of low back pain and sciatica. For example, spinal radiography was, and still is, widely used in the evaluation of low back pain, yet its value, for most low back pain conditions, is minimal because of the equal prevalence of "abnormalities" in symptomatic and asymptomatic populations, ie, low specificity and predictive value.[2] In the specific

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diagnosis of low back pain and sciatica due to herniated nucleus pulposus, plane radiography has been shown to have no value.[11] Similarly, discography is generally reported to have only marginal value in determining the precise level of disc pathology, in part, because of the non-specificity of the test and also because there is reported to be a large interobserver error. Although CT scanning and myelography are well established in the diagnosis of disc herniation, the studies of these tests inevitably have a cautionary note that clinical usage requires a careful correlation between clinical signs and symptoms and the test results.[12]

Thermography

A review of the thermography literature reveals that studies performed to date are flawed by at least one, and most commonly two or more of the criteria outlined in the previous section of this article. These same criticisms can be made about many of the published studies regarding myelography, CT scan, discography, etc. The most common omissions have been the absence of a carefully selected control population, or that the observers were not blinded and, therefore, were subject to observer bias. In two populations where the observers were blinded and there was some attempt at a matched control population, the studies have been criticized for not utilizing "state-of-the-art techniques."[13,14] In designing such a study of thermography, there are a number of practical obstacles.

A global problem in clinical low back pain research is the absence of a precise structural causation for the complaint in at least 50% of the patients. In a study of thermography, it would be impossible to use the general population of low back sufferers, because no independent measure of disease would be available for comparison. Of course, it could be argued thermography objectively describes a new population of low back disease, but such a proof would await the more precise definition of that population. At present, a study would, therefore, require limitation to a population who can be well described. Low back pain and sciatica due to herniated nucleus pulposus seems the most appropriate choice.

A second significant problem to overcome is the definition of a control population. It is known that 80% of the population has, or is, experiencing low back pain and that 24% to 50% of asymptomatic individuals have abnormalities on myelography,[10] discography,[4] and CT scan.[7] In addition, there are many factors which may influence the thermogram, such as age, sex, cardiovascular status, drug use and smoking. On theoretical grounds, occupation may be an important variable to control as well. Careful matching for as many of these variables as possible would be essential. Because a matched control population may be more difficult to obtain than an experimental group, a "reverse" matching procedure might be required, whereby controls were selected and patients matched to the controls for the relevant variables. Lastly, the selection of an independent measure of disc herniation is probably the most difficult obstacle facing investigators in this research. The ideal solution would be to perform CT scans in the asymptomatic population, although the compromise of using a clinical criterion might be required, with the interpretation of results including analysis that a significant number of these subjects may well have abnormalities. Precise estimation of rates, such as specificity or false negative, often requires a fairly large study group. For example, 100 subjects in a control group would be required to estimate a test specificity to about ± 10% with 95% confidence.

Discussion

There is no question that thermography holds intrinsic appeal, and currently is receiving widespread use, including, in certain instances, the use of the test to provide "objective evidence" of low back pathology or "physiologic low back dysfunction." A number of studies have been reported attempting to calculate sensitivity and specificity of the thermogram in comparison to some other test, most commonly electromyogram. In one study,[16] thermography was determined to be 100% sensitive and 88% specific in comparison to electromyography. In surgically confirmed cases, thermography is reported to be as high as 90% in sensitivity. Again, the absence of unbiased, blinded observers makes these data open to question.

From an historic perspective, the current enthusiasm for thermography is reminiscent of previously published studies of plane radiography. There is no doubt the physicians and surgeons, who care for low back pain patients, would welcome a test which indeed provided objective evidence of clinical disease, but in the absence of carefully controlled experiments, the accuracy of thermography in the diagnosis of low back disease must still remain speculative.

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American Medical Association
DIAGNOSTIC AND THERAPEUTIC TECHNOLOGY ASSESSMENT

COUNCIL ON SCIENTIFIC AFFAIRS

SUBJECT: Thermograph

QUESTION: Electronic infra-red and liquid crystal thermography have been used as diagnostic aids in determining the etiology of low-back pain. How would you rate their effectiveness? If established, what are the criteria for their use?

ANSWER: The DATTA panelists who responded to this question felt that neither of these techniques was established as a diagnostic aid in determining the cause of low-back pain.

Thermography is an imaging technique which gives a photographic display of temperature asymmetries on the surface of the body. The new improved electronic infra-red thermography system employs an infra-red detector such as an AGA 680 infra-red camera using an indium anti-monide detector cooled by liquid nitrogen. The image is transmitted electronically to a THV 102 cathode ray display unit that can then be photographed either in black and white or color, as a permanent record. A much less expensive contact thermographic technique uses liquid crystals of cholesterol derivatives embedded in an elastomeric "Flexi-Therm" sheet that is part of an air-pillow box. On inflation of the air-pillow, the sheet containing the temperature sensitive crystals reliably develops different colors that depend upon the contiguous skin temperature. The colored sheet is then photographed by an instant camera. Both of these techniques are subject to between-instrument-systems variations in resolving power, thermal sensitivity, field of view, spectral range, format size, frame time, angle of view, scan time, thermal resolution and other characteristics.

Thermography has been an accepted technique for the display of peripheral arterial insufficiency at various loci and venous thrombosis in the extremities. It has been proposed as a tool for non-invasively studying the cerebral circulation and as an adjunct in the early detection of breast malignancies.

Half of our respondents did not have any familiarity with the technique and had no opinion as to its worth in the diagnosis of low-back pain. This is an indication that the technique is not in wide use for diagnostic evaluation of low-back pain. The remainder of our respondents felt that it was either in an investigational stage or that its efficacy was indeterminate. The changes in skin temperature are reflected accurately and may point to certain pathological conditions including nerve root syndromes. Many users claim the technique to be a promising, simple, non-invasive, non-ionizing imaging modality for evaluating low-back pain, especially when findings are otherwise equivocal or compensation is involved. However, it has not received wide-spread acceptance because no improvement in sensitivity or specificity has been demonstrated over more familiar diagnostic methods such as x-ray of the lumbar spine, electromyography, body CAT scan and myelography.

In a few comparative studies, it has been shown that thermography is almost as sensitive as myelography in diagnosing a herniated disc but totally inadequate when the basis for the symptoms is lumbar spinal stenosis. In another study of patients hospitalized for low-back pain, abnormalities were more apt to be seen with an acquired lesion of the spine or degenerative disc disease than when a congenital or developmental lesion was present. In still another study of patients with ankylosing spondylitis, it was concluded that the thermographic technique was of little help in early diagnosis of sacro-iliitis but might be helpful in the serial assessment of rheumatic activity when joint inflammation was demonstrable.

Some authors have suggested the use of thermography as a screening technique for excluding patients who might otherwise be candidates for myelography or patients who may, in fact, be malingering. However, it must be conceded that false negative tests can be seen in patients with sacro-iliitis or lumbar disc disease. In addition, a few panelists were concerned about the ease with which the application of the technique could be abused, even though it may have much potential for clinical utility.

In summary, these newer thermographic imaging techniques are still under active investigation by several investigators who are attempting to determine the exact role of this imaging technique in screening for and diagnosis of certain low-back pain syndromes. Although they are safe, there is no convincing evidence yet that they provide a significant improvement in sensitivity or specificity over other more familiar diagnostic techniques. Thus, they must still be considered to be investigational and not yet established for this purpose.

Resolution 141 asks the AMA to use public service announcements in an attempt to enhance public understanding of the procedures involved in organ donations and transplantation and to increase the number of people who consent to organ donation, and to research other ways of increasing the organ donor pool.

Your Reference Committee believes that the substantial fiscal note attached to this resolution necessitates referral to the Board of this laudable resolution.

(18) RESOLUTION 113 - GENDER VERIFICATION OF FEMALE ATHLETES

RECOMMENDATION:

Mr. Speaker, your Reference Committee recommends that Resolution 113 not be adopted.

Resolution 113 calls on the AMA to study and develop policy concerning the role and method of gender verification in international athletic competition.

Your Reference Committee believes that the issue raised in this resolution is not of sufficient import to require study. There are many more pressing issues to which the resources of the AMA should be directed.

(19) RESOLUTION 108 - COUNCIL ON SCIENTIFIC AFFAIRS REPORT ON THERMOGRAPHY

RECOMMENDATION:

Mr. Speaker, your Reference Committee recommends that Resolution 108 be (1) amended by the addition of a second Resolve so that it reads:

RESOLVED, That the House of Delegates affirm that it has not requested and has not adopted any official policy statement or position of the American Medical Association on the use of thermography.

RESOLVED, That, in light of the numerous issues aired, the House of Delegates requests the Board of Trustees to ask the Council on Scientific Affairs to reconsider its report on Thermography.

and (2) Resolution 108 be adopted as amended.

Resolution 108 calls on the House of Delegates to affirm that it has not requested and has not adopted any official policy statement or position of the AMA on the use of thermography.

PART OF HANDOUT BY DR. JACOB GREEN
SAN FRANCISCO CONFERENCE - MARCH 2-4, 1990
SOUTHEASTERN NEUROSCIENCE INSTITUTE

THERMOGRAMS

CHARGE PER TEST = $450.00

TOTAL NUMBER OF THERMOGRAMS DONE IN 1988
(regardless of insurance)

RVC CODE	DESCRIPTION	# TESTS	AMOUNTS BILLED
93762	Thermogram-Cervical	399	$179,550.00
93762	Thermogram-Lumbar	388	$174,600.00
	GRAND TOTALS----------	787	$354,150.00

BREAK-DOWN OF TESTS DONE BY INSURANCE (excluding Medicare, BC/BS, Champus)

INSURANCE	# TESTS	AMOUNTS BILLED	
Workers Comp.	Cervical-140	$63,000.00	
	Lumbar -165	$74,250.00	
		Subtotal----------	$137,250.00
Commercial	Cervical-56	$25,200.00	
	Lumbar -64	$28,800.00	
		Subtotal----------	$ 54,000.00
PIP	Cervical-154	$69,300.00	
	Lumbar -109	$49,050.00	
		Subtotal----------	$118,350.00
GRAND TOTALS----------	689		$309,600.00

TOTAL AMOUNTS COLLECTED BY INSURANCE

INSURANCE	AMOUNTS COLLECTED	AVERAGE AMOUNT COLLECTED BY INS.
Workers Comp.	$83,669.00	$340.12 per test
Commercial	$36,848.55	$341.19 per test
PIP	$83,224.52	$396.31 per test
GRAND TOTALS-----	$203,742.07	

F.6
Index TR

TABLE II

MEDICAL SCHOOL CENTERS CLINICALLY USING THERMOGRAPHY

MEDICAL SCHOOL CENTER	DEPARTMENT	COMMENTS
1. GEORGETOWN UNIVERSITY SCHOOL OF MEDICINE WASHINGTON DC 20007	NEUROLOGY	One physician Dr. Margaret Abernathy
2. UNIVERSITY OF KENTUCKY COLLEGE OF MEDICINE LEXINGTON KY 40536	PAIN CLINIC	All eight pain clinic physicians
3. JOHNS HOPKINS UNIVERSITY SCHOOL OF MEDICINE BALTIMORE MD 21205	CLINICAL NEURO-PHYSIOLOGY	One physician Dr. Sumio Uematsu
4. ST. LOUIS UNIVERSITY SCHOOL OF MEDICINE ST LOUIS MO 63104	NEUROLOGY	One physician Dr. Ghazala Riaz
5. UNIVERSITY OF NEVADA SCHOOL OF MEDICINE RENO NV 89557	INTERNAL MEDICINE* *(Not being used this year)	One physician Phillip H. Goodman Presently on sabbatical
6. STATE UNIVERSITY OF NEW YORK AT BUFFALO SCHOOL OF MEDICINE BUFFALO NY 14214	BIOMEDICAL DEPARTMENT	One physician Dr. Michael Anbar
7. DUKE UNIVERSITY SCHOOL OF MEDICINE DURHAM NC 27710	ORTHOPAEDIC SURGERY	One physician?* Dr. Leonard Goldner *Has not responded to calls or letters
8. UNIVERSITY OF ILLINOIS COLLEGE OF MEDICINE CHICAGO IL 60612	ORTHOPAEDIC SURGERY	One physician Dr. Riad Barmada (Dept Radiology was unaware of this use)

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Baltimore MD 21205

Seminar in Neurothermography, March 1989

I regret to announce that Dr. Michael Aminoff, Dr. Yuen So, Dr. Bhagwan Shahani, Dr. Didier Cros and Dr. Ken Nudleman have withdrawn from the faculty of the course that was to have been held in March 1989 in San Francisco. They have been performing unbiased, objective evaluations of thermography in various neuromuscular disorders, and feel that they cannot participate in a course that presents thermography as an accepted and established technique. They wish to be dissociated from any attempts to encourage the widespread use of thermography before any role for it has been properly established in their view.

Jacob Green, M.D.

THERMOLOGY
QUARTERLY NEWSLETTER

A Publication of the American Academy of Thermology

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Health Care Financing Administration Action Imminent

The Health Care Financing Administration (HCFA) has prepared a proposed notice of withdrawal of Medicare and Medicaid reimbursement for thermographic services

This action follows months of consideration by HCFA of what action to take following the recommendations of the 1989 report by the Office of Health Technology Assessment (OHTA) on "Thermography for Indications Other Than Breast Lesions," prepared by Dr. Harry Handelsman. A spokesperson at HCFA says that the evaluation of the OHTA report and the consideration of withdrawal of coverage were initiated in response to outside requests.

The proposal is expected to appear in the Federal Register within six weeks After the notice is published, there will be a period in which individuals may submit comments. All comments will be considered before final action is taken. The HCFA spokesperson projects that no action will be taken before the end of the year Current Medicare policy on thermography remains effective.

The AAT Executive Council expresses great concern over the pending action by HCFA, since commercial insurance carriers, health plans, and workers' compensation programs will likely follow suit if the HCFA decision is to discontinue reimbursement for thermography. The AAT legal counsel has been advising the Council of possible action by the society

Because of the potential harm of the HCFA decision to thermography as a speciality, members of the AAT are encouraged to take action in the matter The AAT is urging members to correspond with individuals who they think should be aware of the situation, i.e., state and local representatives, professional colleagues, and patients Letters, personal phone calls, and visits can help to educate these individuals on the campaign against thermography, which remains an effective diagnostic tool. It is hoped that given the facts, individuals concerned with the quality of medical care will act to secure the future of thermography. Several members of the AAT Executive Council conclude that action on the part of numerous protesters is required for the HCFA decision to be altered.

New York Meeting a Success

Despite the unseasonably cool weather welcome in New York City, attendees quickly warmed to the newest ideas and scientific studies shared during the 19th annual scientific meeting of the American Academy of Thermology, May 11–13.

The 1990 program emphasized the varied applications of thermography in medical practice and its particular applications in different specialties. The bulk of the program included symposia on specialized topics featuring invited speakers who reviewed state-of-art thermography in respective specialties. Symposia topics included Applications of Thermography in Rehabilitation Medicine, Thermography in Internal Medicine and Rheumatology, Thermography in Neurology and Reflex Sympathetic Dystrophy, as well as Thermology Guidelines and Technique. The program also provided planned time for sufficient discussion of the presentation topics.

Dr Andrew Fischer, Chairman of the Program and Scientific Exhibits Committee 1990, reports that the over-all concept was well-

Continued on page 4

1991 Meeting

Basil A. Marryshow, M.D. has agreed to serve as the Chairman of the Program and Scientific Exhibits Committee 1991. As Chairman, Dr. Marryshow's responsibility will be to organize the annual scientific conference.

Dr. Marryshow announces that the 1991 Meeting will be held in sunny San Diego, California. San Diego offers a perfect climate for visitors as well as unlimited attractions including the world-famous San Diego Zoo, Sea World, Seaport Village, historic Old Town, miles of California beach, and nearby Mexico. The property selection for the meeting headquarters is still in negotiation, but a formal meeting announcement will be available shortly.

In keeping with the format and content of recent meetings, the 1991 meeting will focus on the practical applications of thermography. The submission of abstracts of high quality research and clinical studies in areas of general interest will be encouraged. Additionally, the program will include increased opportunities for the professional exchange of ideas on selected topics. Comments and suggestions by previous attendees will be considered in the organization of the scientific program.

The 1991 meeting will be the 20th annual scientific conference of the AAT.

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Joint Thermography Congress to Be Held in Italy

The 9th European Congress and the 6th Annual Italian Congress of Thermology will be held September 23–26, 1990 at Palazzo del Ridotto in Cesena, Italy.

The three-day congress will include an exciting scientific program organized by a joint committee of the European Association of Thermology and the Italian Society of Thermology. The program session topics are scheduled as follows:

Mon, Sept. 23	(a.m.)	Man's Knowledge of Heat
	(p.m.)	Cellular Thermodynamics
	(p.m.)	20 Years of Thermography in Breast Cancer: The Way Ahead
Tues, Sept. 24		Thermological Pathophysiology
Wed, Sept. 25	(a.m.)	Hyperthermia: Physics Questions
	(a.m.)	Hyperthermia: Clinical Questions
	(p.m.)	Microwave Session

The official languages of the meeting will be English and Italian with simultaneous translation available.

Individuals interested in participating in the scientific program may submit abstracts until August 30. Abstracts should be as informative as possible to include the object of study, the methods used, a summary of the results, and a discussion of conclusions. Abstracts must be contained in a 14 x 22 cm form, typewritten, and double-spaced. To be considered for presentation, abstracts also must be accompanied by a completed registration form and payment of registration fee. Abstracts must be sent by FAX to the number (39) 547-24732.

The cost of meeting registration is USD $240. Registration entitles attendees to admission to the scientific sessions, a copy of the abstract volume, and participation in the scheduled social activities. Registration fees may be transferred to the organizing company bank account or may be paid in the form of a certified bank check. Copies of the registration form are available at the AAT business office (703-938-6140).

Hotel space is reserved for attendees at several properties in Cesenatico, a beach resort near Cesena. Bus service between Cesenatico and Cesena will be provided for meeting attendees. Two categories of rooms are available at the prices of Lit. 70.000/120.000 per day per person with all meals included. Reservations can be made with the meeting registration and payment made directly to the hotel.

For more information on the scientific program, please contact: Dr. Rocchí, Centro per la Diagnosi e Terapia del Tumori, Ospedale M. Bufalini, 47023 Cesena (Fo), Italy.

For further registration details, please contact: Associazone Romagnola Ricerca Tumori, Viale Europa 260, 47023 Cesena (Fo), Italy (Tel: 39-547-29125, FAX: 39-547-24732).

Continued from page 1

New York Meeting...

received by attendees. Meeting evaluations indicated an over 80% ranking for Excellent-Good for both course content, and course relevance to medical practice. An Australian member, Dr Dale Thomas, advised Dr. Fischer that "the New York meeting was great!" The evaluations did include minor suggestions, but for the most part the program was highly praised. Because of the success of the meeting concept, it is expected that the Academy will continue a similar format to ensure the success of future meetings.

Dr. Fischer acknowledged that a significant factor in the success of the meeting was the high quality of speakers in the program. Highlights of the program included the Herschel Lecture, " The Anatomic Basis of Vertebrogenic Pain and the Automatic Syndrome Associated With Lumbar Disk Extrusion," presented by John R. Jinkins M.D of the University of Texas Health Sciences Center in San Antonio, and the President's Award, "Manifestation of Neurological Anomalies Through Frequency Analysis of Skin Temperature Regulation," by Michael Anbar, Ph.D. of the State University of New York at Buffalo. The meeting faculty also included Dr. I.M. Kukui of Leningrad, USSR, who was able unexpectedly to attend the meeting to present his study "Thermographic Monitoring of Treatment Efficacy in Patients With Acute Myocardial Infarction."

The fall issue of THERMOLOGY will include the abstracts of podium presentations. Additional copies of the meeting program are available from the AAT business office, 138 Church Street, N.E., Vienna, Virginia 22180.

Tech Column

reported by Gina Wright

During the 19th Annual AAT Meeting held in New York City, May 11–13, 1990, the second technician's meeting was organized. Pierre LeRoy, M.D. moderated the meeting along with Dr. William Hobbins, Dr. Philip Goodman, and Dr. Ronald Schilling. The pertinent topics of the meeting were as followed:

1) Updating the current AAT guidelines to reflect the medical and technical advances of the 1990's. These updates should reflect local, national, and global changes in protocol and procedure.
2) Planning for an AAT board examination for technicians.
3) Basic education requirements for entry-level technicians, i.e. required readings, training in anatomy and physiology, and a basic understanding of thermography (contact liquid crystal and infrared).
4) Establishing Quality Assurance for all existing thermography laboratories.
5) Medicolegal aspects, i.e., what to do in case of witness-supoena as custodian of laboratory records.

For more information regarding the Technician Liaison Committee, please contact Dr. Pierre LeRoy at (302) 738-0261 or Gayle Siltanen-Hansen, care of the AAT business office.

News Briefs

- The **Seventh Annual President's Award** was given to Michael Anbar, Ph.D. for his paper "Manifestation of Neurological Abnormalities Through Frequency Analysis of Skin Temperature Regulation." The paper was presented during the 19th Annual Meeting and will be published in the Fall 1990 issue of THERMOLOGY. Dr. Anbar will receive a special certificate of award and $500.

- Dr. Pierre LeRoy and Roseane Filasky authored a chapter on thermography that was included in "**The Management of Pain: Volume I**" by John Bonica, M.D. The chapter includes an overview of the basic and clinical applications of thermography. Dr. Bonica is considered a world expert on the management of pain. Copies of "The Management of Pain" may be obtained from the publisher, Lea & Fabiger, Philadelphia.

- The **State Industrial Insurance System** (SIIS) of Nevada has recommended adoption of a thermographic protocol that should become effective in the next several weeks. The SIIS covers 85% of the Workman's Compensation for Nevada.

CEARP Update

Initial study findings of the first Clinical Efficacy Assessment Research Project (CEARP) were presented by Dr. Philip Goodman during the 19th annual meeting in New York. The first CEARP was designed to determine optimal imaging protocols for the detection of thermal artifacts.

Dr. Goodman reported that his study "Repeated Thermographic Imaging to Assess Physiologic Equilibration and the Detection of Intentionally-Produced Thermal Artifacts" supports the existing American Academy of Thermology equilibration guidelines. Additionally, his study indicates that intentionally-produced hot and cold artifacts "should be easily detected in the early equilibration and initial imaging period if a brief period of image subtraction or equivalent technique is used in conjunction with electronic thermography."

Dr Goodman is currently evaluating a proposal for the second CEARP to assess the effect of anti-inflammatory medication on acute musculoskeletal injuries. Anyone who is interested in participating in this study or who has ideas for future studies should contact Dr. Goodman, c/o AAT business office.

Thermography in Biomechanics Meeting

Two symposiums on thermography, "Thermography" and "Hyperthermia and Modeling of Circulatory Systems," will be included in the First World Congress of Biomechanics, August 30–September 4. Professor Wen-Jei Yang of the University of Michigan, Ann Arbor will chair the symposiums.

The congress is being sponsored by several biomechanical societies and is being organized by Program Chairman Savio L-Wy Woo, Ph D., Professor of Surgery and Bioengineering at the University of California, San Diego. The scientific sessions will be held in La Jolla, CA at the university Price Center. For a registration pamphlet, please contact Jackie at (619) 534-4672.

IN MEMORY

Roger Paulin, M D., an associate member of the AAT since 1985, passed away April 16, 1990 in Garland, Texas.

Dr. Paulin was born in New Brunswick, Canada and there received his undergraduate degree from Sacred Heart College in Bathurst He received his M D from Laval University in Quebec and went on to specialize in general and thoracic surgery at the New York Medical College and the Hospital of Morrisania, New York.

After many distinguished medical appointments in Canada, the United States and Saudi Arabia, Dr. Paulin established himself fourteen years ago in Garland where he practiced general and thoracic surgery at several hospitals. As the consulting physician for the City of Garland, he was responsible for the opening of the first Clinic for the Prevention of Breast Cancer in the area. He used thermography extensively in his studies at the breast clinic.

New Officers

Following the 1990 annual business meeting, the newly-elected officers assumed their responsibilities. Dr. Alfred Pavot began his three year term as Secretary-Treasurer and Dr. Basil Marryshow commenced a two-year Member-at-Large position. The two officers were elected to these positions by a membership mail ballot

Upon beginning his term as Secretary-Treasurer, Dr. Pavot vacated his Member-at-Large position. Fulfilling his duty as President (Article II, Sec 1), Dr. Rubem Pochaczevsky appointed Dr. Andrew Fischer to serve the remaining tenure of the office Dr. Fischer's term will expire in May 1991

In 1991, the membership will elect a new Member-at-Large and a Vice-President/President-Elect. Nominations for the positions will be solicited in late 1990 and the elections will be held by mail ballot early in the new year. Further details on the 1991 elections will be distributed to the membership in the coming months.

Journal Notes

- Volume 3, #3 of THERMOLOGY was distributed in May. Anyone who did not receive a copy should contact the Academy business office.
- Volume 3, #4 will not be available until late fall

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I.

OPENING STATEMENTS AND CLOSING ARGUMENTS "THE FIRST WORD AND THE LAST WORD"

Many, if not most, experienced defense lawyers believe that cases are won or lost before the plaintiff rests. If this is so, it confirms the widely held belief that nothing is more important in the trial of a lawsuit than opening statements.

Plaintiffs must use voir dire and opening statements to gain momentum for hurdling the burden of proof and stirring the jury from any lethargy it may have from boring cases individual jurors might have experienced in the past. Defense counsel must realize the necessity for breaking plaintiff's momentum by an interesting and effective opening.

Closing arguments are of greatest importance in close cases caused by evenly balanced evidence or very complex issues. They may also be decisive in influencing the amount of damages in cases where jury discretion is wide.

THE OPENING

Many lawyers get the wrong message when they hear the Judge instruct the jury that statements and arguments of counsel are not to be considered by them as evidence. Astute trial lawyers realize that jurors usually extend or reject credibility directly to a lawyer and that in every encounter with opposing counsel the most treasured prize at stake is credibility. Events after opening statements may confirm or destroy a lawyer's credibility. But the

lawyer needs credibility desperately during opening statements and has no means by which to develop it at that point except his own presence.

THE DEMEANOR.

The first judgment that will go for or against a trial lawyer is the jury's assessment of his or her demeanor. Calling upon their own experiences they will begin to decide whether to associate the speaker with people in the past who have borne them true witness or those who have not.

Jurors associate comfort with truth. Therefore, efforts should be made to make them comfortable as the lawyer speaks even as to things which don't seem to relate directly to credibility. Nothing serves to do that better than a good beginning which immediately tells the jury that a lawyer is going to deliver his remarks in an unruffled, interesting style which is not difficult for the lawyer. The flow of remarks should satisfy the jury that the lawyer is confident in his knowledge of the case, has it sifted and organized and can talk about it in an orderly fashion, using plain, understandable terms. The story should be well enough connected that jurors do not worry about what is being left out, it should be brief enough that they do not worry about the time and should be interesting enough that they are not uncomfortable from boredom or from not being able to follow attentively.

Language chosen should fit the demeanor of the lawyer and should be delivered in a tone which is firm and audible but not

loud. Smooth reasoning which develops into inescapable logic is the desired mood. Effective pauses, voice inflection, good eye contact and mild descriptive gestures are in order. Temptations toward dramatizing should be avoided.

THE CONTENT.

As a rule, opening statements are going to cover the following items:

1. A further introduction of counsel.
2. A further introduction of the client.
3. An explanation of the lawsuit from the client's point of view. Deal with the burden of proof.
4. Where and why the opposition will fail.
5. What you want the jury to do.

FURTHER INTRODUCTION OF COUNSEL.

Further introduction of one's self should be carefully done and may often be bypassed. In some cases, however, it can be done to good advantage. While self-glorification holds nothing, a few carefully chosen words will often identify the lawyer in some way which adds to his credibility.

Tactful references to reliable standbys can usually be counted on for some gain. If it fits well with the case without being too obvious, it does not hurt to reference being locally knowledgeable, family oriented and reasonably devoted to traditional values.

FURTHER INTRODUCTION OF THE CLIENT.

The potential is often overlooked to gain a good general impression for the client by further introduction in opening statement due to a feeling that opening statements are not the proper place for such things. While it is true that some clients are not good objects for endearment, considerable warmth can be generated for others and when it is successfully done, it is usually unsettling to the opposition as a tactical surprise. Again, care should be taken not to overdo but a few well planned remarks can be rewarding. In defending a Lockheed C-130 crash to a jury of twelve women it seemed appropriate to make the following introductory remarks:

> It is a treasured privilege for me to represent Lockheed, a company which I have admired since it produced the Lockheed Lightening P-38 during World War II as the first American fighter capable of holding its own against the German Messerschmitt in Europe and the Japanese Zero in the Pacific . . . . The plane alleged to be defective in this case is a Lockheed C-130 (called Hercules for its great lifting strength) which, the evidence will show, has been the mainstay of the free world military transport since its development in the 1950s.

AN EXPLANATION OF THE LAWSUIT FROM THE CLIENT'S POINT OF VIEW.

Plaintiffs usually have good material to fashion an interesting opening statement. As a rule, theirs is an interesting story leading to a sympathetic injury with good human interest aspects. Plaintiffs usually have some problems as well. The problems should be dealt with in the opening rather than leaving the defendant with an open field to get into the matters for the first time with the jury. It is imperative that plaintiff

establish enough momentum with the opening statement to carry the burden of proof if the story is, in fact, supported by the evidence. I, personally, think that plaintiff should mention the burden of proof and assure the jury that the plaintiff recognizes it and will carry it. Defense counsel wants to give the impression that the law makes suing his client extremely easy while it makes winning against his client virtually impossible in the case now before the jury. One approach might be:

> The civil courts of this country are open to any party who may sue any other party at their pleasure for any amount of money upon any allegation that the plaintiff might wish to make. To be successful in the present case, the plaintiff must prove to your satisfaction that Lockheed has done something so wrong that it is fitting for you to use the force of the law to take from it and give to the plaintiff. In order to avoid abuses of such awesome power the law requires that the plaintiff state the wrongful acts that my client did and then prove them to you by a preponderance of the evidence. In this particular case, the plaintiff has chosen to claim that the Lockheed C-130 is a defective airplane.

By such approaches defendants hope to shift emphasis from the proposition that plaintiffs have sustained serious losses in an airplane manufactured by defendant to the question of whether the aircraft was defective.

P

GOALS OF THE OPENING STATEMENT

THE BEGINNING OF PERSUASION.

While everyone is aware and should be respectful of the rule that cases are not to be argued in opening statement, any lawyer who has not been persuasive in the opening statement has lost a golden moment of advocacy. Many lawyers restrict themselves to a

benign "statement of the facts" feeling that it is inappropriate to do much else in the opening statement. Those lawyers may be completely oblivious to the fact that the plaintiff will tell the jury what the "facts" are and that under those "facts" there's no way the defendant can win. It should not be missed that opposition lawyers will also tell the jury what the law is after piously informing them that it is not his function to give them the law but that such is entirely within the domain of "this Honorable Court."

Astute counsel should realize he must present a version of the facts and the law which spells victory for his client.

His tools for persuasion at this stage are not those of an editorial writer but those of a front page fact reporter with all of the accompanying advantages of low key accuracy but not without an appropriate amount of spice.

WHERE AND WHY THE OPPOSITION WILL FAIL.

It is essential that lawyers tell the jury what is wrong with the opposition's story in opening statement. For the plaintiff, this involves anticipation of the defense's statement. For the defendant, it is rebuttal.

If there is a serious question of credibility, the jury should be so told. If there is going to be a theme of believability presented, the theme should be introduced but not detailed in the opening statement. Selected language should be carefully utilized to characterize the credibility disputes. For example, if the case is going to turn upon the testimony of experts the opening

statement should begin the process of discrediting the opposition while building credibility for one's own witnesses. In some cases, the following might be appropriate:

> In order to sustain its burden of proving that the C-130 is a defective airplane, plaintiff will present certain experts who will testify that it is defective. In order to give their testimony the weight which it deserves, you will want to listen carefully to their qualifications. We ask that you listen to see whether any of them have any experience in making or designing airplanes. We have taken their depositions and they have indicated that they have no actual work experience in the aircraft industry although they derive large percentages of their incomes from testifying in airplane cases. Experts who will testify for Lockheed have spent their professional lives making and designing airplanes and while they may appear to you to be not at home on the witness stand I believe that after you have heard them talk about making and designing airplanes you will agree that they know how to do what they do best.

Coverage on the point of where and why the plaintiff will fail should be complete. While taking care not to be too detailed, it is generally a mistake to leave theme points to be brought out in the evidence or during closing argument. There is too much risk involved in hoping that you can turn on all the lights that will illuminate your story later in the case. Attention will never be so good for articulating the theme of the case as in the opening statement.

The major goals of the opening statement are to (1) convince all the jurors that you can on the spot that you should win, (2) persuade all the jurors that you can that if the facts and the law turn out as you have stated, you should win or (3) persuade remaining jurors that there are two sides to the case and no judgment should be made against your client until the entire case

has been heard.

It is no secret that some jurors make up their minds during opening statements and never change throughout the course of the trial. In the cases of those jurors, either the defense attorney failed to successfully question the plaintiff's blueprint to victory or he so overwhelmingly dealt with it that he struck a knockout blow in the first round. Tactically, the defense has the advantage with the juror who is going to decide the case from opening statements since the defense lawyer has the opportunity to characterize the plaintiff's case, answer it and suggest the correct solution to the case without rebuttal from the plaintiff.

Cases which present good opportunities to persuade jurors permanently for the defense are those involving fault on the plaintiff. Good plaintiffs lawyers will mention weaknesses of their cases in opening statement. When they do, defendant's chore is to exploit the admissions to the best effect taking care that plaintiff's causal treatment of his problems are not so regarded by the defendant. If the attorney for plaintiff doesn't mention plaintiff fault or other weaknesses which the evidence will clearly show, his oversight should be skillfully magnified so that the jury understands that plaintiff cannot state a winning case without ignoring crucial evidence.

Closely akin to the plaintiff's ignoring a party's weaknesses are situation where one suspects that certain witnesses under his adversary's control may not be called. This is often the case where an expert has given a poor deposition. It may not be wise or

possible for you to offer the deposition. Opening statement can be used to cover points from that witness favorable to your client. As long as it is carefully explained that the witness is your adversary's witness, you can hardly be blamed if the evidence never gets introduced and it is doubtful that your opponent who chose not to call the witness will refer to the matter.

While winning some jurors with finality in opening statements may not be possible, a realistic goal is that of persuading the jury to the point that if the facts and the law turn out as represented by you, you should win. One of the keys for achieving such a goal is to present and characterize the case in a fashion that is easy to remember during the receipt of evidence, the instructions of the Court and closing arguments.

All of the lawyer's skills should be used to assist the memory of jurors to events favorable to his case. It is essential that the opening statement be interesting. Useful tools are suspense, a certain amount of prophesy, repetition of themes using exact words that will appear in key jury instructions, visual aids and tasteful, sparingly used challenges.

P

WHAT YOU WANT THE JURY TO DO.

When the sale is ready for closing, the jury should be told what you want them to do. If you want a large verdict, say so. If you want a defense verdict, say so. If the case is one of liability where the issue is the amount of damages, tell the jury the amount you feel they should return to the plaintiff, even if

you are attorney for the defendant. It goes without saying that this overture should be made in the form of a respectful request without any sign of arrogance or overconfidence but with absolute conviction that your request is consistent with the right thing to do. After all, it is, isn't it?

II.

THE CLOSING

It is sometimes said that the importance of closing arguments is overemphasized. It would be more accurate to say that the role of the closer is often misunderstood.

With modern juries it is not often that "spellbinders" can, by illusion, create the appearance of hard evidence when none was produced during the trial. A good speech is not appreciated like it used to be.

But the effectiveness of a sincere argument composed of facts carefully documented in the evidence and delivered with feeling cannot be duplicated by any other phase of the trial.

To be effective, the closer needs to anticipate and correctly assess the posture of the case at closing. The theme of the closing should track that of the opening with appropriate awareness that the jury has now heard all the evidence and the Court's instructions (unless you are before a federal judge who prefers to instruct after closing arguments).

The goal of the closing is singular. It is to persuade. The focus of persuasion may vary greatly. The most dramatic contests

are those which involve an open issue of liability coupled with wide ranging prospects for damages. In such cases the plaintiff must close effectively on liability and damages. Defendant must choose as to whether to argue damages at all.

In cases where liability is probable, plaintiffs should cover liability convincingly but will devote more than ordinary time to damages. Defendants in such cases cannot afford to ignore damages and are well advised to treat the subject thoroughly but will be justified in most cases to look for a golden opportunity to strike back on liability.

In cases where damages are the only issue, the approach to closing changes quite a bit, especially for the defendant.

While the tone may vary with the circumstances the following rules are always appropriate:

1. The Demeanor Is All Business.

2. Get to the Theme of Your Argument Quickly.

People who serve on juries today have access to the best entertainment in the world. They are not interested in lawyers' efforts to entertain. Brief transitional words are acceptable but many of us are inclined to waste valuable time on the side shows of the case. All of us have experienced the empty feeling of having used all our time without saying what we came to say.

3. Be Truthful.

The jury corporate has an excellent memory. Aside from ethical aspects, it ill behooves one to say anything in a closing argument that isn't true. Remember at all times that the battle

acceptance because they did not understand that their settlement would reduce their recovery against the remaining Defendants. Defendant Scott filed a motion to enforce the oral settlement agreement. The District Court held the Plaintiffs were confused and did not understand the effects of comparative negligence. The Court held that there was "no informed and voluntary consent to" the settlement offer due to Plaintiffs' misunderstanding of the law.

Reversing the District Court, the Supreme Court stated:

> The law favors settlement of controversies. A settlement agreement is essentially contractual in nature. Wong v. Bailey, 752 F.2d 619, 621 (11th Cir. 1985); Linn County v. Kindred, 373 N.W.2d 147, 149-50 (Iowa App. 1985); Jallen v. Agre, 274 Minn. 369, 373, 119 N.W.2d 739, 743 (1963); 15A C.J.S. Compromise and Settlement §1, at 170 (1967). The typical settlement resolves uncertain claims and defenses, and the settlement obviates the necessity of further legal proceedings between the settling parties. We have long held that voluntary settlements of legal disputes should be encouraged, with the terms of settlements not inordinately scrutinized. See, e.g., Bakke v. Bakke, 242 Iowa 612, 618-19, 47 N.W.2d 813, 817 (1951); Messer v. Washington Nat'l. Ins. Co., 233 Iowa 1372, 1380, 11 N.W.2d 727, 731-32 (1943).

The Wright Court further stated that a settlement agreement cannot be rescinded based upon a party's mutual mistake of law. To vitiate a settlement requires a mutual and material mistake of a present or past fact or law and a voluntary settlement will not be disturbed for ordinary mistakes of law. The Court then held:

> Applying these principles favoring settlement we conclude that as a matter of law the Wrights had no right to withdraw from the settlement agreement they made with Scott on February 14, 1984. On this evidentiary record there can be no question that Wrights made an agreement with Scott and seek to withdraw solely on the theory of unilateral mistake of law. The record is clear: Scott offered $4,000 in consideration for being released as a

> defendant; this was the agreement contemplated by all parties when Wrights' attorneys, with authorization from their clients, accepted Scott's offer; a meeting of the minds occurred. The Wrights' confusion after the settlement was made about how it might affect their claims against other parties was insufficient as a matter of law to vitiate the settlement agreement.
>
> We repeat what we said in Messer v. Washington National Insurance Co., 233 Iowa 1372, 1380-81, 11 N.W.2d 727, 732 (1943):
>
> "Courts should ... support agreements which have for their object the amicable settlement of doubtful rights by parties; ... [S]uch agreements are binding without regarding to which party gets the best of the bargain or whether all the gain is in fact on one side and all the sacrifice on the other."
>
> The district court had the authority to enforce this settlement agreement.

An attorney cannot settle a case without authority but an attorney is presumed to act with the authority of his/her client unless rebutted. Dillon v. City of Davenport, 366 N.W.2d 918, (Iowa 1985). A settlement made with authority is binding on the client.

Absent a reservation of claims, a settlement (oral or written) is assumed to be a full and final resolution of all claims between the parties arising out of the same set of operative facts or events. Iowa State Board of Engineering Examiners v. Olson, 421 N.W.2d 523, 526 (Iowa 1988).

In Waechter v. Aluminum Company of America, ____ N.W.2d ____, (Iowa 1990). Plaintiff, an employee of ALCOA filed a grievance after termination following a positive result in a voluntary drug test and several safety violations. Plaintiff agreed to settle her grievance with Defendant and did not insist on reserving any possible claim based on the Iowa Drug Testing Law.

Q

Following the oral settlement Defendant sent a letter to Plaintiff confirming the agreement stating "the parties agree that this is a full and final settlement of Hotline Grievance #569 and all other issues and/or claims regarding this discipline." The parties never signed a written settlement agreement or release.

Plaintiff then filed suit alleging violation of the Iowa Drug Testing Law, and Defendant asserted the settlement barred the suit.

The Iowa Supreme Court affirmed the trial court's dismissal of Plaintiff's claim and stated:

> . . . we are guided by another sound principle that has particular application to settlements: in the absence of an express reservation of rights, a settlement agreement disposes of all claims between the parties arising out of the event to which the agreement related. See Mensing, 250 Iowa at 929, 97 N.W.2d at 151; Brown, 251 Iowa at 448, 99 N.W.2d at 307.
>
> On our de novo review we are convinced that the parties intended to settle Waechter's claim against ALCOA for allegedly violating Iowa's employee drug testing law. The claim was clearly on the minds of the parties from the time the grievance was filed until Waechter accepted ALCOA's terms of settlement. Yet Waechter made no move to reserve her claim. And she made no objection to Vasquez's letter which explicitly stated that the agreement was a full and final settlement of the grievance and "all other issues and/or claims regarding this discipline." What Waechter did do was to accept the benefits of the settlement and withdraw her grievance.
>
> Had Waechter truly intended to sue ALCOA after the settlement agreement was reached, we think she should have made that fact known to Vasquez before the agreement was reached. The equitable principle of fair dealing that we recognized in Mensing required such a disclosure. In the absence of the disclosure, we hold Waechter to the same "idea of full settlement" that Vasquez had.

See also, Mensing v. Sturgeon, 97 N.W.2d 145, 151 (Iowa 1959) (a reasonable person would not expect the Defendant to pay him money in satisfaction of his claim and then sue him on a crossclaim. There is no reason for Plaintiff to pay Defendant

money if he felt they were indebted to him. Fair dealing requires disclosure of such an intended claim).

A false denial of settlement has subjected one attorney to admonishment from the Iowa Supreme Court. In Hearity v. Iowa District Court, 440 N.W.2d 860, 861-62 (Iowa 1989), the Court affirmed the District Court's imposition of sanctions against Plaintiff's attorney for falsely denying the fact of settlement. Plaintiff's counsel contended that inclusion of a denial of liability in the release constituted an alteration of the original settlement offer relieving Plaintiffs of their obligation to honor the settlement. In fact, the evidence showed Plaintiffs sought to avoid the settlement because they were upset about "gloating being done publicly" by Defendant.

III. SETTLEMENT CHECKLIST

The following is a checklist of matters you should discuss at the time of settlement.

1. How the check should be made payable (plaintiff/attorney/lienholder);

2. Who will pay the court costs and what will the court costs include (depositions, etc.);

3. The complete name of the plaintiff or claimant, their spouse, and all children (including children's ages) and will plaintiff agree to release all claims;

4. Is plaintiff settling all claims or will he/she continue with suit against others [or does plaintiff have other potential claims not yet asserted against others];

5. Will defendant require an indemnity agreement;

6. Are there any hospital or medical liens or outstanding bills for health care practitioners and how will they be resolved;

7. Is there a worker's compensation lien and if so, how will it be resolved;

8. If one of the claimants is a minor, how will the settlement proceeds be allocated, and if the minor will receive over $4,000, who will prepare the conservatorship documents;

9. Does the plaintiff intend to pursue underinsurance, and if so do both parties understand the effect of the release;

10. Does defendant intend to pursue contribution against other tort-feasors or require an assignment;

11. Does either party request confidentiality or nondisclosure clause[2];

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[2] In Tratchel v. Essex Group Inc., 452 N.W.2d 171, 181 (Iowa 1990) the Court affirmed the enforcement of a nondisclosure stipulation regarding documents Defendant produced through discovery.

This checklist should not be considered all inclusive. There may well be other matters that should be agreed upon. As defense counsel our goal is to ensure the settlement is complete and no additional claims will ever be asserted against our clients by anyone.

After you have agreed on these matters and have the information necessary a confirming letter setting out your understanding of the settlement terms may prove invaluable.

IV. RELEASES

A. Standard Release

The standard Release (Exhibit "A") is sufficient in some cases involving adult plaintiffs and one defendant. It provides the basic release language but does little more than a dismissal with prejudice will do.

If the claimant or plaintiff is married and/or has children and the spouse and children are not parties, you may want to require the spouse to sign the release and release any consortium claims he or she may have or you may want to include an indemnifying provision regarding any claims the minor children may make in the future regarding injuries to their parent. Exhibit B contains several alternate provisions you may want to consider adding to the standard release including provisions relating to spouse, minor children, expansion of the released parties, expansion of the facts, and confidentiality.

B. Multiple Defendants

Where there are multiple defendants in a case and only one of the defendants is settling, additional language may be necessary. Iowa Code §668.7 provides:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released persons equitable share of the obligation as determined in §668.3,(4).

Attached as Exhibit "C" are provisions which can be added to the basic or standard release to cover situations involving plaintiff's settlement with one but not all of the defendants. In light of the code section these provisions may or may not be required but they do confirm the intentions of the parties to consummate a settlement based only on the individual defendant's liability and they do address claims for indemnity which are not covered in §668.7. The case of Pierringer v Hogan, 21 Wisc.2d 198, 124 N.W.2d 106 (1963) is often referred to in release documents. This case provides that a release may discharge a tort-feasor's liability and protect him or her from a subsequent suit for contribution by a non-settling tort-feasor. Again, the language of Chapter 668 appears to take care of this concern.

C. Indemnity

The defendant may, where there are remaining defendants or there are other tort-feasors who may be liable but who have not yet

been sued, want to include indemnity language in the release to insure that Defendant will be protected if a Third-Party claim is later initiated. See exhibit C.

D. Hospital/Medical Lien

Where plaintiff may have outstanding hospital or medical expenses it is wise to include a provision in the release as shown in Exhibit "D". These provisions place the obligation on the plaintiff to pay the hospital and medical liens out of the settlement proceeds.

If the defendant has written notice of a hospital lien or medicaid payments (see Iowa Code §249A.6(2)(c)), defendant should receive a lien waiver prior to settling of the claim in addition to the provisions provided in the release. See Exhibit E. A defendant on notice of a lien may be held liable to the lienholder despite payment to plaintiff.

E. Underinsurance Coverage

The Iowa Supreme Court has continued to construe §516A to protect the plaintiff who settles with the underinsured tort-feasor. In Kapidia v. Preferred Risk Mutual Ins. Co., ___ N.W.2d ___ (Iowa 1988) the court held that while a "consent to settlement" clause in an insurance policy is valid, breach of the clause by the insured is an affirmative defense which must be pleaded and proved. The insurer must show actual prejudice - that "it cannot collect from the tort-feasor under its rights embraced by the contractual

subrogation clause" and that it could have collected from the tort-feasor but for the settlement extinguishing its subrogation rights.

Many policies also include exhaustion requirements. In Estate of Rucker, 442 N.W.2d 113 (Iowa 1989) the Court held that breach of an exhaustion clause in an underinsurance policy will not extinguish coverage under the underinsurance policy but an insured who settles with the tort-feasors liability carrier is assumed to have received the policy limits for purposes of eligibility for underinsured motorist coverage.

It is the general rule that unless a claim is specifically reserved, settlement with and dismissal of the tort-feasor will extinguish all claims against the tort-feasor including any claims by Plaintiff's underinsurance carrier for subrogation. While the Wright v. Scott case would dictate that a unilateral mistake will not negate a settlement agreement, you may be embroiled in a battle of releases if Plaintiff's counsel settles without the underinsurer's consent and attempts to cure the mishap by including language in the release preserving the underinsurer's subrogation rights. In Vogt v. Schroeder, 129 Wis.2d 3, 383 N.W.2d 876, (Wis. 1986), the district court entered a ruling that plaintiff could accept the policy limits from an underinsured tort-feasor "with the understanding that the same would be accepted without prejudice to (underinsurer's) maintaining its subrogated rights against the Defendant (underinsured)." In reversing the district court, the Wisconsin Supreme Court commented:

> Additionally, we question why Progressive and Schroeder (underinsured tort-feasor) would pay the policy limits if they were not to be released. We conclude that the

order, if such it be, of the circuit court, although it is predicated upon a generally correct proposition -- that in the present circumstance WECC has, or may acquire, a right of subrogation -- does not reflect the law of subrogation or the realities of insurance practice.

You may want to advise Plaintiff's counsel that it is your understanding that any subrogation rights of the underinsurance carrier will be extinguished by settlement and include similar language in the release. See various examples on Exhibit M.

F. Contribution

If defendant is settling a claim with the intention of pursuing contribution claims against other tort-feasors following settlement there are several matters to bear in mind. Iowa Code §668.5(2) provides:

> Contribution is available to a person who enters into a settlement with the claimant only if the liability of the person against whom contribution is sought has been extinguished, and only to the extent the amount paid in settlement is reasonable.

Section 668.6(3) provides that contribution following settlement is available only if:

a. The person bringing the action for contribution has discharged the liability of the person from whom contribution is sought by payment within period of the statute of limitations applicable to the claimants right of action and has commenced a claim for contribution within one year after that date, or

b. The person seeking contribution must have agreed while the action of the claimant was pending to discharge the liability of the person from whom contribution is sought and within one year thereafter must have discharged liability and commenced the contribution action.

Q

In Aid Insurance v. Dallas County, 426 N.W.2d 631 (Iowa 1988) the court held that a settling party does not have a right of contribution against non-settling tort-feasors unless they are specifically named (or sufficiently identified) as "released parties" in the release with the settling tort-feasor.

An alternative to contribution is an assignment of claims against other tort-feasors. An assignment gives the Assignee only such rights as the Assignor had, however, and the Assignee should be cautioned to check the applicable statute of limitations. The defendant might also consider including language in the release which would require plaintiff to reimburse the released party [defendant] should plaintiff later recover from others on the same claim.

G. Annuities

Structured payments are increasingly used in settlements. Be mindful that annuities are subject to bi-weekly fluctuations so any offer of settlement including a structure should be conditioned on response within a specific period. When settlement proceeds are to be paid by the purchase of an annuity, special release language is necessary to protect the parties. First, the release should contain a provision that upon purchase of the annuity, the obligations of the released parties are satisfied. (See exhibit F).

The second paragraph of release language set out in exhibit F is frequently required by the annuity company. You should check

the annuity company's requirements before preparing the release so that a second release is not required.

H. Settlement of Minor's Claims

In the event one of the plaintiff's is a minor, the settlement immediately becomes more complex. The first question is - How will the settlement proceeds be allocated? Settlement proceeds should be allocated reasonably according to the injuries suffered. You should resist the temptation to allocate the settlement proceeds in an attempt to avoid the need for a conservatorship for the minor.

Iowa Code §633.574 provides as follows:

If the minor's settlement share is $4,000 or less, a conservatorship may not be necessary.

1. $4,000.00 Rule

> If a conservator has not been appointed, money due a minor or other property to which a minor is entitled, not exceeding in the aggregate $4,000.00 in value, may be paid or delivered to the parent or other person entitled to the custody of the minor, for the use of the minor, upon written statement verified by the oath of the parent or other person that all money or property of the minor does not exceed in the aggregate $4,000.00. The written receipt of the parent or other person entitled to the custody of the minor constitutes an acquittance of the person making the payment of the money or delivery of property.

Q

In order to make a settlement with a minor child under the terms of this section you should require a verified release including a statement by the parent that upon payment of the settlement amount all money or property of the minor will not exceed the aggregate of $4,000.00. The release executed by the

parent under such conditions should be entitled "Release and Receipt".

Even if the amount allocated to the minor is less than $4,000, as defense counsel you may want a conservatorship so that court approval is mandatory and hopefully there are no later questions regarding allocation of the settlement, or the fairness and reasonableness of the settlement. As defense counsel our primary duty is to protect our insured from later litigation and seek to ensure that the minor does not at a later time claim that the settlement was insufficient or not properly handled.

2. Conservatorships

If the amount payable to the minor child in settlement exceeds $4,000.00 or the minor's total property inclusive of the settlement amount will exceed $4,000.00, a conservator must be appointed in order to settle the claim. Iowa Code sections 633.566-633.576 govern the opening of conservatorships.[3] Defense counsel should approve all conservatorship documents to ensure all code provisions are followed and the conservatorship has been properly opened and authority for settlement received.

Q

Pursuant to Iowa Code §633.647, a conservator must have the approval of the court "after hearing on such notice, if any, as the court may prescribe" to compromise or settle any claim by or against the ward.

---

[3] Probate forms relating to conservatorships are available from the ISBA and many have recently been revised.

Iowa Code §633,648 provides:

> Notwithstanding the provisions of §633.647 prior to authorizing a compromise of a claim for damages on account of personal injuries to the ward, the court may order an independent investigation by an attorney other than by the attorney for the conservator. The cost of such investigation, including a reasonable attorney fee, shall be taxed as part of the costs of the conservatorship.

Attached as Exhibit "G" is an example of a Voluntary Petition for Appointment of a Conservatorship done in contemplation of settling a personal injury claim. A voluntary petition is appropriate only where the minor is 14 years of age or older. Attached as Exhibit "H" is the Notice of Conservator's Powers which is now required pursuant to Iowa Code Chapter 633.576. Iowa Code Section 633.572 requires that the notice of conservator's powers be incorporated into the petition. In the case of involuntary conservatorship proceedings, Section 633.576 requires that this notice is to be served upon the proposed ward together with the notice of filing of the petition as provided in section 633.568. A form of the involuntary petition for conservator is attached as Exhibit I.

If an attorney is appointed pursuant to Iowa Code §633.575 the attorney will be required to file an answer advising the court that the statutory requirements have been complied with. We also generally file a Proposed Order Appointing Conservator. (The conservator must also execute the court officer's oath). Once the Conservatorship is properly opened, the next order of business is filing an Application for Authority to Compromise the Claim. A form of this application is attached hereto as Exhibit "J". If an

attorney is appointed for the ward, the attorney should approve the settlement and join in the application to compromise the claim. If no attorney is appointed, you may want to attach to the application the medical records and bills so that the Court is fully advised of the facts relating to the claim and settlement. The application should attach a copy of the release the conservator is requesting authorization to execute. A copy of a Conservator's Release is attached hereto as Exhibit "K".

In a case involving an injured minor child, you will want the parents to release any claims they may have under Rule 8 including but not limited to claims for medical expenses and loss of consortium and companionship. We have seen this done both by one release covering both matters or as a separate release.

Following the court's approval of the settlement and authorization to execute the release, defense counsel will no longer be concerned with the conservatorship problems. Counsel representing the conservator should be mindful of the provisions of Iowa Code Chapter 633 regarding the duties and responsibilities of the conservator and the situations in which the conservatorship may be terminated.

Q

I. Plaintiff Under Physical or Mental Incapacity.

If an adult plaintiff is under a physical or mental incapacity which makes him or her unable to make or carry out important decisions concerning financial affairs, a conservatorship should be considered. Today we are confronted with many head injury claims

and counsel should be mindful of the possible need for a conservatorship in those cases.

J. Estates

Wrongful death cases or cases in which an estate is the plaintiff also require court approval for settlement. Exhibit L sets out language that may be included in a release involving an estate.

K. Workers' Compensation

Iowa Code Section 85.22 provides that in any case where an employee has collected worker's compensation and intends to settle a claim with a third party as a result of the same incident, the employee must receive the consent of the employer or insurer, or if the same refuses consent, from the industrial commissioner before settlement of the claim. Exhibit M is an example of a consent and lien waiver form. Always check the file to ensure that all liens have been satisfied when settling claims. You will want to make settlement drafts payable to the lienholder as well as the plaintiff in many circumstances.

Q

L. Other Documents Necessary

In addition to the Release, defendant should also request plaintiff execute a dismissal with prejudice signed by both the plaintiff(s) and counsel. The party who has agreed to pay the court costs should file the dismissal and simultaneously pay court

costs. Many Clerks will not allow the dismissal with prejudice to be filed unless the court costs are paid.

V. CONCLUSION

This outline is intended to raise issues which are frequently the subject of settlement discussions and should be considered in settling a claim. The matters covered should not be considered all inclusive. The exhibits are merely examples of possible language. In most instances there is no "magic" language.

The best way to approach settlement is to know what you want to accomplish through settlement and discuss your position with opposing counsel. Finally, you should draft and review settlement documents bearing this in mind.

RELEASE

The undersigned _____, being of legal age, hereby acknowledge payment to me of the sum of _____ Dollars ($_____) in consideration of which payment I [we] do hereby release, acquit and forever discharge_____ and all other persons, firms and corporations, from any and all liability whatsoever, including all claims, demands and causes of action of every nature affecting me [us or either of us jointly or severally,] which I [we] may have or ever claim to have by reason of:

(a) An accident or event which occurred on or about the _____ day of _____, 19___, at or near_____; or

(b) Any and all claims asserted in or which may have been asserted or joined on the claims asserted in the _____ County, Case No. _____; or

(c) any matter derivative of (a) and (b).

As further consideration of said payment, I [we, each of us, jointly and severally,] hereby agree:

1. That this Release covers all injuries and damages, whether known or not and which may hereafter appear or develop arising from the matters above referred to.

2. That the above sum is all that I [we or either of us] will receive for my [our] claim and no promise for any other or further consideration has been made by anyone.

3. That this Release is executed as a compromise settlement of a disputed claim, liability for which is expressly denied by the party and/or parties released, and the payment of the above sum does not constitute an admission of liability on the part of any person or entity.

4. That I am [we are] executing this Release solely in reliance upon my [our] own knowledge, belief and judgment and not upon the representations made by the party released or others in their behalf.

[5. The undersigned shall dismiss with prejudice the claims against the released parties in the action presently pending in the _____ County District Court, Law No. _____.]

THAT I HAVE READ THE FOREGOING RELEASE, AND UNDERSTAND ITS TERMS AND FREELY AND VOLUNTARILY SIGN THE SAME.

Dated at _____, this _____ day of _____, 19{}.

CAUTION: THIS IS A RELEASE--READ BEFORE SIGNING!

_____

Witnesses: _____

_____

_____ (Official bar form No. 150)

EXHIBIT "A"

1. ADDITIONAL PROVISIONS RELATING TO SPOUSE/CHILDREN:

The undersigned, John Doe and Mary Doe, husband and wife, hereby acknowledge payment to John Doe of the sum of . . .

As further consideration of said payment we, each of us jointly and severally hereby agree:

* * * *

5. The children of the undersigned will not now or hereafter assert any claim based on the facts set forth herein, the same specifically released hereby, and the undersigned will hold harmless and indemnify the parties released herein against all loss, including defense costs, from any claim ever asserted on said incident by any minor children of the undersigned, i.e. John Doe Jr., born January 14th, 1981.

6. That this release is intended to release and discharge the released parties from any claims Mary Doe has or may have as a result of injuries to her husband John Doe, including but not limited to any claims for loss of consortium, services or support.

(Include a signature block for spouse)

2. OPTIONAL LANGUAGE - NO SPOUSE OR CHILDREN:

5. The undersigned states and affirms that he has never been married and does not have any children and agrees to hold harmless and indemnify the parties released herein against any loss, including defense costs from any claim ever asserted on said incident by anyone claiming to be a spouse or minor child of the undersigned.

3. EXPANDING RELEASED PARTIES:

When you have a corporate defendant you may want to add language to the release expanding the parties released to include:

> [released corporation] and each and every one of its past and present affiliates, predecessors, insurers, indemnitors, directors, representatives, officers, employees, successors and assigns (hereinafter collectively referred to as "___")

4. EXPANDING THE FACTS:

Depending on the type of case you may also want to expand the description of the facts upon which the settlement is based for example:

> (b) The facts and circumstances set out in, developed in, or which could have been asserted in or which were pertinent to the factual allegations set forth in the lawsuit filed in _____ County District Court, Law No. _____, styled John Doe v Paul Smith.

5. ALTERNATE PARAGRAPH 4

4. That the undersigned has consulted with their attorneys about the effect of this release and is accepting this settlement and executing this Release solely in reliance upon their own knowledge, belief and judgment and not upon any representations made by The released parties or others on their behalf.

6. CONFIDENTIALITY

The terms and conditions of the settlement are confidential and the parties and their counsel shall in no manner communicate the terms of the settlement, or inferentially the amount of the settlement except to the extent required by law as for example in dealing with parties who may hold a lien.

EXHIBIT "B"

MULTIPLE DEFENDANTS/INDEMNITY

REMAINING TORT-FEASORS

This release is executed according to (but not limited to) the provisions of Iowa Code §§668.1 - 668.10. In addition to releasing all claims of the undersigned this release further releases and discharges the released parties from any and all liability for indemnity and contribution. The payment represents complete satisfaction of the released parties' undetermined proportionate responsibility for the accident.

OR

The undersigned further agree that this payment represents complete satisfaction of the Released Parties' undetermined proportionate responsibility for the incident, if any, and agree to satisfy any judgment which may be rendered in favor of the undersigned against the Released Parties, satisfying such fraction, portion, or percentage of the judgment as the causal fault of the Released Parties is adjudged to be of all causal fault.

OR

The undersigned agree to satisfy any judgment which may be rendered in favor of the undersigned, satisfying such fraction, portion or percentage of the judgment as the causal negligence of the parties released is adjudged to be of all causal negligence of all adjudged tort feasors. In the event the undersigned fail to immediately satisfy any such judgment to the extent of this fraction, portion or percentage of the negligence as found against [released party], the undersigned hereby consent and agree that upon filing a copy of this agreement, without further notice, an order may be entered by the Court in which said judgment is entered directing the Clerk thereof to satisfy said judgment to the extent of such fraction, portion or percentage of negligence as found against [released party] and discharged under this release.

INDEMNITY LANGUAGE

The undersigned agree to indemnify, protect and hold harmless the Released Parties from any loss, damage, cost, claim or demand which may be asserted against the Released Parties by reason of the matters set out in paragraphs (a)-(c), inclusive, including any claims for contribution or indemnity asserted by anyone, and specifically including any claim for contribution or indemnity asserted by [CURRENT DEFENDANT'S NAME] in the suit referred to above or claims made by others so adjudged jointly liable with [RELEASED PARTY].

COMBINED DISCHARGE OF LIABILITY/INDEMNITY

This release also releases and discharges the released parties from any and all liability for indemnity or contribution, including but not limited to that provided in Iowa Code §668.5-7. The Payment represents complete satisfaction of the released parties undetermined proportionate responsibility for the accident, if any. The undersigned shall indemnify and hold harmless (including defense costs) the released parties in the event anyone claims indemnity or contribution form the released parties as a result to the accident.

OR

Additionally you may want to add:

The proceeds of settlement for all claims or demands may be used to satisfy the indemnity and hold harmless obligations set forth in paragraphs _____, and the undersigned expressly waive any exemption or any other protection of any nature which may otherwise attach to said payments.

Q

RESERVATION OF CLAIM LANGUAGE

This release is intended to release only the parties specifically named. The undersigned expressly reserves any other claim not released hereby against any other person or persons.

EXHIBIT "C"

HOSPITAL OR MEDICAL PAYMENTS OR LIENS

The following language may be added to the release.

1. Promise to Satisfy. The undersigned and his attorney, a witness to this Release, agree to satisfy any subrogation lien or hospital liens out of the settlement including but not limited to . . .

OR

2. Promise to Satisfy With Indemnity Language. The undersigned agree to satisfy all medical or hospital charges or subrogation liens of any type and agree to indemnify, protect and hold harmless [released parties] and their attorneys from any loss including counsel's fees from any and every lien, claim or demand of any kind or character (including but not limited to any subrogation or hospital lien) which may be asserted against the released parties by reason of said occurrence, injuries, damages, death, medical, hospital, physician or other health care provider expense or the effects or consequences thereof including but not limited to any governmental benefits or programs of any kind.

OR

3. No Known Liens With Indemnity. (or may be added to #1) The undersigned agree to protect and hold harmless the said parties released and their attorneys in the event that: (a) Any State, Federal or other government agency; and/or (b) private insurer, hospital physician or other health care provider; and/or (c) Any private entity asserts a claim or lien for funds paid, entitlement or benefits received for or on behalf of _____, arising out of the incident which is the subject of the lawsuit pending in _____ County District Court, law number _____, whether said claim or lien be in the past, present or future.

Furthermore, in the event said lien or claim is made against the parties released, the undersigned shall be required to assume the defense of the released parties and their attorneys and the undersigned's cost for all expenses of litigation, including but not limited to attorney's fees, and to hold the released parties and their attorneys harmless from penalty or liability and the undersigned shall be obligated to pay said liens or claims if said parties or their attorneys are obligated to pay such amounts.

OR

4. Statement of No Liens. There are no liens or claims from any hospital, medical practitioner, health care provider, insurer, or governmental agency, including but not limited to claims or liens under 42 USC §2651, et. seq., or Iowa Code §249A.6(2)(c) nor are there any liens or claims which any other person or firm or corporation has as a result of the injuries that were sustained which haven't been settled and paid by those parties executing this release as part of this settlement agreement. The undersigned will indemnify and hold harmless _____ from and against any and all claims, demands, subrogation or lien claims of any kind or character which may be asserted hereafter as a result of the incident described in this release.

5. Additionally you may want to add to any provisions with indemnity provisions:

The proceeds of settlement shall be used to satisfy the indemnity and hold harmless obligations as required by this agreement and the undersigned expressly waive any and all rights of exemption or any other protection of any nature which otherwise may attach to any of said payments.

EXHIBIT "D"

RELEASE AND WAIVER
FOR LIENHOLDER

[Hospital] (hereinafter referred to as _____) hereby acknowledges payment to it of all amounts to which it claims a lien relating to the care and treatment of [Plaintiff], as a result of an accident resulting in injuries to [Plaintiff] which occurred [date]. In consideration of the payment of such amounts, the [Hospital] releases [Name of Defendants], their attorney_____, and all other persons, firms or corporations from any further liability for monies due or services expended on behalf of [Plaintiff] for medical, hospital, or rehabilitative services arising out of the accident which occurred on or about _____. [Hospital] hereby extinguishes and releases its Notice of Hospital Lien and further releases any other claim or lien which the [Hospital] has or may have against those persons being released or by virtue of services provided _____ as a result of the aforementioned injuries sustained by _____.

Dated this ____ day of _____, 1990.

[HOSPITAL]

By: _____

STATE OF _____)
) ss.
COUNTY OF _____)

On this ____ day of _____, 19__, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared _____, to me personally known who being by me duly sworn did state that he is the _____ of the corporation executing this document and that said Release and Waiver is executed on behalf of the corporation by authority of its Board of Directors and Officers that he acknowledges execution of said instrument to be the voluntary act and deed of the corporation, by it, by him, and as such fiduciary voluntarily executed.

_____
Notary Public in and for the State of Iowa

EXHIBIT "E"

ANNUITY RELEASE

The undersigned hereby acknowledge as full, fair and adequate payment: an annuity purchased from _____, which shall provide for payments to _____ as follows:

1. The sum of _____ on _/_/19_;
2. The sum of _____on _/_/19__;

The undersigned acknowledges purchase of the annuity and in consideration of this purchase of annuity the undersigned hereby releases, acquits and forever discharges * * * [follow standard release]

Also add after standard release language:

5. That no representation has been made by those parties being released or their agents, representatives or attorneys concerning the tax consequence of said periodic payments.

6. The purchase of the annuity by _____ releases each of the parties to this agreement from any and all further liability obligation and responsibility of every nature with regard to payments to be made by the annuity company to _____.

7. In the event of the death of _____ at any time prior to the guaranteed periodic payments being made, the payments will be made to the designated beneficiary who, at the time of this Release, is _____, parents of _____.

The following language may be required by the annuity company:

I further agree to the following with regard to the annuity which constitutes a portion of the settlement:

a). Within the meaning of section 130 (c) of the Internal Revenue Code of 1954 as amended (the "Code"), _____ ("Assignor") may make a "qualified assignment" to _____ ("Assignee") of Assignor's obligation to make the future payments described above (the "Periodic Payments"). I consent to such an assignment and agree (a) that my rights to the Periodic Payments and against the Assignee shall be no greater than those of a general creditor, (b) that Assignee is not required to set aside specific assets to secure such Periodic Payments and (c) that I have no right to accelerate, defer, increase or decrease the amount of any payment required to be made by this release, and (d) that Assignee's obligation to make the Periodic Payments shall be no greater than those of Assignor immediately preceding the assignment. Upon assignment, Assignee or its designee shall mail future payments directly to _____.

b) Upon making such a "qualified assignment", Assignor shall be fully released from the obligation to make the Periodic Payments and only Assignee shall be obligated to make the Periodic Payments. Assignees obligation to make each Periodic Payment shall be discharged upon mailing a valid check in the amount due to the address designated by me.

c) Assignee may fund the Periodic Payments by purchasing a "qualified funding asset", within the meaning of section 130 (d) of the Code, in the form of an annuity policy from _____. All rights of ownership and control of the policy shall be vested in the Assignee, but Assignee may have the company issuing the annuity policy make payments directly to _____ for the Assignee's convenience. The undersigned, until _____ is 18, and thereafter, _____ will be responsible for maintaining a proper mailing address with the company issuing the annuity policy.

EXHIBIT "F"

IN THE MATTER OF THE	)	Probate No. _____
	)	
CONSERVATORSHIP OF	)	VOLUNTARY PETITION FOR
	)	APPOINTMENT OF CONSERVATOR
_____, a minor.	)	[AND ATTORNEY]

The undersigned [Proposed Ward] [and Proposed Conservator], being duly sworn on oath depose and state:

1. The undersigned proposed ward's name, post office address and age is: _____.

2. The undersigned is a minor, age [MUST BE 14], whose date of birth is _____. [or By reason of physical or other incapacity, is unable to make or carry out important decisions concerning the undersigned's financial affairs].

3. The undersigned proposed ward is a resident of the State of _____ and the undersigned's best interests require the appointment of a conservator in the State of Iowa.

4. The proposed ward is presently in the care and custody of [her parents], _____ _____ whose address is _____.

5. [name of proposed conservator] [address of proposed conservator],_ [a parent of the proposed ward], is the proposed conservator without bond, and is qualified in all respects to serve in such capacity [and has preference over all others as Conservator under §633.571, Code of Iowa].

6. The purpose of this conservatorship is to enable the conservator to settle a personal injury claim of said minor. Said injury occurred in the State of Iowa.

7. The proposed ward has property with estimated values as follows:
real estate _____;
personal property _____;
[The above listed Personal property is from a future settlement of claim,] the estimated gross annual income of the estate is $_____ [or, the present value of a future payments after the ward reaches majority and no annual income is expected in the estate].

8. Money [is/is not] payable or to become payable to the proposed ward by the United States through the Veteran's Administration.

[9. It would be in the best interests of the ward to appoint an attorney pursuant to section 633.575, Code of Iowa, and the undersigned ask the court to appoint _____.]

10. The proposed ward, a minor over the age of 14 consents to the conservatorship and verifies the same by her notarized signature.

11. The undersigned proposed ward acknowledges receipt of the written notice of the conservators powers pursuant to §633.576, Iowa Code. A copy of such notice is attached to, and by this reference incorporated into this petition as Exhibit A.

12. The undersigned has [have] read the foregoing petition and personally know that the contents and statements made herein are true and correct.

WHEREFORE, the undersigned respectfully request that _____ be appointed conservator for the property of the _____, a minor, to serve without [with] bond as authorized by 633.633 and 633.175, Code of Iowa, [not to exceed ____] [requests that annual reports not be required in this conservatorship. and requests that _____ _____ be appointed attorney for the ward.]

The undersigned Petitioner named above states that I have read the foregoing Petition; and that I verily believe that its statements are true.

_____
[proposed ward]

Subscribed and sworn to before me this _____ day of _____, 19____.

_____
Notary Public for the State of _____

OPTIONAL:

_____
[proposed conservator]

Subscribed and sworn to before me this _____ day of _____, 19___.

_____
Notary Public for the State of _____

EXHIBIT "A" TO PETITION FOR APPOINTMENT OF CONSERVATOR

NOTICE OF CONSERVATOR'S POWERS

Pursuant to §633.576 Iowa Code, you are hereby given written notice of Conservatorship Powers. If a Conservator is appointed for you, the Conservator may, without Court approval, manage your principal (assets), income, and investments, sue and defend any claim by or against you, sell and transfer personal property, and vote on your behalf at corporate meetings. Further, upon the Court's approval, the Conservator may invest your funds, execute leases on your behalf, make payments to or for your benefit, support your legal dependents, compromise or settle any claim, and do other things which the Court determines is in your best interests.

YOU ARE ALSO ADVISED OF YOUR RIGHT TO SEEK COUNSEL, INCLUDING COUNSEL OF AN ATTORNEY OR LAWYER, REGARDING THIS CONSERVATORSHIP. YOU ARE ALSO ADVISED THAT THE CONSERVATORSHIP MAY DEPRIVE YOU OF CIVIL RIGHTS.

The undersigned Proposed Ward acknowledges receipt of the above notice this ____day of _____, 19__.

_____
[signature of proposed ward]

STATE OF _____)
)ss.
COUNTY OF _____)

Subscribed and sworn to me this ____ day of _____, 19__ by _____, to me known as the identical person named in and who executed the foregoing instrument and acknowledges executing the same as his voluntary act and deed.

_____
Notary Public In and For the State of Iowa

EXHIBIT "H"

IN THE MATTER OF THE	)	Probate No. _____
	)	
CONSERVATORSHIP OF	)	PETITION FOR APPOINTMENT
	)	OF CONSERVATOR
_____	)	(INVOLUNTARY)

The undersigned, _____, being duly sworn on oath depose and states:

1. The name, post office address, and age of the Proposed Ward is:
Name:
Address:
Age:

2. The purpose of this conservatorship is to enable the conservator to settle a personal injury claim of said minor.

3. The proposed ward is a minor. The circumstances of this case [do/do not] require that the Proposed Ward be represented by an attorney. [An affidavit explaining these circumstances is attached to this petition as exhibit __. or/ The purpose of this conservatorship is to enable the conservator to settle a personal injury claim of said Ward. The Proposed Conservator's attorney represents only the Proposed Conservator and Ward and their interests are not adverse.]

[option 2 - The Proposed Ward by reason of mental, physical or other incapacity is unable to make or carry out important decisions concerning the Proposed Ward's financial affairs. The Proposed Ward is an adult, and therefore, is entitled to representation.]

4. The name and post office address of the proposed Conservator, who is qualified to serve in that capacity is: [name and address of Conservator].

5. The Proposed Ward is a resident of the State of Iowa or is present in the State, and the Proposed Ward's best interests require the appointment of a conservator in this State.

6. The Proposed Ward is presently in the care and custody of [name and address], [parents of the proposed ward].

7. The Proposed ward has property with estimated values as follows:
real property: _____.
personal property: _____*

*The personal property is from a future settlement of a personal injury claim. The estimated gross annual income of the conservatorship estate is $_____. Money [is/is not] payable, or to become payable, to the proposed ward by the United States through the Veterans Administration.

8. The Proposed Ward is entitled to notice regarding conservatorship powers as required by Iowa Code section 633.576. A copy of such notice is attached to, and by this reference incorporated into, this Petition as exhibit ___.

WHEREFORE, the undersigned requests the Court:

1. Appoint _____ as Conservator of the property of _____ [with or without bond].

2. Enter any additional orders as are necessary.

The undersigned, states that I am the Petitioner named above; that I have read the foregoing Petition and attachments, if any; and that I verily believe that its statements are true.

_____
[signature of Petitioner]

Subscribed and sworn to before me this _____ day of _____, 19__.

_____
Notary Public

EXHIBIT "I"

IN THE IOWA DISTRICT COURT FOR ____ COUNTY

IN THE MATTER OF THE	)	
	)	Probate No.
CONSERVATORSHIP OF	)	
	)	APPLICATION FOR AUTHORITY
_____	)	TO COMPROMISE CLAIM

The undersigned, Conservator and attorney for _____, hereby make application to the Court for permission to enter into a compromise settlement of a personal injury claim on behalf of _____ and in support of this application state:

1. The undersigned are the duly appointed and acting conservator and attorney for the ward.

2. On _____, said minor was injured when a vehicle driven by _____ in which _____ was a passenger, was hit by a vehicle driven by _____.

3. _____, the liability carrier for _____, has made an offer to compromise and settle _____'s claims as well her mother's claims arising from said incident as follows:
[set out settlement agreement]

4. Your conservator advises the Court that counsel represents [the ward] [the Conservator and parents] so that no additional independent investigation, otherwise contemplated by Iowa Code §633.648, is needed and should be waived.

5. The Conservator, parents of the ward, [counsel for the ward] [counsel for the Conservator] has been fully advised and has reviewed documents relating to the claim and settlement, and advises that the offer of settlement is fair and reasonable, and the conservator now recommends the Court authorize acceptance of the settlement proposal and grant authority to execute the release and indemnity agreement.[1]

WHEREFORE, the conservator and Attorney for the Ward respectfully request the Court enter an order as follows:

1. Authorizing them to accept the settlement proposal outlined above.

2. Authorizing the Conservator to execute such documents as may be necessary to conclude the matter including the forms attached hereto as Exhibit "B".

STATE OF _____)
)ss.
COUNTY OF _____)

The undersigned, being first duly sworn, on oath depose and state that I am the duly appointed, qualified, and acting conservator aforesaid, that I have read the foregoing Application prepared at my request and that the allegations are true and correct as I verily believe.

_____
[conservator]

Subscribed and sworn to before me this _____ day of _____, 198____.

_____
Notary Public in and for the State of_____

_____
John Doe, Attorney for Ward.

---

[1] Consider Adding:

The amount allocated to the Conservatorship is less than the maximum amount prescribed by Iowa Code §633.514 and 633.681 so that a Conservatorship might not have been necessary but the settlement proposal required the settlement of the minor's claim to be court approved.

EXHIBIT "J"

RELEASE BY CONSERVATOR

The undersigned, _____, being first duly appointed, qualified and acting Conservator of the Conservatorship of _____, a minor[1], hereby acknowledges as full, fair and adequate payment the sum of_____ ($), in consideration of which the undersigned hereby releases, acquits and forever discharges _____, their insurer, _____ Insurance Company, their officers, agents, employees, successors and assigns from any and all claims, demands, and causes of action whatsoever affecting my said minor ward and son in any manner whatsoever he may have or claim to have by reason of:

a. The injuries sustained by [ward] on or about [date] on/at [place] which included [brief description of damages];

b. Any claim the undersigned parents have or may ever have as a result of the incident referred to in (a), including but not limited to claims for medical expenses, loss of consortium, loss of services, and any other claims allowed or contemplated by Rule 8, I.R.C.P.;

c. All subsequent events claimed related or proximately caused by the accident;

d. Any matter derivative of (a) or (c).

As further consideration for payment of said sum the undersigned hereby agrees:

1. [FOR PARAGRAPHS 1-4 INSERT STANDARD RELEASE LANGUAGE FROM EXHIBIT A, ALSO ADD ADDITIONAL LANGUAGE AS NECESSARY FROM EXHIBITS B, C AND D]

The undersigned has read the foregoing Release and understands it terms and freely and voluntarily signs the same.

Dated at _____, _____ County, Iowa, this _____ day of ____, _____.

* * * * * * * * * * * * * * * *

CAUTION: THIS IS A RELEASE - READ BEFORE SIGNING!

_____
_____, AS CONSERVATOR FOR THE CONSERVATORSHIP OF
_____, A MINOR, AND AS MOTHER AND CUSTODIAL PARENT
OF _____, AND IN HER INDIVIDUAL CAPACITY

STATE OF IOWA)
) ss:
COUNTY OF ___)

Subscribed and sworn to me this ____ day of ___, 19__ by ____ _____, to me known as the identical person named in and who executed the foregoing instrument and acknowledges executing the same as her voluntary act and deed.

_____
Notary Public of the State of Iowa

[1] OR: The undersigned, _____Bank, duly appointed, qualified and acting Conservator of the Conservatorship of _____, a minor, by _____, Vice-President and Trust Officer, duly authorized to act on behalf of _____ Bank,....

EXHIBIT "K"

RELEASE AND INDEMNITY AGREEMENT

The undersigned, _____, individually and as administrator of the Estate of _____, executes this release pursuant to and by authority granted by the Honorable _____ Judge of the __the Judicial District of Iowa on the ____ day of _____, 19__. The undersigned hereby acknowledges as full and complete consideration for this Release the sum of _____ ($) paid to the Estate of _____. In consideration of which payment the undersigned does hereby release, acquit and forever discharge _____, and each and every one of its past and present parent and subsidiary corporations, affiliates, predecessors, insurers, indemnitors, directors, representatives, officers, employees, successors and assigns, from any and all liability whatsoever, including but not limited to, all claims, demands and causes of action of every nature which the undersigned may have or ever claim to have, individually or as administrator of the estate of _____ by reason of:

(a) An accident or event which occurred on or about the _____ day of _____, 19____, at or near_____; or

(b) Any and all claims asserted in or which may have been asserted or joined on the claims asserted in the _____ County, Case No. _____; or

(c) any matter derivative of (a) and (b).

As further consideration, the undersigned hereby agrees:

1. [INSERT FOR PARAGRAPHS 1-4 THE STANDARD RELEASE LANGUAGE FROM EXHIBIT A AND ANY OTHER SPECIFIC LANGUAGE NEEDED FROM EXHIBITS B, C AND D]

5. As Administrator of the Estate of _____, and as mother, the undersigned states and acknowledges that any claim which the undersigned may have as a result of the death of _____are those held by the estate of_____. Notwithstanding this fact, it is the explicit intent and understanding of this settlement to extinguish all claims which the undersigned may now or in the future have or claim to have as a result of the death of _____, and the undersigned does hereby expressly release, acquit and forever discharge the Released Parties from any such claim, both individually and as administrator.

6. The undersigned shall dismiss with prejudice the action presently pending in the _____ County District Court against the Released Parties, Law No. _____.

THAT THE UNDERSIGNED HAS READ THE FOREGOING RELEASE, AND UNDERSTANDS ITS TERMS AND FREELY AND VOLUNTARILY SIGNS THE SAME.

Dated at _____, this _____ day of _____, 1990.

CAUTION: THIS IS A RELEASE--READ BEFORE SIGNING!

_____
MARY DOE, individually and as administrator of the estate of Susan Doe.

EXHIBIT "L"

1. WORKER'S COMPENSATION LIEN/SUBROGATION WAIVER

_____ INSURANCE COMPANY by _____, duly authorized to act on behalf of _____ Insurance Company, hereby consents to the settlement between _____ and _____ as a result of injuries received by _____ on or about _____, and further releases it's lien on all past, present and future subrogation claims of any type or nature that it has or may have against the released parties by reason of the injuries sustained by _____ in the accident on _____, for all past, present and future worker's compensation or medical payments or benefits, within the contemplation of Iowa Code § 85.22 and § 668.5.

Executed at _____, Iowa on _____ ___, 19--.

_____ Insurance Company

By: _____
_____, its authorized attorney [or representative]

Note:

This can be made part of the release document, or a separate document styled release and waiver of subrogation and liens similar to Exhibit E.

It is best to include the compensation carrier on the settlement check (or have separate checks).

2. UNDERINSURED SUBROGATION

1. The undersigned further agrees that no claim for underinsured coverage made by the undersigned to a third party based on the [DATE OF ACCIDENT] collision will result in any further or additional claims or litigation against those parties released and the undersigned agrees to indemnify and hold harmless the parties released from any claim ever asserted by his underinsurance carrier on said accident.

2. The parties agree and understand that the underinsurance carrier of the undersigned has agreed to release any and all subrogation rights it has or may ever have against [NAME OF RELEASED PARTY] as a result of the [DATE OF ACCIDENT] accident.

3. The undersigned expressly reserves all rights against his/her own insurer under the underinsured motorist coverage, it being undersigned's contention that she/he has not been fully compensated for his/her injuries.

3. OTHER SUBROGATION MATTERS

1. That the undersigned, on behalf of {INSURANCE COMPANY}, expressly states that he/she has authority to settle this claim and hereby releases and discharges all rights to subrogation against the released parties.

EXHIBIT "N"

HOW TO TRY A CASE WHEN YOU ARE UNPREPARED

By
MAURICE B. NIELAND
RAWLINGS, NIELAND, PROBASCO, KILLINGER,
ELLWANGER, JACOBS & MOHRHAUSER
300 Toy Building
Sioux City, IA 51101

I. INTRODUCTION

II. FACT SITUATIONS

A. Hypothetical

1. Plaintiff's case. Suit concerns design and construction of a chemical plant. Tort and contract liability issues plus damages including economic loss. Corporate plaintiff plus individual shareholders and directors. Multiple defendants. Case pending approximately four years. Several dozen depositions in six or eight states. Discovery continuing. Firm trial date three months away.

2. Defendant's case. Represent client and insurance company. Client is pastoral counselor charged with improprieties with clients. Single plaintiff. One additional defendant. Considerable discovery continuing up to time of trial. Some settlement discussion undertaken. Trial date three weeks away.

III. REASONS FOR BEING UNPREPARED

A. Death, disability, infirmity of one's own partner or associate.

B. Retained by a non-related lawyer late in the proceedings or just prior to trial.

C. Younger lawyer or associate "in over his/her head."

D. Recent "ominous development" in otherwise routine uncomplicated case handled by junior or less experienced attorney.

E. Last minute demand by client.

F. Other

IV. RESOURCE MATERIAL FOR FACTS AND INFORMATION

A. Initial attorney unavailable--medical reasons.

B. Initial attorney unavailable--disciplinary reasons.

C. Initial attorney unavailable--death.

D. Initial attorney unavailable--unsatisfactory performance.

E. Initial attorney unavailable--discharged by client.

F. Ethical consideration regarding getting into case late:

EC 6-6. A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so.. . .

DR 6-102. LIMITING LIABILITY TO CLIENT

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

G. Resource and information person from client.

H. Resource and information person from corporate defendant.

1. Part-time hiring of employees.

2. Use of officers, directors, and shareholders

I. Resource and information person within the firm.

1. Other attorneys

2. Support personnel including paralegals, secretaries, clerks.

R

V. ASKING FOR A CONTINUANCE

A. Iowa Rules

1. Iowa Rule of Civil Procedure 182. MOTIONS FOR CONTINUANCE

(a) Motions for continuance shall be filed without delay after the grounds therefor become known to the party or the party's counsel. Such motion may be amended only to correct a clerical error.

(b) No case assigned for trial shall be continued ex parte. All motions for continuance in a case set for trial shall be signed by counsel, if any, and approved in writing by the party represented, unless such approval is waived by court order.

2. Iowa Rule of Civil Procedure 183. CAUSES FOR CONTINUANCE

(a) A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree and the court approves.

(b) All such motions based on absence of evidence must be supported by affidavit of the party, his agent or attorney, and must show: (1) the name and residence of the absent witness, or, if unknown, that affiant has used diligence to ascertain them; (2) what efforts, constituting due diligence, have been made to obtain such witness or his testimony, and facts showing reasonable grounds to believe the testimony will be procured by a certain, specified date; (3) what particular facts, distinct from legal conclusions, affiant believes the witness will prove, and that he believes them to be true and know of no other witness by whom they can be fully proved. If the court finds such motion sufficient, the adverse party may avoid the continuance by admitting that the witness if present, would testify to the facts therein stated, as the evidence of such witness.

B. Federal Rules

Rule 16. Pre-trial conferences; scheduling; management

* * *

The scheduling order also may include (4) the date or dates for conferences before trial, a final pre-trial conference, and trial;

R

* * *

(e) PRE-TRIAL ORDERS. After any conference held pursuant to this Rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pre-trial conference shall be modified only to prevent manifest injustice.

* * *

C. Obtain copies of both State and Federal local Rules if working outside of home territory.

D. Refer to Iowa Code Chapter 677.14 NO CAUSE FOR CONTINUANCE

The making of any offer pursuant to the provisions of this Chapter shall not be cause for a continuance of the action or a postponement of the trial.

Apparently offers to confess judgment are not deemed to be appropriate reasons for continuances.

E. Case reviews

1. Generally, continuances will not be granted for want of defense preparation in the absence of a showing of good excuse. State v. Kyle, 271 N.W.2d 689 (Iowa 1978).

2. Where defendant's counsel failed to respond to plaintiff's counsels invitation to divulge the substance of absent expert's testimony so a stipulation might be agreed upon, overruling defendant's motion for continuance following plaintiff's amendment not an abuse of discretion. Madison Silos, Division of Martin Marietta Corp. v. Wassom, 215 N.W.2d 494 (Iowa 1974).

3. Trial Court's ruling on motion for continuance is presumptively correct, and the party challenging the ruling has heavy burden to overcome presumption. Countryman v. McMains, 381 N.W.2d 638 (Iowa 1986).

F. Interlocutory appeal from denial of motion for continuance; reasons and chances for success.

VI. CONSIDERATIONS REGARDING REQUEST FOR CONTINUANCE

A. Previous continuances already been given. Request by adverse party--requests by your clients.

B. Your own clients and predecessor attorney's insistence on prompt trial.

C. Resistance by the opposition.

D. Client's reasons for wanting case tried promptly.

1. Series of cases, best case first.

2. Illness or infirmity of client or witnesses.

3. Unavailability of client or witnesses including expert witnesses.

2. Areas of particular skill or expertise.

3. Knowledge or familiarity with particular experts.

4. Sharing in the fee, negotiation of the fee, increase in the fee.

B. Defense of cases

1. Insurance companies, banks, institutional clients.

2. Additional fees and costs.

3. Reduction of fees.

4. Reduction of hourly rate.

5. Modification or amendment of fee agreement or contract.

6. Maintaining client contact and avoiding adversary relationship with client.

7. Handling mounting costs, excessive delays, inappropriate offers.

IX. THE OPTION OF SETTLEMENT

A. Explore the position of the parties.

1. Positions of strength verses positions of weakness.

2. Ignorance of the facts verses knowledge of the facts.

3. Ignorance of the law verses knowledge of the law.

B. Protecting the record regarding error.

1. Motions for continuance.

2. 104A motions.

3. Motions in limine.

4. Motions for protective orders.

5. Motions to exclude witnesses.

6. Motions for mistrial.

7. Other

X. CONSIDERATION OF OFFERS TO CONFESS JUDGMENT

A. Federal Rule--Federal Rule of Civil Procedure 68. OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer is not admissible except in a proceeding to determine costs. It the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

B. State Statute--Iowa Code Section 677.1 states:

The defendant in any action for the recovery of money only may, at any time after the service of notice and before the trial, serve upon the plaintiff or the plaintiff's attorney an offer in writing to allow judgment to be taken against the defendant for a specified sum with costs.

XI. CONSIDERATIONS REGARDING SETTLEMENT

A. Settlement with some defendants.

B. Settlement with some plaintiffs.

C. Loss or retention of witnesses (lay).

D. Loss or retention of expert witnesses.

E. Depth of preparation of opposition or oppositions counsel.

F. Strengths and abilities of opposition counsel.

G. Collectibility of judgment.

H. Apportionment of "fault."

XII. HANDLING OF PRE-TRIAL MATTERS WHEN YOU ARE UNPREPARED

A. Motions to amend, resisting opposition's motions, appearing and filing your own motions.

B. Motions in limine.

C. Production of documents.

D. Request for admissions.

E. Supplementation of answers to interrogatories.

F. Rule 104A hearings.

G. Motions to read in depositions.

H. Subpoenas and schedule for witnesses.

XIII. DISCOVERY BEFORE TRIAL--COMPLETION OF, CONTINUANCE OF, THE NEVER ENDING STORY

A. Request for production of documents.

B. Deposition of experts.

C. Depositions of other witnesses, motions for protective orders, motions to quash.

D. Limiting opposition, designating additional experts, protecting your own experts for deposition.

XIV. MECHANICS OF TRYING A CASE UNPREPARED

A. "Clear the decks"--clear your own practice, postpone all other depositions, hearings, trials and other professional commitments.

B. Arrange your own support staff; other partners, other associates; assume responsibility for other cases, trials, work.

C. Clear personal schedule; vacations, ballgames, weddings, funerals.

D. Determine the issues; read the pleadings file, sort out the major from the minor issues, ask yourself what do you have to prove or what do you have to defend against?

E. Read the correspondence file, what has happened? What agreements have been made regarding discovery, calling of witnesses, presentation of the case? At least skim through the "briefs and legal file" to develop acquaintance with the legal issues. Investigate matters that have been briefed. What matters are likely to be an issue?

F. Read deposition summaries, if available, of your own experts and opposing experts.

G. Read deposition summaries of key fact witnesses, if available.

H. Read opposing party's depositions (lay witnesses and experts).

I. Read your own depositions.

J. Selection of witnesses: pare down, present only the essential, one good clear concise effective witness is better than two or three "lukewarm and unprepared witnesses."

K. Analyze order of presentation; start with most "likable" and most "knowledgeable" witness first. Help you learn along the way. Plan to finish with a "sweeper" witness. Consider calling witnesses more than once, liability verses damages, calling witnesses to be examined by various attorneys.

L. Consider opening statement when you are unprepared: Do you advise the jury you are unprepared? "I wasn't there at your deposition but . . .").

M. Make use of the self-starter witness, "tell the jury what you know about building an alcohol plant."

N. Ration your time; try to shorten the trial day, starting at 9:30, hour and one-half for lunch, quit at 4:00 p.m.

   1. Strategy session with clients and witnesses.

   2. Interview witnesses for the next day, read deposition summary or deposition.

   3. Outline testimony--bed by midnight.

O. Keeping your opposition honest: Motions in limine; motions for mistrial; motions for continuance; motions to exclude testimony.

R

P. Opening up your own offense.

Q. More effective presentation to the jury (same level of learning and expertise).

XV. ADVANTAGES TO TRYING A CASE WHEN YOU ARE UNPREPARED

A. Good will and discretionary rulings from Judge.

B. Great identification with jury.

C. "Tight leash" on opposing counsel.

D. Lower client expectations and greater gratitude upon success.

ANNUAL APPELLATE DECISIONS REVIEW

October 1989 - September 1990
445 N.W.2d through 459 N.W.2d 618

By
Gregory M. Lederer
Simmons, Perrine, Albright & Ellwood
1200 Merchants National Bank Building
Cedar Rapids, IA 52401

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I would like to thank Julia A. Barry, Martha L. Shaff, Charles W. Hippee, Bruce A. Kittle, Leonard T. Strand, and Mary B. Junge for their assistance in preparing this review.

APPELLATE PROCEDURE

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Brief/Appendix

In appealing from an adverse jury verdict in a products liability case that took several weeks to try, defendant prepared and submitted an appendix of 4,522 pages. In its brief, defendant frequently failed to cite to the appendix or the transcript for its factual statements. The Supreme Court expressed its belief that the appendix contained superfluous material and that the failure to edit and cite to the appendix and/or the transcript "needlessly increased our burden." Throughout the opinion, the Court repeatedly expressed dissatisfaction with defendant's failure to identify or particularize challenged pieces of evidence, testimony, and rulings. The Court affirmed.

Richers v. Marsh & McLennan Group Associates, 459 N.W.2d 478 (Iowa 1990)

Finality

Defendants appealed as a matter of right from district court's refusal to disqualify plaintiff's counsel. HELD: An order disqualifying counsel is not final for purposes of appeal, but the danger of transmission of confidential information meets the requirements for accepting an interlocutory-appeal application.

Hillview Associates v. Palmer, 456 N.W.2d 909 (Iowa 1990)

Jurisdiction

Landlord commenced forcible entry and detainer action against tenants of mobile home park. Small claims court found in landlord's favor, and on appeal district court affirmed. Tenant sought relief from Supreme Court and claimed that he had a right to a mandatory appeal rather than discretionary review. Supreme Court held that section 631.15 specifically states that any civil action originally tried as a small claim is appealable to the Supreme Court only by discretionary review. This specific provision controls over more general provisions creating a right of appeal from district court rulings.

S

Reimers v. Honeywell, Inc., 457 N.W.2d 336 (Iowa 1990)

New Trial

Plaintiffs sued for wrongful death and serious injuries in gas furnace explosion. Honeywell cross-petitioned against Poweshiek-Jasper Farm Service (Poweshiek), who supplied the gas. Honeywell settled with plaintiffs before trial for $1.4 million and tried its contribution claim against Poweshiek. Jury found the settlement to be reasonable, and assessed some fault against Poweshiek.

One of plaintiffs' claims against Honeywell sought punitive damages. Poweshiek contended at trial and on appeal that Honeywell, a reckless or intentional tort feasor, was not entitled to contribution. See Beeck v. Aquaslide'n'Dive Corp., 350 N.W.2d 149 (Iowa 1984). The district court held that the enactment of ch. 668 overruled Beeck and did not require Honeywell to show what portion of the settlement was attributable to the punitive-damage claim. On appeal Poweshiek alternatively argued that failure to show such allocation irretrievably tainted the contribution verdict.

The Supreme Court reaffirmed its recent decision that punitive damages are not to be reduced or impacted by comparative fault. See Godbersen v. Miller, 439 N.W.2d 206 (Iowa 1989). This does not mean, however, that Honeywell cannot recover contribution at all. "When and if the conduct giving rise to punitive damages can be separated from damages arising from the tort feasor's other, less egregious, conduct there is no reason to bar contribution for that part of the damages which was not punitive in nature." Since the district court did not have the benefit of Godbersen and had ruled that the settlement did not have to be allocated between compensatory and punitive exposures, Honeywell was entitled to a new trial.

In response to Poweshiek's argument that it did not ask for a new trial, the court held that it had the power to remand to district court for new trial, even though appellant (Poweshiek) did not move for a new trial and did not seek one on appeal.

Adams v. Johnson, 445 N.W.2d 422 (Iowa App. 1989)

S

Waiver

Plaintiff in dog-bite case recovered $52,500. Defendants moved for discovery sanctions under rule 134 against plaintiff for his failure to give timely answers to interrogatories. The district court granted the sanctions in the form of a suspension of prejudgment interest. Plaintiff appealed and defendant cross-

appealed, arguing that additional discovery sanctions should have been imposed. Defendant then paid the judgment voluntarily.

HELD: Mermigis v. Servicemaster, 437 N.W.2d 242 (Iowa 1989), controls. Section 535.3 makes imposition of such interest obligatory, and there is no language in rule 134(b)(2) specifically providing for such a sanction.

Defendants waived their right of cross-appeal by voluntarily paying the judgment.

COMMENT: The court did not address the merits of whether sanctions should have been imposed. Even with the dismissal of the cross-appeal, shouldn't the court have remanded for imposition of an authorized sanction?

Hense v. G.D. Searle & Co., 452 N.W.2d 440 (Iowa 1990)

Waiver

Plaintiff sued IUD manufacturer in products liability action. Six continuances were granted over the course of six years, due in large part to discovery problems. Defendant moved for summary judgment because plaintiff had no expert to establish the causal link between defendant's product and the plaintiff's medical injuries. The motion was denied. The day before trial, however, plaintiff asked the court to reconsider its denial of summary judgment. The court had denied a seventh continuance to the plaintiff, and plaintiff was not ready to try the case, again due to discovery problems. The district court accommodated plaintiff and entered summary judgment for defendant.

HELD: A lack-of-consent exception to the rule of nonreviewability, rather than a strict appellate waiver rule, best reflects Iowa law. However, the facts in this case establish that plaintiff invited the final judgment. The denial of a continuance did not automatically preclude plaintiff from recovering, and the court previously had rejected the arguments asserted in defendant's motion for summary judgment.

CHR Equipment Financing Co. v. C & K Transport, Inc., 448 N.W.2d 693 (Iowa App. 1989)

S

Waiver

Plaintiff and defendant executed a five-year lease for trucks. Defendant defaulted on its lease payments. CHR sued for breach of lease and was awarded $36,000. CHR took steps to collect

on the judgment, but also appealed, due to the district court's failure to award certain additional damages sought by CHR. C & K did not appeal.

HELD: The appellate-waiver doctrine does not prevent the collection of funds over which there is no disagreement. Deliberate conduct to enforce a judgment, at least under these circumstances, does not constitute waiver.

ATTORNEYS

Richers v. Marsh & McLennan Group Associates, 459 N.W.2d. 478 (Iowa 1990)

Conflict Of Interest

Marsh and McLennan Group Associates (MMGA) and an insurer retained Shuttleworth and Ingersoll (S & I) to defend a suit for coverage on a disability policy (the Oaks' suit). Sue Richers, an assistant vice-president at MMGA, was an important witness. Ten months later, MMGA terminated Richers' employment. MMGA retained the Davis firm, and Richers retained Alanson Elgar. There were at least four telephone conversations involving MMGA personnel and attorneys from the Davis and S & I firms to discuss Richers' termination, the need for her continued cooperation to defend the Oaks' suit, and the content of a "termination package" to be offered Richers that would include her promise of cooperation and availability.

Elgar eventually advised the Davis firm that Richers had hired S & I to prosecute, with Elgar, a suit against MMGA. MMGA immediately objected to S & I on grounds of conflict of interest. The partner in charge of the Oaks' suit advised MMGA that S & I would not represent Richers. Several months later, the insurer in the Oaks' suit requested that S & I be replaced, and S & I withdrew in favor of substitute counsel. Several months later, Richers sued MMGA for wrongful discharge, tortious interference, and fraudulent misrepresentation. She was represented by Elgar and S & I. MMGA moved to disqualify S & I and Elgar.

HELD: Substantial evidence supported the district court's finding that a conflict of interest existed, but conflict could not be limited to only those issues raised by Richers' claim for denial of certain benefits due to her refusal to sign a release.

> Each count . . . grows out of the termination of her employment. While the Oaks' suit

> alleges that misinformation was given through a policyholder, it is uncontradicted that this complaint was directed against an employee supervised by [Richers] and that [Richers] was an important witness in the case. The ability of MMGA to properly train and supervise its personnel is an essential issue in both cases. As the person responsible for supervising and training the employee implicated in the disbursal of incorrect coverage information, [Richers'] alleged inability to perform these aspects of her job is closely related to Oaks' claim and is crucial to her own causes of action. We conclude that all counts in [Richers'] petition are substantially related to the Oaks' suit.

Given the presumption of disclosure of confidences from the former representation, district court abused its discretion in not denying motion to disqualify S & I. Absent any previous relationship between Elgar and MMGA, and absent any direct evidence of actual impropriety by Elgar, his association with S & I for purposes of this litigation does not generate an appearance of impropriety that requires disqualification of Elgar.

National Child Care, Inc. v. Dickinson, 446 N.W.2d 810 (Iowa 1989)

Conflict Of Interest

Attorney Ronwin was the sole shareholder of National Child Care, Inc., who sued the Dickinsons and Susan Hill, its competitors, for tortious interference with business opportunities. When it became apparent that Ronwin was personally involved and would be a witness at trial, the Dickinsons moved to have him disqualified pursuant to DR 5-101(C). The court granted the motion and ordered National to secure new counsel within 45 days. National, in turn, moved to have the Dickinsons' attorney, Tom Salsbery, disqualified under DR 5-102(B), stating that National intended to call Salsbery as a witness because he had been present at some of the meetings between Ronwin and Mrs. Dickinson, and arguing that Salsbery's testimony would be prejudicial to his clients. The district court overruled National's motion, because there was nothing in the record to indicate what Salsbery's testimony might be. National failed to secure new counsel under the court's DR 5-101(C) order, so the court granted Dickinsons' motion to dismiss without prejudice. National appealed, arguing that because Ronwin owned all of National's stock, his interests and National's coincided, and therefore he was like the lawyer-litigant who represents himself in court and who may also be a witness.

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A majority of the Supreme Court referred to Presnick v. Esposito, 8 Conn. App. 364, 513 A.2d 165 (1986), where the court refused to disqualify an attorney-litigant-witness under Connecticut's counterpart to DR 5-101(C), with approval. Without citation, the majority concluded:

> We fail to see why a different result should prevail where a corporation is represented by an attorney who is its sole shareholder. . . .
>
> DR5-101(C) does not directly focus on conflicts of interest between attorney and client, but at preventing potential harm to the client because of a conflict inherent in the attorney's dual role as advocate and witness. . . . [N]either an opposing litigant nor the trial court should be able to deny a client's choice of counsel without a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process. . . . [N]either of these dangers is present . . . .

As to National's motion to disqualify Salsbery, there was nothing in the record to indicate to what Salsbery, if called by National, might testify. National had failed to carry its burden of demonstrating that prejudice was likely to result from Salsbery's testimony.

Four Justices dissented. Even though Ronwin was the sole stockholder, his interests and allegiances differ from National's. Ronwin's failure to secure a non-witness counsel for National could prejudice National's interests during the trial and is "clearly violative" of EC 5-18, which concerns a lawyer's allegiance to a corporate client. The practical effect of the majority's holding is to put Ronwin's financial interests in appearing pro se above those of National in having effective and unimpeachable representation. Furthermore, this is not a case where securing new counsel would work a "substantial hardship" on the corporate client, as explained in one of the exceptions to DR 5-101(c)(4).

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Killian v. Iowa District Court, 452 N.W.2d 426 (Iowa 1990)

Conflict of Interest

Joan and John Killian are beneficiaries of an inter vivos trust created by their mother. Represented by Tom Riley, Joan sued the trustees for mismanagement and breach of fiduciary duty. The parties eventually negotiated a settlement, which was expressly conditioned upon no further litigation over the trust. The

trustees filed a report, including the settlement, and had the matter set for hearing with notice to John. The probate court approved the settlement. A few days later, Riley was retained by John to bring a similar action against the trustees. Riley first moved to set aside the order approving the settlement, since it was a necessary condition for permitting John's suit against the trustees to proceed. The trustees moved to disqualify Riley and, in support of such motion, submitted a letter from Joan to Riley in which she vigorously objected to his representation of John.

HELD: The district court did not abuse its discretion in disqualifying Riley. Although the settlement money had already been paid to Joan, an order setting aside the probate court's approval of the settlement would place Joan in a position of uncertainty, at the very least. At the moment, Riley continues to be her attorney. Riley's suggestion that Joan could protect her interests by intervening or even by suing Riley if she is ever harmed "further reveals that Riley is in a potential conflict with Joan." Riley's contention that he has received no information in confidence from Joan that could be used on behalf of John is irrelevant. Because the cases are substantially related, "it is assumed the attorney may have obtained relevant information . . . . A potential conflict is enough to warrant disqualification."

Committee v. Baudino, 452 N.W.2d 455 (Iowa 1990)

Discipline

Baudino failed timely to file returns for '84, '85, and '86 and answered the client security questionnaire tax questions incorrectly, if not falsely, for each year.

HELD: Suspension for six months.

Four justices dissented. Accepting his failure to file timely returns and his untruthfulness in responding to the client security questionnaire, the dissenting justices found that a six-month suspension did not accurately "reflect our view of the attorney's fitness to practice law." Any significant suspension carries an excessive financial penalty.

COMMENT: The tenor of the majority opinion and a special concurrence by two justices gives little basis for believing that the majority will lose any of its votes very soon.

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The majority was particularly irked that Baudino adduced expert testimony from Yale Law Professor Geoffrey C. Hazard Jr., that Baudino's tax violations, stemming from confusion over deadlines rather than a flagrant disregard for tax responsibilities, was inconsistent with disciplinary sanctions.

Koegel v. R Motors, Inc., 448 N.W.2d 452 (Iowa 1989)

Discovery

Plaintiffs, prospective car purchasers, prevailed in a breach of contract action against the alleged principal of a car dealership. Plaintiffs filed a motion for attorney's fees under Rule 134(c), alleging that defendant had unreasonably denied plaintiffs' request for admissions. District court granted the motion and awarded fees and expenses. Pursuant to Rule 179(b), defendant asked the court to particularize its ruling by identifying the denials that it found were contradicted by proof at trial. Defendant also asked the court to reconsider its refusal to permit defendant to examine plaintiff's counsel about the fees and expenses submitted.

HELD: Although a trial may result in a finding that matters denied were true, this does not necessarily mean that matters were unreasonably denied. Specifically, the language of Rule 134(c)(3) implies that the determination of whether the denying party has reasonable ground for the denial is based on what that party knew at the time, and that whether the denying party had a reasonable ground is a factual determination. In deciding whether the denying party had a reasonable ground, the district court must employ an objective test: Could a person in the denying party's position, armed with the information available at the time, reasonably believe there was a basis to deny the request? District court's failure to set out specifically the denials it regarded as false and why required a remand. At that time, defendants also should be allowed to examine plaintiffs' attorney about the expenses sought for having to prove the matters denied.

COMMENT: If you receive what you regard to be insufficient responses to your request for admissions, consider the court's critical observation that plaintiff could have moved under Rule 127 to determine the sufficiency of the answers and for expenses in connection with that motion, thus clearing up the matter entirely.

Burns v. Rodriquez, 448 N.W.2d 673 (Iowa App. 1989)

Discovery

Burns and a passenger in his car, Fitzgerald, were injured in a two-car collision. They sued Rodriquez, the driver of the second car and Craven, its owner. Craven and Rodriquez counter-claimed for contribution against Burns. Shortly before trial, Burns and Fitzgerald settled their claims against Craven and Rodriquez. The only remaining issue was Burns' liability for contribution. Burns moved for production of the settlement documents on the Fitzgerald claim, but the court denied it.

HELD: Release and settlement documents were highly relevant in ascertaining whether Burns' liability to Fitzgerald had been discharged, which was a condition precedent to the claim for contribution. District court abused its discretion in refusing to order production of them.

Berg v. Des Moines General Hospital Co., 456 N.W.2d 173 (Iowa 1990)

Discovery

In action for medical malpractice, plaintiff claimed that the defendant hospital and doctors were negligent in failing to diagnose his heart attack in a timely manner. Plaintiff asked hospital and doctor to produce patient records of all persons for whom doctor had ordered an EKG or cardiac injury panel (CIP) during 5 years before plaintiff's treatment. Defendants sought protective order preventing such discovery.

HELD: No abuse of discretion in protecting defendants from the discovery request. Defendants established that they would have had to examine a great number of files manually in order to comply, and then would have had to incur significant time and expense in protecting the confidentiality of the other patients, which effort could never be entirely successful.

Mercy Hospital v. Hansen, Lind & Meyer, 456 N.W.2d 666 (Iowa 1990)

Discovery

Hospital sued architect for negligence and breach of contract in connection with construction project, when exterior brick walls began to fail. Hospital's in-house expert on lost profits revised his calculation formula between the time of his deposition and his trial testimony, without pre-trial notice to defendant and without amending his signed interrogatory answer. HELD: No abuse of discretion in permitting expert to testify in accordance with the new formula. "[He] presumably made this revision . . . to account for weaknesses in his initial opinion which were pointed out on cross-examination at the deposition." The change resulted in a downward adjustment in his damage figure.

COMMENT: The court's opinion observes that the district court's ruling could have gone the other way. The court also notes that it would have been helpful for the expert's deposition to have been part of the record to facilitate appellate review.

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Clark v. Sisters of Mercy Health Corp., 458 N.W.2d 398 (Iowa App. 1990)

Discovery

Plaintiff sued hospital and doctor for medical malpractice. Two years later, plaintiff added additional defendant Sims. All other defendants were granted summary judgment in 1988 because of plaintiff's failure to comply with discovery orders. After 215.1 notice was issued, Sims moved for the ultimate sanction of dismissal for plaintiff's failure to comply with an order compelling responses to discovery requests. District court sustained the motion one day before the case would have been dismissed automatically pursuant to rule 215.1, and plaintiff apparently had not filed a motion to remove the case from the operation of rule 215.1.

HELD: No abuse of discretion in dismissing plaintiff's case for violating discovery order.

Garcia v. Wibholm, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Guardian Ad Litem

Guardian ad litem was appointed pursuant to rule 13 to represent incarcerated defendant in tort case. After filing an answer and asserting an affirmative defense, the guardian ad litem withdrew with court approval. The case went to trial, without the defendant being present. Judgment was entered for substantial compensatory and punitive damages. Defendant appealed.

HELD: Judgment entered against an incarcerated person without appointment of a guardian ad litem is voidable under rule 13, even if the person was actually represented by an attorney or a court-appointed guardian. Here the incarcerated person received no representation at all. A guardian ad litem must provide a defense that will ensure protection of the ward's interest. In some circumstances, conducting an investigation and filing a general denial to avoid a default may be enough. In other circumstances, the guardian ad litem may need to do more, even to the extent of proceeding to trial.

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COMMENT: The court invited the legislature to take action regarding payment of attorneys appointed to represent civil defendants.

Lansky v. Lansky, 449 N.W.2d 367 (Iowa 1989)

Motions

Former wife brought action against former husband for tortious interference with custody. Former husband filed motion to dismiss, asserting defective notice, improper service, and lack of personal jurisdiction. The court sustained the motion to dismiss, but made no findings or conclusions and did not make separate rulings on the various grounds asserted for relief.

HELD: District court's ruling did not comply with rule 118. Counsel and the appellate court need to know the grounds upon which the motion was sustained. Defendant's attack on subject matter and/or personal jurisdiction requires the scheduling of an evidentiary hearing or at least the affording of an opportunity to present evidence and/or legal argument. Where notice is defective or service is improper, the appropriate relief would be that service is quashed, not dismissal of the action.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Pleading

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. Petition contained no reference to Chapter 502, but did contain allegations that firm made untrue statements to her and failed to warn her of the risk involved in a particular investment.

HELD: Petition gave fair notice of a claim under blue sky law.

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Protective Order

In products liability case, plaintiffs and defendant entered into a stipulated protective order that prevented plaintiffs from disseminating documents containing what defendant considered to be trade secrets or confidential business information. Plaintiffs sought release from the stipulation, because defendant no longer manufactured the product and had no reason to protect the trade secrets. HELD: No abuse of discretion in requiring the parties to perform their agreement with respect to this discovery dispute.

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Bronner v. Exchange State Bank, 455 N.W.2d 289 (Iowa App. 1990)

Real Party in Interest

Customer, after receiving Chapter 7 bankruptcy discharge, filed action against bank for wrongful use of loan proceeds. Cause of action arose before Chapter 7 petition was filed. Trial court granted summary judgment for bank on grounds that customer had no standing to bring the action. Court of appeals affirmed, holding that customer's cause of action became property of bankruptcy estate when Chapter 7 petition was filed, and thus customer had no standing to bring action. Filing by bankruptcy trustee of notice of abandonment of customer's cause of action was ineffectual, because it was filed after customer commenced action.

Mathias v. Glandon, 448 N.W.2d 443 (Iowa 1989)

Rule 80

Jewel Glandon had a car accident. Melinda Mathias, a passenger, was injured. Melinda and her parents filed a personal injury action against the Mr. and Mrs. Glandon two and one-half years after the accident. Plaintiffs alleged that the filing deadline was tolled by §614.8 because Melinda was a minor and because she had suffered from brain damage which allegedly made her mentally ill. Melinda's parents' claim was dismissed shortly after the petition was filed. The court then dismissed Melinda's claim against William Glandon (apparently he was not an owner), leaving only Melinda's claim against Jewel. The court then ruled on a motion to adjudicate law points, holding that Melinda's petition had not been filed within one year after her minority ended. Melinda filed a dismissal without prejudice. The defendants moved for sanctions under §619.19 and Rule 80(a). The plaintiffs resisted the motion and moved for sanctions against the defendants for filing a frivolous motion for sanctions. The court refused to impose any sanctions. Glandons appealed.

HELD: Appeal is the proper method for challenging the denial of a sanctions motion. Contrary to the three-tier standard adopted in Hearity v. Iowa District Court, 440 N.W.2d 860, 864 (Iowa 1989), the court will follow an emerging federal consensus on a deferential review standard. "[T]he finding of fact may be disturbed on appeal only if 'clearly erroneous,' and the resolution requiring the application of judgment may be undone only if the district court has abused its discretion." There was ample evidence to support the district court's determination that counsel had exercised reasonable inquiry as to the facts and the law before filing the suit. There is no continuing duty under Rule 80 or §619.19 which requires counsel to dismiss a suit when counsel learns that it has no merit.

COMMENT: The court quotes with approval from the ABA Litigation Section's Standard and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (1988), reprinted in 121 F.R.D. 101 (1988), for the factors to be considered in determining whether a reasonable inquiry into facts and law has been made. As to post-filing conduct, the court offers this caveat to its holding that rule 80 does not impose a continuing duty of investigation:

> Although the rule and statute focus upon the event of signing, we recognize that in most cases there will be a series of filings. They may indicate a pattern of conduct. The provisions of our rule and statute would apply to each paper signed and would require that each filing reflect a reasonable inquiry.

Carr v. Hovick, 451 N.W.2d 815 (Iowa 1990)

Rule 80

Carr sued Hovick for fraud in the sale of greyhound racing dogs. Hovick counterclaimed to recover his expenses from the transaction with Carr, and added claims for malicious prosecution and abuse of process. The district court advised Hovick's counsel that the malicious prosecution claim was premature, see Galloway v. Zuckert, 424 N.W.2d 437, 440 (Iowa 1988), but counsel disagreed. Without further notice to counsel, the district court found a violation of rule 80 and scheduled a hearing to determine the sanction.

HELD: District court's failure to notify counsel that it was contemplating a violation of rule 80(a) was error. "Sanctions will not be imposed upon a person who is not at least on notice that sanctions are under consideration. Ideally, the notice would also state the reasons why the sanctions are under consideration and the type of sanctions being considered."

James v. Swiss Valley Ag Service, 449 N.W.2d 886 (Iowa App. 1989)

Rule 80

Plaintiff was injured when he was sprayed with anhydrous ammonia due to rupture of rubber hose attached to "nurse tank." The manufacturer of the tank moved for summary judgment, documenting that the tank was manufactured 13 years before promulgation of safety standards relied on by plaintiff and that plaintiff's own expert had failed to point out any design or

manufacturing flaws in the tank. Manufacturer also filed a motion for rule 80 sanctions, claiming that plaintiff and his counsel failed to make an adequate factual investigation and that they pursued the claim after learning that it had no merit.

The district court overruled the motion for summary judgment and accordingly overruled the rule 80 motion.

HELD: Summary judgment should have been granted. Safety standards published 13 years after manufacture "are irrelevant." Plaintiff's only expert repeatedly declined to express any criticisms of the design or manufacture of the nurse tank.

As to the rule 80 motion, the court of appeals viewed it "as an extremely close call," but noted in plaintiff's favor that the district court overruled the motion for summary judgment.

Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989)

§ 1983

City terminated street superintendent for failure to follow orders, inattention to duties, reduction and consolidation of city employment positions, and misuse of city time. Superintendent requested a public hearing on his discharge, which was granted. He attended with his attorney before the city council. The superintendent, his attorney, city council members, and other persons made comments and expressed opinions. A motion to rehire him was defeated, and he refused an offer of part-time employment.

Plaintiff sued the city under 42 U.S.C. section 1983, for deprivations of liberty and property interests without due process. He joined a common-law claim for wrongful discharge. District court granted the city's motion for summary judgment with respect to the property interests and with respect to the wrongful-discharge claim. Twenty days before trial and after the amendment deadline established in a scheduling order, plaintiff sought leave to amend to add claims of libel, slander, and defamation of character. The district court denied the request to amend.

HELD: District court did not abuse its discretion in denying the motion on grounds of timeliness.

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Bean v. Midwest Battery & Metal, Inc., 449 N.W.2d 353 (Iowa 1989)

Service

Plaintiff commenced negligence action on last day of statute of limitations, but failed to serve original notice for approximately eight months. Defendant moved to dismiss for failure to comply timely with rule 49. Plaintiff received notice of non-oral submission of defendant's motion. Plaintiff resisted, but gave no explanation or justification for the delay in service and made no request for oral or evidentiary hearing. District court sustained motion to dismiss.

HELD: Eight-month delay was presumptively abusive. Plaintiff had the burden of justifying the delay and failed even to attempt to do so. "[P]laintiff cannot fairly blame the trial court for failing to set an oral hearing on a motion when none was requested. A busy trial court, processing pending motions on a regular motion day, can scarcely be expected to accord such unsolicited protection."

McKenzie v. Eastern Iowa Tire, Inc., 448 N.W.2d 464 (Iowa 1989)

Special Master

Plaintiff stockholder brought an action to liquidate the assets of the defendant corporation and the second stockholder intervened. The parties executed an agreement for appointment of a special master to determine the buy-out price.

HELD: Normally a master's findings are reviewed by a "clear error" standard. When the parties agree that the master's finding shall be final, however, only questions of law shall thereafter be considered. See, rule 214.

Roberts v. Moore, 445 N.W.2d 384 (Iowa App. 1989)

Summary Judgment

Moore bought a Mercedes from Roberts and two days later took it to a Mercedes-Benz dealer for an inspection. The dealer refused to service the car because it was a "gray market vehicle," made for sale in Europe and which lacked the required emission control devices. Moore returned the car to Roberts and stopped payment on his check. Roberts sued Moore for non-payment of the purchase price. Moore counterclaimed for fraudulent misrepresentation. The district court granted Roberts' motion for

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partial summary judgment on the issue of Moore's contractual liability.

HELD: Moore raised issues of material fact that, if found true, would constitute good defenses to the breach of contract claim. If Roberts knew that the vehicle was "gray market," and he intentionally concealed it, Moore may have justification for repudiating the contract. If neither Roberts nor Moore knew, the contract may be voidable for mutual mistake.

Reimers v. Honeywell, Inc., 457 N.W.2d 336 (Iowa 1990)

Venue

A foreign corporation that maintained its primary Iowa office in Polk County was a resident of the county for venue purposes.

CIVIL RIGHTS

Christie v. Rolscreen Co., 448 N.W.2d 447 (Iowa 1989)

Section 601A.16 generates a cause of action for remedying certain discriminatory practices and gives the district court subject matter jurisdiction over such actions. "District court" is defined in section 601A.2(1) to mean "the district court in the judicial district in which the alleged unfair or discriminatory practice occurred." Section 601A.16(4) provides that venue for such an action "shall be in the county in which the respondent resides or has its principal place of business, or in the county in which the alleged unfair or discriminatory practice occurred."

An employee who worked for an Illinois corporation in Pella, Iowa, sued under chapter 601A in Scott County. HELD: Section 601A.16(4) is a venue provision and must be read in conjunction with section 601A.2(1), which generates subject matter jurisdiction only for the judicial district in which the discriminatory practice occurred.

Harrington v. Schossow, 457 N.W.2d 583 (Iowa 1990)

Where DOT motor vehicle enforcement officer allegedly acted willfully, knowingly, purposefully and with malice or in

reckless disregard of arrestee's rights, plaintiff's 1983 action was properly brought against the officer in his individual capacity, rather than his official capacity. Therefore, the officer did not enjoy immunity from liability.

Hulme v. Barrett, 449 N.W.2d 629 (Iowa 1989)

39-year-old employee filed a complaint with the Iowa Civil Rights Commission, alleging age discrimination because of reduction in her hours compared to those of the newer, younger employees. Employee also alleged that defendants had threatened to discharge her if she pursued her complaint.

After Hulme filed her complaint, the employer fired her. After the commission issued an administrative release, Hulme commenced an action in district court pursuant to chapter 601A, and included allegations arising out of the discharge as well as the reduction in hours.

HELD: A 39-year-old could allege a valid age discrimination claim under the Iowa Civil Rights Act. The federal Act, which protects individuals only from age 40 to 70, does not preempt state age discrimination laws. Chapter 601A does not contain the limiting language from the federal Act, and previous opinions of the court, referring to the limiting language, were not intended to rewrite Iowa's legislation.

As to the discharge allegations, Hulme need not file a new charge with the commission and exhaust administrative remedies, because they were reasonably related to the pending charges for which administrative remedies have been exhausted.

COMMENT: Opinion contains dicta relating to a level and type of proof appropriate for establishing that age was "a determinative factor" in the decision to reduce Hulme's hours or to terminate her. The court also commented as to the method and nature of proof for a retaliatory discharge claim.

Smith v. ADM Feed Corp., 456 N.W.2d 378 (Iowa 1990)

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Jury Trial

There is no right to a jury trial for actions brought under Ch. 601A. Jury trial would be incompatible with the scheme of administrative adjudication created under Ch. 601A. Actions under Ch. 601A are at law, and review on appeal is not de novo.

Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989)

§ 1983

City terminated street superintendent for failure to follow orders, inattention to duties, reduction and consolidation of city employment positions, and misuse of city time. Superintendent requested a public hearing on his discharge, which was granted. He attended with his attorney before the city council. The superintendent, his attorney, city council members, and other persons made comments and expressed opinions. A motion to rehire him was defeated, and he refused an offer of part-time employment.

Plaintiff sued the city under 42 U.S.C. section 1983, for deprivations of liberty and property interests without due process. He joined a common-law claim for wrongful discharge. District court granted the city's motion for summary judgment with respect to the property interests and with respect to the wrongful-discharge claim. Jury returned a verdict for plaintiff on the Section 1983 "liberty" claim.

The court reversed as to the liberty-interest claim. "To establish a liberty interest due process claim, the claimant must prove that the employer published false, stigmatizing charges in connection with the discharge which were denied by the claimant and which seriously damaged the claimant's employment opportunities or standing and associations in the community, all without notice and opportunity to be heard in a name clearing hearing requested by the claimant." It was beyond dispute that the city notified Bennett of the reasons for his termination and provided a full public hearing in timely response to his request for same. Moreover, none of the reasons given by the city for discharge were stigmatizing in nature. The district court should have granted one of the city's pre-trial, in-trial, or post-verdict motions with respect to the liberty-interest 1983 claim.

The court affirmed on Bennett's cross-appeal from the dismissal of the property-interest and wrongful-discharge claims.

Section 372.15, which provides the procedure for terminating municipal employees, does not create a property interest in continued employment so as to support plaintiff's property-interest 1983 claim. The legislature's failure to provide civil-service-like protection for municipal employees in cities with populations of less than 15,000, does not violate equal protection under a rational-basis analysis.

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As to the wrongful-discharge claim, chapter 400 (civil service) does not constitute an expression of public policy regarding the grounds and procedures for terminating municipal employees, the violation of which creates a basis for a wrongful discharge claim, at least under circumstances to which chapter 400, by definition, does not apply.

Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990)

Breach Of Warranty

Anne Fell caught her hand in an exposed gear mechanism on a corn elevator. Kewanee manufactured the elevator in 1969 with a guard covering the gear mechanism. The guard had vibrated off several times and had not been in place for 3 years before the accident, which occurred in 1986. Anne sued Kewanee. District court sustained Kewanee's motions for partial summary judgment and dismissed Anne's claim on breach of implied warranty.

HELD: Section 554.2725's 5-year statute of limitations for breach of implied warranty of fitness for a particular purpose applies to personal-injury claims arising out of breach of implied warranty, and it begins to run at the time of sale.

COMMENT: Four justices dissented without opinion.

Morris Plan Co. v. Bruner, 458 N.W.2d 853 (Iowa App. 1990)

Foreclosure

Morris Plan filed a petition of foreclosure against debtors. The petition sought only judgment in rem, not personal judgments against the debtors. The original notice failed to comply with section 654.21's requirement that, absent a waiver of deficiency judgment, filing a written demand to delay the sale (if the mortgaged property is a residence or a one or two-family dwelling) permits the mortgagee to enter a deficiency judgment. The fact that Morris Plan sought only a judgment in rem does not excuse or moot Morris Plan's failure to comply with Section 654.2. Section 654.26, however, makes the error "merely an irregularity."

Federal Land Bank v. Bryant, 445 N.W.2d 761 (Iowa 1989)

Foreclosure

Debtor who elects to redeem homestead portion of mortgaged land sold at sheriff's sale must pay interest accrued as calculated in accordance with the terms of note.

Federal Land Bank v. Lockard, 446 N.W.2d 808 (Iowa 1989)

Foreclosure

Legislature's imposition of a collection moratorium in section 654.6 until July 1, 1991, and suspension of the two-year statute of limitations for collection actions on deHP LaserJetHPLASERJ.PRS refrained from enforcing its deficiency judgment in observance of the statute, and because the two-year limitation had expired, the court fashioned a remedy to permit all lenders covered by the now-unenforceable moratorium to commence proceedings to collect on their deficiency judgments within a two-year period beginning July 1, 1990.

Decorah State Bank v. Wangsness, 452 N.W.2d 438 (Iowa 1990)

Foreclosure

Wangsness defaulted on a loan by Decorah State Bank. In lieu of foreclosure they gave the bank a deed to the agricultural land that had secured their indebtedness. The bank sold the land to Gehling without affording Wangsness the opportunity to repurchase under the same terms, a right granted them under section 524.910(2). The bank tried after the fact to get a waiver, but the Wangsness refused. The bank then gave notice of a "proposed" sale. Wangsnesses announced their intention to repurchase and apparently demonstrated ability. Gehling refused to surrender the property, so the bank brought this declaratory judgment action.

HELD: The bank's contract with Gehling is not void, because the bank had the power to sell the land. Wangsness had a preemption, however, with respect to the disposition of the land. The circumstances here warranted setting aside the contract. The land had unique value to the Wangsnesses and they were ready to repurchase the land. Specific performance was the proper remedy.

Thornton v. Ankeny State Bank, 453 N.W.2d 240 (Iowa App. 1990)

Guaranty

Plaintiff was co-signor of note which was extended several times by bank. Plaintiff was not asked to sign last extension agreement, and last extension was unknown to plaintiff. HELD: Guarantor of promissory note is relieved of liability when note is extended without the guarantor's consent.

Folkers v. Britt, 457 N.W.2d 578 (Iowa 1990)

Secured Transactions

Recognition of valid perfected security interests in prior creditors at the time the security agreements were executed by notations on the agreements could not be interpreted as a subordination clause after the prior creditor's perfected security interest had lapsed. Such notations or clauses also did not constitute a waiver of the bank's priority rights after the lapse of the prior creditor's interest.

First National Bank v. Creston Livestock Auction, Inc., 447 N.W.2d 132 (Iowa 1989)

Secured Transactions

Jerry Parker, a farmer, borrowed money from First National Bank in Lenox (Lenox Bank), and gave it a security interest in all his livestock and livestock proceeds. Parker later borrowed money from First National Bank in Creston (Creston Bank), and again gave a security interest in his livestock and livestock proceeds. Later, Parker sold livestock to Creston Livestock Auction, Inc. (Creston Livestock), in exchange for a check payable to Parker and Creston Bank. The back of the check contained language indicating that the "payee" represented and warranted that he was the sole owner of the property, and that the property was free and clear of all liens. Parker endorsed the check and gave it to Creston Bank, who was unaware of Lenox Bank's prior perfected security interest. Lenox Bank brought a conversion action against Creston Livestock, who paid the amount of the check to Lenox Bank in settlement, and who then sued Creston Bank for contribution. The district court found Creston Bank to be a holder in due course under §554.3304. Creston Livestock appealed, arguing that Creston Bank did not take in good faith and/or that the Bank had notice.

HELD: The endorsement language on the check did not give Creston Bank notice of Lenox Bank's prior interest. Creston Bank took the check in good faith, where it had no actual knowledge of Lenox Bank's claim against the check, it had not received any notification of such claim, and there was no evidence that it had reason to know of such claim. Although it was a co-payee, Creston Bank was not directly involved in the Parker-Creston Livestock transaction.

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Rockport Co. v. Wedgewood, Inc., 447 N.W.2d 126 (Iowa 1989)

Secured Transactions

Wedgewood had been purchasing shoe inventory from Rockport on account. Wedgewood negotiated a sale of its assets, including inventory, to David Ewan, and notice of the proposed bulk transfer was sent to Wedgewood's creditors, stating that Wedgewood's estimated debt was about $427,000, that total consideration to be received for the bulk transfer was $133,000, that First Interstate Bank of Urbandale had a security interest in Wedgewood's collateral and was to be paid $118,000 from the transfer proceeds, and that the remaining $15,000 was to be paid to Merle Hay Mall, which had a landlord's lien on Wedgewood's property. Wedgewood's debt to Rockport totalled about $11,000 and was unsecured. Rockport filed a collection suit and obtained a prejudgment order for attachment of Wedgewood's property under §639.3(10). The sheriff seized 452 pairs of shoes from Wedgewood's store about an hour before the bulk transfer was to take place. Completion of the bulk transfer was delayed and Wedgewood received $36,000 less than under the original agreement.

In its answer to Rockport's collection suit, Wedgewood asserted counterclaims for wrongful attachment, abuse of process, and tortious interference with a contractual relationship. The district court entered judgment for Rockport on the debt issue, but found for Wedgewood on its wrongful attachment claim and assessed $36,000 in actual damages, plus attorney fees, against Rockport. The court also awarded Wedgewood $1,000 in punitive damages. Rockport appealed from the wrongful attachment judgment, arguing that the trial court erroneously engrafted a "fraudulent intent" requirement onto §639.3(10), and that but for this "engrafting" error, the district court would have found Rockport's attachment was justified. Rockport further argued that because Wedgewood had announced it intended essentially to convert its assets into money via bulk transfer and then prefer its secured creditors, Rockport was justified in attachment under §639.3(10).

HELD: The district court did not engraft a fraudulent intent requirement onto §639.3(10). The purpose of the bulk transfer was to liquidate Wedgewood's business assets to pay secured creditors, not to place the assets beyond the reach of other creditors. Rockport had no basis for suspecting fraud. A transaction involving a proposed non-fraudulent, preferential transfer outside of bankruptcy, does not authorize an attachment under §639.3(10). "[A]llowing an attachment here would conflict with the well-established principle that outside of bankruptcy and in the absence of fraud, even an insolvent debtor may prefer one creditor over another. ... We are not inclined to adopt a construction of section 639.3(10) that would allow a disappointed unsecured creditor to attach its debtor's assets merely because the debtor was paying another bona fide creditor." The general rule is not changed just because there has been a bulk sale in the

preferential transfer; the general assembly rejected that option when it rejected UCC §6-106.

COMMENT: The court disavowed as "clearly dicta" contradictory language from its recent decision in Klooster v. North Iowa State Bank, 404 N.W.2d 564, 568 (Iowa 1987), cited by Rockport:

> If [an unsecured creditor] as reasonable grounds to believe that a debtor is placing assets beyond the creditor's reach, enough of the debtor's assets to satisfy the creditor's claim may be placed in custodia legis pending trial of the action on the unsecured account.

The quoted portion of Klooster is not really dicta, but Klooster is easily distinguished on its facts, which the court also observes.

Tolander v. Farmers National Bank, 452 N.W.2d 422 (Iowa 1990)

Secured Transactions

Tolander, a farmer, was doing business with Farmers National Bank. In 1983 the bank agreed to lend him up to $100,000, covered by a security agreement. In 1984 the bank loaned him $74,000. In 1984 the bank was examined by the state bank examiners, who classified Tolander as "substandard" and recommended close monitoring. In November 1984 he defaulted on the $74,000 note. The note was restructured, dividing the loan into a short-term note and a long-term note, both containing acceleration clauses. In December 1984 Tolander brought two checks, payable to him and totalling $30,000, to the bank, and $3,000 was released to Tolander for living expenses and other obligations. In March 1985 Tolander sought another loan but was rejected because of the bank examiners' report. Tolander received two checks for seed corn in May 1985, and both were given to the bank. Tolander received a third check, which he deposited, and then wrote a check to pay off the large note, leaving $2,380.77 in his account at the bank.

A fourth check was delivered directly to the bank. This fourth check was addressed to Tolander but made out to Tolander and the bank. The bank cashed the check with no notice to Tolander. The bank withdrew the $2,380.77 from Tolander's account and applied it and the fourth check to reduce the balance of the small note, even though it was not yet due.

Tolander sued, alleging bad faith in the cashing of the check. The district court found against Tolander on all claims.

Tolander had a negative cash flow in 1985, allowing the bank to accelerate the loan. The court's finding of no malice or bad faith was supported by substantial evidence.

C & H Farm Service v. Farmers Savings Bank, 449 N.W.2d 866 (Iowa 1989)

Secured Transactions

Duane and Nina Schellhorn were engaged in farming. Between 1979 and 1984, Schellhorns purchased farm supplies from C & H Farm Service (C & H). Some of the purchases were financed through F S Credit Corporation, which was affiliated with C & H. (Hereinafter collectively C & H). Schellhorns granted C & H a security interest in crops growing or to be grown on the land they farmed to secure some of their debts to C & H. In 1982 and 1984, Schellhorns attempted to grant a security interest in the same collateral to Farmers Savings Bank. Between 1980 and 1985, Tripoli Ag Center (Tripoli) bought grain from Schellhorns. The grain was allegedly collateral for Schellhorns' debt to C & H. Schellhorns deposited the proceeds of these grain sales to their checking account at the bank and did not always pay the proceeds to C & H. In June 1984, C & H obtained judgment against Schellhorns for approximately $84,000.00. The judgment was not satisfied. In April 1985, C & H brought this action against the bank and Tripoli.

On September 27, 1982, the bank filed a financing statement pertaining to crops growing or to be grown on the land. The financing statement reasonably identified the real estate concerned and was signed by the Schellhorns. While there was no security agreement as of that date, the bank argued that this financing statement perfected a security interest which was granted to it in a series of promissory notes/security agreements signed by the Schellhorns between December 1981 and October 1983. None of the security agreements described the land upon which Schellhorns' crops were growing or were to be grown.

HELD: The security interest allegedly created by the security agreements never attached and could not be perfected by filing a financing statement. Because there was no adequate, signed security agreement relating to the September 1982 financing statement, that financing statement did not perfect the bank's alleged security interest in crops growing or to be grown on the land.

When a third party purchases collateral from a debtor under the Course of Dealing Waiver Doctrine, the third party takes the collateral free of the secured party's security interest. Nonetheless, although a secured party's rights under a security agreement may be waived by a prior course of dealing, they also may be reasserted by giving reasonable notice to the debtor that the

creditor intends to do so. The reasserted rights again may be waived by course of dealing subsequent to their reassertion.

At least since February of 1983, the bank knew of the existence of C & H's claimed security interest in Schellhorns' 1983 grain. Ordinarily, during the pendency of the course of dealing waiver of C & H's security interest, the bank would take the proceeds to C & H's collateral free of the security interest. In this case however, the bank expressly subordinated its rights to Schellhorns' 1983 grain to the rights of C & H. Whatever the status of the underlying security interest, C & H and the bank clearly intended that C & H's rights to the grain would be superior between them. Therefore, the bank cannot assert the course of Dealing Waiver Doctrine as a means of escaping the clear intent of the voluntary subordination of its rights in the 1983 grain to C & H.

From 1980 through 1984, Schellhorns' checking account at the bank often was overdrawn. The bank routinely would pay Schellhorns' overdrafts out of its own funds, then recover the amount advanced to Schellhorns from the grain proceeds subsequently deposited to Schellhorns' account. When the bank accepted the identifiable cash proceeds of the grain for deposits and applied those proceeds to reduce the debit balance of Schellhorns' account, it was satisfying Schellhorns' antecedent debt to it with proceeds in which C & H had a security interest. When the bank paid Schellhorns' checks without funds in Schellhorns' account, the bank became a creditor of Schellhorns and accepted the risk of an unsecured loan to them. Therefore, to the extent the bank applied proceeds of C & H's collateral to reduce the debit balance of Schellhorns' account, the bank is liable to C & H for conversion.

CONSTITUTIONAL LAW

Knepper v. Monticello State Bank, 450 N.W.2d 833 (Iowa 1990)

Due Process/Equal Protection

Section 524.910(2) provides that state banks must offer the debtor the opportunity to repurchase land acquired by the bank in foreclosure of mortgage securing debt to the bank. HELD: No violation of equal protection, even though other financial institutions or lenders are not similarly regulated. It does not violate due process for vagueness, even though section 654.19 authorizes a state bank to enter into an agreement whereby land is transferred to the mortgagee in satisfaction of all or part of the mortgage obligation under terms which may include a right in the mortgagor to purchase the land within five years.

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Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990)

Due Process/Equal Protection

Section 668.11, which imposes deadlines for designation of expert witnesses "in a professional liability case brought against a licensed professional," does not violate due process or equal protection.

Starlin v. State, 450 N.W.2d 257 (Iowa App. 1989)

Equal Protection

Section 25A.4 provides that "that the State shall not be liable for interest prior to judgment." HELD: No violation of equal protection.

State v. Fratzke, 446 N.W.2d 781 (Iowa 1989)

First Amendment

Fratzke received a speeding ticket for doing 68 in a 55 zone. He mailed his fine and court costs to the clerk along with a nasty letter addressed to the clerk and state trooper Tom Keenan. Fratzke was charged with harassment under §708.7(1). The magistrate found the letter annoyed Keenan and was written without legitimate purpose. He convicted Fratzke and sentenced him to two days in jail. On appeal, the district court rejected all of Fratzke's arguments. Protesting a speeding ticket was a "legitimate and constitutionally protected" activity, but the district court found "no legitimate purpose for the language and terms used by the defendant in his letter."

HELD: The State did not adduce substantial evidence of a lack of legitimate purpose. The use of offensive language cannot criminalize the otherwise legitimate act of protesting governmental action, where such a restraint on free speech can be justified only in the case of "fighting words." Fratzke's language did not rise to the level of "fighting words." The language appeared in a letter and not face to face. The letter was mailed to the clerk of court, a neutral intermediary. Peace officers "may reasonably be expected to exercise a higher degree of restraint than the average citizen and thus be less likely to respond belligerently to 'fighting words.'" Fratzke was exercising his uniquely American privilege "to speak one's mind, although not always with perfect good taste, on all public institutions."

Bricker v. Maytag Co., 450 N.W.2d 839 (Iowa 1990)

Preemption

Similarly-situated employees of Maytag sued for negligence, misrepresentation, and equitable estoppel as a result of a dispute arising out of a change in Maytag's retirement plan and the effective dates of the plaintiffs' retirements. HELD: Plaintiffs' action was not preempted by ERISA. The action relates to Maytag's employment benefit plans only indirectly, and the action was brought against the employer, not the benefit plan or its administrator or fiduciaries. Payment of any resulting judgment on the tort claims could not be made from pension funds.

CONTRACTS

Preferred Marketing Associates Co. v. Hawkeye National Life Ins. Co., 452 N.W.2d 389 (Iowa 1990)

Preferred Marketing Associates (PMA) and Hawkeye entered into a contract in which PMA became a marketing representative of Hawkeye. PMA's job was to sell life insurance policies issued by Hawkeye. The contract provided for payment of renewal commissions to PMA even if the contract was terminated. Hawkeye terminated the contract with PMA but refused to pay renewal commissions, probably in the hundreds of thousands, because of PMA's failure to pay an outstanding debt of $8,000.00. The contract provided that failure by PMA to pay any indebtedness within 30 days of an accounting of same, "shall annul all rights to any commissions."

HELD: It was a jury question whether PMA's failure to pay the debt was a material failure of performance and whether Hawkeye breached the contract by refusing to pay the renewal commissions. Hawkeye was assured of being paid on the loan to PMA because renewal commissions would far exceed the loan.

Taylor Enterprise, Inc. v. Clarinda PCA, 447 N.W.2d 113 (Iowa 1989)

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Taylor's farming operation, historically financed by PCA, was in financial difficulty. With PCA's approval, Taylor obtained a 5-year loan commitment from Citizens State Bank. As part of the transaction with Citizens, Taylor and PCA agreed that Taylor would apply the proceeds from the Citizens loan to its debt with PCA, in return for PCA's release of its first mortgage on certain real estate (to give Citizens priority). PCA retained a second mortgage

on the real estate. PCA agreed in a separate document to advance the interest and principal payments for five years on the note to Citizens, and Taylor signed an agreement recognizing "that real estate needs to be sold to cover losses in the projected cash flow."

Subsequently, PCA refused to make an interest payment on the Citizens loan because Taylor had failed to perform his commitment to sell real estate and because of other transactions inconsistent with PCA's view of the agreed-upon work-out. Citizens foreclosed, as did PCA. Taylor sued PCA for breach of contract.

Taylor sought to rely on the separate loan agreement in which PCA, without "internal" condition, agreed to advance monies for the principal and interest payments on the Citizens loan. Taylor sought a directed verdict in its favor for existence and breach of this contract. PCA defended by conditioning its obligation in that agreement on Taylor's performance of its obligations under the other agreements executed by the parties in connection with the Citizens loan. HELD: Whether or not the contracts were intended by the parties to be construed together, such that Taylor's failure to perform certain obligations excused PCA's failure to pay the Citizens loan, was a question of fact for the jury. PCA adduced substantial evidence to support its affirmative defense of discharge due to the failure of consideration. PCA likewise adduced sufficient evidence to support its affirmative defense of excuse.

Johnson v. Dodgen, 451 N.W.2d 168 (Iowa 1990)

Agency

Defendant purchased majority of stock in First National Bank of Humboldt from plaintiff on contract. Written agreement provided that defendant was the responsible purchaser. After bank was closed for insolvency, defendant stopped paying on contract. Defendant attempted to present evidence of oral conversations with plaintiff that defendant's corporation, not in existence at the time of the agreement, was to be the responsible party, and that defendant was acting only as an agent.

HELD: District court should have directed a verdict against defendant's affirmative defense of agency. The written contract was not ambiguous, and extrinsic evidence of plaintiff's intent to look only to a yet-to-be formed corporation for payment was properly excluded. An agent who purports to act on behalf of a non-existent principal is liable, unless the contracting party knows that the principal does not yet exist but looks to the principal alone for responsibility in any event. Aside from parole evidence, here properly excluded, defendant adduced no substantial

evidence of plaintiff's intent to look to anyone other than defendant for payment.

Johnson v. Dodgen, 451 N.W.2d 168 (Iowa 1990)

Consideration

Defendant purchased majority of stock in First National Bank of Humboldt from plaintiff on contract, which called for payments over many years. Pursuant to the agreement, plaintiff resigned as president and director of the bank, influenced employees to stay with the bank, and agreed not to compete. Plaintiff retained the stock in his possession, but defendant exercised all ownership rights normally associated with a controlling interest.

Gary Lewellyn embezzled from the bank, and as a result it was declared insolvent and closed in 1982, 15 years after the contract between plaintiff and defendant was executed but while it was still being performed. In fact, defendant continued to make payments for two years after the bank was closed, until defendant's corporation ran out of money. Plaintiff sued for breach of contract, and defendant raised failure of consideration as affirmative defense. Defendant counterclaimed on the theory of unjust enrichment for payments made after close of the bank. The jury found against each party on its respective claims.

HELD: Defendant did not generate a jury question on the failure of consideration. Defendant bargained for control of the bank by purchasing the stock. "[H]e got it and had it for 15 years. The fact that his investment later turned out worthless does not . . . constitute failure of consideration. Although plaintiff retained physical custody of the stock, constructive delivery occurred."

Chard v. Iowa Machinery & Supply Co., 446 N.W.2d 81 (Iowa App. 1989)

Employment Contract

Iowa Machinery hired Chard in October 1984 as vice-president of their industrial division, with the expectation that he would increase lagging sales in that division. The division continued to lose money and Chard was fired in early May 1985. He was given 3 weeks of severance pay. Chard sued for additional severance pay under his contract. He also sought damages for emotional distress and punitive damages. The district court found Chard had been hired for a minimum of 18 months (because the

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parties expected it would take 12-18 months to turn the company around), and thereafter was to be employed at will. The court awarded him 11 months of regular pay and 3 months of severance pay, but denied his claims for emotional distress and punitive damages. Iowa Machinery appealed, arguing that the handwritten employment agreement provided that if Chard resigned or was terminated for good cause, he was to receive no pay, but if he was terminated "in spite of good performance" he was to receive 3 months of severance pay. Chard had argued that the agreement was unclear as to its terms and as to the parties' intentions and understanding, and had offered extrinsic evidence that the termination provision kicked in only after 18 months.

HELD: (1) The agreement was clear and unambiguous on its face. Resort to extrinsic evidence was unnecessary to determine the intent of the parties. Iowa Machinery's right to terminate without good cause existed immediately. All other items listed in the agreement were benefits which began when employment commenced, and there was no qualifying language indicating that the termination provision would apply only after 18 months. (2) The finding that Chard was terminated "in spite of good performance" was supported by substantial evidence, including extrinsic economic factors within Iowa which contributed to Iowa Machinery's poor financial performance in late 1984 and early 1985. (3) The district court correctly computed interest from the date of termination, not from the date on which the complaint was filed. (4) Chard is not entitled to punitive or emotional-distress damages.

LaFleur v. LaFleur, 452 N.W.2d 406 (Iowa 1990)

Independent Contractor

10-year-old Frank LaFleur was injured when his father ran over him while the family was delivering newspapers. Frank's two siblings were the carriers, and each had written contracts with the newspaper, but Frank and his father were helping Frank's siblings deliver the newspapers at the time of the accident. After the plaintiff reached majority, he sued his father and the newspaper. The Supreme Court determined that the father was not an employee but rather an independent contractor, and reversed the district court's refusal to grant the newspaper's motion for summary judgment.

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Hoover v. Webb, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Interpretation

Purchasers paid for real estate partly in cash and partly by transferring a vendor's interest in land they had previously held. Purchasers utilized a quit claim deed to accomplish the latter. Purchasers in the first transaction them defaulted on their obligation.

HELD: The assignment to Sellers in the second transaction omitted any words of endorsement regarding the first transaction. Therefore, Sellers in the second transaction must bear the loss on the first real estate transaction which was transferred to them.

United Warehousing Corp. v. Interstate Acres, 458 N.W.2d 14 (Iowa App. 1990)

Interpretation

Clause in commercial building lease requiring tenant to pay all utilities used "in or upon the demised premises" did not require tenant to pay proportionate share of water used in irrigating the landscaping features on the land.

Harding v. Willie, 458 N.W.2d 612 (Iowa App. 1990)

Mistake

Seller sued for specific performance or money damages on a residential real estate contract. Purchaser adduced evidence that before purchasing, he noticed a crack in the ceiling and asked seller about it. Seller had advised buyer that there had been a leak but that it had been fixed. Buyer did not investigate further.

HELD: There was a mutual mistake of fact as to whether the roof of the house leaked. Therefore, no contract was made.

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First Interstate Equipment Leasing of Iowa, Inc. v. Fielder, 449 N.W.2d 100 (Iowa App. 1989)

Parol Evidence

Plaintiff and Fielder agreed that plaintiff would lease farm equipment purchased from local dealer to Fielder, so that the "purchase and lease-back" arrangement would provide certain tax advantages to Fielder, as well as plaintiff. Written lease agreement signed by plaintiff and Fielder gave Fielder an option to purchase "at fair market value" at the end of the lease. Another provision referred to "0%" salvage value.

At end of lease, Fielder attempted to exercise option to purchase by tendering $1. In resulting lawsuit, Fielder offered evidence that parties' oral agreement was that Fielder could purchase the equipment at the end of the lease for a nominal amount. HELD: Parol evidence was properly admitted to provide Fielder with the opportunity to prove that the writing did not, in fact, represent the actual agreement of the parties. The use of "fair market value" and "salvage value" in the written agreement generated ambiguity.

Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684 (Iowa App. 1989)

Requirements Contract

Hoover (in Iowa) and Utgaard (in Wisconsin) operate chicken hatcheries. Hoover told Utgaard it might be interested in selling the hatchery operation, and Utgaard expressed interest. No decision on a sale was made at that time. The parties then entered into negotiations for Hoover to become the chick supplier for Utgaard for the 1985 hatching season. The precise number of chicks was never specified, but initial estimates were that Utgaard would purchase over 400,000 chicks from Hoover -- which Hoover believed was substantially all of Utgaard's chick requirements for the season. Hoover prepared to produce chicks in accordance with those estimates. In late 1984, Utgaard told Hoover that it would only be purchasing 270,000 chicks from Hoover, and Hoover's "set" plans were altered accordingly. When the 1985 season arrived, Utgaard took far fewer chicks from Hoover than any previous estimate, and Utgaard raised many chicks in its own operation. Hoover found itself with hundreds of thousands of chicks on hand; some were sold at distressed prices, and 248,000 were exterminated. Utgaard then made new inquiries about buying Hoover. Hoover sued for breach of contract, fraud, negligent misrepresentation, promissory estoppel, and equitable estoppel, believing that Utgaard had deliberately misled it about the "requirements" contract, causing Hoover to overproduce and incur losses so that Hoover's sale price would be reduced. Hoover's fraud claim was dismissed at the end of plaintiff's evidence. After both parties rested, the

district court determined that Utgaard had breached a requirements contract under §554.2306, and that Hoover had suffered about $70,500 in losses. The court also found that Hoover had failed to mitigate its damages, and reduced the award by 70%. Hoover appealed, arguing that it was error to dismiss the fraud claim and challenging the sufficiency of the evidence to establish it failed to mitigate damages. Hoover also argued that it was error to use comparative-fault analysis to determine damages in a contract case. Utgaard cross-appealed, challenging the sufficiency of the evidence of a requirements contract because it did not contract to purchase all of its chicks from Hoover. Utgaard also argued that Hoover suffered no compensable damages.

HELD: The parties entered into a requirements contract, even though Utgaard gave no promise to purchase exclusively from Hoover. Nothing in Iowa Code §554.2306 nor in the attending comments suggests that exclusivity is required to establish a requirements contract. Even if exclusivity was an element of a requirements contract, if the buyer contracted to purchase up to a specified amount from the seller, then the exclusivity requirement would be met. Sufficient evidence supported the district court's finding that Hoover was aware of Utgaard's intention to purchase fewer chicks than originally planned, and yet failed to mitigate its losses. Nothing in the court's decision indicates that comparative fault principles were used; in fact, the court expressly relied on UCC provisions to determine damages.

Wiysel v. William Penn College, 448 N.W.2d 712 (Iowa App. 1989)

Rescission

Wiysel and defendant William Penn College entered into an employment agreement whereby Wiysel was to employed for 12 months beginning July 1, 1984, as a business manager and assistant professor. On November 8, 1984, Wiysel met with the college's president, John Wagoner. At the meeting, Wiysel presented an unsigned document on a standardized form that the college had used for his prior employment contract. The new document provided for service beginning November 1, 1984, and increased his annual salary from $28,325 to $40,000. The next day, the parties met again, at which time Wagoner asked Wiysel to resign. Wiysel refused, relying on his original employment contract. Wagoner terminated Wiysel on November 13.

HELD: When Wiysel presented the new employment contract to Wagoner, it constituted an offer to rescind the previous contract. Wiysel never revoked this offer of rescison prior to Wagoner's acceptance of it on November 13. Wagoner's acceptance of Wiysel's offer to rescind constituted mutual agreement to rescind the employment contract.

Gardner v. Gardner, 454 N.W.2d 361 (Iowa 1990)

Statute of Frauds

Mark and James Gardner conveyed their remainder interest in family real estate to their brother Harry, so that he could use those interests, combined with his, to obtain more financing from his bank. The conveyance was by quit claim deed, which was silent as to any agreement for reconveyance by Harry to his brothers. When Harry's effort to obtain financing failed, Mark and James asked for the return of their remainder interest. When Harry refused, they sued, claiming that Harry orally agreed to reconvey the remainder interest if his effort to refinance failed. The district court excluded evidence of the oral agreement under section 622.32, the statute of frauds.

HELD: Mark and James' performance of their part of the oral agreement by conveying the remainder interest to Harry was sufficient to remove the oral agreement from the operation of statute of frauds. They also adduced sufficient evidence of an admission by Harry as to the existence of the agreement to permit admission of the evidence.

DAMAGES

Cowan v. Flannery, ____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Adequacy

Jury awarded personal-injury plaintiff damages for past and future medical expenses, but nothing for pain and suffering. Supreme Court ordered new trial. A jury verdict awarding past and future medical expenses but no damages for pain and suffering is illogical and not supported by the evidence.

Steckelberg v. Randolph, 448 N.W.2d 458 (Iowa 1989)

Attorney Fees

Attorney fees normally are not recoverable in a fraud or fraudulent misrepresentation case. Language in Suss v. Schammel, 375 N.W.2d 252, 256 (Iowa 1985) (fees might be allowed if defendant's conduct was "oppressive and tinctured with legal malice"), to the contrary was "not necessary to the decision." The cases cited in Suss dealt with fees as a cost of litigation

with third parties, when the litigation was caused by the acts of the wrongdoer.

Bangert v. Osceola County, 456 N.W.2d 183 (Iowa 1990)

Calculation

Plaintiff sued county for wrongful removal of trees on plaintiff's property. District court found liability and awarded damages based on trees commercial market value as lumber. Plaintiff appealed.

HELD: Measurement of damages by commercial market value is appropriate when the trees have no special use and their only worth to the owner is their value as wood products. When plaintiffs maintained the trees for reasons other than commercial use, other methods of valuation should be used. A valuation that takes into account the deprivation of the trees' special value to the owner is permissible. It also would be proper to use replacement cost as the measurement of damages when the trees have a special value to the owner. District court, on remand, should apply either method or a combination of both.

Dumont v. Keota Farmers Cooperative, 447 N.W.2d 402 (Iowa App. 1989)

Consequential Damages

Dumont engaged Keota to apply herbicides to his fields. A jury could find that Keota was negligent in applying the herbicide and that such negligence was the proximate cause of damage to Dumont's corn crop. He replanted, which resulted in reduced crop yield. Later that year, the bank foreclosed and liquidated virtually all Dumont's machinery and livestock. Dumont sued Keota and Monsanto Chemical Co., the manufacturer of the herbicide. In an amended petition he sought damages for loss of crops, replanting costs, cost of chemicals, emotional distress, lost income, loss of livestock, loss of machinery, medical bills, loss of farming operation, and foreclosure by the bank. At trial, the court sustained Co-op's motion for a directed verdict as to Dumont's consequential damage claims for losses of livestock and machinery, loss of farming operation, and foreclosure.

HELD: A directed verdict on the consequential damages claim was proper, where Dumont's testimony on such damages was so speculative and conjectural as to render it insufficient to justify submitting it to a jury.

Hutchinson v. Broadlawns Medical Center, 459 N.W.2d 273 (Iowa 1990)

Consortium

A grandchild does not have a claim under section 613.15 or at common law for loss of consortium for the wrongful death or injury to a grandparent, even when the grandparent has been appointed as a "custodian" after a CINA adjudication and even when the grandparent acted, for all practical purposes, as a parent.

Chard v. Iowa Machinery & Supply Co., 446 N.W.2d 81 (Iowa App. 1989)

Emotional Distress

Iowa Machinery hired Chard in October 1984 as vice-president of their industrial division, with the expectation that he would increase lagging sales in that division. The division continued to lose money and Chard was fired in early May 1985. He was given 3 weeks of severance pay. Chard sued for additional severance pay under his contract. He also sought damages for emotional distress and punitive damages.

HELD: Chard is not entitled to punitive or emotional-distress damages.

Nesler v. Fisher & Co., 452 N.W.2d 191 (Iowa 1990)

Emotional Distress

Court continues to permit recovery of emotional distress damages for interference with existing contract and/or prospective business advantage, without requiring proof of outrageous conduct or supporting medical testimony, and even though the interference occurred in a commercial environment.

Kirk v. Farm & City Ins. Co., 457 N.W.2d 906 (Iowa 1990)

Emotional Distress

Plaintiff's decedent was killed in a one-car accident. Neither the owner nor the car was insured. Decedent was covered, however, under two Farm & City policies with uninsured motorist coverage totalling $20,000. No one survived the accident and no one saw it. The vehicle struck a tree at a high rate of speed and

all occupants were thrown from the vehicle. All of them had been drinking. Decedent's parents reported the accident to their insurance agent and retained counsel. Farm & City and the attorney exchanged numerous letters in an effort to settle the matter, but Farm & City steadfastly refused to offer more than $10,000. In one letter, the adjuster said that Farm & City had no "proof" that decedent was not the driver. At that time, Farm & City's file contained information that suggested that decedent was not, in fact, the driver.

Plaintiff sued for breach of contract, fraudulent and negligent misrepresentation, and first-party bad faith. HELD: At the time of the adjuster's communications to counsel, the identity of the driver and the decedent's contributory fault were "fairly debatable." As to the fraudulent misrepresentation claim, there was no substantial evidence to support a finding that the adjuster's representations were knowingly false. Also, it was impossible for decedent's family to have relied upon the representations. "The relationship between Farm & City and the Kirks was confrontational from the beginning . . . . The Kirks' attorney made it clear that it was an adversarial relationship, announcing early on in their negotiations that, if Farm & City did not comply with his demands, suit would be filed."

Decedent's parents' independent but consolidated claim against Farm & City for intentional infliction of emotional distress was properly dismissed at the close of trial. Farm & City's conduct was not outrageous.

Steckelberg v. Randolph, 448 N.W.2d 458 (Iowa 1989)

Emotional Distress

Plaintiffs transferred all of their assets to Randolph in return for Randolph's agreement to settle with their creditors. They agreed that upon such settlement and plaintiff's reimbursement of Randolph, he would reconvey their property. When this did not work out, plaintiffs sued in equity for an accounting and at law for fraudulent misrepresentation. During trial, plaintiffs were granted leave to amend to assert intentional infliction of emotional distress. The jury returned a substantial verdict against Randolph on the emotional distress claim.

HELD: Plaintiffs did not adduce substantial evidence of severe or extreme emotional distress. Plaintiffs' son testified "that he saw his father take a shotgun out of the house for the alleged purpose of killing himself . . . [and] that his mom use to cry every night." There was no evidence that "the contemplated suicide" was caused by defendants' actions. Plaintiffs had suffered from severe financial problems long before defendants

became involved. Mrs. Steckelberg's crying, standing alone, does not constitute severe or extreme emotional distress.

Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990)

Emotional Distress

Medical malpractice plaintiff may recover emotional distress damages in a medical malpractice case, even in the absence of proof of any physical injury. In this case, plaintiffs adduced evidence of severe emotional distress as a result of how they were "treated" by doctors and hospital employees during a miscarriage that ultimately left Mrs. Oswald with no physical injury.

Mills v. Guthrie County Rural Electric Cooperative, 454 N.W.2d 846 (Iowa 1990)

Emotional Distress

Plaintiffs' hog farrowing facility was destroyed by fire caused by an imbalance in electrical voltage delivered to their farm by defendant. Defendant's insurer attempted to adjust the loss by meeting with plaintiffs on numerous conversations over several months, acknowledging defendant's responsibility, promising a reasonable settlement offer, making a settlement offer, and increasing it when it was rejected. Plaintiffs sued and, when dissatisfied with the amount of the verdict, appealed.

HELD: District court properly declined to submit intentional infliction of emotional distress. Taking plaintiffs' evidence as true, defendant's conduct "fell far below that which is required." Emotional distress likewise is not recoverable on the basis of simple negligence, in the absence of some physical injury to plaintiffs or in the absence of application of one of the recognized exceptions (which now includes Oswald, above).

Engstrom v. State, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Emotional Distress

After terminating mother's parental rights, State began searching for adoptive home for child. State erroneously believed that child's father was deceased. State placed child with plaintiffs as potential adoptive parents while adoption proceedings continued. Child's father then appeared and demanded custody of

his daughter. Juvenile court eventually awarded custody of child to the father. Plaintiffs sued the State and the individual social workers involved on several theories.

HELD: State did not engage in outrageous conduct of the type necessary to support an action for intentional infliction of emotional distress.

Mills v. Guthrie County Rural Electric Cooperative, 454 N.W.2d 846 (Iowa 1990)

Lost Profits

Plaintiffs' hog farrowing facility was destroyed by fire caused by an imbalance in electrical voltage delivered to their farm by defendant. HELD: District court erred in refusing to submit plaintiffs' claim for lost profits in addition to loss of the value of the animals. Although measure of damages for destruction of tangible property by fire is reasonable market value of the property, there may be additional compensable loss when the injury interrupts business activities. "While recovery of the market value of the hogs that were destroyed precludes plaintiffs from also recovering profits based on their inability to sell those hogs, this circumstance should not preclude additional damages based on interruption in the production of additional litters during the period of time reasonable required to replace the destroyed farrowing facility."

CHR Equipment Fin. v. C & K Transport, 448 N.W.2d 693 (Iowa App. 1989)

Present Value

Plaintiff and defendant executed a five-year lease for trucks. Defendant defaulted on its lease payments. CHR sued for breach of lease and was awarded $36,000. CHR took steps to collect on the judgment, but also appealed, due to the district court's failure to award certain additional damages sought by CHR. C & K did not appeal.

HELD: District court correctly reduced the future lease payments to present value for the purpose of calculating damages. To do otherwise would leave plaintiff in a better position than the contract intended.

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Chard v. Iowa Machinery & Supply Co., 446 N.W.2d 81 (Iowa App. 1989)

Punitive Damages

Iowa Machinery hired Chard in October 1984 as vice-president of their industrial division, with the expectation that he would increase lagging sales in that division. The division continued to lose money and Chard was fired in early May 1985. He was given 3 weeks of severance pay. Chard sued for additional severance pay under his contract. He also sought damages for emotional distress and punitive damages.

HELD: Chard is not entitled to punitive or emotional-distress damages.

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Punitive Damages

Plaintiffs were injured as a result of a gas furnace explosion, and sued Essex, who manufactured the gas control unit that Lennox incorporated into the furnace.

The Supreme Court found substantial evidentiary support for submitting punitive damages with plaintiffs' claim of fraudulent misrepresentation. Defendant was aware of defects allowing gas leakage. Disassembly and inspection of defective units returned from the field showed broken components, in-house contamination, and "out-of-spec" cavity dimensions. Defendant knew that customers were using tools to turn knobs, which was resulting in internal breakage. Defendant made design changes but did not notify consumers of the problems, except to "warn that a small percentage of the units might not operate properly, . . . due to inadvertent and improper lighting." Although only one other personal injury had occurred, Essex "had a record of other incidents and hundreds of leakage reports."

Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990)

Punitive Damages

Anne Fell caught her hand in an exposed gear mechanism on a corn elevator owned by her father-in-law Louis and operated by Anne and her husband James. Kewanee manufactured the elevator in 1969 with a guard covering the gear mechanism. The guard had vibrated off several times and had not been in place for 3 years before the accident, which occurred in 1986. The gear mechanism

is right next to the operating lever, which contains holes through which ropes can be strung so that a person can sit on the tractor (to which the elevator is hooked and from which it gets its power) and operate the elevator. Kewanee did not supply ropes with the elevator.

District court sustained Kewanee's motions for partial summary judgment. It dismissed Anne's claims on strict liability and breach of implied warranty and rejected her claim for punitive damages. Anne went to trial on her negligence claim. District court instructed on Kewanee's state-of-the-art affirmative defense. The jury found in special verdicts that Kewanee established this defense as to each particular of Anne's negligence claim and, in accordance with the instructions, proceeded no further.

A 5-4 majority of the Supreme Court reversed the entry of summary judgment on Anne's strict liability claim. Anne had adduced substantial evidence that the guard's attachment device and/or method was defectively designed, because it would vibrate off. Anne also adduced substantial evidence that the product was being used "without substantial change in its condition." In fact, the only evidence was that the guard had vibrated off and had not been replaced, rather than deliberately being removed.

The court affirmed entry of summary judgment on Anne's claim for punitive damages. Considering the evidence adduced not only in opposition to the motion for summary judgment but during trial on the negligence claim, the court found no substantial evidence that Kewanee's failure to change the design was willful and wanton, despite substantial evidence that Kewanee knew the design was defective.

> This is not a case in which Kewanee knew that people were being injured by exposed gears and ignored this knowledge for economic reasons. To the contrary, the evidence shows that Kewanee manufactured and sold thousands of these elevators without a similar incident occurring. Simply put, risk of injury from exposed beveled gears on the elevators was not so great as to make it highly probable that an injury would occur.

COMMENT: Four justices dissented without opinion.

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Seraji v. Perket, 452 N.W.2d 399 (Iowa 1990)

Punitive Damages

Plaintiff sued trucking company and its driver for damages suffered in two-vehicle accident. Punitive damages were awarded against the employer only.

HELD: Punitive damages may be assessed against an employer because of the employer's own recklessness in hiring and/or retaining an unfit employee, if an act by that employee results in injury to a third party. Here, plaintiff's evidence was not sufficient to establish reckless or wanton disregard by the employer. The employer's procedures in checking into a driver's past employment and driving record was consistent with federal and state requirements. The driver's hiring was consistent with company policy. The driver's other accidents were minor, "especially in the context of the many thousands of miles driven by an over-the-road truck driver during the course of several years." Evidence that the driver had lost previous employment due to his driving record, that he had lost his license on one occasion, and that he had been reprimanded for avoidable accidents, establish at best that the employer was negligent in hiring and retaining him.

Schneider v. Middleswart, 457 N.W.2d 33 (Iowa App. 1990)

Punitive Damages

Jury awarded Schneider compensatory damages of $1,500 and punitives of $20,000 on his claim for assault, as a result of an argument in which Middleswart approached Schneider with a shotgun and threatened to shoot him. HELD: The punitive damages were not excessive.

Reimers v. Honeywell, Inc., 457 N.W.2d 336 (Iowa 1990)

Punitive Damages

Plaintiffs sued for wrongful death and serious injuries in gas furnace explosion. Honeywell cross-petitioned against Poweshiek-Jasper Farm Service (Poweshiek), who supplied the gas. Honeywell settled with plaintiffs before trial for $1.4 million and tried its contribution claim against Poweshiek. Jury found the settlement to be reasonable, and assessed some fault against Poweshiek.

One of plaintiffs' claims against Honeywell sought punitive damages. Poweshiek contended at trial and on appeal that Honeywell, a reckless or intentional tort feasor, was not entitled to contribution. See Beeck v. Aquaslide'n'Dive Corp., 350 N.W.2d 149 (Iowa 1984). The district court held that the enactment of ch. 668 overruled Beeck and did not require Honeywell to show what portion of the settlement was attributable to the punitive-damage claim. On appeal Poweshiek alternatively argued that failure to show such allocation irretrievably tainted the contribution verdict.

The Supreme Court reaffirmed its recent decision that punitive damages are not to be reduced or impacted by comparative fault. See Godbersen v. Miller, 439 N.W.2d 206 (Iowa 1989). This does not mean, however, that Honeywell cannot recover contribution at all. "When and if the conduct giving rise to punitive damages can be separated from damages arising from the tort feasor's other, less egregious, conduct there is no reason to bar contribution for that part of the damages which was not punitive in nature." Since the district court did not have the benefit of Godbersen and had ruled that the settlement did not have to be allocated between compensatory and punitive exposures, Honeywell was entitled to a new trial.

Johnston v. Norfolk Construction Company, 448 N.W.2d 486 (Iowa 1989)

Punitive Damages

Landowners of property adjacent to a railroad right-of-way sued for the subsidence of their property, resulting from a landslide caused by the railroad's negligence. The jury awarded $12,000 in compensatory damages and $200,000 in punitive damages. Defendant did not challenge the evidentiary basis for submitting punitives, but did attack the amount awarded by the jury as excessive.

HELD: The primary focus in reviewing punitive damage awards should be the relationship between the dollar amount awarded and the wrongful conduct of the offending party. "Although defendant may have heedlessly ignored the probable harm to plaintiffs, its actions were not sufficiently egregious, given the degree of potential harm, to warrant punitive damages of the magnitude awarded."

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Steckelberg v. Randolph, 448 N.W.2d 458 (Iowa 1989)

Punitive Damages

Punitive damages are recoverable in a "promissory fraud" case. Plaintiffs' claims arose out of an agreement under which they transferred their assets to Randolph in return for his promise to pay off their creditors. Randolph agreed to return their assets when plaintiffs reimbursed him for his expense. When this did not work out, plaintiffs sued Randolph for fraud and recovered actual and compensatory damages.

Mills v. Guthrie County Rural Electric Cooperative, 454 N.W.2d 846 (Iowa 1990)

Punitive Damages

Plaintiffs' hog farrowing facility was destroyed by fire caused by an imbalance in electrical voltage delivered to their farm by defendant. Defendant's insurer attempted to adjust the loss by meeting with plaintiffs on numerous conversations over several months, acknowledging defendant's responsibility, promising a reasonable settlement offer, making a settlement offer, and increasing it when it was rejected. Plaintiffs sued and, when dissatisfied with the amount of the verdict, appealed.

HELD: District court correctly declined to submit plaintiffs' claim for punitive damages. Plaintiffs' evidence, taken as true, established only that defendant was negligent in how it transmitted electricity to plaintiffs' farm, and failed to discover the dangerous situation created by the negligence. Defendant's insurer's adjusting efforts do not give rise to the claim for punitive damages against the insurer, let alone against defendant.

Decorah State Bank v. Wangsness, 452 N.W.2d 438 (Iowa 1990)

Specific Performance

Wangsness defaulted on a loan by Decorah State Bank. In lieu of foreclosure they gave the bank a deed to the agricultural land that had secured their indebtedness. The bank sold the land to Gehling without affording Wangsness the opportunity to repurchase under the same terms, a right granted them under section 524.910(2). The bank tried after the fact to get a waiver, but the Wangsness refused. The bank then gave notice of a "proposed" sale. Wangsnesses announced their intention to repurchase and apparently

demonstrated ability. Gehling refused to surrender the property, so the bank brought this declaratory judgment action.

HELD: The bank's contract with Gehling is not void, because the bank had the power to sell the land. Wangsness had a preemption, however, with respect to the disposition of the land. The circumstances here warranted setting aside the contract. The land had unique value to the Wangsnesses and they were ready to repurchase the land. Specific performance was the proper remedy.

O'Tool v. Hathaway, ____ N.W.2d ____ (Iowa, Sept. 19, 1990)

Speculative

District court held defendants liable for flooding of plaintiffs' basement, caused by break in defendants' soil conservation terrace. District court refused to allow recovery for labor costs incurred by plaintiffs in repairing their own basement, because the amount of this expense was "speculative." Plaintiffs did the repair work themselves and with the assistance of friends.

HELD: Mere fact that a party performs his or her own repairs rather than hiring a third party to do the work does not preclude recovery for labor costs. The court reiterated its rule that where the amount of damages, rather than the occurrence of damage, is speculative, the plaintiff still is entitled to recover.

Johnson v. Dodgen, 451 N.W.2d 168 (Iowa 1990)

Unjust Enrichment

Defendant purchased majority of stock in First National Bank of Humboldt from plaintiff on contract, which called for payments over many years. Pursuant to the agreement, plaintiff resigned as president and director of the bank, influenced employees to stay with the bank, and agreed not to compete. Plaintiff retained the stock in his possession, but defendant exercised all ownership rights normally associated with a controlling interest.

Gary Lewellyn embezzled from the bank, and as a result it was declared insolvent and closed in 1982, 15 years after the contract between plaintiff and defendant was executed but while it was still being performed. In fact, defendant continued to make payments for two years after the bank was closed, until defendant's corporation ran out of money. Plaintiff sued for breach of contract, and defendant raised failure of consideration as affirmative defense. Defendant counterclaimed on the theory of

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unjust enrichment for payments made after close of the bank. The jury found against each party on its respective claims.

HELD: Because the court correctly concluded that defendant did not adduce substantial evidence of a failure of consideration, a contract existed as a matter of law, which precludes application of the doctrine of unjust enrichment.

Shold v. Goro, 449 N.W.2d 372 (Iowa 1989)

Unjust Enrichment

Unmarried cohabitant who loaned money to her cohabitant was entitled to recover all amounts advanced, on theory of unjust enrichment and because the claim arises independently of the relationship. While the loans were intended to foster and perhaps even perpetuate the relationship, they retained their character as loans. Slocum v. Hammond, 346 N.W.2d 485 (Iowa 1984) (request by unmarried cohabitant for equitable division of assets acquired during cohabitation on theory of unjust enrichment was rejected), was distinguished because the payments by Shold to Goro were regarded by both of them as loans at the time they were made.

EVIDENCE

Schonberger v. Roberts, 456 N.W.2d 201 (Iowa 1990)

Collateral Source Rule

Plaintiff collected worker's compensation benefits as a result of an employment-related accident. He sued the driver of the other vehicle involved in the accident and recovered a large judgment. District court would not admit evidence of the worker's compensation benefits plaintiff already had received. Section 668.14 provides:

> (1) In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment

> or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.
>
> (2) If evidence and argument regarding previous payments or future rights of payment is permitted to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

HELD: A literal application of section 668.14 would be absurd, because it would invite the jury to reduce the total damage award at the same time that section 85.22 requires the plaintiff to reimburse his employer out of the award. "We are convinced the legislature did not intend to call for this double reduction. To avoid this unintended result we interpret the statute so as to deem its requirements satisfied when the requirements of section 85.22 are complied with."

Three justices dissented. Under section 668.14(1) "evidence of certain collateral benefits . . . is clearly admissible. The statute says 'the court shall permit' such evidence. Subsection (2) allows the plaintiff to counter this evidence by introducing evidence of the cost of obtaining the collateral benefits and evidence of any rights of subrogation relating to the benefits. The language could not be more clear." Appropriate use of instructions and special interrogatories would easily protect against the potential problem seen by the majority. "[T]he jury should be instructed that if it finds that such rights of subrogation do exist, the plaintiff's recovery from the defendant may not be reduced by the amount of those collateral benefits."

Nesler v. Fisher & Co., 452 N.W.2d 191 (Iowa 1990)

Hearsay

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Nesler purchased a building in downtown Dubuque for renovation and leasing to commercial and governmental tenants. He planned to syndicate the building and manage it for a fee. Defendant owned commercial property in Dubuque which was leased to the same governmental tenants that were being targeted by Nesler. Nesler eventually obtained rental contracts with some of defendant's tenants. Defendant sued the county board of

supervisors for failing to accept his rental bid, which was lower than Nesler's. Defendant pressured the building inspector to take action against Nesler's project. Defendant supplied counsel to one of his tenants, without charge, to sue Nesler for failing to provide adequate handicap access. A jury could find that as a result of defendant's actions, Nesler was unable to syndicate his project or to obtain financing for it. The project failed. Nesler eventually deeded his equity in the real estate to his original lender.

Nesler sued defendant for interference with existing contracts and prospective business advantage. After the jury found for Nesler, district court granted defendant's motion for judgment notwithstanding the verdict.

HELD: Nesler could testify as to statements made by prospective lessees and bank representatives about their reasons for refusing to continue their negotiations with him.

State v. Barrett, 445 N.W.2d 749 (Iowa 1989)

Hearsay

Forensic pathologist who opined from the physical evidence that a person's death was homicide rather than suicide also was permitted to testify that he had discussed the case with his partners and that they had not given him any reason to disregard his opinion.

Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert basis an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

HELD: Rule 703 "does not . . . completely overrule" State v. Judkins, 242 N.W.2d 266 (Iowa 1976), where the court held it inadmissible hearsay for one expert to testify that his opinion was confirmed by another expert. "It does not empower one expert witness to state other experts also subscribe to the witness's stated conclusion." Absent foundational evidence to the contrary, "missing here," the opinion of a colleague is not the type of "fact or data" reasonably relied upon by experts in reaching their conclusions.

COMMENT: By a 6-3 vote, the court found the error did not impact on the jury's verdict.

State v. Turecek, 456 N.W.2d 219 (Iowa 1990)

Impeachment

Criminal prosecution defendant's testimony that she was "telling the truth" did not open the door for the admission of character evidence.

Leuchtenmacher v. Farm Bureau Mutual Insurance Co., _____ N.W.2d _____ (Iowa, July 18, 1990)

Insurance

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer for underinsured motorist coverage. The estate settled with the driver's liability insurer before trial. The jury determined the damages that the estate was legally entitled to recover against the driver, and the court entered judgment against Farm Bureau for its underinsured motorist coverage limits.

HELD: No error in permitting plaintiff to introduce evidence of

> the policy limits available under both the underinsured motorist coverage of [Farm Bureau's] policy and [the underinsured driver's] liability policy. . . . Evidence of the insurance limits . . . was offered by the estate to prove its claim under the insurance contract. In order to recover, the estate necessarily must prove the existence of the insurance contract and its terms. Any direct claim against an insurer on a contract dispute necessarily involves introduction of the insurance policy and its terms.

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State v. Murphy, 451 N.W.2d 154 (Iowa 1990)

Opinion

Police officer's opinion that defendant charged with drunk driving flunked the horizontal gaze nystagmus test (HGN) test was admissible.

Committee v. Baudino, 452 N.W.2d 455 (Iowa 1990)

Opinion

In attorney disciplinary case, attorney adduced evidence from law school professor known for expertise in ethics matters to the effect that lawyer's late filings arose from misunderstandings rather than flagrant disregard of tax responsibilities, such that imposition of disciplinary sanctions were inconsistent with the goals of the canons. A 5-4 majority of the court found such testimony to constitute "an opinion as to whether or not the person or the conduct in question measures up to [a fixed] standard." Grismore v. Consolidated Products Co., 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942). "We think Professor Hazard trod heavily with his academic boots on the Grismore rule. To say the rule survived is more a resurrection than an affirmation."

State v. Dodson, 452 N.W.2d 610 (Iowa App. 1989)

Opinion

Defendant was accused of sexually abusing the four-year-old daughter of his live-in girlfriend. In rebuttal to the Defendant's evidence that the child was not unhappy, the State offered testimony of a clinical psychologist to testify on the theory of Victim Accommodation Syndrome. The syndrome is not probative of sexual abuse, but assumes the presence of sexual abuse and seeks to explain the child's reaction to it.

HELD: No blanket rule as to admissibility of this evidence can be adopted because it may be used incorrectly by the fact finder as evidence of abuse. However the expert testimony may explain why children delay reporting sexual abuse or do not appear fearful of the perpetrator. Use of this evidence must be limited to rehabilitative functions and the fact finder must be instructed on its limited purpose.

Mercy Hospital v. Hansen, Lind & Meyer, 456 N.W.2d 666 (Iowa 1990)

Opinion

Hospital sued architect for negligence and breach of contract in connection with construction project, when exterior brick walls began to fail. HELD: Hospital's associated administrator was qualified to express opinions as to loss of profits, even though he is not an accountant. Hospital's failure to introduce the documents the expert consulted in formulating his calculations does not invalidate his opinions. Rule of Evidence 705 "Place[es] the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination."

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Settlement

Plaintiffs were injured as a result of a gas furnace explosion, and sued Essex, who manufactured the gas control unit that Lennox incorporated into the furnace.

A Lennox employee testified without objection that Lennox had experienced problems with the Essex valve knobs, which problems were resolved by Essex paying Lennox $100,000. Over objection, plaintiffs then adduced written evidence of the settlement, including a memorandum indicating that 16,000 of the 111,000 valves received by Lennox from Essex were defective and describing the remedial measures that had been taken by Essex.

HELD: An objection to the entire exhibit, because a portion of it contains an offer of compromise, is too broad and not well taken when portions of the rest of the exhibit are admissible. Aside from the evidence of compromise, the rest of the exhibit established knowledge on the part of Essex as to product defect.

Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990)

Similar Accidents

Anne Fell caught her hand in an exposed gear mechanism on a corn elevator. Kewanee manufactured the elevator in 1969 with a guard covering the gear mechanism. The guard had vibrated off several times and had not been in place for 3 years before the accident, which occurred in 1986. The gear mechanism is right next to the operating lever, which contains holes through which ropes can be strung so that a person can sit on the tractor (to which the

elevator is hooked and from which it gets its power) and operate the elevator. Kewanee did not supply ropes with the elevator.

HELD: No abuse of discretion in refusing to permit Anne to show evidence of other injuries suffered by Kewanee elevator users, because none of the injuries occurred through contact with the gear mechanism.

COMMENT: Four justices dissented without opinion.

Sandry v. John Deere Co., 452 N.W.2d 616 (Iowa App. 1989)

Similar Accidents

Sandry was injured by a John Deere combine while repairing the combine's water pump. While checking for leaking fluid Sandry's hand was sucked into the rotating fan. He reached over the top of the radiator and placed his hand on the fan side while the engine was running. Plaintiff offered evidence of three prior accidents involving operators doing service or maintenance work and putting their hands near the fan side of the radiator while the engine was running. HELD: District court properly exercised its discretion in allowing this evidence.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Similar Acts

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. Broker testified regarding firm's policies and procedures on precautionary advice to be given customers and his adherence to the procedures. HELD: No abuse of discretion in permitting plaintiff to adduce evidence in rebuttal that broker had violated the procedures with other customers.

Vance v. Pekin Insurance Co., 457 N.W.2d 589 (Iowa 1990)

Exclusions

An innocent co-insured spouse could not recover under a homeowner's policy for fire damage when she was convicted of arson. The policy excludes coverage for "intentional loss . . . committed by or at the direction of an insured." HELD: The unambiguous language means that if any insured commits arson, there is no coverage.

Starlin v. State, 450 N.W.2d 257 (Iowa App. 1989)

Pre-Judgment Interest

Plaintiff sued State and State employee after being struck by motor vehicle owned by State and operated by employee in the course of his employment. Jury found for plaintiff and judgment was entered against defendants jointly and severally. On defendants' motion, the district court disallowed pre-judgment interest.

Section 25A.4 provides "that the State shall not be liable for interest prior to judgment." The court of appeals noted that before the enactment of chapter 25A, plaintiff could have sued the employee personally, and that plaintiff elected to benefit from the additional remedy granted by chapter 25A. "Consequently, in electing to sue the State, plaintiff must forego his claim for interest against [the employee]."

Swanger v. State, 445 N.W.2d 344 (Iowa 1989)

Tort Claims

Swanger was injured in accident involving state vehicle. State was insured on this accident, and it reported the accident to the insurer, who hired an adjuster to investigate. Swanger filed tort claim with the state appeal board, but withdrew the claim and filed suit before six months had elapsed and before the board had acted on the claim. Suit was filed longer than six months, however, after the adjuster first contacted Swanger.

Section 25A.20 provides:

> Whenever a claim or suit against the state is covered by liability insurance, the provisions of the . . . policy on defense and settlement shall be applicable notwithstanding any inconsistent provisions of this chapter.

The insurance policy provided:

> [Insurer] will not use, either in the adjustment of claims or in the defense of suits against the insured, the immunity of the insured by reason of its governmental corporate nature from tort liability.

HELD: State's purchase of insurance with "waiver" language does not constitute an abrogation of chapter 25A or a waiver of the state's right to insist that Swanger comply with the appeal-board exhaustion requirement prior to initiating litigation. The "defense and settlement" language in section 25A.20 was intended to permit the state's insurers to adjust and settle claims without following the procedures normally imposed upon the appeal board. Presentation of claims to the adjuster does not constitute filing of claims with the appeal board for purposes of triggering the six-month waiting period before suit is permissible.

Foster v. City of Council Bluffs, 456 N.W.2d 1 (Iowa 1990)

Tort Claims

Plaintiff brought action against city after driving her vehicle into excavation hole in road dug by city road repair crews. City claimed immunity under section 668.10, which states that a municipality shall not be assigned a percentage of fault for failure to place, erect, or install a traffic control device or other regulatory sign. Federal court certified question whether immunity granted by section 668.10 applies when the municipality has created a dangerous condition in the roadway while engaged in the repair of roadway.

HELD: Section 668.10 does immunize the city for liability based on failure to install any signs or traffic control devices that warned of the dangerous condition created by city repair crews. However, other theories of liability may exist that would not be precluded.

Engstrom v. State, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Tort Claims

After terminating mother's parental rights, State began searching for adoptive home for child. State erroneously believed that child's father was deceased. State placed child with plaintiffs as potential adoptive parents while adoption proceedings continued. Child's father then appeared and demanded custody of his daughter. Juvenile court eventually awarded custody of child to the father. Plaintiffs sued the State and the individual social workers involved on several theories. District court granted summary judgment to defendants, holding that all of the claims were barred by the State Tort Claims Act.

The Supreme Court affirmed the judgment, but on different grounds. The court examined each cause of action individually and held that they all failed as a matter of law. No breach of contract action could arise from an adoption-placement agreement. Preadoptive parents have no private cause of action when the State allegedly violates the adoption provisions of ch. 232. The Court refused to recognize a "social worker malpractice" negligence action, held that no deprivation of due process occurred because no protected interest of the preadoptive parents was affected, and held that there was no outrageous conduct of the type necessary to support an action for intentional infliction of emotional distress.

Harrington v. Chicago & Northwestern Transportation Co., 452 N.W.2d 614 (Iowa App. 1989)

Tort Claims

Harrington was killed by a train as she was driving on a road within the boundaries of Missouri Valley. No primary roads were involved. The State did not maintain, design, or build the road or the adjacent right-of-way. Harrington sued the railroad, the city, and the State. The district court sustained the State's motion for summary judgment.

HELD: State did not have jurisdiction or control over the road, and was not responsible for the railroad grade crossing.

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Williams v. Bayers, 452 N.W.2d 624 (Iowa App. 1990)

Tort Claims

Wagner and Williams went to their standing Tuesday appointment at Bev's Beauty Boutique. While descending the three flights of steps Wagner fell and died from the injuries a month later. Wagner's estate sued the owner of the commercial building (Bayers) and the City of Davenport. Bayers settled and trial was held against the city, who asserted immunity.

HELD: Question of whether the city maintained supervision and control of the building was a matter of statutory construction for the court to decide. The building was privately owned and was not supervised or controlled by the city. Inspection by city does not give rise to supervision or control. City was immune.

INDEMNITY

Aid Insurance Co. v. United Fire & Casualty Co., 445 N.W.2d 767 (Iowa 1989)

Customer test-drove dealer's vehicle and was involved in an accident, injuring plaintiff. Plaintiff sued the customer and dealer and obtained a judgment against both.

Aid insured the customer. United insured the dealer under a policy that excluded customers from the definition of insured unless the customer had "no other available insurance (whether primary, excess, or contingent)." In that event, the United policy purported to make such a customer "an insured but only up to the compulsory or financial responsibility law limits."

United refused to defend the customer. Aid satisfied the judgment in full and sought contribution from United for its "proportional share" of the judgment and defense costs. The court applied the Union pro-rata rule, 175 N.W.2d 413, 418-19 (Iowa 1970). United sought indemnity from the customer, since the dealer's liability was vicarious only.

HELD: Since neither the dealer nor United paid any of the judgment obtained by plaintiff, "there is nothing for which [the dealer] or its subrogee, United, can be indemnified." Also, since the customer was in fact an insured, to permit indemnity would be to permit recovery from the insured by way of subrogation, which is impermissible.

Kirk v. Farm & City Ins. Co., 457 N.W.2d 906 (Iowa 1990)

Bad Faith

Plaintiff's decedent was killed in a one-car accident. Neither the owner nor the car was insured. Decedent was covered, however, under two Farm & City policies with uninsured motorist coverage totalling $20,000. No one survived the accident and no one saw it. The vehicle struck a tree at a high rate of speed and all occupants were thrown from the vehicle. All of them had been drinking. Decedent's parents reported the accident to their insurance agent and retained counsel. Farm & City and the attorney exchanged numerous letters in an effort to settle the matter, but Farm & City steadfastly refused to offer more than $10,000. In one letter, the adjuster said that Farm & City had no "proof" that decedent was not the driver. At that time, Farm & City's file contained information that suggested that decedent was not, in fact, the driver.

Plaintiff sued for breach of contract, fraudulent and negligent misrepresentation, and first-party bad faith. HELD: At the time of the adjuster's communications to counsel, the identity of the driver and the decedent's contributory fault were "fairly debatable." As to the fraudulent misrepresentation claim, there was no substantial evidence to support a finding that the adjuster's representations were knowingly false. Also, it was impossible for decedent's family to have relied upon the representations. "The relationship between Farm & City and the Kirks was confrontational from the beginning . . . . The Kirks' attorney made it clear that it was an adversarial relationship, announcing early on in their negotiations that, if Farm & City did not comply with his demands, suit would be filed."

Leuchtenmacher v. Farm Bureau Mutual Insurance Co., ____ N.W.2d ____ (Iowa, Sept. 19, 1990)

Bad Faith

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer on the underinsured motorist provision. The jury returned a verdict for the estate in the amount of $223,000, and the court entered judgment against the insurer for its $100,000 policy limit. The estate then filed an action against her insurer, alleging it had acted in bad faith in denying the estate's claim for uninsured motorist benefits. The district court dismissed the petition,

holding that the earlier action on the policy precluded a separate suit for bad-faith failure to settle.

HELD: A successful action brought by an insured estate against its own insurance company for uninsured motorist benefits does not necessarily preclude the estate from thereafter suing the company for an alleged bad faith-failure to settle the claim. Preclusion will depend on whether the cases arose out of the same facts, and on a motion to dismiss, the district court cannot conclude as a matter of law that they did. Therefore dismissal was inappropriate.

Wierck v. Grinnell Mutual Reinsurance Co., 456 N.W.2d 191 (Iowa 1990)

Bad Faith

Wierck's son was involved in an accident while operating a vehicle listed under Wierck's liability insurance policy. The per-person bodily injury liability policy limit was $100,000. A person injured in the accident, Toni Ague, sued. Defense counsel hired by Grinnell evaluated the case as one of pure liability with verdict potential in excess of limits. The only settlement demand ever made by the plaintiff before trial was $300,000.00, first communicated in her prayer for relief and repeated several months before trial.

Personal counsel for Wierck and Ague's attorney both pressed defense counsel throughout the litigation to make (or cause Grinnell to make) an offer. Grinnell eventually offered its policy limits before trial, but this offer, communicated several times, was rejected by plaintiff. Just before trial, Ague's counsel indicated that Ague might take $150,000.00, but Wierck could not pay the difference. The tort case went to trial and Ague obtained a verdict in excess of $200,000. Wierck and Ague (plaintiffs) sued Grinnell for bad faith. They adduced substantial evidence that Ague's counsel "would have recommended" that she take $100,000.00 early on in the case, before her medical condition deteriorated. It was undisputed, however, that this position had not been communicated to defense counsel.

HELD: Directed verdict should have been granted, because of a fundamental flaw in plaintiffs' bad-faith case: They did not establish that a settlement offer was made by Ague and then rejected - in bad faith - by Grinnell. The only firm demand by Ague was for $300,000.00, and not even Ague or Wierck had suggested that it constituted bad faith for Grinnell to reject the $300,000.00 demand. No other firm demands were made.

Grinnell did not have an affirmative obligation to offer its limits, regardless of Ague's settlement posture.

> Both parties insist it was incumbent upon the other to state a specific offer of settlement, and on this issue we are convinced Grinnell is right. The only specific offer was the $300,000.00 demand previously mentioned. There is nothing in the record to suggest Grinnell would have settled for that amount if the policy had provided coverage to that extent.
>
> It is an extraordinary thing to require an insurer to pay more than the policy limits. A bad faith claim cannot be based on settlements never presented to the liability insurance carrier. It is thus incumbent on the person claiming bad faith to show that a settlement offer was extended to and was in bad faith rejected by the insurer. Bad faith arises when the rejection can be traced to misconduct of the insurer which irresponsibly exposes the insured to unreasonable risk because an offer was rejected only because of policy limits. This is a matter of set amounts, and the burden of showing the amounts is upon the person claiming bad faith.

The court also re-affirmed its use of the so-called "no limits" test in testing a liability insurer's good faith:

> It is bad faith for the company to factor in its consideration of settlement offers the limited amount between an offer and the policy limits.
>
> The best standard for good faith in a specific negotiation is to ignore the policy limits. If but for the policy limits, the insurer would settle for an offered amount, it is obliged to do so (and pay toward settlement up to the policy limits). But the insurer is free to reject the offer if it would have rejected the same offer under policy limits covering the whole claim.

Plaintiffs also accused Grinnell of bad faith for its prosecution of a declaratory judgment action to contest coverage. Defense counsel reported to Grinnell on non-confidential and non-privileged matters that triggered Grinnell's inquiry into coverage issues. Grinnell commenced a declaratory judgment action. The district court found coverage. Grinnell did not appeal.

In the bad-faith case, plaintiffs adduced substantial evidence that defense counsel "broached" the issue of coverage with

Grinnell and encouraged them to pursue it, that declaratory judgment counsel advised Grinnell, at least initially, that the coverage action had no merit, and that Wierck's defense of the coverage action deprived him of the ability to pay the difference between Grinnell's limits and the "soft" $150,000.00 demand made by Ague just before trial.

Nevertheless, the Supreme Court reversed. It measured the reasonableness of Grinnell's pursuit of the coverage action in part by examining Grinnell's view of the facts. Given Grinnell's version of the facts and with the advice of "experienced and competent" counsel, "it was eminently reasonable for Grinnell to bring the declaratory judgment action, and doing so was no indication of bad faith."

Lewis v. St. Paul Fire & Marine Insurance Co., 452 N.W.2d 386 (Iowa 1990)

Claims Made

Plaintiff petitioned for review-reopening pursuant to section 86.34. The petition was dismissed four years later. Plaintiff obtained new counsel who filed a request to reinstate and notified plaintiff's original counsel, Crawford, that plaintiff intended to assert a claim against him should the attempt to reinstate fail. The letter to Crawford asked him to notify his insurer. The industrial commissioner eventually determined that it lacked subject matter jurisdiction to reinstate the review-reopening petition. During the intervening administrative proceedings, plaintiff's new lawyer again notified Crawford that plaintiff would be asserting a claim against him, if the proceedings before the industrial commissioner were unsuccessful.

After the industrial commissioner's final ruling, Crawford's firm obtained a new "claims made" policy from St. Paul. The policy provides:

> We'll cover claims based on a wrongful act that occurred before the effective date of this agreement, but only if all of the following conditions are met:
>
> The protected person involved had no knowledge of the prior wrongful act on the effective date of this agreement nor any reasonable way to foresee that a claim might be brought.
>
> . . . .

Plaintiff ultimately sued Crawford for legal malpractice and obtained a judgment. After execution was returned unsatisfied, plaintiff sued St. Paul.

HELD: Crawford knew or reasonably should have foreseen as of the first letter from the plaintiff's new counsel that a claim would be asserted against him. St. Paul had no coverage for this claim.

Bettis v. Wayne County Mutual Insurance Association, 447 N.W.2d 569 (Iowa App. 1989)

Coverage

The front suspension of Bettis' farm tractor was damaged on a culvert. The tractor was towed into town for repairs. When Bettis picked up the tractor, the transmission did not operate properly. He discovered that the transmission damage had been caused by towing the tractor without the engine running. Bettis' collision insurer paid for the suspension repairs (less deductible) under the collision coverage, but refused to pay for the transmission repairs due to policy language limiting coverage to "direct loss resulting from overturn or collision." Bettis filed a declaratory judgment action to determine whether the policy covered the transmission damage. The district court found it did not because the damage was not a "direct loss resulting from" the collision with the culvert. The court concluded that "direct loss" refers to proximate cause, and that the culvert accident was not a proximate cause of the transmission damage because it was not a substantial factor in causing the damage.

HELD: The culvert collision was the dominant cause of the transmission damage, and the transmission damage is covered by the collision insurance. In an insurance policy, direct cause is defined as immediate or proximate cause, as opposed to remote cause. Proximate cause doctrine is applied differently in insurance cases than in tort cases; in insurance, an insured event is the "proximate cause" of a loss if the event sets in motion an unbroken sequence of events or other causes which result in the loss. Here the collision, an insured event, set in motion a chain of events resulting in the transmission damage.

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Dahlke v. State Farm Mutual Automobile Insurance Co., 451 N.W.2d 813 (Iowa 1990)

Coverage

Plaintiffs' son was killed in a collision with an uninsured driver. State Farm's insuring language under the uninsured motorist clause requires it "pay for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle."

HELD: "Bodily injury" does not include the physical manifestations of the emotional distress suffered by parents upon the death of a child.

Vance v. Pekin Insurance Co., 457 N.W.2d 589 (Iowa 1990)

Exclusions

An innocent co-insured spouse could not recover under a homeowner's policy for fire damage when her spouse was convicted of arson. The unambiguous language means that if any insured commits arson, there is no coverage.

Kroblin Refrigerated Xpress, Inc. v. Iowa Insurance Guaranty Association, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Guaranty Association

HELD: For the purposes of Iowa Code Section 515B.2(3)(a) the term "resident" as applied to an insurance corporation refers to the sight of its principal place of business, regardless of its charter state or the number of states in which it conducts business.

Andresen v. Employer's Mutual Casualty Co., ____ N.W.2d ___ (Iowa, Sept. 19, 1990)

Interpretation

Bank employee was injured in collision while operating his car in the course of his employment. The other driver was at fault and underinsured. After recovering the limits of the other driver's automobile insurance policy and the underinsured motorist limits of his own automobile insurance policy, plaintiff then sued

bank's insurer under the underinsured motorist coverage included in bank's commercial auto policy.

HELD: Under the language of the underinsured motorist endorsement in bank's commercial auto policy, the employee's auto was a "borrowed auto" and was covered. Vehicle is borrowed when someone other than the owner temporarily gains its use. Policy also provided that anyone occupying a covered auto would be an insured.

Aid Insurance Co. v. United Fire & Casualty Co., 445 N.W.2d 767 (Iowa 1989)

Other Insurance Clause

Customer test-drove dealer's vehicle and was involved in an accident, injuring plaintiff. Plaintiff sued the customer and dealer and obtained a judgment against both.

Aid insured the customer in a policy that contained the following "other insurance" clause:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

United insured the dealer under a policy that excluded customers from the definition of insured unless the customer had "no other available insurance (whether primary, excess, or contingent)." In that event, the United policy purported to make such a customer "an insured but only up to the compulsory or financial responsibility law limits."

United refused to defend the customer. Aid satisfied the judgment in full and sought contribution from United for its "proportional share" of the judgment and defense costs. The court applied the Union pro-rata rule, 175 N.W.2d 413, 418-19 (Iowa 1970), to a conflict between "other insurance" clauses, even when one is or can be construed as an exclusion clause as opposed to an "escape" clause.

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COMMENT: The rationale of Union was to protect an insured from losing the coverage bargained for in either policy and being prejudiced by the "drafting" contest carried on by

insurers. The court does not address the factual situation presented here: The insured has been protected by one of the insurers, who has defended and has paid the judgment in full. Under such circumstances, what is wrong with letting the insurance companies fight it out? United did not perform its duties incident to providing primary insurance to the customer in this case, despite Union and its descendants. Wouldn't it encourage allegiance to the Union rule if the insurer with a better "other insurance" clause argument were permitted to prevail in an indemnity suit, assuming it has first discharged its obligations to the insured and protected the insured fully?

William C. Brown Co. v. General American Life Insurance Co., 450 N.W.2d 867 (Iowa 1990)

Other Insurance

Wife was injured and applied to her husband's (under which she was covered as a dependent) and her insurance companies for benefits. Husband's policy contained a coordination of benefits (COB) provision that provides the following rules for determining primary and secondary coverage obligations:

> (a) The benefits of a plan which covers the individual on whose expense claim is based other than as a dependent shall be determined before the benefits of a plan which covers such individual as a dependent;
>
> . . .
>
> (c) When rules (a) and (b) [not relevant] in this subparagraph . . . do not establish an order of benefit determination, the benefits of a plan which has covered the individual on whose expense claim is based for the longer period of time shall be determined before the benefits of a plan which has covered such individual the shorter period.

Wife's policy contained a standard excess clause that sought to make it excess to all other health insurance coverage.

HELD: Clause (a) in husband's COB, which required primary coverage by plan covering claimant as insured (i.e., wife's own policy), and excess clause in wife's policy, which made it excess to all other coverage, canceled each other out. Clause

(c) of husband's policy rendered the husband's policy primary because it had covered wife for longer period.

Iowa American Insurance Co. v. Pipho, 456 N.W.2d 228 (Iowa App. 1990)

Subrogation

Insured was injured in an automobile accident, and her health insuror paid $11,000 in medical expenses. After a trial had established that the insured's total damages, including loss of future earnings and past and present pain and suffering, were in excess of $400,000, the insured entered into a settlement agreement with the driver's liability insurer for its limits of $25,000. The health insuror then filed a subrogation claim. The insured claimed that subrogation was not proper because the settlement had not made her whole.

HELD: Subrogation was proper, even if the settlement did not make the insured whole. District court should have determined, however, what portion of the medical bills was attributed to the $25,000 settlement.

West Trucking Line, Inc. v. Northland Insurance Co., 459 N.W.2d 262 (Iowa 1990)

Underinsured Motorist

West purchased commercial automobile liability insurance for Northland. The policy provided coverage for bodily injury and property damage liability as well as coverage for uninsured and underinsured motorists. The insuring language for underinsured motorist coverage expressly limited coverage to bodily-injury damages. HELD: Fact that declarations page showed that West purchased a combined single limit of $1 million for bodily injury and property damage coverage did not generate either an ambiguity or the reasonable expectation that the purchase of a combined single limit of $500,000 for uninsured and underinsured motorist coverage related to property damage as well as bodily injury.

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Leuchtenmacher v. Farm Bureau Mutual Insurance Co., _____ N.W.2d _____ (Iowa, July 18, 1990)

Underinsured Motorist

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer for underinsured motorist coverage. The estate settled with the driver's liability insurer before trial. The jury determined the damages that the estate was legally entitled to recover against the driver, and the court entered judgment against Farm Bureau for its underinsured motorist coverage limits, minus payments under "med pay."

The court held that the policy language "legally entitled to recover" in underinsured motorist coverage does not require a judgment against the underinsured motorist as a precondition to coverage.

The court also held that there was no error in permitting plaintiff to introduce evidence of

> the policy limits available under both the underinsured motorist coverage of [Farm Bureaus'] policy and [the underinsured driver's] liability policy. . . . Evidence of the insurance limits . . . was offered by the estate to prove its claim under the insurance contract. In order to recover, the estate necessarily must prove the existence of the insurance contract and its terms. Any direct claim against an insurer on a contract dispute necessarily involves introduction of the insurance policy and its terms.

The court lastly held that Farm Bureau could not deduct payments under its "med pay" clause, at least when adding those amounts to others recovered do not exceed the amount that the insured was determined to be "legally entitled to recover."

Veach v. Farmers Insurance Company, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

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Underinsured Motorist

While riding his motorcycle, plaintiff was struck by an underinsured motorist. Plaintiff collected $100,000.00 from the driver and the $25,000.00 limit on his own underinsured policy issued by defendant (plaintiff's damages were stipulated to be at least $175,000.00). The plaintiff also was an "insured person" under a policy issued to his mother by defendant. This policy had

underinsured motorist coverage with a limit of $50,000. Both policies contain an exclusion clause:

> This coverage does not apply to bodily injury sustained by a person:
>
> . . . .
>
> 4. If the injured person was occupying a vehicle you do not own which is insured for this coverage under another policy.

Both policies also contained an "other insurance" clause:

> 5. If any applicable insurance other than this policy is issued to you by us . . . , the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability.

Defendant refused to make any payments under plaintiff's mother's policy and plaintiff sued. The district court held the exclusion invalid and the "other insurance" clause valid, and accordingly ordered defendant to pay an additional $25,000.00 to plaintiff (the difference between the $25,000.00 received and the $50,000.00 limit on mother's policy).

HELD: The exclusion clause is void as against public policy. The court noted the "crucial distinction" between this policy, with a "not-owned-but-insured" exclusion, and the one at issue in Kluiter v. State Farm Mutual Ins. Co., 417 N.W.2d 74 (Iowa 1987), which held an "owned-but-not-insured" exclusion valid. With a "not-owned-but-insured" clause an insured "often will not have control over the coverage of the vehicle in which he or she is riding. Coverage could be cut in half simply by moving from

> his mother's car to his motorcycle. . . .
>
> The average member of the consuming public would doubtlessly find it strange that by purchasing $25,000.00 of underinsured motorist coverage [plaintiff] lost $50,000.00 of underinsured motorist coverage provided under his mother's policy. Moreover, under such a clause, the insureds are often better covered than a vehicle with no underinsured motorist coverage than in one with the statutory minimum.

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The exclusion was held invalid despite the fact "not-owned-but-insured" clauses in the uninsured motorist context have been upheld. McClure v. Employers Mutual Casualty Co., 238 N.W.2d 321, 326-27 (Iowa 1976). The difference is due to the difference in objectives between uninsured (to provide victims with minimum coverage) and underinsured coverage (to provide victims with full compensation).

The "other insurance" clause is totally inapplicable. It relates only to any other applicable insurance issued to the named insured, and does not apply to policies issued to other family members. Plaintiff was entitled to recover $50,000.00 ($75,000.00 in total benefits from both policies, minus the $25,000.00 already received).

Hernandez v. Farmers Insurance Co., ____ N.W.2d ____ (Iowa, Sept. 19, 1990)

Underinsured Motorist

Plaintiff was injured in an auto collision while a passenger in a car driven by an underinsured motorist. After collecting the limits of the driver's liability insurance, plaintiff retained a personal injury claim in excess of $225,000. He sought to recover on his own underinsured motorist policy, with a limit of $25,000, and on similar provisions contained in two policies issued to his mother, with limits of $100,000 each, under which he was an "insured person." Farmers, the issuer of all three policies, refused to pay the limits on all three policies because of an "other insurance" anti-stacking clause contained in each policy:

> If any applicable insurance other than this policy is issued to you by us . . ., the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability.

Farmers did pay $25,000 on plaintiff's policy and $75,000 on his mother's policies, reasoning that the "other insurance" clause limited plaintiff's total underinsurance recovery from Farmers to $100,000.

HELD: The "other insurance" anti-stacking clause contained in each policy applies only to other policies issued to the same named insured. Thus, Farmers' payment of $25,000 on plaintiff's policy has no impact on its obligations under the policies issued to his mother. Since plaintiff has not been fully compensated, enforcement of the "other insurance" anti-stacking

clause contained in the mother's policies would frustrate the protection afforded insureds under section 516A.1.

JUDGMENTS

Citizens State Bank v. Hansen, 449 N.W.2d 388 (Iowa 1989)

Execution

In "Suit I" the bank brought suit to foreclose on mortgages and collect on notes. Debtor deeded the property to the bank and agreed to entry of a $380,000 personal judgment for the remaining debt.

The bank eventually sold the property. Debtor brought an action, "Suit II," to set aside the sale on the grounds that the bank had failed to give the debtor right of first refusal to repurchase the property on the same terms being offered by the prospective purchaser. See, Section 524.910(2). Bank, which still was a judgment creditor of debtor, attempted to execute on debtor's cause of action as asserted in Suit II and sell it at sheriff's sale.

HELD: The levy and execution provisions of Section 626.21 cannot be used by a judgment creditor in possession of a debtor's real property effectively to defeat the enforcement of the debtor's right under Section 524.910(2) of first refusal to repurchase the property.

Adams v. Johnson, 445 N.W.2d 422 (Iowa App. 1989)

Interest

Plaintiff in dog-bite case recovered $52,500. Defendants moved for discovery sanctions under rule 134 against plaintiff for his failure to give timely answers to interrogatories. The district court granted the sanctions in the form of a suspension of prejudgment interest. Plaintiff appealed.

HELD: Mermigis v. Servicemaster, 437 N.W.2d 242 (Iowa 1989), controls. Section 535.3 makes imposition of such interest obligatory, and there is no language in rule 134(b)(2) specifically providing for such a sanction.

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Veach v. Farmers Insurance Company, _____ N.W.2d ____ (Iowa, Sept. 19, 1990)

Interest

Plaintiff sued to recover underinsured motorist benefits on a policy issued to his mother and under which she was an additional insured. HELD: The damages recoverable under this policy did not become fixed until after the action was commenced. Thus, interest is limited to the statutory 10% accruing from the date of the commencement of the action, not from the date of the accident.

Mercy Hospital v. Hansen, Lind & Meyer, 456 N.W.2d 666 (Iowa 1990)

Interest

Hospital sued architect firm after exterior brick work began to fail. District court awarded prejudgment interest from the date the action was commenced. The architect argued that interest on the portion of judgment compensating hospital for repair costs should accrue from the date the expenditures were made when, as in this case, the expenditures were made after the action was filed.

HELD: Prejudgment interest ran from the date the action was commenced, notwithstanding the fact that many of the expenditures were not incurred until after the commencement of the action. Prejudgment interest on the portion of the judgment representing future expenses also accrues at the time the action was commenced.

Starlin v. State, 450 N.W.2d 257 (Iowa App. 1989)

Interest

Plaintiff sued State and State employee after being struck by motor vehicle owned by State and operated by employee in the course of his employment. Jury found for plaintiff and judgment was entered against defendants jointly and severally. On defendants' motion, the district court disallowed pre-judgment interest.

Section 25A.4 provides "that the State shall not be liable for interest prior to judgment." The court of appeals noted that before the enactment of chapter 25A, plaintiff could have sued the employee personally, and that plaintiff elected to benefit from the additional remedy granted by chapter 25A. "Consequently, in

electing to sue the State, plaintiff must forego his claim for interest against [the employee]."

McKenzie v. Eastern Iowa Tire, Inc., 448 N.W.2d 464 (Iowa 1989)

Interest

Approval of a master's report is not the equivalent of a money judgment. Therefore, an award of prejudgment interest pursuant to section 535.3 would be improper.

Power Equipment, Inc. v. Tschiggfrie, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Interest

Plaintiff sued to collect finance charges allegedly owed on the account of defendant. Defendant periodically purchased goods and services from plaintiff and customarily signed plaintiff's invoice that provided for interest on amounts due after 30 days. Defendant asserted that plaintiff did not have the right to assess finance charges, and further questioned plaintiff's right to compound the finance charges by assessing them against prior finance charges. The district court held that the compounding was improper, and therefore used section 535.11(8) to effect a forfeiture of plaintiff's right to collect any finance charges.

The Supreme Court reversed and remanded for additional fact finding. District court should determine whether or not the invoice signed by defendant constituted an agreement, under section 535.2(2), to pay a greater rate of interest than otherwise authorized by law. As a matter of law, however, compounding was improper because the invoice language did not specifically address it.

Matter of Mt. Pleasant Bank & Trust Co., 455 N.W.2d 680 (Iowa 1990)

S

Interest

Prejudgment interest on judgment entered against defendant added after suit was commenced begins to run from date defendant was added as a party.

Brockhouse v. State, 449 N.W.2d 380 (Iowa 1989)

Offer To Confess

County compensation commission assessed damages resulting from condemnation for highway improvements at $6,400. Brockhouse appealed to the district court. DOT offered to confess judgment in the amount of $10,000 "with costs to the time of this offer." Brockhouse did not accept. Brockhouse received jury award of $7,500, and district court assessed costs against DOT. The costs increased the total judgment above $10,000.00. HELD: The term "with costs" in Section 472.33 means "that costs are tendered in addition to the sum in the offer." Because the jury award was for less than the amount stated in the offer, costs incurred after the offer should not have been assessed against DOT.

Morris Plan Co. v. Bruner, 458 N.W.2d 853 (Iowa App. 1990)

Preclusion

Morris Plan filed a petition of foreclosure. Bruner did not appear, and the district court entered a judgment in rem against mortgaged property and in favor of Morris Plan. Bruner moved to set aside judgment on grounds that he had not believed that the mortgage was on his property. District court eventually denied this motion. Some time later, Bruner filed a petition pursuant to Rule 252 to vacate or modify the judgment.

HELD: Bruner's failure to appeal from the ruling on his motion to set aside the judgment is preclusive of any claims he can raise in a 252 petition.

Ackley State Bank v. Haupt, 451 N.W.2d 495 (Iowa 1990)

Preclusion

Haupt signed a six-month note to Ackley State Bank on January 15, 1986. The note was secured by Haupt's inventory, farm products, livestock, farm machinery, and other items. A security interest was perfected in January. The note was then extended to February 1, 1987. In March 1986 Haupt joined the federal dairy termination program (DTP), sold his herd, and received payment. None of the proceeds were paid to Ackley. In March 1987 Haupt filed for bankruptcy. The bank requested that the note not be accepted for discharge because the failure to provide the DTP money was willful and malicious. The bankruptcy court discharged the loan. The bank did not appeal, but rather filed this action in state court.

HELD: Because bankruptcy court found that the security interest did not attach to termination payments, its ruling precludes further litigation on that question.

Leuchtenmacher v. Farm Bureau Mutual Insurance Co., ____ N.W.2d ____ (Iowa, Sept. 19, 1990)

Preclusion

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer on the underinsured motorist provision. The jury returned a verdict for the estate in the amount of $223,000, and the court entered judgment against the insurer for its $100,000 policy limit. The estate then filed an action against her insurer, alleging it had acted in bad faith in denying the estate's claim for uninsured motorist benefits. The district court dismissed the petition, holding that the earlier action on the policy precluded a separate suit for bad-faith failure to settle.

HELD: A successful action brought by an insured estate against its own insurance company for uninsured motorist benefits does not necessarily preclude the estate from thereafter suing the company for an alleged bad faith-failure to settle the claim. Preclusion will depend on whether the cases arose out of the same facts, and on a motion to dismiss, the district court cannot conclude as a matter of law that they did. Therefore dismissal was inappropriate.

JURISDICTION

Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684 (Iowa App. 1989)

Hoover (in Iowa) and Utgaard (in Wisconsin) operate chicken hatcheries. Hoover told Utgaard it might be interested in selling the hatchery operation, and Utgaard expressed interest. No decision on a sale was made at that time. The parties then entered into negotiations for Hoover to become the chick supplier for Utgaard for the 1985 hatching season. The precise number of chicks was never specified, but initial estimates were that Utgaard would purchase over 400,000 chicks from Hoover -- which Hoover believed was substantially all of Utgaard's chick requirements for the season. Hoover prepared to produce chicks in accordance with those estimates. In late 1984, Utgaard told Hoover that it would only be purchasing 270,000 chicks from Hoover, and Hoover's "set"

plans were altered accordingly. When the 1985 season arrived, Utgaard took far fewer chicks from Hoover than any previous estimate, and Utgaard raised many chicks in its own operation. Hoover found itself with hundreds of thousands of chicks on hand; some were sold at distressed prices, and 248,000 were exterminated. Hoover sued for breach of contract. The district court determined that Utgaard had breached a requirements contract under §554.2306. Utgaard cross-appealed, arguing that there were insufficient minimum contacts with Iowa to confer personal jurisdiction over Utgaard, because it was only a "passive purchaser" and Hoover had initiated all contacts and had actively sought Utgaard's participation.

HELD: Utgaard was an active purchaser, sufficient to satisfy the minimum-contacts requirement for personal jurisdiction in an Iowa court, where it specified certain types and amounts of chicks it would purchase and Hoover modified the "set" plans for production.

Bankers Trust Co. v. Fidata Trust Co., 452 N.W.2d 411 (Iowa 1990)

General Growth decided to offer subscription rights to its shareholders for additional shares. It retained Bankers Trust to act as its agent. Bankers Trust retained Fidata to act as its New York agent for acceptance of hand deliveries of subscriptions. A Maryland shareholder whose additional shares were misdelivered sued and recovered a judgment against Fidata. Fidata sued Bankers Trust for indemnification in New York. While Fidata's action was pending, Bankers Trust commenced this action against Fidata for declaratory judgment and breach of contract. Fidata moved to dismiss for lack of personal jurisdiction.

Fidata performed its duties in New York, and none of its employees or representatives had physical contact with Iowa, other than mailings and telephone calls to Bankers Trust. HELD: Although telephonic and mail contacts may suffice to trigger jurisdiction, Fidata's contacts were not the type that should have led Fidata to conclude that it would be suable in Iowa. While the quantity of contacts was plentiful, the nature and quality of the contacts was trifling. In each instance, the mailing was a ministerial act, and the phone call was simply to alert Bankers Trust to the imminent mail delivery. Fidata performed its contractual obligations in New York.

Independently of the Fidata-Bankers Trust agreement arising out of the General Growth offering, Fidata and Bankers Trust had an ongoing relationship for several years, during which Fidata employees had been in Des Moines on many occasions. HELD: Evidence of Fidata employees' visits to Iowa in furtherance of this unrelated relationship "do not form substantial evidence of a continual and systematic presence in the State of Iowa that is so

pervasive as to subject Fidata to the general jurisdiction of the courts of the state."

State v. Baxter Chrysler Plymouth, Inc., 456 N.W.2d 371 (Iowa 1990)

State of Iowa brought action against five Nebraska automobile dealers and their corporate officers for advertising in violation of the Iowa Consumer Fraud Act. The trial court sustained motions by all of the defendants to dismiss the action for lack of personal jurisdiction. The Supreme Court reversed in part, holding that personal jurisdiction against the corporate defendants existed but personal jurisdiction over the corporate officers did not. The corporate defendants advertized regularly in an Omaha newspaper that has a large Iowa circulation. They also advertized in the yellow pages of the Council Bluffs phone book. This conduct constituted an intentional attempt to reach Iowa consumers and thus satisfied the minimum contact requirement. The contact was not pervasive enough to establish general jurisdiction, but jurisdiction only over issues related to the advertising. The officers' only contacts with Iowa were in their corporate capacity.

Robert Half of Iowa, Inc. v. Citizens Bank, 453 N.W.2d 236 (Iowa App. 1990)

Iowa employment agency (agency) advertised in a banking newsletter that one of its clients was seeking to make an employment move. Missouri bank officer saw ad and telephoned agency. Agency's client traveled to Missouri for interview. Client was hired by bank and began work there. Dispute arose over payment of agency's fee and agency filed suit for recovery of fee. Bank asserted that it had insufficient minimum contacts with State of Iowa to confer jurisdiction on the Iowa court.

HELD: Nonresident bank's telephone call to agency in Iowa concerning Iowa client and agreement to pay agency fee were insufficient to give Iowa court personal jurisdiction over bank.

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Percival v. Bankers Trust Co., 450 N.W.2d 860 (Iowa 1990)

Contingent beneficiaries of trust governed by Iowa law brought declaratory judgment action in Iowa, seeking to establish that their step-mother exercised undue influence over their father to amend the trust to their detriment. The beneficiaries named the

trustee and their step-mother as defendants, and the step-mother moved to dismiss for lack of personal jurisdiction. She and the beneficiaries' father had been married in Las Vegas and thereafter lived in California, and she had been to Iowa on only one occasion and then just to visit the beneficiaries.

HELD: Iowa has personal jurisdiction over the step-mother. The cause of action arises totally out of her claim to ownership of the trust property. Beneficiaries properly expect protection from Iowa courts of their beneficial interest in the trust property. State has a strong interest in assuring the marketability of property within its borders and providing a procedure for resolution of disputes over title and possession.

LIMITATION OF ACTIONS

LeBeau v. Dimig, 446 N.W.2d 800 (Iowa 1989)

Plaintiff received what she believed to be minor head and neck injuries in an automobile accident. Her medical expenses of $200.00 were paid by the tortfeasor. More than two years later, plaintiff was diagnosed as having epilepsy, and less than two years after such diagnosis, she sued the tort feasor, claiming that the epilepsy was caused by the accident. HELD: Plaintiff's cause of action accrued with the occurrence of the accident. To permit a second accrual for purposes of the development and/or discovery of hidden, more serious injuries permits the splitting of causes of action, multiple lawsuits, and open-ended liability. "[F]airness to a defendant" does not permit further extension of the discovery rule.

Barkema v. Clement Auto & Truck, Inc., 449 N.W.2d 348 (Iowa 1989)

Iowa's "Lemon Law" contains a statute of limitations:

> Any action brought under this section shall be commenced within six months following either the expiration of the express warranty term, or one year following the date of original delivery to a consumer, whichever is the earlier date. Section 322E.1(7).

HELD: The statute of limitations requires that suit be brought within 18 months after delivery, unless the warranty period

is shorter than one year, in which case the limitation period would run in less than 18 months.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Blue Sky Law

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. Section 502.504 provides a statute of limitations that is the shorter of 5 years from the act or transaction in question, or 2 years from when plaintiff knew or should have known of "the facts constituting the violation."

HELD: Section 502.504 does not provide a 2-year per se statute from the date of last purchase.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Breach Of Fiduciary Duty

Plaintiff sued investment firm for breach of fiduciary Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. HELD: Statute of limitations for breach of fiduciary duty is 5 years.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Negligent Misrepresentation

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502.

HELD: Statute of limitations for negligent misrepresentation, when the claim concerns injury to economic and financial interests, is 5 years.

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Husker News Co. v. Mahaska State Bank, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Commercial Paper

Plaintiff filed conversion action against bank, alleging that the bank improperly paid checks on a forged endorsement. The checks were payments from plaintiff's customers that were forged by an employee of plaintiff and deposited in that employee's personal account. The action was filed after the expiration of the 5-year limitation period for injuries to property provided by section 614.1(4), but the plaintiff claimed that the suit was timely because it was brought within 5 years from the date plaintiff discovered the forged endorsements.

The Supreme Court refused to apply the discovery rule to conversion actions brought under section 554.3419. The court relied on the overwhelming weight of authority from other jurisdictions, and the uniformity and finality policies of the UCC in determining that the 5-year period commenced on the date the forged instruments were paid.

Meier v. Alfa-Laval, Inc., 454 N.W.2d 576 (Iowa 1990)

Estoppel

Plaintiff dairy farmer's suit for breach of contract and warranty and for negligent design and installation of milking-machine system and for negligent misrepresentation resulted in verdict for plaintiff. Defendants asserted five-year statute of limitations as an affirmative defense, and the district court instructed on plaintiff's responsive claim of estoppel. Plaintiff's estoppel claim was based on repairs that occurred before and after the statute otherwise would have run, coupled with assurances that the system would operate satisfactorily. The district court fashioned its estoppel instruction accordingly.

The supreme court reversed the judgment on jury verdict and remanded for an order dismissing plaintiff's action on grounds of statute of limitations. The court examined the doctrine of "repair estoppel" and rejected it as an independent basis for setting aside an otherwise valid statute of limitations defense.

> "The repair of defective goods does not in itself rise to the level of deception." Neither do we believe that repairs accompanied by assertions that they will cure the defective generally amount to false misrepresentation. . . . [T]here must be some evidence that such repairs and assertions were not only made to

conceal the true condition of the product, but also with the intent to mislead the injured party into the trap of the time bar."

NEGLIGENCE

Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990)

Ch. 668

Anne Fell caught her hand in an exposed gear mechanism on a corn elevator owned by her father-in-law Louis and operated by Anne and her husband James. Kewanee manufactured the elevator in 1969 with a guard covering the gear mechanism. The guard had vibrated off several times and had not been in place for 3 years before the accident, which occurred in 1986. The gear mechanism is right next to the operating lever, which contains holes through which ropes can be strung so that a person can sit on the tractor (to which the elevator is hooked and from which it gets its power) and operate the elevator. Kewanee did not supply ropes with the elevator.

Anne sued Kewanee and Louis, her father-in-law. Louis added a third-party claim against James. Anne settled with Louis before trial, and Louis dismissed his claim against James, which was a condition of settlement. Kewanee never asserted a claim against James.

HELD: Error to include Anne's husband James as a party against whom the jury could apportion fault, even though Louis dismissed him as part of the settlement agreement between Anne and Louis. The only release executed was between Anne and Louis.

> Because James Fell was not a party to the release, we think Section 668.7 does not apply.
>
> This interpretation is faithful to our strict definition of "party" in Section 668.2 . . . [A] strict interpretation of Section 668.2 [serves] as a significant incentive for both plaintiffs and defendants to join all available parties who may be liable. Kewanee did not file a third-party action against James Fell. Kewanee's failure to do so is not in line with the underlying reason behind our strict interpretation of Section 668.2.

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COMMENT: Four justices dissented without opinion.

The majority opinion is silent as to whether Louis' dismissal of his claim against James was with or without prejudice.

Kowalski v. State, 447 N.W.2d 146 (Iowa App. 1989)

Ch. 668

Joy Kowalski and her three-year-old son were injured when their southbound car was hit by Genevieve Ginapp's northbound car on a highway that was under construction. The Kowalskis sued the State, alleging negligence in the DOT's formulation of the traffic control plan used to divert the traffic in and around the construction area. The State cross-petitioned against Ginapp and Allied Construction Company for contribution and/or indemnity. At the close of the evidence, the trail court granted Allied's motion for directed verdict. A jury awarded the Kowalskis $75,000 against the State. The State appealed, arguing that there was sufficient evidence to submit the question of Allied's negligence in placing signs and traffic-channeling devices, and proximate cause of such alleged negligence.

HELD: Citing Law v. Bryant Asphaltic Paving Co., 175 Iowa 747, 157 N.W. 175 (1916), the court of appeals held "that construction companies have a duty of care to the travelling motorist . . . to act as reasonable and prudent contractors to post necessary warnings in the areas of construction." It was a question of fact as to whether the common-law duty existed in addition to Allied's contractual duties to the state.

Dumont v. Keota Farmers Cooperative, 447 N.W.2d 402 (Iowa App. 1989)

Ch. 668

Dumont engaged Keota to apply herbicides to his fields. A jury could find that Keota was negligent in applying the herbicide and that such negligence was the proximate cause of damage to Dumont's corn crop. Dumont sued Keota and Monsanto Chemical Co., the manufacturer of the herbicide. Later, Dumont dismissed all claims against Monsanto without prejudice. The jury awarded damages of $17,500 and apportioned fault to Co-op, 60%, and Monsanto, 40%. The court entered judgment against Co-op, but only for 60% of the damages. Dumont appealed.

HELD: Monsanto was not a "party" within the meaning of §668.2, and its fault should not have been compared with that of

the Co-op. The amount of the verdict should not have been reduced by the percentage of fault attributable to Monsanto, because Monsanto was not a "person released" within the meaning of §668.7. A dismissal without prejudice, by itself, cannot be equated with an agreement such as a release or covenant not to sue, as required under §668.7. Because the Co-op was found 60% at fault, the rule of joint and several liability, codified in §668.4, must apply, and the Co-op is liable for the entire verdict.

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Ch. 668

In products liability case, plaintiff added a claim against the manufacturer for fraudulent misrepresentation. HELD: Chapter 668 does not apply to fraudulent misrepresentation. On the other hand, defendant was entitled to a pro tanto set-off for all settlements paid by the settling defendants, regardless of whether or not each settling defendant was found liable to plaintiffs.

Eventide Lutheran Home v. Smithson Electric & General Construction, Inc., 445 N.W.2d 789 (Iowa 1989)

Ch. 668

In professional liability case, the plaintiff presented testimony of expert witness. Defendant did not counter with an expert of its own. HELD: Finder of fact was not compelled as a matter of law to accept the testimony of an unrebutted expert, even in a case where the factfinder lacks the necessary expertise to dispute expert opinions on the basis of other evidence.

Reimers v. Honeywell, Inc., 457 N.W.2d 336 (Iowa 1990)

Ch. 668

Plaintiffs sued for wrongful death and serious injuries in gas furnace explosion. Honeywell cross-petitioned against Poweshiek-Jasper Farm Service (Poweshiek), who supplied the gas. Honeywell settled with plaintiffs before trial for $1.4 million and tried its contribution claim against Poweshiek. Jury found the settlement to be reasonable, and assessed some fault against Poweshiek.

One of plaintiffs' claims against Honeywell sought punitive damages. Poweshiek contended at trial and on appeal that Honeywell, a reckless or intentional tort feasor, was not entitled to contribution. See Beeck v. Aquaslide'n'Dive Corp., 350 N.W.2d 149 (Iowa 1984). The district court held that the enactment of ch. 668 overruled Beeck and did not require Honeywell to show what portion of the settlement was attributable to the punitive-damage claim. On appeal Poweshiek alternatively argued that failure to show such allocation irretrievably tainted the contribution verdict.

The Supreme Court reaffirmed its recent decision that punitive damages are not to be reduced or impacted by comparative fault. See Godbersen v. Miller, 439 N.W.2d 206 (Iowa 1989). This does not mean, however, that Honeywell cannot recover contribution at all. "When and if the conduct giving rise to punitive damages can be separated from damages arising from the tort feasor's other, less egregious, conduct there is no reason to bar contribution for that part of the damages which was not punitive in nature." Since the district court did not have the benefit of Godbersen and had ruled that the settlement did not have to be allocated between compensatory and punitive exposures, Honeywell was entitled to a new trial.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Ch. 668

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. Jury returned verdicts in favor of plaintiff on all three claims and found plaintiff 35% at fault.

HELD: District court was correct in not reducing plaintiff's damages in proportion to her own fault under the blue sky claim, Chapter 502.

Burns v. Rodriquez, 448 N.W.2d 673 (Iowa App. 1989)

Ch. 668

Burns and a passenger in his car, Fitzgerald, were injured in a two-car collision. They sued Rodriquez, the driver of the second car and Craven, its owner. Craven and Rodriquez counter-claimed for contribution against Burns. Shortly before trial, Burns and Fitzgerald settled their claims against Craven and Rodriquez. The only remaining issue was Burns' liability for contribution. Burns moved for production of the settlement

documents on the Fitzgerald claim, but the court denied it. Burns moved for leave to amend his answer in order to assert as a new affirmative defense that Rodriquez and Craven's settlement with him acted as a bar to any claim Rodriquez and Craven had against him for contribution.

HELD: Asserted defense was baseless. As long as Burns' liability to Fitzgerald had been extinguished by the settlement between Fitzgerald and the defendants, Rodriquez and Craven could seek contribution from Burns.

STATUTE OF LIMITATIONS

Healy v. Carr, 449 N.W.2d 883 (Iowa App. 1989)

Relation Back

On November 3, 1985 Healy was injured when a car in which she was riding collided with a car driven by Wilbur Molln. Molln died January 10, 1987. His estate was closed on July 14, 1987. On September 14, 1987, Healy filed suit against Molln. Healy was unaware of Molln's death until later in 1987, and filed an application in December to have Molln's estate reopened. The probate court reopened the estate in February 1988 and appointed Carr as executor. Carr had no knowledge of the lawsuit before the two-year anniversary of the accident. On February 10, 1988, Healy filed an amended petition substituting Carr as defendant.

HELD: Action filed against decedent's estate more than 2 years after accident was properly dismissed as untimely. Jacobson v. Union Story Trust and Savings Bank, 338 N.W.2d 161 (Iowa 1983), governs, and was not overruled by the 1985 amendment to Section 633.410, which provides that the four-month limitation for filing lawsuits against an estate is not applicable to claims for which there is insurance coverage. That amendment did not alter the general two-year statute of limitations. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988), does not impact upon the operation of the two-year statute of limitations for litigation arising before the death of the decedent.

COMMENT: Healy established that Molln's insurer was aware of the commencement of the action and Molln's death, all before the statute ran. The court of appeals found merit in the argument that Jacobson should be overruled "so that notice to an insured would be imputed to the insured or the insured's executor," but deferred to the supreme court.

Matter of Mt. Pleasant Bank & Trust Co., 455 N.W.2d 680 (Iowa 1990)

Aiding and Abetting

Mt. Pleasant Bank served as trustee for bondholders under two separate municipal bond issues. Purpose of bonds was to provide industrial development loans to SAI, an Iowa corporation. As trustee, Mt. Pleasant bank assumed the duty to enforce the terms of each bond loan. Mt. Pleasant Bank and Centerre Bank also provided direct operating loans to SAI. As SAI began to experience financial difficulties, Mt. Pleasant and Centerre took steps to enforce their own loans against SAI while Mt. Pleasant apparently ignored its obligation to bondholders. HELD: Substantial evidence supported finding that Centerre took full advantage of Mt. Pleasant's fiduciary status and exploited Mt. Pleasant's status as fiduciary to recover as much of Centerre's loans to SAI as possible. Centerre participated in Mt. Pleasant's breach of fiduciary duty, and thereby was liable to the bondholders.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Breach Of Fiduciary Duty

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. She was 54, newly divorced, and very liquid as a result of the divorce and on inheritance. He had no investment experience. There was substantial evidence that she wanted to invest only in A-rated bonds, and that the broker advised her to purchase the securities in question.

HELD: There was sufficient evidence to support a special verdict that a fiduciary relationship existed between the investment firm and plaintiff.

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Konicek v. Loomis Bros., Inc., 457 N.W.2d 614 (Iowa 1990)

Business Invitee

General contractor (Loomis) hired plaintiff's employer (Abild) to roof a commercial building. The roof was flat and dotted irregularly with skylights. When Abild began its work, the steel decking for the roof was in place and the holes for the

skylights existed. Loomis asked Abild if Abild intended to cover the skylight holes. There was 40 feet of air between the roof and the floor. Abild "insisted" that the work could not be done with the skylights covered. Plaintiff's work for Abild required him to roll out "vapor barrier" material in 6-foot strips, to secure it, and then to cut out the material where it covered the skylight holes.

After one of plaintiff's co-employees stepped through a hole he had just covered and averted injury only by catching himself on part of the steel structure, plaintiff suggested to Abild that Abild cover the holes with a support platform that could attach to the inside of the holes. Neither Abild nor Loomis did anything to avert further mishaps, however.

Plaintiff subsequently fell through a skylight hole that he had just covered with vapor barrier. He was walking toward the skylight to cut out the hole, when a wind came up and started to blow the vapor barrier off. He stepped down on the strip "out of reflex" to secure it and stepped through the hole. After surviving, he obtained compensation benefits from Abild and sued Loomis.

HELD: Plaintiff's jury verdict was supported by substantial evidence. As an employee of an independent contractor, plaintiff was a business invitee. While the danger was as open and obvious to plaintiff as it was to Loomis, Loomis should have anticipated that the dangerous condition would cause physical harm to plaintiff, despite its obviousness, because he would proceed to encounter the risk and then either forget, be distracted, or simply fail to protect himself.

COMMENT: Quoting the Restatement (Second) of Torts Section 343A, comment (f), the court noted that the obviousness of the danger "is important in determining whether the invitee is to be charged" with any fault. The jury assessed no fault against plaintiff, but the opinion does not reflect that Loomis attacked the evidentiary sufficiency of that finding.

Tubbs v. United Central Bank, 451 N.W.2d 177 (Iowa 1990)

Conspiracy

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Exchange Bank of Bloomfield (Exchange) was founded before legislation requiring banks to be chartered and regulated. Much more recently, United Central Bank (UCB) became the correspondent bank for Exchange, which meant it processed checks and furnished overtime credit for borrowers whose needs exceeded the financial capability of Exchange. Unbeknownst to UCB, its loans to Exchange actually were used to keep Exchange afloat. Exchange's loans with UCB neared UCB's limits in 1982. UCB threatened to

terminate the correspondence relationship. When it became clear the Exchange bank had greater liabilities than assets, UCB unsuccessfully tried to sell the bank. In 1983 and at the direction of UCB's bank examiners, UCB did its first in-depth examination of the Exchange Bank. The severe financial problems came to light and UCB caused Exchange to request supervision, which ultimately led to Exchange being closed by the Iowa Department of Banking. The receiver sued UCB, alleging damages for conspiring with and aiding and abetting Exchange in causing its insolvency.

HELD: The court cited with approval Restatement (Second) of Torts section 876 as the test for aiding and abetting:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The court also approved of a 3-step test for aiding and abetting in the area of securities law violations:

> (1) the existence of a securities law violation by the primary party,
>
> (2) "knowledge" of the violation on the part of the aider and abettor, and
>
> (3) "substantial assistance" by the aider and abettor in the achievement of the primary violation.

The court declined to find that Exchange had committed securities violations by its conduct of unregulated banking business, "because it has never been determined that bank certificates are 'securities' under our statutes." Assuming that Exchange committed other torts, there was not substantial evidence that UCB was aware of such conduct. UCB knew of Exchange's

"illiquid" position for over a year before Exchange was closed, but did not know the true extent of its financial position until immediately before it caused Exchange to involve the superintendent of banking. While UCB provided substantial assistance, it was not done with knowledge.

The receiver's conspiracy theory was found to be lacking in substantial evidentiary support for the same basic reasons.

Galloway v. Zuckert, 447 N.W.2d 553 (Iowa App. 1989)

Defamation

Galloway leased office space in a Des Moines office building. The building was purchased by Zuckert. The parties encountered a dispute concerning the terms of the lease, renewal of the lease, and conditions of the building. Zuckert sent a letter to Galloway, with copies to other people, one of which did business with Galloway, to the effect that he was not able to do business with Galloway "on a handshake" and that Galloway did "an about-face." Galloway sued for, among other things, libel.

HELD: Zuckert's letter did not constitute libel per se. These statements, even though they might have tended to injure Galloway's maintenance of his business, were not synonymous with calling Galloway a liar or accusing him of dishonesty. The district court's definition of actual malice "as a statement made concerning another because of ill-will or hatred, or made recklessly with an intent to injure," was satisfactory. Actual antagonism or contempt is insufficient, as is intent to inflict harm. "There must be an intent to inflict harm through falsehood."

Davitt v. Smart, 449 N.W.2d 378 (Iowa 1989)

Defamation

Smart offered to buy real estate, contingent upon Smart obtaining certain financing. Smart eventually did not perform and blamed it on the failure of financing. Davitt sued for breach of contract, and attached Smart's offer to purchase as an exhibit to the petition. Davitt then sold real estate to another buyer. The examining attorney objected to title, because Smart's contract, filed in Davitt's breach-of-contract suit, constituted a cloud on the title. Smart refused to execute a quit-claim deed or affidavit, and Davitt sued him for slander of title.

HELD: Copy of the contract for sale of real estate, attached as an exhibit to the petition in Davitt's breach-of-contract suit, did not support Davitt's slander of title claim against Smart. Davitt offered no evidence that Smart's offer to buy was "false" or made maliciously.

Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989)

Dram Shop

Plaintiff's decedent was fatally injured by a drunk driver who allegedly bought beer at a convenience store. At that time, section 123.92 provided a cause of action

> against any licensee or permittee, who sells or gives any . . . intoxicating liquor to a person while the person is intoxicated, or serves a person to a point where the person is intoxicated.

In 1986, the legislature amended this language so that it provided a cause of action

> against any licensee or permittee, who sold and served any . . . intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known the person was intoxicated, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated.

The legislation became effective in June 1986 after publication and provided that it applied to all cases filed on or after July 1, 1986, just 20 days later. Plaintiff did not file his action until 1987.

HELD: Because the legislation effectively eliminates plaintiff's cause of action against a convenience store for providing beer that is to be consumed off premises, the retrospective application of the amendment violates the due process clauses of the federal and state constitutions.

Plaintiff also sued the state for a state liquor store employee's sale of alcohol to the drunk driver on the evening of the accident. HELD: The state can be liable for an employee's

violation of section 123.49(1), which holds: "A person shall not sell, dispense, or give to an intoxicated person . . . any alcoholic liquor, wine, or beer." Sub-section (a), which exempts persons other than licensees and permittees from the provisions of section 123.49(1), is limited to "dispensing" and "giving" alcohol. Because section 123.49(1) also refers to "sell," persons who are not licensees or permittees and who "sell" to an intoxicated person can be held liable under section 123.49(1).

Yet another tavern sued by plaintiff moved for summary judgment because of the absence of any evidence that it "sold and served" alcohol to the drunk driver. HELD: Plaintiff need not prove that alcohol sold to an intoxicated person was subsequently consumed, notwithstanding the abolition of strict liability by the 1986 amendment to section 123.92.

Kowalski v. State, 447 N.W.2d 146 (Iowa App. 1989)

Duty

Joy Kowalski and her three-year-old son were injured when their southbound car was hit by Genevieve Ginapp's northbound car on a highway that was under construction. The Kowalskis sued the State, alleging negligence in the DOT's formulation of the traffic control plan used to divert the traffic in and around the construction area. The State cross-petitioned against Ginapp and Allied Construction Company for contribution and/or indemnity. At the close of the evidence, the trail court granted Allied's motion for directed verdict. A jury awarded the Kowalskis $75,000 against the State. The State appealed, arguing that there was sufficient evidence to submit the question of Allied's negligence in placing signs and traffic-channeling devices, and proximate cause of such alleged negligence.

HELD: Citing Law v. Bryant Asphaltic Paving Co., 175 Iowa 747, 157 N.W. 175 (1916), the court of appeals held "that construction companies have a duty of care to the travelling motorist . . . to act as reasonable and prudent contractors to post necessary warnings in the areas of construction." It was a question of fact as to whether the common-law duty existed in addition to Allied's contractual duties to the state.

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Devilbiss v. Brenton National Bank, 451 N.W.2d 198 (Iowa Ct. App. 1989)

Duty

Plaintiff was injured when she tripped and fell on a sidewalk in front of and owned by bank. At the time of accident, plaintiff was walking past the bank and was not going in. District court instructed as to duty owed by bank to invitees, even though best view of evidence for plaintiff made her only a licensee. Jury returned defense verdict. HELD: Since district court imposed highest duty of care possible, bank implicitly satisfied any lesser standard of care, including that owed to a licensee.

COMMENT: The court of appeals declined the invitation to abrogate the common-law distinction between the duty of a landowner to an invitee and the duty owed to a licensee.

Sankey v. Richenberger, 456 N.W.2d 206 (Iowa 1990)

Duty

Crazed gunman stormed Mt. Pleasant City Council meeting and shot several council members. They filed suit against police chief, who was present at the meeting, for negligence in failing to protect them adequately. District court granted summary judgment in favor of police chief and Supreme Court affirmed. Neither Mt. Pleasant city ordinances nor the common law imposed a duty on the police chief to control the action of a third party. The court noted that the police chief had been asked to attend the meeting for administrative input, not for security, and specifically had been asked to attend unarmed.

Peterson v. Schwertly, _____ N.W.2d _____ (Iowa, Sept. 19, 1990)

Duty

Plaintiff was injured while trespassing on defendant's property. Defendant owns land adjacent to pond with tree overhang. People used the area for swimming without defendant's permission. Defendant had knowledge that people swam in the area and had taken steps, unsuccessfully, to discourage people from swimming in the area.

Sections 111C.3 and 111C.4 relieve land owners of duties toward those who use the land for recreational purposes. The statute is not limited to permissive users. A blanket abrogation

of duty to all recreational users will encourage property owners more readily to make lands suited for recreational uses available for that purpose.

Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684 (Iowa App. 1989)

Fraud

Hoover (in Iowa) and Utgaard (in Wisconsin) operate chicken hatcheries. Hoover told Utgaard it might be interested in selling the hatchery operation, and Utgaard expressed interest. No decision on a sale was made at that time. The parties then entered into negotiations for Hoover to become the chick supplier for Utgaard for the 1985 hatching season. The precise number of chicks was never specified, but initial estimates were that Utgaard would purchase over 400,000 chicks from Hoover -- which Hoover believed was substantially all of Utgaard's chick requirements for the season. Hoover prepared to produce chicks in accordance with those estimates. In late 1984, Utgaard told Hoover that it would only be purchasing 270,000 chicks from Hoover, and Hoover's "set" plans were altered accordingly. When the 1985 season arrived, Utgaard took far fewer chicks from Hoover than any previous estimate, and Utgaard raised many chicks in its own operation. Hoover found itself with hundreds of thousands of chicks on hand; some were sold at distressed prices, and 248,000 were exterminated. Utgaard then made new inquiries about buying Hoover. Hoover sued for breach of contract, fraud, negligent misrepresentation, promissory estoppel, and equitable estoppel, believing that Utgaard had deliberately misled it about the "requirements" contract, causing Hoover to overproduce and incur losses so that Hoover's sale price would be reduced. Hoover's fraud claim was dismissed at the end of plaintiff's evidence. Hoover appealed, arguing that it was error to dismiss the fraud claim.

HELD: Hoover failed to adduce substantial evidence of the intent element of its fraud claim. The evidence was that Utgaard may have hatched some of his own eggs because Hoover refused to guarantee Utgaard priority in receiving chicks, and because economic and weather conditions harmed the entire industry and were a contributing factor in Utgaard's decreased purchases.

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Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Fraud

In product liability case, plaintiff also asserted fraudulent misrepresentation by manufacturer as a basis for obtaining punitive damages. Without approving or disapproving it, the court noted that the Uniform Instruction Committee has adopted a definition of clear, convincing, and satisfactory to be used in connection with the burden of proof in fraud cases:

> Evidence is clear, convincing, and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

ICJI 100.19.

Nesler v. Fisher & Co., 452 N.W.2d 191 (Iowa 1990)

Interference

Nesler purchased a building in downtown Dubuque for renovation and leasing to commercial and governmental tenants. He planned to syndicate the building and manage it for a fee. Defendant owned commercial property in Dubuque which was leased to the same governmental tenants that were being targeted by Nesler. Nesler eventually obtained rental contracts with some of defendant's tenants. Defendant sued the county board of supervisors for failing to accept his rental bid, which was lower than Nesler's. Defendant pressured the building inspector to take action against Nesler's project. Defendant supplied counsel to one of his tenants, without charge, to sue Nesler for failing to provide adequate handicap access. A jury could find that as a result of defendant's actions, Nesler was unable to syndicate his project or to obtain financing for it. The project failed. Nesler eventually deeded his equity in the real estate to his original lender.

Nesler sued defendant for interference with existing contracts and prospective business advantage. After the jury found for Nesler, district court granted defendant's motion for judgment notwithstanding the verdict.

The Supreme Court held that Nesler adduced substantial evidence in support of his claim for intentional interference with his ability to perform existing contracts with the building's seller and the lessees that Nesler had attracted to his project. The fact that these contracting parties were still willing to perform was irrelevant. Nesler's claim for intentional

interference with existing contract proceeded from Restatement section 766A:

> One who intentionally and improperly interferes with the performance of a contract between another and a third person, by preventing the other [Nesler] from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability.

The Court also held that Nesler had adduced substantial evidence in support of his claim for interference with potential contracts (prospective business advantage). Although Nesler had no binding contract for financing and had not begun syndication activity until after most of defendant's actions had occurred, the prospective business advantage harmed by defendant "was much broader" than successful syndication or financing; "it ultimately was to result in the completion of the project and the sale of the building," with resulting profit to Nesler. Defendant knew from the beginning that Nesler would have to finance the project in some fashion in order to succeed.

Defendant alternatively sought a new trial due to instruction errors. Although the district court required plaintiff to prove that defendant "intentionally and improperly interfered," the court also instructed that lawful conduct becomes actionable "when done with malice." Because none of defendant's acts was tortious in and of itself, defendants suggested that such conduct could not be "improper" and that malicious motive was insufficient to generate liability. The Supreme Court held that an otherwise legal act may be improper and constitute interference if the actor's "motive or purpose . . . was improper." The court approved Uniform Jury Instructions 1200.1 (intentional interference with contract) and 1200.2 (intentional interference with prospective business advantage). The court also noted that in the case of interference with prospective business advantage, a purpose "to financially injure or destroy . . . is essential."

Last but not least, the court reiterated that notwithstanding the commercial context, Nesler can recover for emotional distress as an aspect of interference damages without proof of outrageous conduct and without supporting medical testimony.

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Toney v. Casey's General Stores, Inc., ____ N.W.2d ____ (Iowa, Sept. 19, 1990)

Interference

Former employee sued employer for breach of at-will employment contract and employer's franchisor for intentional interference with that contract. Case was dismissed, but the Supreme Court held that a third party may be liable for intentional interference with an at-will employment contract. On remand, jury found in favor of plaintiff and awarded actual and punitive damages against franchisor. HELD: Evidence did not support the verdict. For a third party to be liable for intentional interference with an at-will contract, there must be substantial evidence of improper conduct. The court generally defined improper conduct as conduct not fair and reasonable under the circumstances, and did so after relying on and quoting extensively with approval from the restatement and comments to it. In particular but certainly not exclusively, the court focused for the first time on section 767:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference, and
>
> (g) the relations between the parties.

Toney claimed that Casey's was motivated to cause his employer (a Casey's franchisee) to fire him in order to standardize all Casey's managers' contracts. Assuming this to be its purpose, such conduct was "fair and reasonable" and motivated by a "legitimate business purpose."

Preferred Marketing Associates Co. v. Hawkeye National Life Ins. Co., 452 N.W.2d 389 (Iowa 1990)

Interference

Preferred Marketing Associates (PMA) and Hawkeye entered into a contract in which PMA became a marketing representative of Hawkeye. PMA's job was to sell life insurance policies issued by Hawkeye. The contract provided for payment of renewal commissions to PMA even if the contract was terminated. Hawkeye terminated the contract with PMA but refused to pay renewal commissions, probably in the hundreds of thousands of dollars, because of PMA's failure to pay an outstanding debt of $8,000.00. PMA sued Hawkeye for breach of contract and interference with prospective business advantage.

HELD: Hawkeye terminated this relationship to rid itself of an uncooperative marketing director, not to damage PMA's business, so the motive was not improper. Improper motive is a necessary element of the tort of interference with prospective contractual or business relationships. That the termination destroyed PMA's ability to profit from future Hawkeye policy renewals was incidental to the pursuit of Hawkeye's own ends by proper means. Hawkeye's contract gave it the right to terminate at will.

Lewis v. St. Paul Fire & Marine Insurance Co., 452 N.W.2d 386 (Iowa 1990)

Legal Malpractice

Plaintiff petitioned for review-reopening pursuant to section 86.34. The petition was dismissed four years later. Plaintiff obtained new counsel who filed a request to reinstate and notified plaintiff's original counsel, Crawford, that plaintiff intended to assert a claim against him should the attempt to reinstate fail. The letter to Crawford asked him to notify his insurer. The industrial commissioner eventually determined that it lacked subject matter jurisdiction to reinstate the review-reopening petition. During the intervening administrative proceedings, plaintiff's new lawyer again notified Crawford that plaintiff would be asserting a claim against him, if the proceedings before the industrial commissioner were unsuccessful.

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After the industrial commissioner's final ruling, Crawford's firm obtained a new "claims made" policy from St. Paul. The policy provides:

> We'll cover claims based on a wrongful act that occurred before the effective

> date of this agreement, but only if all of the following conditions are met:
>
> The protected person involved had no knowledge of the prior wrongful act on the effective date of this agreement nor any reasonable way to foresee that a claim might be brought.
>
> . . . .

Plaintiff ultimately sued Crawford for legal malpractice and obtained a judgment. After execution was returned unsatisfied, plaintiff sued St. Paul.

HELD: Crawford knew or reasonably should have foreseen as of the first letter from the plaintiff's new counsel that a claim would be asserted against him. St. Paul had no coverage for this claim.

Hutchinson v. Broadlawns Medical Center, 459 N.W.2d 273 (Iowa 1990)

Medical Malpractice

In a wrong-diagnosis medical malpractice case, defendants claimed that district court erred in refusing to instruct as follows:

> [A] doctor cannot be found negligent merely because he/she makes a mistake in the diagnosis and treatment of a patient. Any error in diagnosis and treatment, if you find any, does not in and of itself constitute negligence. For a doctor to be found negligent, it must be shown by a preponderance of the evidence that the doctor, in making his/her diagnosis and treatment, failed to follow the customary practice and procedure of doctors under similar circumstances.

HELD: Defendants' requested instruction was adequately covered elsewhere by instructions that defendants could be found liable only if plaintiff proved they were negligent, that defendants were negligent if they failed to use the degree of skill, care, and learning ordinarily possessed and exercised by other doctors and hospitals, and that mere fact that an injury occurred was not evidence of negligence.

Hutchinson died due to an infection that started with an IV needle. Defendants thought the infection was localized and treated it accordingly. When defendants discovered that the infection had spread, defendants changed to intravenous treatment, but not in time to save the patient.

Defendants objected to district court's failure to instruct that election from more than one alternative method of treatment does not constitute negligence. HELD: Evidence established that this was a negligent diagnosis case, not a choice of treatment case. All evidence established that there was only one way to treat a generalized infection. The question was whether or not defendants were negligent in failing to detect sooner that the infection had generalized.

Surgical Consultants, P.C. v. Ball, 447 N.W.2d 676 (Iowa App. 1989)

Medical Malpractice

Dr. Foster performed a gastric bypass on Ball, who suffered from morbid obesity. After the surgery, Ball had several follow-up visits with Dr. Foster. Ball claimed that she had a "foreign body reaction," in the form of numerous painful abscesses, to the sutures which remained in her body after the operation. Dr. Foster removed only one of the sutures, three months after the surgery. Dr. Foster testified that he was waiting to remove the rest of the sutures in an abdominoplasty procedure, which would take place only after Ball's weight stabilized. Eighteen months (and eleven visits) after the surgery, Ball went to see Dr. Foster and was told by the office bookkeeper that she was no longer Dr. Foster's patient, because she had not paid her bill. Dr. Foster never contacted her again and refused to return her calls. Ball went to other physicians to continue her postoperative care, which continued for over four years. Ball had several more abscesses during that time, and had to have sutures removed on four other occasions. Twenty-two months after the surgery, Dr. Foster sued Ball in small claims court for the $1300 unpaid balance of her bill. Ball counterclaimed, alleging negligence and breach of contract. At trial, her claims were negligence and abandonment. Dr. Foster's motion for a directed verdict on the counterclaim was granted.

HELD: No error to direct a verdict on Ball's claims of negligence and abandonment. Expert testimony offered by Dr. Monson, a physician who treated Ball after she left Dr. Foster's care, did not establish that Dr. Foster's treatment deviated from the appropriate standard of care. Dr. Monson testified that the appropriate treatment of postoperative infection and abscesses would require hydrogen peroxide and clean dressings, rather than removal of the sutures, as the infections often heal on their own with time, and (in his opinion) suture removal would be required

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only after 30 to 60 days of infection. He also testified that treatment by disinfectant was especially appropriate, as Dr. Foster contemplated removing the sutures in an abdominoplasty operation anyway. A claim of abandonment requires more than a mere termination of the doctor/patient relationship. There must be evidence of termination at a critical stage of the patient's treatment, without reason or sufficient notice for the patient to secure another physician, and resulting injury. Ball presented no evidence that she was at a critical stage of treatment, and there was no evidence that Ball could not have retained a bariatrics specialist between the last time she attempted to see Dr. Foster and the first time she saw another physician.

Marquis v. Nuss, 451 N.W.2d 833 (Iowa 1990)

Medical Malpractice

In medical malpractice case, the district court instructed "that a doctor cannot be found negligent merely because he makes a mistake in the diagnosis and treatment of a patient." HELD: Failure to insert "honest" before "mistake" does not allow jury to conclude that a negligent mistake is not actionable.

COMMENT: Supreme Court declines to recognize mistake as an affirmative defense in a medical malpractice case.

Maples v. Siddiqui, 450 N.W. 529 (Iowa 1990)

Medical Malpractice

Parents brought medical malpractice action against physician, who had recommended that child be placed in temporary custody of juvenile court, and sought damages for loss of companionship. Physician's diagnosis that resulted in his recommendation turned out to be erroneous. HELD: Statutory tort immunity for reporting child abuse applies, even if diagnosis which led to recommendation was negligent.

Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990)

Medical Malpractice

Patient and her husband appealed from summary judgment in favor of hospital and medical professionals in an action arising out of spontaneous abortion of fetus. Plaintiffs were barred from

introducing expert testimony due to their failure to timely designate an expert in accordance with section 668.11(2).

At approximately 5 months in her third pregnancy, Mrs. Oswald experienced severe cramping and bleeding. Visits to the doctor's office and the emergency room resulted in no diagnosis and instructions only to rest. When her condition worsened, she returned to the hospital, where Mr. Oswald insisted that his wife be admitted after the doctor again told her to go home.

Upon admission, the first nurse she saw said, "what are you doing here? The doctor told you to stay home and rest." A second nurse explained to her that if she miscarried, it would be a "big blob of blood." Mrs. Clark heard one of the defendant doctors yelling outside her room, "I don't want to take that patient. She's not my patient and I am sick and tired of Dr. Smith dumping his case load on me." That same doctor later ignored Mrs. Oswald's hysterical insistence that she was about to deliver, and left for vacation one-half hour before the end of his scheduled shift. Mrs. Oswald began delivering her baby in a hospital hallway, unattended by anyone except her husband, who "saw [his] daughter hanging from her belly." Two nurses responded to his plea for help, and they delivered the baby. One of them announced that the baby was dead, without conducting anything more than a brief visual examination. Upon the arrival of one of the defendant doctors, he made no physical examination of the fetus, which still lay on an instrument tray, wrapped in a towel. One-half hour after the doctor left, Mr. Oswald determined that the fetus was still alive.

District court determined that plaintiffs could not generate a material issue of fact concerning defendant's negligence.

HELD: Expert testimony is required to support claim (1) that more prompt and heroic efforts to sustain life of fetus would have been successful, (2) that different treatment would have prevented the premature delivery. Expert testimony is <u>not</u> required, however, to support claims arising out of (3) the nurses' statements to Mrs. Oswald and the doctor's complaints overheard outside her door, (4) one defendant doctor's early departure, and (5) the nurses' and the other defendant doctor's failures to detect that the fetus was alive.

As to (3):

> [L]iability for emotional injury should attach to the delivery of medical services ....
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> . . . .
>
> . . . In reaching this conclusion we hasten to emphasize that our decision in this case is closely limited to its facts. We in

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> no way suggest that a professional person must ordinarily answer in tort for rudeness, even in a professional relationship. In order for liability to attach there must appear a combination of the two factors existing here: extremely rude behavior or crass insensitivity coupled with an unusual vulnerability on the part of the person receiving professional services.

As to (4), a jury can evaluate the professional propriety of a physician's early departure in the face of an hysterical patient who thinks, correctly it turns out, that she was about to deliver. As to (5), independent expert testimony is unnecessary when the defendant doctors acknowledged in their depositions that a physical examination of the fetus should have been undertaken by the nurses and the doctor to determine whether the infant was alive.

Kirk v. Farm & City Ins. Co., 457 N.W.2d 906 (Iowa 1990)

Misrepresentation

Plaintiff's decedent was killed in a one-car accident. Neither the owner nor the car was insured. Decedent was covered, however, under two Farm & City policies with uninsured motorist coverage totalling $20,000. No one survived the accident and no one saw it. The vehicle struck a tree at a high rate of speed and all occupants were thrown from the vehicle. All of them had been drinking. Decedent's parents reported the accident to their insurance agent and retained counsel. Farm & City and the attorney exchanged numerous letters in an effort to settle the matter, but Farm & City steadfastly refused to offer more than $10,000. In one letter, the adjuster said that Farm & City had no "proof" that decedent was not the driver. At that time, Farm & City's file contained information that suggested that decedent was not, in fact, the driver.

Plaintiff sued for breach of contract, fraudulent and negligent misrepresentation, and first-party bad faith. HELD: At the time of the adjuster's communications to counsel, the identity of the driver and the decedent's contributory fault were "fairly debatable." As to the fraudulent misrepresentation claim, there was no substantial evidence to support a finding that the adjuster's representations were knowingly false. Also, it was impossible for decedent's family to have relied upon the representations. "The relationship between Farm & City and the Kirks was confrontational from the beginning . . . . The Kirks' attorney made it clear that it was an adversarial relationship, announcing early on in their negotiations that, if Farm & City did not comply with his demands, suit would be filed.

Preferred Marketing Associates Co. v. Hawkeye National Life Ins. Co., 452 N.W.2d 389 (Iowa 1990)

Negligent Breach Of Contract

Preferred Marketing Associates (PMA) and Hawkeye entered into a contract in which PMA became a marketing representative of Hawkeye. PMA's job was to sell life insurance policies issued by Hawkeye. The contract provided for payment of renewal commissions to PMA even if the contract was terminated.

HELD: Although breach of a contractual duty may give rise to an independent action in tort under certain circumstances, the Hawkeye-PMA relationship did not give rise to a legal duty to pay renewal commissions, independent of the contract. PMA's remedy lies in contract, not tort.

Meier v. Alfa-Laval, Inc., 454 N.W.2d 576 (Iowa 1990)

Negligent Misrepresentation

Plaintiff dairy farmer's suit for breach of contract and warranty and for negligent design and installation of milking-machine system and for negligent misrepresentation resulted in verdict for plaintiff. HELD: A retailer generally cannot be liable for negligent misrepresentation in connection with statements made in connection with the retail transaction. Contract and warranty provide the more appropriate remedies for misstatements made during the sale and servicing of a product, unless plaintiff can show that the retailer was in the business of supplying information.

Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990)

Products Liability

Anne Fell caught her hand in an exposed gear mechanism on a corn elevator. Kewanee manufactured the elevator in 1969 with a guard covering the gear mechanism. The guard had vibrated off several times and had not been in place for 3 years before the accident, which occurred in 1986. The gear mechanism is right next to the operating lever, which contains holes through which ropes can be strung so that a person can sit on the tractor (to which the elevator is hooked and from which it gets its power) and operate the elevator. Kewanee did not supply ropes with the elevator.

Anne sued Kewanee. District court sustained Kewanee's motions for partial summary judgment. It dismissed Anne's claims

on strict liability and breach of implied warranty and rejected her claim for punitive damages. Anne went to trial on her negligence claim. District court instructed on Kewanee's state-of-the-art affirmative defense. The jury found in special verdicts that Kewanee established this defense as to each particular of Anne's negligence claim and, in accordance with the instructions, proceeded no further.

A 5-4 majority of the Supreme Court reversed the entry of summary judgment on Anne's strict liability claim. Anne had adduced substantial evidence that the guard's attachment device was defectively designed, because it would vibrate off. Anne also adduced substantial evidence that the product was being used "without substantial change in its condition." In fact, the only evidence was that the guard had vibrated off and had not been replaced, rather than being removed deliberately.

Presumably for the benefit of retrial, the court held that there should have been instruction on "Anne's theory of subsequently acquired knowledge" in conjunction with Kewanee's state-of-the-art affirmative defense. Section 668.12, which codifies this defense and renders it a bar, does not "diminish the duty of [a product-liability defendant] to warn concerning subsequently acquired knowledge of a defect or a dangerous condition that would render the product unreasonably dangerous for its foreseeable use." Because one of Anne's particulars was failure to warn, and because she had adduced substantial evidence that Kewanee was aware that guards vibrated off and that the attachment device could be improved upon, an unadorned construction on state-of-the-art did not adequately address all related factual issues. Because the caveat to section 668.12 relates only to failure to warn, retrial of the negligence claim would be limited to the failure-to-warn particular.

The court affirmed entry of summary judgment on the breach of implied warranty claim on statute of limitation grounds. Section 554.2725's 5-year statute of limitations for breach of implied warranty of fitness for a particular purpose applies to personal-injury claims arising out of breach of implied warranty, and it begins to run at the time of sale.

The court affirmed entry of summary judgment on Anne's claim for punitive damages. Considering the evidence adduced not only in opposition to the motion for summary judgment but during trial on the negligence claim, the court found no substantial evidence that Kewanee's failure to change the design was willful and wanton, despite substantial evidence that Kewanee knew the design was defective.

> This is not a case in which Kewanee knew that people were being injured by exposed gears and ignored this knowledge for economic reasons. To the contrary, the evidence shows that Kewanee manufactured and sold thousands

of these elevators without a similar incident occurring. Simply put, risk of injury from exposed beveled gears on the elevators was not so great as to make it highly probable that an injury would occur.

For benefit of retrial, the court found no abuse of discretion in refusing to permit Anne to show evidence of other injuries suffered by Kewanee elevator users, because none of the injuries occurred through contact with the gear mechanism.

COMMENT: Four justices dissented without opinion.

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Products Liability

Plaintiffs were injured as a result of a gas furnace explosion, and sued a number of companies who either manufactured the furnace or a component part, or were retailers, distributors, or suppliers. At the time of trial, plaintiffs had settled with everyone except Essex, who manufactured the gas control unit that Lennox incorporated into the furnace.

The Supreme Court found substantial evidentiary support for the finding of causation inherent in the verdict that allocated 50% of the fault to Essex, 1% to plaintiffs, and the remaining 49% to the settling defendants. Essex's complaint that the opinions of plaintiffs' expert were based on unsupported legal conclusions or factual assumptions lacking evidentiary support was waived by failure to object during trial. Essex complained that the expert's opinion that there were dual, simultaneous failures in the two safety valves in the control unit is insufficient to establish causation when coupled only with circumstantial evidence and a lack of any prior failures. HELD: Plaintiffs adduced substantial evidence that was not circumstantial in nature. Moreover, "[t]he accumulation of gas leading to an explosion normally results from mechanical failure."

James v. Swiss Valley Ag Service, 449 N.W.2d 886 (Iowa App. 1989)

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Products Liability

Plaintiff was injured when he was sprayed with anhydrous ammonia due to rupture of rubber hose attached to "nurse tank." Manufacturer of the tank moved for summary judgment, documenting that tank was manufactured 13 years before promulgation of safety

standards relied on by plaintiff and that plaintiff's own expert had failed to point out any design or manufacturing flaws in the tank.

HELD: Safety standards published 13 years after manufacture "are irrelevant." Expert testimony is required to generate a jury issue when technical issues beyond common knowledge and experience are involved in a design or manufacturing defect case. Plaintiff's only expert expressed a general opinion that "there should be water tanks on that nurse tank," but otherwise repeatedly declined to express any criticisms of the design or manufacture of the nurse tank, repeatedly declined to tie the accident to the functioning of the nurse tank, and instead attributed the cause to pressure build-up in the hose (manufactured by another defendant), which was not equipped with a relief valve.

Sandry v. John Deere Co., 452 N.W.2d 616 (Iowa App. 1989)

Products Liability

Sandry was injured when his hand was sucked into a running fan. He sued Deere on a claim of strict liability, alleging defective design and failure to warn. Deere moved for a directed verdict on the warning issue, arguing that the danger inherent in working around a fan is common knowledge.

HELD: Although Sandry knew the dangers of a rotating fan, the danger resulting from suction caused by the fan may not be known and obvious. Because Sandry showed that a suction was created and his hand was sucked into the fan, a jury question was generated.

The district court instructed that "[a] defective product is unreasonably dangerous if the danger would not be recognized by an ordinary person in similar circumstances." Deere objected to the instruction because it omitted the essential element that unreasonable danger is one "not contemplated by the user in the normal and innocent use of the product."

HELD: The defect seen by Deere in the instruction was adequately covered in other instructions.

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Crutchley v. First Trust & Savings Bank, 450 N.W.2d 877 (Iowa 1990)

Realtor Malpractice

Sellers sued realtor for breach of contract and negligence for damages resulting from real estate sales contract

on which buyers defaulted. Sellers sold 600-acre tract for $1.65 million on an installment contract calling for $300,000 down, interest - only payments for ten years, and the remaining balance to be paid over the second ten years. Contract contained a nonrecourse clause:

> In the event of default . . . , sellers shall only be entitled to possession . . . . Buyers will only lose their interest in said property and any payments made.

Buyers defaulted after several years, during which time farm real estate plummeted in value. In bankruptcy proceedings, sellers liquidated the land for $600,000.

Substantial evidence supported findings inherent in jury verdict for plaintiffs that the realtors' code of ethics required them not to engage in the practice of law and to recommend the use of legal counsel when the interest of any party to the transaction requires it, that realtor gave an inadequate and incorrect explanation of the nonrecourse provision, that the realtor failed to recommend that sellers retain counsel, and that the realtor discouraged sellers from seeking counsel.

HELD: Unlike other professional malpractice cases, sellers' claim of injury does not involve loss of a right to recover money from a specific third-party. Plaintiffs did not adduce evidence that buyers would have agreed to the transaction without inclusion of the nonrecourse clause. Instead, plaintiffs adduced substantial evidence, through the realtor's testimony, that the property could have been sold on the open market for about $1.5 million. Such evidence was sufficient to establish an actual financial loss.

COMMENT: This appears to be a "lost financial opportunity" case. The court found suitable instructions on loss of opportunity, because sellers were required to prove that they "would have received some greater amount than the amount actually received [from the down payment and bankruptcy sale]."

Also, the court was not concerned with sellers' failure to articulate their damage theory upon which they ultimately relied until after the trial began. In their pre-trial statement, sellers simply measured their damages by reference to the purchase price to be paid in the contract on which buyers defaulted, based on a legal theory of liability of breach of warranty by the realtor. When the warranty theory was withdrawn before trial, "the district court did not abuse its discretion in permitting the jury to consider the case under the theory of injury which was shown by the evidence. The theory of recovery to which plaintiffs ultimately resorted was thrust upon them by the factual setting of the transaction."

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Gerard v. Peterson, 448 N.W.2d 699 (Iowa App. 1989)

Realtor Malpractice

Gerards (sellers) and Petersons (buyers) entered into a contract for the purchase of real estate. Gerards had retained Maas, a realtor, to sell the property. Petersons asked Maas about including a loan-contingency clause in the offer-and-acceptance agreement, which would condition the contract on Petersons getting approval for their financing. Maas stated that such a clause was unnecessary. Petersons ultimately were unable to obtain adequate financing and could not perform. Plaintiffs sued, and Petersons cross-petitioned against Maas.

HELD: In spite of the lack of agency relationship between Maas and the Petersons, the realtor owed them a general duty not to negligently cause them harm, which Maas breached when he advised them that the contingency clause was unnecessary.

COMMENT: If Maas was plaintiffs' agent, why not just accept Petersons' claim that Maas' statement effectively amended the agreement? Instead, we now have a realtor malpractice case in which the plaintiffs had no contractual relationship with the realtor.

Peterson v. Ford Motor Credit Company, 448 N.W.2d 316 (Iowa 1989)

Vicarious Liability

Schoning rented a new vehicle from Arrow Ford, who assigned the lease and transferred title to Ford Credit. The lease included a purchase option. The certificate of title showed Ford Credit as owner and Arrow Ford as prior owner; no lien or security interest appeared on the certificate of title. Peterson was injured in an accident involving the leased vehicle. Peterson sued Schoning and Ford Credit for his injuries. Ford Credit filed a motion for summary judgment, claiming that it was not the owner within the meaning of the owners' responsibility law. The district court sustained the motion. The jury determined damages to be $860,000, and assessed Peterson 10% and Schoning's driver 90% of the fault. The court entered judgement against Schoning for $774,000 and denied Peterson's motion to amend the judgment to include a judgment against Ford Credit.

HELD: Control and dominion are not controlling factors in determining whether a lessor is an "owner" within the meaning of the owners' responsibility law. The original transaction between Arrow Ford and Schoning cannot be characterized as a security agreement which, by operation of Iowa Code §321.1(36), would require the debtor to be deemed the owner of a vehicle. The

lease contained a purchase option, but it could not be exercised by payment of a nominal amount.

COMMENT: The Supreme Court agreed that the district judge had no authority simply to modify the judgment to include a judgment against Ford Credit after it had been dismissed. The case was remanded, presumably for trial against Ford Credit and Schoning (although it did not say so and Schoning did not appeal).

Rockport Co. v. Wedgewood, Inc., 447 N.W.2d 126 (Iowa 1989)

Wrongful Attachment

Wedgewood had been purchasing shoe inventory from Rockport on account. Wedgewood negotiated a sale of its assets, including inventory, to David Ewan, and notice of the proposed bulk transfer was sent to Wedgewood's creditors, stating that Wedgewood's estimated debt was about $427,000, that total consideration to be received for the bulk transfer was $133,000, that First Interstate Bank of Urbandale had a security interest in Wedgewood's collateral and was to be paid $118,000 from the transfer proceeds, and that the remaining $15,000 was to be paid to Merle Hay Mall, which had a landlord's lien on Wedgewood's property. Wedgewood's debt to Rockport totalled about $11,000 and was unsecured. Rockport filed a collection suit and obtained a prejudgment order for attachment of Wedgewood's property under §639.3(10). The sheriff seized 452 pairs of shoes from Wedgewood's store about an hour before the bulk transfer was to take place. Completion of the bulk transfer was delayed and Wedgewood received $36,000 less than under the original agreement.

In its answer to Rockport's collection suit, Wedgewood asserted counterclaims for wrongful attachment, abuse of process, and tortious interference with a contractual relationship. The district court entered judgment for Rockport on the debt issue, but found for Wedgewood on its wrongful attachment claim and assessed $36,000 in actual damages, plus attorney fees, against Rockport. The court also awarded Wedgewood $1,000 in punitive damages. Rockport appealed from the wrongful attachment judgment, arguing that the trial court erroneously engrafted a "fraudulent intent" requirement onto §639.3(10), and that but for this "engrafting" error, the district court would have found Rockport's attachment was justified. Rockport further argued that because Wedgewood had announced it intended essentially to convert its assets into money via bulk transfer and then prefer its secured creditors, Rockport was justified in attachment under §639.3(10).

HELD: The district court did not engraft a fraudulent intent requirement onto §639.3(10). The purpose of the bulk transfer was to liquidate Wedgewood's business assets to pay secured creditors, not to place the assets beyond the reach of

other creditors. Rockport had no basis for suspecting fraud. A transaction involving a proposed non-fraudulent, preferential transfer outside of bankruptcy, does not authorize an attachment under §639.3(10). "[A]llowing an attachment here would conflict with the well-established principle that outside of bankruptcy and in the absence of fraud, even an insolvent debtor may prefer one creditor over another. ... We are not inclined to adopt a construction of section 639.3(10) that would allow a disappointed unsecured creditor to attach its debtor's assets merely because the debtor was paying another bona fide creditor." The general rule is not changed just because there has been a bulk sale in the preferential transfer; the general assembly rejected that option when it rejected UCC §6-106.

COMMENT: The court disavowed as "clearly dicta" contradictory language from its recent decision in Klooster v. North Iowa State Bank, 404 N.W.2d 564, 568 (Iowa 1987), cited by Rockport:

> If [an unsecured creditor] as reasonable grounds to believe that a debtor is placing assets beyond the creditor's reach, enough of the debtor's assets to satisfy the creditor's claim may be placed in custodia legis pending trial of the action on the unsecured account.

The quoted portion of Klooster is not really dicta, but Klooster is easily distinguished on its facts, which the court also observes.

Hutchinson v. Broadlawns Medical Center, 459 N.W.2d 273 (Iowa 1990)

Wrongful Death

A grandchild does not have a claim under section 613.15 or at common law for loss of consortium for the wrongful death or injury to a grandparent, even when the grandparent has been appointed as a "custodian" after a CINA adjudication and even when the grandparent acted, for all practical purposes, as a parent.

Wilcox v. Hy-Vee Food Stores, Inc., 458 N.W.2d 870 (Iowa App. 1990)

Wrongful Discharge

Upon the authority of Springer v. Weeks and Leo Co., 429 N.W.2d 558 (Iowa 1988), the court of appeals held that an at-will employee may sue for wrongful discharge after being fired for

failing to submit to a polygraph examination as a condition to continued employment. At the time of Hy-Vee's conduct, section 730.4(2) made Hy-Vee's conduct a simple misdemeanor. "[V]iolation of the statute violated public policy."

COMMENT: Section 730.4(2) has since been amended to provide expressly for a civil remedy.

Chard v. Iowa Machinery & Supply Co., 446 N.W.2d 81 (Iowa App.. 1989)

Wrongful Discharge

Iowa Machinery hired Chard in October 1984 as vice-president of their industrial division, with the expectation that he would increase lagging sales in that division. The division continued to lose money and Chard was fired in early May 1985. He was given 3 weeks of severance pay. Chard sued for additional severance pay under his contract. He also sought damages for emotional distress and punitive damages. The district court found Chard had been hired for a minimum of 18 months (because the parties expected it would take 12-18 months to turn the company around), and thereafter was to be employed at will. The court awarded him 11 months of regular pay and 3 months of severance pay, but denied his claims for emotional distress and punitive damages. Iowa Machinery appealed, arguing that the handwritten employment agreement provided that if Chard resigned or was terminated for good cause, he was to receive no pay, but if he was terminated "in spite of good performance" he was to receive 3 months of severance pay. Chard argued that the agreement was unclear as to its terms and as to the parties' intentions and understanding, and offered extrinsic evidence that the termination provision kicked in only after 18 months.

HELD: (1) The agreement was clear and unambiguous on its face. Resort to extrinsic evidence was unnecessary to determine the intent of the parties. Iowa Machinery's right to terminate without good cause existed immediately. All other items listed in the agreement were benefits which began when employment commenced, and there was no qualifying language indicating that the termination provision would apply only after 18 months. (2) The finding that Chard was terminated "in spite of good performance" was supported by substantial evidence, including extrinsic economic factors within Iowa which contributed to Iowa Machinery's poor financial performance in late 1984 and early 1985. (3) The district court correctly computed interest from the date of termination, not from the date on which the complaint was filed. (4) Chard is not entitled to punitive or emotional-distress damages.

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Niblo v. Parr Manufacturing, Inc., 445 N.W.2d 351 (Iowa 1989)

Wrongful Discharge

Plaintiff's employment required her to work with plastisol, a chemical used in manufacturing fuel filters. When she developed a skin condition on her face, she asked her supervisor about going to a doctor. "The supervisor ignored her first inquiry and responded to her second request by stating that he did not care what she did, but that defendant was not going to pay for her to go to a doctor." Plaintiff subsequently informed defendant's president of the dermatologist's opinion that her skin condition was work-related.

> When she told the president that she needed goggles, protective cream, and continued treatment, the president became irate. He told plaintiff that he was not going to pay workman's compensation or unemployment benefits and that he did not think that her skin problem was his fault or 'factory related'. He said that he was not going to pay to have plaintiff's face worked on at all. At the conclusion of this outburst, he fired plaintiff.

Plaintiff never testified that she wanted to or intended to file a worker's compensation claim, and she never did so.

HELD: Plaintiff adduced substantial evidence of a discharge that interfered with her right to seek compensation for work-related injuries. Plaintiff may recover emotional distress damages for a discharge in violation of public policy, and need not prove severe or serious emotional distress as a precondition to recovery.

Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989)

Wrongful Discharge

Grinnell College employed Fogel as a receiving clerk and custodian in the food service department from August 1977 until January 1985. There was no written employment contract, but the college gave him a handbook which provided the following terms:

> DISMISSAL. If termination is necessary for reasons not prejudicial to the employee (reasons

> unrelated to job performance), he/she may expect to receive notice of not less than one month . . . . When dismissal is necessary because of unsatisfactory work, as much notice as possible will be given, ordinarily not less than two weeks. . . . Dismissals necessitated by dishonesty or misconduct become effective immediately upon determination of facts concerning the offense.

Fogel suffered several minor injuries during his employment, and his claims for medical insurance were granted. In September 1983 Fogel experienced back pain from lifting chairs and mopping and missed ten days of work. His medical expenses were covered by insurance, but he did not seek workers' compensation for this injury until seven months after his discharge.

Fogel received satisfactory evaluations but also was a disciplinary concern, primarily because of a "chronic hygiene problem." In the weeks just before his discharge, Fogel discovered, with the assistance of his barber and physician, that he had head lice. He notified his supervisor of the condition in a letter that also referred to his "continuing back pain" and the resulting medical expense and exercise program. Upon his return to work after the holidays, his supervisor discharged him because of the head lice and because of its relationship to his other hygiene infractions.

Fogel sued for age and disability discrimination, retaliatory discharge, breach of contract, and breach of implied covenant of good faith and fair dealing. The college obtained summary judgment on all counts except age discrimination, and the jury found in favor of the college on that claim (which Fogel did not challenge on appeal).

As to disability discrimination, the court held that Fogel did not adduce substantial evidence to support his claim that his discharge related to the back injury instead of his hygiene. Although Fogel's letter to his supervisor referred to his continuing back pain and although Fogel adduced evidence of statements by his supervisor that if Fogel had problems lifting the chairs the school would have to find someone else, "Fogel made it clear in his own deposition testimony that his 1983 back injury has never prevented him from doing his job. Moreover, he freely acknowledged that he never told [the college] that he was disabled. At no time did he furnish the college with any medical evidence of a disability prior to his discharge." The court held as a matter of law that Fogel did not suffer "from a disabling handicap that has substantially limited a major life activity entitling him to protected class status. . . . [T]he purpose of

disability discrimination legislation is to protect the truly disabled."

As to retaliatory discharge, the court held that Fogel had not adduced substantial evidence of a belief by the college that he was considering a workers' compensation claim.

As to Fogel's attempt to avoid at-will status, the court followed McBride, 444 N.W.2d 85 (Iowa 1989), and held that "Grinnell's handbook falls short of the definiteness required to constitute an offer of continued employment." In fact, the court characterized the unspecific guidelines as "merely reflect[ing] the terminable-at-will status of [Fogel]."

The court declined to recognize a cause of action for breach of implied covenant of good faith and fair dealing under these facts.

COMMENT: The following language as to the reasons for requiring definite terms from an employee handbook under the unilateral contract theory outlined in McBride may be helpful in future cases:

> The reason for requiring such a high threshold of definiteness is two-fold. First, courts are generally reluctant to dismantle an employer's long-standing common-law right to terminate at-will in the absence of an express offer by the employer to do so. Second, the handbook language must be sufficiently definite in its offer of continued employment that a fact-finder is not left adjudicating the alleged breach of a "contract" for which the factfinder has supplied its own terms.

Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989)

Wrongful Discharge

City terminated street superintendent for failure to follow orders, inattention to duties, reduction and consolidation of city employment positions, and misuse of city time. Superintendent requested a public hearing on his discharge, which was granted. He attended with his attorney before the city council. The superintendent, his attorney, city council members, and other persons made comments and expressed opinions. A motion to rehire him was defeated, and he refused an offer of part-time employment.

Plaintiff sued the city under 42 U.S.C. section 1983, for deprivations of liberty and property interests without due process. He joined a common-law claim for wrongful discharge. District court granted the city's motion for summary judgment with respect to the property interests and with respect to the wrongful-discharge claim. Jury returned a verdict for plaintiff on the Section 1983 "liberty" claim.

As to the wrongful-discharge claim, chapter 400 (civil service) does not constitute an expression of public policy regarding the grounds and procedures for terminating municipal employees, the violation of which creates a basis for a wrongful discharge claim, at least under circumstances to which chapter 400, by definition, does not apply.

TRIAL

Steckelberg v. Randolph, 448 N.W.2d 458 (Iowa 1989)

Closing Argument

Plaintiffs sued Randolph for fraud and for intentional infliction of emotional distress. Randolph claimed that the instructions shifted the burden of proof on the fraud claim to him, and sought the opportunity to open and close in final argument. HELD: No abuse of discretion in granting plaintiffs the right to open and close.

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Closing Argument

Plaintiffs were injured as a result of a gas furnace explosion, and sued Essex, who manufactured the gas control unit that Lennox incorporated into the furnace.

In final argument, plaintiffs' counsel accused Essex of having no concern for the safety of the consumers. He referred to Essex selling its plant and getting rid of its hourly employees as its only response to problems with its product. He then stated:

> What is the next thing they do? They hire the lawyers. They're lucky in that circumstance. The valve burned up. I don't have it here. I can't experiment

> on it. There was suppose to be 700 of them out there and I couldn't get one of them.
>
> The game will continue. You will hear about how it was Carl's fault. They went through 3-1/2 years of this. There is only one thing, only one thing this kind of company understands. They need to be punished. They deserve it. There are a million of those valves out there. They don't even try to defend it for you.

The district court overruled Essex's motion for mistrial, stating that the argument about the plant closing was a fair comment on the evidence, but directed counsel not to proceed further in commenting about "hiring lawyers." The Supreme Court held it was unnecessary to decide whether counsel's argument was a proper inference from the evidence, because apparently assuming it was not, the trial court did not abuse its discretion in refusing to grant a mistrial.

Tratchel v. Essex Group Inc., 452 N.W.2d 171 (Iowa 1990)

Evidentiary Rulings

Plaintiffs were injured as a result of a gas furnace explosion, and sued Essex, who manufactured the gas control unit that Lennox incorporated into the furnace.

The Consumer Product Safety Commission (CPSC) had conducted an investigation of Essex's control unit. After initially sustaining a motion in limine by Essex that excluded mention of the CPSC's investigation, the court reconsidered and permitted plaintiff to introduce evidence that referred, albeit indirectly, to the CPSC investigation. The court continued to exclude the CPSC's "rules and regulations," and the jury was aware that the product was never recalled. HELD: No abuse of discretion in determining that the problems created by trying to edit out the references to the CPSC investigation in documents that were otherwise admissible was not mandated by a slight possibility of prejudicial effect.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Evidentiary Rulings

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. Plaintiff adduced testimony of her physical and emotional suffering. District court had overruled defendant's motion in limine on such evidence, but then directed a verdict on the "claim of emotional damages."

HELD: District court did not err in refusing to instruct jury to disregard evidence of claim that had been directed out.

Eventide Lutheran Home v. Smithson Electric & General Construction, Inc., 445 N.W.2d 789 (Iowa 1989)

Expert Witness

In professional liability case, the plaintiff presented testimony of expert witness. Defendant did not counter with an expert of its own. HELD: Finder of fact was not compelled as a matter of law to accept the testimony of an unrebutted expert, even in a case where the factfinder lacks the necessary expertise to dispute expert opinions on the basis of other evidence.

Hutchinson v. Broadlawns Medical Center, 459 N.W.2d 273 (Iowa 1990)

Instructions

In a wrong-diagnosis medical malpractice case, defendants claimed that district court erred in refusing to instruct as follows:

> [A] doctor cannot be found negligent merely because he/she makes a mistake in the diagnosis and treatment of a patient. Any error in diagnosis and treatment, if you find any, does not in and of itself constitute negligence. For a doctor to be found negligent, it must be shown by a preponderance of the evidence that the doctor, in making his/her diagnosis and treatment, failed to follow the customary practice and procedure of doctors under similar circumstances.

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The district court instrued that "[a] defective product is unreasonably dangerous if the danger would not be recognized by an ordinary person in similar circumstances." Deere objected to the instruction because it omitted the essential element that unreasonable danger is one "not contemplated by the user in the normal and innocent use of the product."

HELD: The defect seen by Deere in the instruction was adequately covered in other instructions.

State v. Johnson, 445 N.W.2d 337 (Iowa 1989)

Jury

Johnson was charged and convicted of second degree sexual abuse, perpetrated upon his girlfriend's daughters. Defendant moved for a new trial, alleging that juror S.B. had personal knowledge of hearsay information prejudicial to the defendant and that S.B. had shared the information with other jurors during deliberations. The jurors were examined. S.B. confirmed that he had informed the other jurors that one of the daughters broke down and cried before a teacher in school and also that he had heard rumors about defendant hitting the girls. S.B. explained that he had disclosed during voir dire that he knew defendant, had spoken with him, and had heard rumors about him. S.B. was not challenged for cause or stricken from the panel. Defendant's motion for new trial was denied and judgment and sentence were entered upon the verdict.

HELD: Defendant's allegation that S.B. concealed bias during voir dire is contrary to the record, where S.B. was "forthright and candid" during voir dire examination. S.B.'s statements about his prior knowledge of defendant gave the parties adequate notice of any prejudice toward the defendant, so that any objection defendant might have had concerning S.B.'s alleged bias was waived. Even if defendant was previously unaware of any grounds for objection, there was insufficient evidence to indicate that S.B. was biased, where S.B. testified he knew the defendant only slightly and that the rumors he had heard involved physical and not sexual abuse. Testimony by jurors about what information S.B. provided during their deliberations may be considered by the court as evidence of misconduct, but testimony about the impact the statements had upon the jurors' deliberation, the context in which the statements were made, etc., must be disregarded under State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984), and Iowa Rule of Evidence 606(b). S.B.'s statements improperly furnished information to the other jurors and "violated" the tolerable bounds of deliberation. Defendant failed to show, however, that S.B.'s misconduct was calculated to, and with reasonable probability did, influence the verdict, where S.B.'s statements added little to the admissible evidence which the jury was already allowed to consider.

McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

Mistrial

Plaintiff sued investment firm for breach of fiduciary duty, negligent misrepresentation, and violation of blue sky law, Chapter 502. District court held that plaintiffs claims arising out of one investment were precluded by a settlement in other litigation. On direct, plaintiff testified that she was "down to $42,000 from the original $72,000 she initially had available to invest." She then explained that $15,000 of her loss was due to the investment on which she was still suing. On cross defense counsel asked plaintiff to explain the rest of her loss. In doing so, she referred to the investment: "the one I can't mention I had $12,000."

HELD: District court did not abuse its discretion in overruling defendants' motion for mistrial. Defendant invited the error. The answer, perhaps not technically responsive, should have been expected.

Berg v. Des Moines General Hospital Co., 456 N.W.2d 173 (Iowa 1990)

New Trial

In medical malpractice case against doctor and hospital, doctor volunteered while being examined by hospital's counsel that hospital "has had some financial problems recently. They've been in the newspapers." Plaintiff's counsel's objection and motion to strike were sustained. HELD: No abuse of discretion in declining to grant plaintiff's motion for new trial due to "disapparently inadvertent comment."

Franklin v. Sedore, 450 N.W.2d 849 (Iowa 1990)

Verdict Forms

"We have approved special verdicts as an ideal method of implementing a jury's fact-finding function in complex litigation. Special verdicts contribute uniquely to the truth-finding process. .... The process diverts the juror's attention from any preconceived notions of desired results and forces it upon the precise matters which should claim a juror's attention."

AGRICULTURE

SENATE FILE 390 — Real Property Mortgagors' Rights
BY COMMITTEE ON AGRICULTURE. This Act provides for the redemption and repurchase of agricultural land. In the mid 1980's, the General Assembly enacted a number of statutes relating to agricultural finance. In 1985, a statute was enacted requiring a state bank to offer the prior owner of agricultural land the opportunity to repurchase the land on the same terms the bank proposed to dispose of the land to another purchaser. In 1986, a statute enacted provisions granting separate redemption rights to a homestead on agricultural land based on the homestead's fair market value. In 1987, the fair market redemption statute was expanded and the time for redemption was increased. However, its application varied depending on the type of mortgagee. The statute also provided an opportunity for prior owners of homesteads to repurchase their homesteads according to detailed procedures absent in the 1985 Act. Again, the repurchase provision applied differently between creditors. In 1988, the Iowa Supreme Court held that all mortgagees were subject to the same redemption and repurchase period (2 years for redemption and 1 year for repurchase).

The Act reconciles the various redemption and repurchase schemes. The Act creates no distinctions in the rights and obligations of creditors. The separate redemption provision for homesteads on agricultural land is not significantly amended, except that redemption applies to all creditors for a 1 year period. Provisions in the 1985 and 1987 Acts creating an opportunity to repurchase homesteads and agricultural land are combined. The Act creates a single scheme governing repurchase of all agricultural land, modeled on the homestead repurchase provision in the 1987 Act. Under the 1987 Act, notice of repurchase rights is triggered by issuance of the sheriff's deed. This Act requires any grantee purchasing land from a sheriff's sale to notify the prior owner of repurchase rights not later than when the sheriff's deed is recorded. The grantee must record the deed within 1 year and 60 days from the date of the sheriff's sale. Under the 1987 Act, an offer to repurchase a homestead must be made within 1 year from the date that the sheriff's deed is issued. This Act does not contain the time limitation. It provides that the obligation to offer an opportunity to repurchase is triggered by recording the sheriff's sale. Provisions regarding contents of the notice, procedures for providing notice, and procedures for repurchase of the agricultural land by the prior owner parallel provisions in the 1987 Act.

The Act takes effect on May 6, 1990. The Act applies retroactively to foreclosure actions for which a sheriff's sale had not been held by the effective date of the Act. In addition, provisions amending the 1985 Act apply to all foreclosure actions filed on or after March 30, 1990.

SENATE FILE 2052 — Foreclosure Moratorium
BY COMMITTEE ON AGRICULTURE. This Act extends by 1 year the Governor's declaration of economic emergency applicable to mortgage foreclosures, from March 30, 1990, to March 30, 1991. The owner of real estate used for farming or for operating a small business may be granted a continuance by a court from foreclosure actions due to the owner's inability to pay. The Act takes effect March 30, 1990

SENATE FILE 2080 — Purple Loosestrife Regulation
BY COMMITTEE ON AGRICULTURE In 1989, the General Assembly prohibited the sale, offer for sale, or distribution of purple loosestrife (lythrum salicaria). This Act provides that purple loosestrife (lythrum virgantum) is not subject to the same prohibition, if the plant is used for ornamental gardens, and if the plant is sterile according to a list published by the State Weed Commissioner.

SENATE FILE 2315 — Swine Pseudorabies Control
BY COMMITTEE ON AGRICULTURE. In 1989, the Iowa General Assembly enacted provisions rewriting the law relating to the control of pseudorabies, a contagious disease principally affecting swine. Regulation under the law is performed by the Department of Agriculture and Land Stewardship on a geographic basis in "program areas" designated by the state upon consent by pork producers voting in participating counties. The law also creates a number of categories of swine herds eligible to remain in program areas.

This Act provides additional requirements in administering program areas. When a majority of herds within a program area have been tested, certain requirements apply. All herds within the area must be tested within 12 months, restrictions are placed on the movement of untested herds, and swine moved into a program area must be reported to and inspected by the Department. The Act removes reporting requirements in program areas having a noninfection rate of at least 90 percent. The Department is required to establish pilot projects

upon recommendation of an advisory committee. The Act creates a new class of swine herd subject to regulation referred to as a "qualified differentiable negative herd." A herd may be certified as a qualified differentiable negative herd if 100 percent of the breeding swine have reacted negatively to a test. The herd must be free from infection for 30 days prior to testing. At least 90 percent of the swine must have been on the premises as a part of the herd for at least 60 days prior to testing, or swine in the herd must have been moved directly from another safe herd. To remain certified, the herd must be periodically retested, and be protected from new swine entering into the herd. A swine herd classified as a qualified differentiable negative herd is permitted to remain in a program area.

The Act provides that the Secretary of Agriculture must disapprove vaccines against pseudorabies for use in the state unless the vaccines can be differentiable from the disease according to diagnostic procedures.

SENATE FILE 2317 — Water Use Permits
BY COMMITTEE ON AGRICULTURE. This Act provides that an application for a permit or renewal of a permit to divert, store, or withdraw water for a regulated use, which includes a use of more than 25,000 gallons per day, must be approved or denied by the Department of Natural Resources within 90 days from the date that the Department receives the request. The Act provides that a permit shall be renewed or not renewed by the Department within 30 days from the date that the Department receives an application to renew the permit.

SENATE FILE 2334 — Agricultural Equipment Dealers and Suppliers
BY COMMITTEE ON AGRICULTURE. This Act regulates business relationships between suppliers and dealers of agricultural equipment. Prior to this enactment, Chapter 322D had regulated farm equipment and motorcycle dealership agreements. The Act replaces the Chapter's authority over franchise relationships based on agreements executed or renewed on or after July 1, 1990, or agreements without any expiration date. Prior law still governs motorcycle dealerships and agricultural dealership franchise agreements executed before July 1, 1990, which expire on a date certain.

The Act creates a new chapter. The new chapter restricts the termination by a supplier of a dealership agreement, by requiring that good cause exist for the termination. The new chapter provides notice requirements for termination. It also provides requirements relating to the repurchase and repossession of equipment by suppliers following termination of the dealership agreement. Upon termination of a franchise, the amount that a supplier is required to pay a dealer or credit the dealer's account for repair parts is increased from 85 to 90 percent of the net price of the repair parts. The Act specifies rights and obligations for dealers and suppliers. It places restrictions on supplier practices, and provides for supplier liability, and remedies available to the dealer.

SENATE FILE 2363 — Approval of Commercial Weighing and Measuring Devices and Services
BY COMMITTEE ON AGRICULTURE. This Act relates to commercial weighing and measuring devices, including livestock scales and pit type scales. The installation of the scales must be approved by the Department of Agriculture and Land Stewardship based upon recommendations by the United States National Institute of Standards and Technology. A livestock scale or pit type scale must be installed with a clearance of not less than 4 feet from the finished floor line of the scale to the bottom of the "I" beam of the scale bridge. Livestock must not be weighed on any scale other than a livestock or pit type scale. The Institute was formerly known as the National Bureau of Standards.

The Act changes this reference throughout the Code. The Act takes effect March 26, 1990. The provision relating to requirements for scales applies to scales installed on or after July 1, 1990.

SENATE FILE 2379 — Earthen Waste Slurry Storage Basins
BY COMMITTEE ON AGRICULTURE. This Act further restricts construction of certain waste storage impoundments near residences. The Act amends a provision requiring that an anaerobic lagoon used in connection with an animal feeding operation be located a minimum distance from a residence other than the residence of the owner of the feeding operation, unless a written waiver is recorded in the office of the County Recorder. This Act provides that the same requirements apply to earthen waste slurry storage basins. An "earthen waste slurry storage basin" is defined as an uncovered and exclusively earthen cavity which receives waste discharge from a confinement feeding operation on a regular basis if accumulated wastes from the basin are completely removed at least twice each year.

The Act applies to earthen waste slurry storage basins constructed on or after July 1, 1990.

HOUSE FILE 534 — Commercial Feed
BY COMMITTEE ON AGRICULTURE. This Act amends Chapter 198 formerly referred to as the Iowa Commercial Feed Law of 1974 ' and renamed under the Act as the "Iowa Commercial Feed Law." It replaces registration requirements with license requirements for manufacturers and distributors of commercial feed. Labeling requirements are amended to require a statement of medication used in a drug-containing product. A commercial feed is deemed to be adulterated if it contains unsafe animal drugs.

The Act increases from 12 to 16 cents per ton the inspection fee paid on commercial feed by the first distributor. The Act changes eligibility to escape liability for the fee. The fee is not required if a qualified buyer is responsible for the fee. The Act removes the exception applied to commercial feed used as an ingredient for the manufacture of a registered commercial feed. The Act imposes a minimum semiannual fee of $20 and removes the minimum inspection fee of $10. Registration is required for dog or cat food distributed in packages of 10 pounds or less. There is an annual registration fee of $50 imposed in lieu of the per ton rate. The Act increases the amount of the penalty from $5 to $50 for a delinquency in filing a statement used to calculate the inspection fee.

The Act decreases the amount of money, from $350,000 to $150,000, allowed to accumulate in the Commercial Feed Fund before the Secretary of Agriculture is required to decrease the per ton fee. The Secretary is also required to report a detailed accounting of all sources of revenue and dispositions of funds utilized by the Fund. Copies of the report must be delivered to the Agriculture Committee in the Senate and the House of Representatives each year.

HOUSE FILE 2120 — Poultry Associations Aid Repealed
BY COMMITTEE ON AGRICULTURE. This Act repeals Chapter 184 of the Iowa Code relating to the organization, support, and functions of poultry associations including provisions regarding certification of and state aid to the associations.

HOUSE FILE 2236 — Private Activity Bond Allocation to First-time Farmers
BY COMMITTEE ON AGRICULTURE. This Act amends Section 7C.4A which sets a state ceiling for allocation of private activity bonds as provided in Section 141 of the Internal Revenue Code. The Act provides that the annual amount allocated to qualified small issue bonds issued for first-time farms is increased from 5 to 12 percent of the state ceiling. The Act takes effect March 5, 1990.

HOUSE FILE 2250 — Regulation of Beekeeping
BY COMMITTEE ON AGRICULTURE. This Act amends provisions relating to the state's apiary law, by the Department of Agriculture and Land Stewardship including the movement of a colony of bees into the state. It authorizes the examination of bees suspected of being African in origin. Before a colony or a used appliance with combs for housing bees is moved into this state, an entry permit must be obtained from the Department, and a certificate of inspection from the state of origin must be issued. In addition, information relating to the location of the apiary in the state must be registered with the Department.

A person violating the Act s requirements commits a simple misdemeanor. Each day a colony, used appliance or combs moved in this state in violation of the Act remain in the state constitutes a separate violation. The Department may also declare that the violation constitutes a nuisance. Upon conviction of a violation, a person must forfeit all interest in the illegally moved property and the Department may immediately destroy the property. The Act increases from $.50 to $1 the entry fee required to be paid by a nonresident moving a colony into the state.

HOUSE FILE 2404 — Farm Mediation Service
BY COMMITTEE ON AGRICULTURE. In 1986, the General Assembly required creditors and debtors engaged in agricultural production to participate in mediation before enforcing a debt through legal action. This Act reorganizes statutory provisions relating to mediation, amends mediation provisions, expands mediation as a dispute resolution mechanism beyond creditor-debtor relations, and extends the sunset clause for mediation provisions.

The name of the position within the Attorney General's office designated to select a farm mediation organization is changed from the Farm Crisis Program Coordinator to the Farm Assistance Program Coordinator. Provisions relating to the Coordinator, and confidentiality, rules and forms, liability of the organization (the Farm Mediation Service) are transferred from Chapter 654A to Chapter 13. Chapter 654A retains provisions relating to creditor and debtor mediation. The Act provides that the organization may provide mediation services in addition to services provided by statute.

SENATE FILE 2100 — Fraternal Benefit Societies
BY HUSAK, RUNNING, TIEDEN, AND VANDE HOEF. This Act replaces Chapter 512, governing fraternal benefit societies, with a new Chapter 512B. The new Chapter adopts, in substance, the 1983 Model Fraternal Code adopted by the National Fraternal Congress of America (NFCA). Fraternal benefit societies offer benefits in the form of insurance to a limited class of members and related persons and are subject to regulation by the Commissioner of Insurance. Fraternal benefit societies are based on a unique form of corporate organization. Issues of structure, membership, benefits, and regulation are all covered under the new Chapter 512B. The Act takes effect January 1, 1991.

SENATE FILE 2261 — Filing of Financing Statements
BY COMMITTEE ON STATE GOVERNMENT. This Act authorizes the electronic filing of Uniform Commercial Code financing statements with the Secretary of State. A copy of any signature required by Section 554.9402, governing the form of financing statements, is permitted in place of the previously required original signature. An electronic copy by its nature would not contain an original signature. The Secretary of State is to adopt rules governing the electronic filing of a financing statement.

SENATE FILE 2271 — Bank Merger or Consolidation Plans
BY COMMITTEE ON COMMERCE. This Act specifies in greater detail than prior law the required contents of a bank plan of merger or consolidation, which, as under prior law, is required to be filed with and approved by the Superintendent of Banking as a condition of the merger or consolidation.

SENATE FILE 2291 — Finance Charge on Extension or Renewal of a Retail Vehicle Installment Contract
BY COMMITTEE ON COMMERCE. This Act permits the holder of a retail installment contract for the purchase of a motor vehicle to renew or extend the loan at the request of the buyer if the finance charge does not exceed the interest rate on the original contract. Under prior law, the interest rate on extensions or renewals was governed under separate provisions from those applying to the original motor vehicle retail installment contract.

SENATE FILE 2350 — Institutional Funds Management
BY COMMITTEE ON JUDICIARY. This Act deals with a uniform Act known as the "Uniform Management of Institutional Funds Act" that has been adopted by approximately 30 other states. The Act regulates the investment and expenditure authority of endowment funds provided to nonprofit entities that are organized and operated exclusively for educational, religious, charitable, or other benevolent purposes.

SENATE FILE 2395 — Trade Secrets
BY COMMITTEE ON JUDICIARY. This Act provides for the protection of trade secrets. It is based upon a model Act, the Uniform Trade Secrets Act, drafted by the National Conference of Commissioners on Uniform State Laws. It provides a cause of action by the owner of a trade secret against a person misappropriating the secret. The Act provides for injunctive relief and damages, including exemplary damages and the payment of attorney fees. It also provides that a court may act to preserve the secrecy of a trade secret during legal proceedings. The Act includes a 3-year statute of limitations.

SENATE FILE 2412 — Charitable Organization Regulation
BY COMMITTEE ON WAYS AND MEANS. This Act relates to the regulation of charitable organizations and professional commercial fund-raisers. Specifically, the Act requires professional commercial fund-raisers to register with the Attorney General and requires charitable organizations request

The Act also prohibits charitable organizations from soliciting contributions claiming that a portion or all of the contributions received will be given to another charitable organization without first obtaining permission from the other charitable organization. The Act provides for a registration fee and penalties.

HOUSE FILE 658 — Savings and Loan Associations
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act makes several changes to the regulation of state chartered savings and loan associations. Many of the changes are technical in character to conform with federal regulatory practice or to more clearly define original intent. For instance the definition of "residential real estate" is relocated within Chapter 534 to clearly state an investment limitation, and reports filed with federal regulatory authorities must also be filed with the state Savings and Loan Division.

Substantive changes include: requiring each savings and loan to adopt formal lending policies and only make loans which satisfy those internal policies; requiring a savings and loan to report certain actions taken to avoid a loss; authorizing investment in real estate secured bonds; restricting total investment in any one mutual fund; expanding investment authority for certain types of commercial paper and corporate securities; prohibiting the use of certain names, signage, or logos which might imply that a savings and loan association is a commercial bank; authorizing certain mergers and dissolutions; and other changes.

The Act also legally requires that certain regulatory actions taken by the Superintendent of Savings and Loan Associations are not subject to the contested case provisions of Chapter 17A, the Administrative Procedures Act, including action to assume the management of a failing or failed association. This requirement parallels a recent Iowa Supreme Court decision holding that similar authority of the Superintendent of Banking is not subject to Chapter 17A contested case requirements.

HOUSE FILE 677 — Credit Agreements
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act displaces principles of common law relating to the enforcement in contract law of credit agreements or modifications of such agreements. The Act provides that a credit agreement is not enforceable unless the agreement is in writing and signed by the party against whom enforcement is sought. A modification to the credit agreement which occurs after the person asserting such modification has been notified in writing that oral or written modifications are unenforceable and should not be relied upon, unless otherwise expressly agreed by the parties in writing, is not enforceable unless a writing exists containing the material terms of the modification and is signed by the party against whom enforcement is sought. Also, to be enforceable, any modification must be conspicuous. The Act does not apply to a credit agreement made primarily for a personal, family, or household purpose where the credit extended is $20,000 or less. The Act is effective January 1, 1991, and applies to credit agreements and modifications of credit agreements on or after January 1, 1991.

HOUSE FILE 685 — Interstate Banking and Community Reinvestment
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act permits, effective January 1, 1991, an out-of-state bank holding company located within the midwestern region to own or control an Iowa bank or bank holding company. A bank holding company is considered to be located in the state in which the operations of its banks are "principally conducted", as defined by federal law. The midwestern region includes the states of Illinois, Iowa, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin (Iowa and the contiguous or bordering states). Under prior law an out-of-state bank holding company could not own directly, or indirectly, an Iowa bank or bank holding company.

The Act modifies the community reinvestment reporting requirements to more closely conform with federal law and conditions the deposit of public funds in a financial institution upon the approval of a committee composed of the Superintendent of Banking, the Auditor of State or a designee, and the Treasurer of State.

The Act alters the aggregate deposit limitations to count within the deposit base, deposits held in savings and loan associations and savings banks (thrifts). A single bank holding company is prohibited from controlling through acquisitions more than 10 percent of the total time and demand deposits of all banks, savings and loan associations, and savings banks in this state. Additionally, a bank holding company is not permitted to acquire a bank or other bank holding company if following the acquisition, all banks owned or controlled by out-of-state bank holding companies would control more than 35 percent of the total time and demand deposits in the state.

The Act specifies a detailed application and approval process under the authority of the Superintendent of Banking as a condition to an out-of-state bank holding company acquiring an Iowa bank or bank holding company. Reciprocity is not required, but currently every state but Nebraska within the midwestern region would permit an Iowa bank holding company to acquire a bank. Nebraska has some limited authority for emergency acquisitions of troubled banks and savings and loans by an out-of-state bank holding company, under both state and federal law. An Iowa bank may preclude its acquisition by and out-of-state bank holding company by adopting an irrevocable resolution before January 1, 1991, exempting the bank for a specified period of time. The Act imposes developmental loan requirements upon regional bank holding company owned Iowa banks. Similarly, regional bank holding company owned banks are required to offer basic services accounts to certain low income persons. Penalties are provided for violations of acquisition agreements or conditions, but divestment as a remedy or penalty is only required if, because of an acquisition, the out-of-state bank holding company ceases to be located within the midwestern region. The Act originally provided for fines of up to $5,000 per violation and $250,000 per year. House File 685 was later amended by S.F. 2280 to reduce authorized maximum fines to $500 per violation and $10,000 per year. An advisory council is created to review the effectiveness and enforceability of the Act. Special severability provisions are included to control the effect of any judicial finding that all or part of the Act is unconstitutional.

Other changes to this original Interstate Banking Act included in S.F. 2280 are as follows: Change in the definition of "acquire"; a new definition of a "bank conducting a banking business in this state"; adopted the Federal Bank Holding Company Act's definition of "control"; explicity reserved certain rights which preexisted H.F. 685; altered the community benefits test; terms of the compliance contract; and limitations on insurance activities by regional bankholding companies; and imposes restrictions upon foreign banks or bank holding companies acquiring an Iowa bank or bankholding company. Finally the Division of Banking was appropriated $50,000 to implement the Act.

The Interstate Bank Act takes effect January 1, 1991.

HOUSE FILE 730 — Real Estate Licensees Insurance Requirement
BY COMMITTEE ON STATE GOVERNMENT. This Act requires the Real Estate Commission to adopt rules requiring as a condition of licensure that real estate licensees carry errors and omissions insurance. The Commission is directed to contract with an insurance provider for a group policy to be made available to all licensees without right of cancellation by the insurer. The contract would be solicited by competitive, sealed bid. A licensee would have the option of obtaining insurance independently if the coverage complies with the minimum requirements established by the Commission.

The Act also requires the Real Estate Commission to adopt rules requiring that each broker or salesperson in a real estate transaction disclose in writing the broker's or salesperson's agency relationship with the buyer or seller in the transaction.

The Act takes effect March 30, 1990, for rulemaking, administrative procedures, and competitive bidding procedures. All other provisions take effect July 1, 1991.

HOUSE FILE 2092 — Debt Management Services Fee
BY TEAFORD AND HARPER. This Act increases the fee which a licensed debt management service is permitted to charge from 12.5 percent to 15 percent of any payment made by the debtor and distributed to creditors by the service under contract. The Act also permits creditors to contribute a portion of this fee. Prior law required the entire fee to be paid by the debtor.

HOUSE FILE 2165 — Motor Vehicle Dealer's Bond
BY COMMITTEE ON TRANSPORTATION. This Act provides for indemnification from a motor vehicle dealer's surety bond, if a motor vehicle purchaser suffers loss or damage caused by the dealer's failure to comply with Iowa odometer requirements, regardless of whether the vehicle was purchased directly from the dealer. In addition, the Act increases the amount of the motor vehicle dealer's surety bond from $25,000 to $35,000.

HOUSE FILE 2213 — Federal Agencies Regulating Banks
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act conforms terminology contained in the banking laws of Chapter 524 to current federal usage based upon the financial institutions regulatory and guarantee reforms contained in the Financial Institutions Reform, Recovery and Enforcement Act (FIREA) of 1989, otherwise known as the Savings and Loan Bailout Act. For example, the Federal Deposit Insurance Corporation (FDIC) previously insured banks exclusively. Under FIREA, certain savings and loans are also insurable under FDIC rather than the superseded Federal Savings and Loan Insurance Corporation (FSLIC) or the related Resolution Trust Corporation (RTC), but banks and savings and loans are insured under separate funds within the FDIC. Where appropriate, references to the FDIC are limited by restricting the references to the bank insurance fund of the FDIC. Similarly, the Office of Thrift Supervision has superseded the regulatory role of the former Home Loan Bank Board.

HOUSE FILE 2320 — Insurance Regulation
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act amends the regulation of various types of insurers, insurance, annuity contracts, and other subjects within the jurisdiction of the Commissioner of Insurance.

School districts' and merged area schools' authority to contract indebtedness for insurance in excess of spending authorized under the tax levy limitation is limited. An employee benefit plan which includes a specific or aggregate excess loss coverage or a program that self-insures only a per-employee or per-family deductible for each year and which transfers the risk remaining beyond this deductible is defined to be an insurance program, and not self-insurance. The Act further prohibits a school district from contracting indebtedness, issuing general obligation bonds, or entering into an insurance agreement obligating the district to make payments beyond its

current year to fund an employee benefit plan. An employee benefit plan is considered to be an anticipated annual expense and not the type of sudden casualty or insurance policy or program for which the tax levy exemption may have been originally authorized. A school district may, however, apply to the state's School Budget Review Committee for relief if necessitated by the expenses in the school district's employee benefit insurance program. The provisions relating to schools' authority takes effect May 2, 1990.

The Act permits the Commissioner of Insurance to impose by rule any fees necessary to administer laws assigned to the Division of Insurance for enforcement. It defines the status of examination records for public access purposes. It amends the procedures for conversion of mutual life insurance companies and policies into stock companies and increases the required capital and surplus requirements for a stock life insurance company.

The Act alters the Life and Health Insurance Guaranty Association chapter to permit the Association to provide assistance to an impaired foreign or alien insurer to prevent insolvency. Prior law required the Association to wait until the insurer became insolvent before coverage could be provided. Other amendments affect the calculation of assessments which support the Association. The Association secures the payment of policies of a member company which becomes insolvent by assessing other member companies. The structure of the Association is intended to provide consumer protection while creating a positive incentive for member insurers to demand effective regulation to avoid insolvencies.

The Act imposes a minimum surplus requirement of $50,000 upon county mutual insurance associations. Under prior law, no minimum surplus requirement applied to county mutuals. Similarly, a new minimum surplus requirement of $100,000 is imposed upon state mutual insurance associations. Conforming changes are made to other surplus requirements to comply with a change enacted in 1989 increasing the minimum surplus requirement to $2,000,000 for all insurers other than county and state mutuals. Additionally, the capital and surplus requirement for new companies in the state is increased to $2,500,000.

Restrictions on the percentage of the surplus amount subject to a single risk without adequate reinsurance are imposed upon state mutual insurance associations.

Limitations upon loans to an insurance company's officers or employees are imposed upon certain sources of funds for these loans.

The Act revises cancellation and nonrenewal notice provisions to provide parallel procedures for all types of noncommercial casualty insurance other than workers' compensation.

A major change substitutes revisions recommended by the National Association of Insurance Commissioners (NAIC) for the current insurance rate-filing procedures in fire and casualty lines. The revisions reflect the Insurance Service Organization's (ISO) change in policy, discontinuing the practice of filing final rates on behalf of member insurers. The ISO is an advisory organization through which insurers share statistical information for ratemaking purposes. Insurers have a specific limited exemption under federal and most state antitrust statutes to permit sharing statistical information. This Act requires individual insurers to file rates for prior approval by the Commissioner of Insurance and requires each insurer to document the source of those rates. The Act retains rating organizations for workers' compensation insurance, pending the NAIC's review of and recommendations concerning the more specialized workers' compensation market. The repeal of current law relating to the filing of advisory rates, Sections 515A.1 through 515A.19, takes effect July 1, 1992.

Other technical changes in insurance regulatory authority, procedures, and requirements for insurers are included in the Act.

A special applicability limitation exempts insurers currently authorized to do business in Iowa from some of the new capital and surplus requirements. Together with a section on statutory construction, the special applicability limitation takes effect May 2, 1990.

HOUSE FILE 2369 — Real Property Inspection Reports
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act creates a real property inspection report for use by mortgage lenders in determining whether a parcel of real property which is being collateralized is materially impaired. This report is exempt from the provisions of Chapter 114 and the rules adopted under that Chapter relating to land surveyors and survey requirements. The report is to include a clear and prominent statement to the buyer that the report is not a property survey or an engineering document and that the report is primarily for the use of the mortgage lender and should not be relied upon to determine the placement of boundary lines. This report is not to be filed or recorded with the County Recorder.

HOUSE FILE 2377 — Commodity Code
BY SCHRADER. This Act adopts a new Chapter 502A incorporating the Model State Commodity Code as recommended by the North American Securities Administrators Association (NASAA), minus the licensing subchapter contained in the NASAA model. The Act regulates the commodities industry in an analogous fashion to the existing state regulation of the securities industry by mandating certain minimum standards of conduct and disclosure, and authorizing the administrator of the Securities Bureau of the Insurance Division of the Department of Commerce to investigate violations and impose civil remedies, sanctions, and penalties. Additionally, the Act authorizes criminal prosecutions and penalties for certain violations. Several groups already self-regulated or regulated under other state or federal laws are exempted from the scope of coverage of the new Chapter 502A. In effect the Act will make it easier to establish long-arm personal jurisdiction over commodities brokers and dealers who fail to comply. Remedies in these cases will now include immediate administrative remedies, including cease and desist orders.

HOUSE FILE 2381 — Mutual Insurance Company Conversions
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act authorizes and specifies the procedures for the conversion of a mutual property and casualty insurance company into a stock company. A conversion is subject to the approval of the plan of conversion by both the mutual policyholders and the Commissioner of Insurance in addition to other conditions and procedural requirements.

HOUSE FILE 2431 — Preexisting Conditions, Coverage Under Comprehensive Health Insurance Association Policies
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act, for purposes of the Iowa Comprehensive Health Association, further defines "involuntary termination" of insurance coverage to include termination of insurance coverage when a conversion policy is not available or where benefits under a state or federal law providing for continuation of coverage upon termination of employment will cease or have ceased. The Iowa Comprehensive Health Association admits applicants for state-subsidized health insurance upon certain terms and conditions. The Association permits applicants to be covered retroactively to the date of involuntary termination of a prior insurance policy provided application is made to the Association within 30 days following the involuntary termination. The change in the meaning of "involuntary termination" permits a person who continued group coverage under a former employer's policy pursuant to the federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) to obtain coverage for preexisting conditions under the state sponsored Association policy under the same terms as prior COBRA benefits, after the expiration of the COBRA benefits. The Act further permits dual coverage during any waiting period for Association coverage of preexisting conditions.

HOUSE FILE 2436 — Prescription Drug Insurance Restriction
BY COMMITTEE ON HUMAN RESOURCES. This Act prohibits a group health insurer or other third-party health benefits payor from imposing certain conditions on providing prescription drug coverage under a health insurance policy. A covered person cannot be required to obtain prescription drugs from a mail order pharmacy if a pharmacy selected by the covered person agrees to the same terms and conditions as those provided by the mail order pharmacy.

HOUSE FILE 2451 — Weighing and Measuring Devices
BY COMMITTEE ON STATE GOVERNMENT. This Act provides for an update of adoption of the United States National Institute of Standards and Technology, (formerly the National Bureau of Standards), specifications, tolerances, and other technical requirements for weighing and measuring devices. All commercial weighing and measuring devices which are currently inspected and licensed by the Department of Agriculture and Land Stewardship are grouped into classes according to the United States National Institute of Standards and Technology Handbook 44. Separate annual inspection and license fees levied pursuant to Chapters 214 (public scales and motor vehicle fuel pumps), 215 (inspections of weights and measures), and 215A (moisture measuring devices) that are currently being paid by the owners of the devices are combined into one annual fee. Liquid petroleum gas is defined, and the accuracy tolerance for liquid petroleum gas meters is decreased from the present 2 percent to 1 percent.

HOUSE FILE 2453 — Motor Vehicle Arbitration
BY COMMITTEE ON TRANSPORTATION. This Act prohibits a manufacturer, distributor, or importer of motor vehicles or an agent or representative of the manufacturer, distributor, or importer from requiring that a motor vehicle dealer submit to arbitration before a controversy arises. A motor vehicle dealer can voluntarily agree

to arbitration after a controversy arises. Iowa law must be applied to resolve the controversy pursuant to a voluntary arbitration agreement. A party may appeal an arbitration decision to the district court if the arbitrator did not apply Iowa law to resolve the conflict.

HOUSE FILE 2455 — Nonprofit Corporation Procedures
BY COMMITTEE ON STATE GOVERNMENT. This Act provides for the execution and filing of cooperative association documents required to be filed with the Secretary of State. The Act removes requirements relating to acknowledgment or verification of documents. It provides for execution of documents by certain persons authorized to act on behalf of the association. Execution is accomplished by the person signing the person's name next to the person's printed name. The Act also provides for the correction of errors in documents already filed, and provides the time when corrected documents are deemed to have been filed.

The Act makes procedural changes to the nonprofit corporation law, Chapter 504A, which parallel the procedures established for for-profit corporations under Chapter 490, the New Iowa Model Business Corporation Act, enacted in 1989. Procedures affected by the Act include: change of registered corporate agent, form and content of corporate documents filed with the Secretary of State, correction of previously filed documents, and related procedures. Conforming amendments to other sections are also included. Additionally, the Act requires Chapter 504 nonprofit corporations to convert to Chapter 504A corporations on or before July 1 1992

HOUSE FILE 2475 — Dishonored Instrument Surcharge
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act increases from $10 to $15 the surcharge which the holder of a dishonored financial instrument may assess against the maker. This means that a merchant or bank left holding a bad check may now charge $15 to the person who wrote the bad check or other dishonored instrument. This surcharge permitted under Section 554.3507, subsection 5 of the Uniform Commercial Code, is not the same as bank service charges or similar fees which may be permitted under Chapter 524, 533, or 534. It is possible that a person who writes a bad check may be liable for both the surcharge and bank service charges.

HOUSE FILE 2476 — Prohibited Credit Practices Based on Familial Status
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act extends the same protections to familial status as already granted age, color, creed, national origin, race, religion, marital status, sex, and physical disability in connection with consumer credit transactions, extensions of credit by state chartered financial institutions, and offers of credit life or health and accident insurance. The Act makes it an unfair or discriminatory practice for a creditor to refuse to enter into a consumer credit transaction or impose more onerous terms or conditions upon the loan because of the consumer's familial status. Loans by financial institutions or sale of credit life or health and accident insurance are also subject to the prohibition upon discrimination based upon familial status. A person aggrieved by an unfair or discriminatory credit practice may seek relief through the Civil Rights Commission, and may receive any or all of the remedies permitted including the award of damages.

HOUSE FILE 2488 — Corporation Law and Notarial Acts
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act makes technical corrections to prior law to reflect the enactment of the New Iowa Model Business Corporation Act, Chapter 490 in the 1989 Session. References to the prior for-profit corporation provisions, Chapter 496A, are revised to reference the appropriate sections of Chapter 490. Certain corporate shares under Chapter 490 are characterized as issued, but not outstanding shares, in order to resolve questions regarding treasury stock which have been raised since the passage of Chapter 490. Additionally new substantive provisions are included regulating the form and treatment by Iowa courts of notarial acts in sister states, under federal law, and in foreign jurisdictions.

HOUSE FILE 2496 — Group Health Benefits Insurance Disclosure
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act requires a group health benefits insurer to disclose aggregate claims experience and costs to the group policyholder contract holder, or sponsor of the group health benefit plan (typically the employer of the group), upon request, provided the group has 100 or more persons. This will permit the group sponsors to compare costs to actual benefits received, and compare existing policies to alternatives offered to the group by other insurers. The information is to be disclosed in the aggregate to prevent disclosure of any confidential information regarding any individual insured or covered person. For purposes of this Act, a group health benefits insurer also includes a health maintenance organization or Blue Cross/Blue Shield in addition to a conventional health insurance company

HOUSE FILE 2516 — Motor Vehicle Services Contracts
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act substantially modifies Chapter 321I originally enacted by the 1989 Session of the General Assembly. Chapter 321I regulates motor vehicle service contracts which are typically sold in conjunction with the sale or lease of new or used motor vehicles, often in the form of extended warranties.

The Act more specifically defines the motor vehicle service contracts which are subject to regulation to limit the scope to light trucks and passenger vehicles and to exclude maintenance agreements for scheduled repair and maintenance services for leased vehicles. Service contracts issued by the manufacturer or importer of a new motor vehicle are also exempt from regulation. Motor vehicle service contracts are subject to regulation by the Commissioner of Insurance and an issuer is required to insure the service contract through an authorized insurer.

The Act specifies in greater detail the reinsurance requirements for these contracts. The Act also alters the annual filing requirements and imposes a filing fee. The Act mandates the minimum information which must be included in a motor vehicle service contract. Unfair or deceptive trade practices are defined and prohibited, and violations are subject to the same penalties and remedies as provided for unfair trade practices in Section 714.16. Issuers of motor vehicle service contracts are required to maintain accurate accounts, books, and records and the Act provides for the examination of these records by the Commissioner of Insurance. The Commissioner is authorized to conduct audits investigations, examinations, and to take other administrative actions to enforce Chapter 321I.

HOUSE FILE 2537 — Funeral and Cemetery Services and Merchandise
BY COMMITTEE ON SMALL BUSINESS AND COMMERCE. This Act alters the provisions regulating the sale of prearranged funeral contracts by adding additional administrative powers for the Commissioner of Insurance to conduct investigations and to enforce the law. The Act alters the requirements for trust accounts securing prearranged funeral contracts and adds new disclosure requirements for these contracts. The Act authorizes the suspension or revocation of a permit or the issuance of cease and desist orders in certain circumstances. Additionally, a regulatory fund is created within the Division of Insurance to fund audits and investigations. Finally, a new chapter is created to regulate cemetery sales with essentially identical substantive provisions to those governing prearranged or preneed funeral sales in Chapter 523A as amended by this Act. The regulation of cemetery plot sales is also placed under the jurisdiction of the Commissioner of Insurance.

COURTS AND JUDICIAL PROCEEDINGS

SENATE FILE 18 — Time for Charging Sexual Abuse of a Child
BY CORNING. This Act provides that an information or indictment for sexual abuse committed on or with a child under the age of 12 (previously 10) years of age must be found not later than 6 months after the child attains 18 years of age.

SENATE FILE 182 — Civil Rights Commission's Release to Commence Action
BY COMMITTEE ON JUDICIARY. This Act prohibits complainants in civil rights cases from commencing actions for relief in district court if the complaint was closed as an administrative closure by the Civil Rights Commission and 2 years have elapsed since the closure. The Act allows a party access to case files in cases when the Commission has issued a release to commence a court action.

SENATE FILE 460 — Obtaining Depositions in Other Jurisdictions
BY COMMITTEE ON JUDICIARY. This Act provides that a court in this state may petition a court in another state or country to issue a subpoena or other appropriate order to compel the deposition of a witness located in the other state or country.

SENATE FILE 2139 — Postconviction Judgment Appeals
BY COMMITTEE ON JUDICIARY. This Act requires that applicants appealing a prison disciplinary decision to the Iowa Supreme Court must do so by a writ of certiorari.

SENATE FILE 2173 — Witness Competency
BY SZYMONIAK. This Act conforms rule 601 of the Iowa Rules of Evidence, relating to competency, to the corresponding federal rule and provides that unless a statute or rule provides otherwise, every person is competent to be a witness.

SENATE FILE 2296 — Vetoed by the Governor
BY LLOYD-JONES. This bill would have substantially altered the Informal Dispute Resolution Program. Under current law, the Program is administered in the Office of Prosecuting Attorneys Training Coordinator of the Department of Justice. The bill would have relieved that office of its informal dispute resolution duties, and provided for the establishment of the Iowa Council for Dispute Resolution, an independent, nonprofit, quasi-public corporate body.

Members of the Council would have served 3-year terms, and would have been appointed by approved dispute resolution centers, the Chief Justice of the Supreme Court, the Governor, the Legislative Council, the Public Employment Relations Board, the Drake University Dispute Resolution Resource Center, the Iowa County Attorneys Association, and the Iowa State Bar Association. Members of the Council would have served without compensation, except for expenses.

The chief administrative officer of the Council would have been its Executive Director. The Council would also have elected an Executive Committee, which included the Council's officers.

The Council would have had numerous duties relating to the dispute resolution process. As is the case under current law, the Council, through its Executive Director, would have approved certain dispute resolution centers to receive state grants. The bill specified that approved centers would have been able to accept disputes involving state agencies. The bill specified that centers receiving state funds would establish a sliding scale of fees, based upon ability to pay. The bill established an endowment fund in the Office of Treasurer of State for use by the Council and authorized the use of certain moneys outside the endowment fund.

HOUSE FILE 489 — Vetoed by the Governor
BY DODERER. This bill would have overridden the Iowa Supreme Court decision in Harden v. State, 434 N.W. 2d 881 (1989), where the Court stated that the statute of limitations did not toll under the State Tort Claims Act for a minor or incompetent because of the lack of any specific provision providing for the tolling. The bill would have been retroactive and would have allowed a claim, barred as of July 1, 1990, solely because the statute of limitations had not tolled, to be submitted to the State Appeal Board within 1 year of July 1, 1990

HOUSE FILE 2045 — Additional District Judge for Penitentiary's District
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act provides that the judicial election district in which the Iowa State Penitentiary is located is entitled to one additional judgeship. The total of permissible judgeships is increased from 100 to 101. (Funding for this judgeship is provided in H.F. 2564.)

HOUSE FILE 2113 — Name Change Petitions — Birth Certificate Requirement
BY COMMITTEE ON HUMAN RESOURCES. This Act requires all individuals seeking name changes to attach to the name change petition a certified copy of the birth certificate for each person seeking a name change.

HOUSE FILE 2153 — Report to Court After Admission of an Individual Involuntarily Committed to a Treatment Facility
BY ROSENBERG. This Act requires an involuntary commitment proceeding to be reviewed by the court, for a determination of whether a respondent should be discharged, if the chief medical officer or administrator of a hospital or facility fails to make the required 15-day report on a respondent's condition and also fails to ask for an extension of time to report to the court. A chief medical officer or administrator of a hospital or facility who fails to file the required report, and does not ask for an extension of time to file the report, is guilty of contempt and is to be punished according to the provisions of Chapter 665, providing for contempt of court.

The Act also clarifies that the court is to enter an order with respect to a respondent's care, treatment, and placement when a 15-day report is received by the court from the chief medical officer or administrator of a hospital or facility.

HOUSE FILE 2268 — Sexual Abuse, Sexual Assault, and Sexual Harassment — Procedures
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act provides that in a civil action for damages resulting from an act of sexual abuse, sexual assault, or sexual harassment, any party seeking discovery of information concerning the plaintiff's sexual conduct must establish specific facts showing good cause and that the information to be discovered is relevant to the action and that it is reasonably calculated to lead to the discovery of admissible evidence. The Act also provides that an action for damages resulting from sexual abuse which occurred when the injured person was a child, but not discovered until after the injured person is of the age of majority, must be brought within 4 years of the time of discovery, by the person, of the injury and the causal relationship between the injury and the act of sexual abuse. The Act is applicable to all actions filed on or after July 1, 1990.

HOUSE FILE 2304 — Notice of Execution Sales
BY PONCY. This Act provides that notice by publication concerning a sale under execution is to be made at least 4 weeks before the date of sale if the sale involves real estate, and at least 3 weeks before the date of sale if the sale involves personal property. The second notice by publication is to occur at a later time, but prior to the date of sale in either case.

HOUSE FILE 2364 — Penalty for Failure to Acknowledge Satisfaction of Judgment
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act increases the penalty to be assessed against a party who fails to file a release and satisfaction within 30 days when a judgment is paid in full. The penalty increases from $50 to $100 plus reasonable attorney fees incurred by the party aggrieved.

HOUSE FILE 2423 — Affidavit of Surviving Spouse to Change Title to Real Property
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act provides that title to real estate may be established by an affidavit of a surviving spouse when a decedent, who died on or after January 1, 1988, owned real estate which was held in joint tenancy with a right of survivorship solely with the surviving spouse. The form of the affidavit is provided.

HOUSE FILE 2425 — Estate Claims, Voluntary Conservatorships, and Voluntary Trusts
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act provides that an action based upon the failure to give notice by mail to heirs of a decedent or to persons known to possess a claim in any estate in which a personal representative was discharged prior to July 1, 1989, is not to be maintained in any court unless commenced prior to July 1, 1991. The Act provides that only petitions for appointment of a conservator executed on or after July 1, 1989, need advise the proposed ward of the conservator's powers. The Act also provides that a voluntary trust is not invalid, merged, or terminated if the trustor is also trustee or a cotrustee and a beneficiary during the trustor's lifetime.

HOUSE FILE 2471 — Small Claims Court Jurisdiction Over Executions and Garnishments
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act allows small claims magistrates to process motions and orders relating to wage garnishments and other executions where the value of the property or money involved is $2,000 or less. The Act is applicable to all such actions filed on or after July 1, 1990.

CRIMINAL JUSTICE AND CORRECTIONS

SENATE FILE 148 — Injury to or Interference with a Police Service Dog
BY GRONSTAL. This Act provides criminal penalties for a person who interferes with, physically harms, or kills a police service dog. This Act provides an exemption for a peace officer or veterinarian who terminates the life of a police service dog in order to relieve the dog of pain or suffering, or to a person who justifiably acts in defense of self or another.

SENATE FILE 2015 — Reserve Peace Officer Training
BY GETTINGS, HUTCHINS, AND HULTMAN. This Act increases the amount of training that reserve peace officers are required to complete from 30 hours within 1 year of their appointment to 150 hours within 4 years of their appointment. In addition, if the reserve officer is to carry a weapon, the reserve officer must complete the same number of hours in weapons training as are required of regular peace officers. Under the new curricula, 30 hours are devoted to general law enforcement training as prescribed by the Iowa Law Enforcement Academy Council, and 30 hours to field training. The remaining 90 hours of training will be selected by the appointing authority from the approved basic training curriculum established by the Iowa Law Enforcement Academy for use in training regular peace officers. Incumbent reserve peace officers have 4 years to satisfy the new training requirements and training received previously will apply toward the new basic requirements.

SENATE FILE 2156 — Peace Officer Status for Federal Law Enforcement Officers
BY WELSH. This Act extends to federal law enforcement officers the same authority and immunity from lawsuits given to any peace officer of this state when making an arrest if the federal officer has reasonable grounds for believing an indictable offense has been committed and the person to be arrested committed the offense, or when the federal officer is rendering assistance to a peace officer of this state.

SENATE FILE 2197 — Protection of Individual Rights
BY RUNNING. This Act prohibits violations of a person's rights based upon the person's sexual orientation, age, or disability. Malicious or intentional intimidation or interference with another person because of the person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability is an aggravated misdemeanor. The fact that a person committed a felony or misdemeanor, or attempted to commit a felony because of the characteristics of the victim enumerated above, must be considered an aggravating circumstance in imposing sentence and fine. Evidence of the fact includes, but is not limited to, the burning of crosses and other symbols, and a rebuttable presumption of the fact arises where such an act is shown to have been committed. Victims of these violations are granted civil remedies. If a finding that a discriminatory or unfair practice prohibited under Chapter 601A, relating to civil rights and the Civil Rights Commission, has occurred, the remedies provided under that chapter are the exclusive remedies available to the victim. The Act does not establish a new category of civil rights.

SENATE FILE 2413 — Juvenile and Adult Offenders and Offenses, Including Related Tax Provisions
BY HUTCHINS. This Act amends provisions relating to the courts and judicial proceedings, criminal acts, and disposition of certain offenders.

The Act provides that criminal offenders performing unpaid community service or providing services under a Chapter 28E agreement where the Department of Corrections is a party, are to be considered employees of the state. Permitted coverage and benefits for the offenders is also provided for pursuant to workers' compensation provisions.

Parental notification by law enforcement officials concerning persons under age 18 found to be in possession of alcohol or controlled substances is provided for and penalties related to distribution of drugs which currently apply to offenses which occur within 1,000 feet of a school, are expanded to also include offenses which occur in or on the real property comprising a public park.

The Act establishes reporting requirements for manufacturers of certain precursor substances (substances which may be used as a precursor in the illegal production of a controlled substance) as designated by the Board of Pharmacy Examiners.

The definition of a "child in need of assistance" is amended to include an unmarried child who is imminently likely to be sexually abused by the child's parent, guardian, custodian, or other member of the household in which the child resides.

The juvenile court is given jurisdiction over offenses involving possession of alcohol by persons under age 18. These offenses were previously excluded from that jurisdiction. The court is directed to determine whether a child alleged to have committed a second delinquent act or second violation excluded from the jurisdiction of the juvenile court regularly abuses alcohol or another controlled substance, and to advise appropriate juvenile authorities concerning the disposition of the offender. The juvenile court may order an offender and the offender's custodial parent or parents to participate in an educational program if the program would be in the best interests of the offender.

Authority is provided to remove a person from the home of a child upon a finding that the person committed physical abuse against the child.

The Department of Corrections is to provide suitable reading space for inmates so that visitors are not able to view the reading material or space. A definition of "suitable reading materials" is provided.

The Department of Corrections is to develop standardized assessment criteria for the assignment of offenders to a facility pursuant to Chapter 321J, operating a motor vehicle while under the influence, unless initial medical treatment is necessary or there is insufficient space to accommodate the person. The intent is to divert certain offenders from initially being assigned to the Iowa Medical Classification Facility at Oakdale.

Persons serving mandatory minimum sentences of 1 year or more, and who are approved for work release, are to serve the final 6 months of the mandatory minimum sentence performing physical labor in plain view of the public unless the work is beyond the inmate's physical ability, or would endanger the inmate's life or health.

A minimum term of confinement for a second or subsequent offense under Chapter 321J is to be served on consecutive days unless the court finds that the service would be an undue hardship on the person, or finds that jail space is not available and is not reasonably expected to become available within 4 months after sentencing.

Continued probation and posttreatment services are provided for persons completing 6 months' probation or failing to complete additional services or treatment as ordered by the court, including a course for drinking drivers.

Surrender of the registration certificate and registration plates of vehicles registered to the defendant for a third or subsequent violation of Chapter 321J is required effective July 1, 1991. A defendant or owner may apply for new registration plates which must bear a special series of numbers or letters readily identifiable to law enforcement officials.

The Act provides for the taxation of certain controlled substances possessed, distributed, or offered for sale by a dealer. These sections take effect September 1, 1990.

The tax credit provided to small businesses for hiring certain offenders is extended to all businesses.

Magistrates are given jurisdiction over violations involving supply of alcoholic beverages to persons 18 years of age.

The Act provides that a person commits a class "C" felony (previously class "D") if the person causes the death of another under Section 707.6A, homicide by vehicle, and provides that a person commits an aggravated misdemeanor for causing serious injury unintentionally with a motor vehicle.

Provisions defining and providing penalties for participating in criminal gang activity are included.

A person committing a felony under Chapter 204, controlled substances, is presumed to be ineligible for bail unless the court finds that the release of the person will not result in the person failing to appear and will not jeopardize the personal safety of any other person.

A short form presentence investigation for serious misdemeanors is created.

The court is granted authority to require certain offenders to submit to and complete a substance abuse evaluation, if the court determines that there is reason to believe that the defendant regularly abuses alcohol or other controlled substances and may be in need of treatment. The court may order the defendant to complete any treatment indicated to be appropriate by a substance abuse evaluation

The Board of Parole is authorized to establish as a condition of a person's parole or work release that the person perform a specified number of hours of unpaid community service. The Board is also directed to develop and implement a plan for the purpose of early release of property offenders where the offenders can be released without detriment to the community or to the person.

Parole and probation officers are authorized to discharge certain offenders from parole and probation upon finding that the purposes of parole or probation have been fulfilled. The district director is to be notified of a proposed discharge and must approve the discharge. Prior to discharge from probation, the sentencing court may on its own motion, or upon the request of the prosecuting attorney must, order a hearing to review the discharge. A parole or probation officer acting in compliance with the provisions regarding the discharges is not personally liable, either civilly or criminally.

Priority for payments under a plan of restitution is provided.

A victim of an act committed outside the state is eligible for compensation under the Crime Victim Compensation Program. Reasonable allowable charges for medical care under the Program are increased by $500 to a total of $10,500, and reasonable charges for mental health care not to exceed $1,500 are allowed as a part of that total.

The Department of Public Safety is to study the feasibility of implementing a pilot program for determining the extent of drug and alcohol use and abuse among persons arrested for felony offenses. The Department is also to develop a plan for the implementation of alternative drug testing programs for law enforcement, parole, and probation officers. The plan is to be submitted to the General Assembly by January 15, 1991.

HOUSE FILE 2109 — Criminal History Data Definition
BY TEAFORD. This Act expands the coverage of Section 692.17 concerning criminal history data that cannot be kept in a computer data storage system. Prior to enactment of this Act, arrest and disposition data concerning a person could not be included in a computer data storage system after acquittal or dismissal of the charges when the information was being maintained by the Department of Public Safety or the Department's Division of Criminal Investigation or Bureau of Investigation. The Act expands the coverage of Section 692.17 to include information maintained by any criminal justice agency, including local agencies.

HOUSE FILE 2160 — Mandatory Domestic Abuse Arrests
BY VANDE HOEF. This Act specifically provides that the mandatory arrest provisions in domestic abuse situations do not apply where more than 1 person is involved in physical aggression, but only 1 person is the primary physical aggressor. The Act provides that persons acting with justification under Section 704.3, relating to justified force in defense of self or another, are not subject to mandatory arrest.

HOUSE FILE 2309 — Controlled Substances
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act adds carfentanil to the opiates listed in schedule II of Iowa's Uniform Controlled Substances Act, and also adds nabilone, a synthetic derivative of chemicals found in marijuana, to the schedule II list of hallucinogenic substances, in order to conform Iowa law with the federal Uniform Controlled Substances Act. The Act also makes several technical corrections to the Iowa statute.

HOUSE FILE 2321 — Firearms Regulation
BY COMMITTEE ON LOCAL GOVERNMENT. This Act prohibits political subdivisions of the state from enacting ordinances relating to the regulation of firearms that are more restrictive than state law. In addition, the Act increases the penalty for committing a crime or intending to commit a crime with a concealed dangerous weapon or to interfere with an official act of a peace officer or firefighter while armed with a firearm. An additional identification will be required by the county sheriff after July 1, 1991, and a criminal background check will be made before a permit to acquire or carry a firearm is issued. The Act also requires persons to store loaded firearms in a secure location or lock box, and the sale of manual or power-driven trigger-activating devices for firearms is prohibited. Also, the penalty for selling, giving, or otherwise transferring firearms or offensive weapons to felons or other persons prohibited by law from possessing these weapons is increased to a class "D" felony.

The Act takes effect April 5, 1990.

HOUSE FILE 2458 — Restitution for Interference with Traffic-control Devices
BY COMMITTEE ON TRANSPORTATION. This Act requires that a person who is convicted of willfully and intentionally interfering with a traffic device, sign, or signal make restitution to the affected jurisdiction for the costs to repair or replace the traffic device, sign, or signal.

HOUSE FILE 2468 — Criminal and Juvenile Justice Planning
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act expands the membership of the Criminal and Juvenile Justice Planning Advisory Council from 13 to 22. Terms of Council members which expire April 30, 1990, are extended until July 1, 1990, when expansion of the Council takes effect. The Division of Criminal and Juvenile Justice Planning of the Department of Human Rights is directed to establish and maintain an Iowa Correctional Policy Project for the purpose of conducting analyses of major correctional issues affecting the criminal and juvenile justice system. The Division is also authorized to form subcommittees for the purpose of addressing major correctional issues, and must establish a subcommittee to address issues specifically affecting the juvenile justice system.

HOUSE FILE 2568 — Oakdale Prison Construction Contracts
BY ARNOULD AND VAN MAANEN. This Act authorizes the Department of Corrections to consider 2 prison construction projects at the Oakdale corrections campus, authorized by the 1989 and 1990 Sessions of the General Assembly, as one project for the purposes of bidding, negotiating, and entering into the construction contracts for the projects.

ECONOMIC DEVELOPMENT

SENATE FILE 2186 — Fraudulent Practice in Procuring Economic Development Assistance
BY COMMITTEE ON SMALL BUSINESS AND ECONOMIC DEVELOPMENT. This Act makes it a fraudulent practice in the first degree to knowingly engage in deception by making a false statement in writing for the purpose of obtaining economic development assistance from a state agency or political subdivision of the state. A fraudulent practice in the first degree is a class "C" felony punishable by up to 10 years in jail and a fine of up to $10,000

SENATE FILE 2252 — Iowa Logo Authorization — Immunity from Liability
BY COMMITTEE ON SMALL BUSINESS AND ECONOMIC DEVELOPMENT. This Act provides that in authorizing the use of a label or logo the state, a state agency, or state official or employee is immune from a civil suit for damages. The Act also provides that the authorization of the use of a trademark or logo is not an express or implied guarantee or warranty.

SENATE FILE 2385 — Value-added Agricultural Products and Processes Financial Assistance
BY COMMITTEE ON SMALL BUSINESS AND ECONOMIC DEVELOPMENT. This Act provides that the Department of Economic Development may establish a Value-added Agricultural Products and Processes Financial Assistance Program to foster the development of new innovative products, practices, and processes related to agriculture through specialized financial or technical assistance to facilitate the acquisition of capital. A person may receive assistance for developing processes not commonly available in this state, for innovative or diversified products, or for innovative processing, packaging, marketing, or management practices. Under the program, eligible persons may be granted financial assistance upon review of the person's application by the Agricultural Products and Advisory Council.

The Act also provides that the Department may establish a Value-added Agricultural Products and Processes Financial Assistance Fund. The Fund is a revolving fund from which moneys may be used to support purposes of the program.

HOUSE FILE 705 — Economic Development Network
BY COMMITTEE ON ECONOMIC DEVELOPMENT. This Act establishes the Iowa Economic Development Network to create and stimulate economic opportunity through planning, technical assistance, and support to entrepreneurs and existing business in the state. The Network is established in the Department of Economic Development, the Director of which is responsible for establishing a Primary Center for Economic Development Programs and Services, a statewide system of Regional Economic Development Centers, and Regional Coordinating Councils to coordinate the regional delivery of economic development programs and services.

The duties of the Network are to coordinate the delivery of economic and community development programs with other local, regional, state, and federal programs; provide leadership and support for local economic and community development planning efforts; provide information and data; provide coordination and assistance in the operation of the Regional Centers; and establish a professional development training and education curriculum for Regional Centers.

The Act creates the Regional Coordinating Councils and establishes their duties which include contracting with the Department of Economic Development to create the Regional Centers, and adopting a multiyear regional business assistance work plan to implement the purposes of the Network.

The Primary Center has the responsibility to implement a comprehensive statewide economic development planning process and provide leadership, coordination, and support to regional and local economic and community development planning efforts, to implement activities of the Network, and to establish a database of products and services available from Iowa businesses to provide businesses with a source for locating buyers for and suppliers of their products. The Regional Centers have the responsibility of creating and stimulating economic development by assisting and supporting entrepreneurs and business in the region, maintaining ongoing communications with other business assistance providers in the region, and providing the regional link for the database and information systems of the Network and Primary Center.

The Act also establishes within the Department of Economic Development a Community Builder Program to encourage a city, cluster of cities, county or group of counties, or unincorporated areas to implement planning efforts for community, business and economic development.

The Act repeals statutory provisions creating the Primary Research and Marketing Center and the Satellite Centers, since these duties and responsibilities are included in those of the Primary Center and Regional Centers.

HOUSE FILE 2482 — Entrepreneurship Task Force
BY COMMITTEE ON ECONOMIC DEVELOPMENT. This Act establishes an Entrepreneurship Task Force to study how to encourage, promote, and support entrepreneurship in the state. Twenty-five members are to be appointed from the executive and legislative branches of government, from higher education, and from private business with the remaining members to be appointed by the Governor. One member will serve as chairperson. The Task Force must submit a report with recommendations or a request for further study to the Department of Economic Development, the Governor, and the General Assembly, by January 15, 1991. The members' appointments terminate December 31, 1991.

The Act also appropriates $25,000 to the Department of Economic Development for the expenses of the Entrepreneurship Task Force.

HOUSE FILE 2485 — Arts and Culture Challenge Grant Foundation
BY COMMITTEE ON ECONOMIC DEVELOPMENT. This Act establishes the Iowa Arts and Culture Challenge Grant Foundation, an independent nonprofit corporation, whose administrative functions are performed by the Arts Division of the Department of Cultural Affairs. State funds appropriated to the Foundation must be matched from money from other sources before the state funds may be expended. The Foundation's funds are to be used to award grants to public and private organizations or persons to develop, encourage, and enhance arts and cultural programs.

ENVIRONMENTAL PROTECTION

SENATE FILE 2113 — Pesticide Ingredient Statement
BY COMMITTEE ON ENVIRONMENT AND ENERGY UTILITIES. This Act provides for the reporting of inert ingredients contained in pesticides distributed, sold, offered for sale, or transported within this state. Prior law provided for the registration of these pesticides. In addition, a registrant is required to file with the Department of Agriculture and Land Stewardship, an ingredient statement listing information regarding active ingredients and the percentage by weight of inert ingredients.

This Act requires filing of an inert ingredient statement containing the common name of each inert ingredient listed in rank order according to weight. A copy of the ingredient statement, including the inert ingredient statement, must be furnished upon request to the Department of Natural Resources or to the Center for Health Effects of Environmental Contamination. The Act provides for confidentiality of information relating to reported inert ingredients. Public disclosure of research, monitoring, or data relating to an inert ingredient is not prohibited, if the disclosure does not link the inert ingredient to a particular brand of pesticide.

The Act requires a registrant to report to the Department of Agriculture and Land Stewardship information relating to inert ingredients contained in pesticides distributed, sold, or offered for sale by the registrant beginning in 1985.

A person violating a provision of the Act is guilty of a serious misdemeanor.

SENATE FILE 2158 — Shared Petroleum Facilities
BY GETTINGS. This Act permits a public agency or political subdivision of the state to jointly own, operate, or share the use of petroleum storage facilities with one or more other public agencies or political subdivisions. Under prior law, a rule of the State Fire Marshal governing aboveground fuel storage tanks required that the tank be used by a single agency or political subdivision. The Act facilitates local and state responses to the October 26, 1990, deadline for reporting existing petroleum underground storage tank contamination in order to remain eligible for state financial assistance. The Act permits cooperation to reduce the number of petroleum tank sites, and thus reduce the risk of environmental damage and financial loss.

SENATE FILE 2181 — Penalty for Failure to Pay Solid Waste Tonnage Fee
BY COMMITTEE ON ENVIRONMENT AND ENERGY UTILITIES. This Act alters the penalty for failure to pay the solid waste tonnage fee. Prior law applied a penalty of 15 percent of the amount of the fee due, with no reference to how late the fee payment was received. The Act provides that the solid waste tonnage fee late payment penalty is equal to 2 percent of the fee due for each month that the fee is overdue.

SENATE FILE 2393 — Vetoed by the Governor
BY COMMITTEE ON ENVIRONMENT AND ENERGY UTILITIES. This bill would have increased the permissible maximum civil penalty for each violation of a municipal ordinance regulating industrial waste water pretreatment standards to $1,000 for each day a violation existed or continued. The bill duplicated H.F. 2412 also passed in the 1990 Session which provides essentially identical authority to municipalities.

HOUSE FILE 656 — Soybean-based Inks and Starch-based Plastics
BY COMMITTEE ON AGRICULTURE. This Act continues efforts by the General Assembly to increase the level of purchases by state government of office products which contain grain-based materials. The Act applies to purchases made by the Department of General Services, the State Board of Regents, the State Department of Transportation, and the Commission for the Blind.

The percentage of purchases of soybean-based inks used for newsprint printing services must increase by July 1, 1991, to 100 percent of the total purchases of inks used for newsprint printing services. By July 1, 1991, a minimum of 25 percent of the purchases of other inks which are used internally or contracted for by an agency must be soybean-based to the extent formulations for the inks are available. The percentage of purchases, to the extent the formulations are available, must increase by July 1, 1992, to 50 percent of the total purchases, and must increase by July 1, 1993, to 100 percent of the total purchases.

The agencies are required to report to the General Assembly, information relating to soybean-based inks and starch-based garbage can liners regularly purchased by the agencies. The Department of Natural Resources is charged to review procurement specifications to eliminate discrimination against the procurement of products

manufactured with starch-based plastic and soybean-based ink purchases. The State Department of Transportation is no longer required to purchase starch-based plastic garbage can liners if the liners are recycled by a facility approved by the Environmental Protection Commission.

HOUSE FILE 2115 — Commercial Cleaning of Private Sewage Disposal Facilities
BY PELLETT AND HARBOR. This Act requires the Department of Natural Resources to adopt standards relating to the commercial cleaning of private sewage disposal facilities and the disposal of waste from the facilities. The Department is exclusively responsible for licensing persons engaged in the commercial cleaning of facilities and disposal of waste from the facilities. County boards of health must enforce standards and license requirements. The license or license renewal fee is $25. Persons violating standards or license requirements are subject to a civil penalty which cannot exceed $25 for each day the offense continues. The total civil penalty cannot exceed $500 per year.

The Act takes effect on March 1, 1991, and provides that persons issued a license by a county board of health before the effective date are not subject to licensure requirements until March 1, 1992, unless the county license expires earlier.

HOUSE FILE 2170 — Aquatic Applications of Pesticides
BY GRUHN AND OSTERBERG. This Act prohibits the application of a pesticide to any water of the state classified by the Department of Natural Resources as a class "A" or class "C" water. The prohibition does not apply to the application of a pesticide by a certified applicator who is trained in aquatic pesticide applications and who has received a permit for the applications from the Department. Existing penalties established for violation of general water quality provisions or permits, rules, standards, or orders issued pursuant to the general water quality provisions are applicable to a violation of this Act.

HOUSE FILE 2199 — Agricultural Drainage Wells
BY COMMITTEE ON AGRICULTURE. This Act extends the time limit for owners of agricultural land to comply with requirements relating to agricultural drainage wells in Section 159.29. It delays the development of certain plans proposing alternatives to the use of agricultural drainage wells until July 1, 1994. The date for registering agricultural drainage wells is changed to September 30, 1988, to conform with existing law. The time is also extended for the Department of Agriculture and Land Stewardship to initiate a program to eliminate chemical contamination caused by agricultural drainage wells. The Act requires that notice by a county board of supervisors of an approved emergency repair to an agricultural drainage well be submitted to the Department of Natural Resources rather than the Department of Agriculture and Land Stewardship. The Act takes effect March 3, 1990.

HOUSE FILE 2401 — Notification of Hazardous Conditions to Water Supply System Operators
BY COMMITTEE ON ENERGY AND ENVIRONMENTAL PROTECTION. This Act modifies the notification requirements relating to hazardous spills to include an obligation to notify any possibly affected public or private water supply systems of the occurrence of a hazardous condition. Under prior law, a person responsible for hazardous substances was required to notify either the Department of Natural Resources (DNR), or the local police or sheriff. The Act requires the responsible person to notify both the DNR and local authorities. When the local police or sheriff's office is notified it must then notify the DNR. The DNR is then required to notify any public or private water supply system which may be affected.

HOUSE FILE 2412 — Environmental Infractions
BY OLLIE, STUELAND, BEATTY, JOHNSON, ROSENBERG, EDDIE, TRENT, PLASIER, AND OSTERBERG. This Act provides that a city may enact an ordinance classified as a "municipal infraction" for purposes of protecting the quality of the city's air and water resources.

An industry violating a municipal infraction arising from noncompliance with a pretreatment standard or requirement for water quality which is part of federal law is subject to a civil penalty of not more than $1,000 for each day a violation exists or continues.

A city may classify a municipal infraction, other than a violation arising from noncompliance with a pretreatment standard or requirement, as an environmental violation if the infraction is a violation of environmental protection requirements set forth under Chapter 455B of the Iowa Code or established by a city in consultation with the Department of Natural Resources.

Certain circumstances excuse the commission of an environmental violation. The Act does not apply to the discharge of airborne residue from grain created by the handling, drying, or storing of grain unless the discharge is due to industrial production or manufacturing of grain products. The discharge from industrial production or manufacturing of grain products is excused, if the discharge occurs from September 15 to January 15. A person is not subject to a civil penalty if the discharge is limited, it results from the installation or maintenance of a pollution control device, and the city receives timely notice. The city must also agree to participate in informal negotiations with an offender before sanctions may be enforced.

The amount of a civil penalty for an environmental violation cannot exceed $100 or $200 for a repeat offense.

HOUSE FILE 2531 — Limits on State Financial Assistance for Economic Development
BY COMMITTEE ON ENERGY AND ENVIRONMENTAL PROTECTION. This Act provides that before a state agency may provide state grants, loans, or other financial assistance for economic development to or on behalf of a business, the business must make a report detailing the circumstances of its violations, if any, of federal or state environmental protection laws within the last 5 years. The agency must take the report into consideration before allowing the assistance. If the business generates solid or hazardous waste the business must conduct either in-house audits or have the Iowa Waste Reduction Center or Waste Management Authority do the audits of the disposal of the waste. The business must have waste management plans to reduce the amount and to safely dispose of the waste.

HOUSE FILE 2534 — Solid Waste Disposal
BY COMMITTEE ON ENERGY AND ENVIRONMENTAL PROTECTION. This Act provides for review and approval by city councils or county boards of supervisors of proposals for the establishment of sanitary landfills and infectious waste incinerators by a city, county, or private agency planning to operate a sanitary landfill or an infectious waste incinerator, with the exception of a private agency disposing of waste which the agency generates on property owned by the agency as of January 1, 1990. The Act provides for publication of written notice of the proposal, for the holding of at least one public hearing regarding the proposal following receipt of the request for siting approval, for appeal of the decision of a city council or county board of supervisors to the Environmental Protection Commission or the Commission's designee, and for judicial review.

The Act prohibits the deposit of radioactive materials, as defined as of January 1, 1990, in a sanitary landfill; provides for an extension in the period of time allowed a local community in developing a collection system for yard waste; establishes a 1-year moratorium on the granting of permits for the construction or operation of commercial infectious waste incinerators, with the exception of hospitals which accept no more than 66 percent of their waste from other infectious waste generators; and requires the Department of Natural Resources to provide a report on the implementation of the rules regarding the on-farm disposal of dead animals to the Administrative Rules Review Committee of the Legislative Council at the October 1991 meeting. The moratorium is retroactively applicable to January 1, 1990, and provisions for appeal and judicial review relative to a siting proposal decision are repealed effective June 30, 1991.

HOUSE FILE 2552 — Petroleum Storage Tanks
BY COMMITTEE ON APPROPRIATIONS. This Act generally amends the Underground Storage Tank Act H.F. 447, enacted by the 1989 Session of the General Assembly.

The authorization for aboveground petroleum tanks in retail motor vehicle outlets is revised to permit use of these tanks anywhere the model rules of the National Fire Protection Association would allow. The local government with jurisdiction over a proposed aboveground tank site must also approve the installation.

The scope of the aboveground storage tank registration requirements is limited to petroleum tanks not otherwise regulated by the federal government or State Department of Transportation. Under prior law, aboveground tanks containing any regulated substance were required to be registered. Questions concerning intent to register tanker trucks and trailers are answered with a specific exclusion for these mobile tanks. Tanker trucks and trailers are regulated by the federal government or State Department of Transportation.

A variety of amendments concerning the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (UST Board) are included: a definition of "third-party liability" to parallel federal law; additional limitations on state or Fund liability; a reduction in the required notice to change the cost factor of the environmental protection charge; restrictions on the definition of a "responsible owner" to parallel federally defined liability; and an extension from October 26, 1991, to October 26, 1992, for an operator to complete required improvements to a clean site to qualify immediately for insurance despite noncompliance with underwriting standards.

The Act also revises the funding mechanism for storage tank financial assistance by depositing the environmental protection charge on petroleum diminution into the Road Use Tax Fund, and exchanging the environmental protection charge revenues for an equivalent $12,000 000 in motor vehicle use tax revenues out of the constitutionally unrestricted portion of the Road Use Tax Fund This change is intended to remove any remaining constitutional cloud on the funding mechanism to facilitate a bond issue to capitalize the UST Program.

Eligibility for certain underground storage tank (UST) financial assistance programs is changed The retroactive eligibility is expanded to permit compensation of persons who cleaned up tanks prior to July 1, 1987; or after May 5, 1989, but who are no longer engaged in the business for which the tank was operated. Prior law authorized $6,000,000 for retroactive benefits. In related action, S.F. 2402, the Transportation Appropriation Act, increased the authorized level of retroactive benefits to $8,000,000. As of January 31, 1990, qualified claims amounted to approximately $4,500,000. The Transportation Appropriation Act provides for distributing the entire $8,000,000 now authorized according to a hierarchy of preference.

To further increase assistance targeted specifically for small business, the maximum net worth for loan guarantee net worth is increased from $200,000 to $400,000, and the value of the contaminated site for calculating net worth is to be the fair market precorrective action value.

The Act adopts the federal definition of "responsible owner or operator' to provide a limit on liability. If an owner or operator has a net worth of under $15,000, the owner or operator will not be held liable as a financially responsible person. An owner or operator does not cease to be a responsible owner or operator simply by quit claiming the contaminated property "Responsible owner or operator" as used by the federal laws pertaining to UST's does not connote negligence or fault, but rather financial responsibility, regardless of negligence. Mere ownership or operation incurs strict liability for any release of petroleum from the UST.

The Act sets out the form and substance of insurance to be offered to tank installers pursuant to an existing authorization to issue the insurance.

An insurance premium discount of 8 percent is offered tank owners who accept waste oil from the general public under certain conditions.

The Act authorizes cost containment mechanisms exercisable by the Fund Administrator to control expenses payable from the Fund or by tank owners and operators. Contracts involving expenses compensable from the Fund are made invalid unless and until a contract is approved by the Administrator. Under the contract terms of the insurance program, the Administrator has similar authority to adjust claims by controlling unreasonable charges by contractors or consultants. The Act provides similar authority to the Administrator intended to limit expenses incurred by tank owners and operators, and prevent price gouging, in connection with the Remedial Account.

The Administrator is further authorized to enter into contracts with a supplier of goods or services, if the contract involves a compensable item, to provide the item at a fixed cost, gross maximum price, or other term or condition reasonably intended to obtain the lowest cost for tank owners and operators and the Fund. Again, the Administrator is provided the cost containment authority under the insurance contract's terms, but the prior statute did not authorize cost containment authority for the Remedial Account.

The Environmental Protection Commission is required to adopt rules providing for the land application of soils resulting from the remediation of UST releases. The land application of sludges or soils accomplished in compliance with these rules is not required to be reported in a groundwater hazard statement as the disposal of solid waste or hazardous waste. The soil is to be cleaned by aeration. Any free petroleum is to be recovered by pumps at the site. The contaminated soil is then to be spread in a very thin layer, and periodically churned until the remaining traces of petroleum evaporate.

The Act authorizes an additional class of unaffiliated inspectors to conduct inspections of tank installations to assure compliance and environmentally safe installations

The Act addresses problems which property owners have encountered in transferring property on which a tank was situated which meets current environmental safety standards. An environmental cloud on title may persist because of the possibility that the standards requiring environmental remedial action may change in the future, subjecting a new owner to liability despite a previously completed cleanup or closure of a tank in conformance with then current Department of Natural Resources (DNR) rules. The Act requires the DNR to issue a certificate of satisfactory completion of a remediation action. The certificate may be recorded to evidence completion of a remediation in the chain of title. A person issued a certificate is not required to perform further

HUMAN SERVICES

SENATE JOINT RESOLUTION 2003 — Disability Prevention Programs
BY RENSINK. This Joint Resolution proposes the establishment of disability prevention activities coordination by various state agencies. The Governor's Planning Council for Developmental Disabilities must convene representatives of the Iowa Department of Public Health, Department of Human Rights, Department of Education, Department of Human Services, Department of Natural Resources, State Department of Transportation, and Department of Public Safety. The representatives must identify existing disability prevention programs and activities to make suggestions to increase coordination between existing efforts, to establish budget recommendations for coordination, and to make recommendations for a coordinated approach to prevention activities. The representatives must report to the Governor and the General Assembly concerning findings and recommendations by October 1, 1990.

SENATE FILE 199 — Child and Family Day Care
BY LLOYD-JONES. This Act relates to child day care statutory definitions and requirements for family day care homes. The definition of child day care is revised to mean care, supervision, or guidance of a child for periods of less than 24 hours. The law previously contained an additional time period requirement of 2 hours or more in order for care, supervision, or guidance of a child to be defined as child day care. The definition of the term 'child care center' is revised to exclude registered family day care homes and coordinates with an expansion in the number of children which may be cared for at one time by a registered family day care home. Technical corrections in internal references are made where a child day care program is referred to as a "facility."

Subject to 2 limitations, registered and unregistered family day care homes are now permitted to care for more than 6 but less than 12 children at any one time. The care cannot be provided to more than 6 children for more than 2 hours at any one time and a maximum of 6 of the total number of children present during the 2-hour period can be children who are not attending school full time on a regular basis. In determining the number of children cared for at any one time, if the person providing the care is a child's parent, guardian, relative, or custodian and the child is not attending school full time on a regular basis, then the child is counted as one of the children cared for in the home.

Before this change, no more than 6 children could be cared for in a registered family day care home at any one time. However, more than 6 children could be cared for in an unregistered family day care home at any one time if the excess number of chidren received care for less than a 2-hour period. In addition, if a provider was a child's parent, guardian, relative, or custodian, the child was not included in the count of children cared for in an unregistered family day care home but was included in the count of children cared for in a registered family day care home if the child was not attending school full time on a regular basis.

SENATE FILE 2082 — Mental Illness, Mental Retardation and Developmental Disabilities Law Continued
BY BRUNER. This Act repeals a provision providing for the prospective repeal on July 1, 1990, of Chapter 225C, relating to mental health, mental retardation, and developmental disabilities. The Act takes effect March 19, 1990.

SENATE FILE 2201 — Family Support Subsidy Program
BY DELUHERY. This Act changes the eligibility criteria for the Family Support Subsidy Program, to include children with certain disabilities who have not been weighted by a school district or who otherwise meet the definition of developmental disability under the federal Developmental Disabilities Act. Under the prior law, only children who had been weighted within each school district as requiring full-time, self-contained special education placement with little integration into a regular classroom, and children requiring special education who were severely handicapped or had multiple handicaps, were eligible family members. The Act provides that children with certain disabilities who have not been weighted within a public school district are still eligible for the Family Support Subsidy Program as long as an educational determination has been made that the child has an educational handicap or special health care needs or otherwise meets the federal definition of developmental disability.

remediation solely because action standards are changed at a later date. The certificate does not prevent the DNR from ordering remediation of a new petroleum release. To further address the problem, the UST Board in consultation with the Attorney General and the DNR is to assess state and federal laws regarding liability for site remediation and third-party liability in connection with UST's. Based on this assessment, the Board is to identify whether it is desirable and appropriate to further define limits to liability among parties involved in the purchase or transfer of property which has been subject to a remediation action or tank closure consistent with environmental standards at the time of the action or tank closure.

The Act takes effect May 2, 1990.

GAMING

SENATE FILE 2057 — Gambling and Liquor Control
BY KINLEY. This Act removes the limit of 10 simultaneous telecast races for pari-mutuel wagering purposes per calendar year, but requires that the simultaneous telecast races can be televised at a racetrack only on a day when there is live racing at the racetrack. The Act also provides that nonprofit corporations whose facilities or indebtedness are supported in whole or in part with property tax revenue and which are licensed to conduct pari-mutuel wagering pursuant to Chapter 99D are subject to the requirements of the open meetings law under Chapter 21 while the nonprofit corporations are conducting business related to the pari-mutuel wagering racetrack. The sale and serving of alcoholic beverages at pari-mutuel racetracks is specifically authorized and the sale of alcoholic beverages on common carriers such as aircraft and watercraft is authorized on Sunday under a separate license. Also, if a watercraft is an excursion gambling boat, a separate class "D" license is required for each excursion gambling boat.

This Act takes effect April 19, 1990.

SENATE FILE 2240 — Racing Dog Adoption
BY COMMITTEE ON AGRICULTURE. This Act establishes a racing dog adoption program which replaces a racing dog adoption program enacted in 1989. The Department of Agriculture and Land Stewardship no longer oversees the program which had been administered by persons under contract with the Department to provide adoption services. Under the Act, tracks licensed to race dogs maintain the adoption program and are responsible for advertising dogs available for adoption. A dog must be examined by a veterinarian and sterilized before adoption unless the ownership of the dog is transferred to a governmental agency or nonprofit organization. Dogs cannot be transferred for purposes of racing, breeding, hunting, or experimentation. A person violating the provisions of the Act commits a simple misdemeanor.

HOUSE FILE 2454 — Gambling Devices
BY COMMITTEE ON STATE GOVERNMENT. This Act permits the manufacture, distribution, and possession for manufacture or distribution of all gambling devices if their use is licensed under Chapter 99B or 99E, pertaining to games of skill or chance, raffles, and the lottery, or if the manufacture or distribution is for sale out of state to another jurisdiction where the gambling devices are legal.

The Act also states that the sole purpose of the Program is to keep families together by defraying some of the special costs of caring for a family member at home. Under the prior law, additional purposes of the Program included reducing the capacity of state facilities, facilitating the return of family members to their homes from out-of-home placements, and preventing or delaying out-of-home placements.

In addition, the Act alters Section 225C.37, concerning program specifications rules. Under the prior law, the parent or legal guardian of a family member who was a resident of or being considered for placement in a State Hospital-School serving mentally retarded individuals or persons with developmental disabilities, a child foster care group or family home, or a State Mental Health Institute could apply for the program. Under the Act, the parent or legal guardian of a family member with a developmental disability, or a family member who by educational determination has a moderate, severe, or profound educational handicap or special health care needs, may apply for the Program.

SENATE FILE 2388 — Spousal Support Debts
BY COMMITTEE ON HUMAN RESOURCES. This Act relates to administrative procedures for the establishment, determination, and collection of certain spousal support debts created due to the receipt of Medical Assistance by an institutionalized spouse, under certain circumstances. The Act creates a new Code chapter tentatively numbered Chapter 249B.

Under circumstances involving assignments of support rights to the Department of Human Services or involving inability to execute an assignment or a hardship situation, a spousal support debt is created against the community spouse of an individual who resides in a hospital or health care facility when Medical Assistance is provided on behalf of the individual. The spousal support debt is owed to the Department of Human Services. Certain income and resources of the community spouse are exempt from the spousal support debt.

Procedures for notice, service of notice, conferences, filing of objections, requests for a district court hearing, and judgment orders are provided. Authority is granted to the district court for ex parte review and approval of the Department's administrative orders.

Interest accrues on spousal support debts in the same manner as judgments and decrees of the court. The Department can waive the interest. The court may order a guarantee to be provided to secure payment of the support debt and may order the guarantee to be forfeited.

SENATE FILE 2425 — Emergency Care of Children
BY HUTCHINS AND HULTMAN. This Act relates to the care of children when a legally responsible adult is unavailable to provide the care. The Act establishes information procedures relating to emergency removal of a child without a court order and provides for temporary placement of a child under certain circumstances. In accordance with court-established procedures, a peace officer or physician who removes or retains custody of a child must immediately orally inform the court of an emergency removal of a child and provide written documentation of the oral information within 24 hours. Similar provisions apply to the Department of Human Services or Juvenile Probation Department when the child's parent or person responsible for the child is located or when information is received which could affect the court's decision regarding the child's return.

A placement procedure is established for situations in which a child is without adult supervision because the person responsible for the care of the child is unable to care for the child because the person has been arrested and detained or has been unexpectedly incapacitated. If a peace officer is unable to locate an adult person who is legally responsible for the child, the peace officer must attempt to place the child with a relative or other person who is known to the child and may request assistance from the Department of Human Services in making the placement. The person with whom the child is placed may give consent for emergency medical treatment of the child. The placement may not exceed a period of 24 hours and is terminated when a person who is legally responsible for the child takes custody of the child. If a person legally responsible for the care of the child cannot be located within 24 hours or an appropriate placement is unavailable, the provisions of Section 232.79, relating to emergency removal of a child, apply.

SENATE FILE 2429 — Support of Dependents and Medical Support
BY HUTCHINS AND HULTMAN. This Act relates to the responsibilities for the receipt and disbursement of support payments, satisfaction of a support order by direct payment to the person who is to receive the payment, medical support for children receiving child support, modification of child support orders, child support enforcement, determination of paternity, and establishment of past child support obligations, and establishes an advisory committee.

The Act relates to responsibilities for the receipt and disbursement of support payments by providing that the Collection Services Center of the Department of Human Services and the Clerk of the District Court are established as the official entities responsible for the receipt and disbursement of support payments. An exception to requirements for payments to the Center or the clerks is provided in addition to those in prior law, permitting support payments made to persons other than the center or clerks to satisfy support obligations if a sworn affadavit is submitted by the person entitled to receive the payment to the court as proof of payment. The Department of Human Services and the Judicial Department are directed to establish a schedule to transfer to the Clerk of the District Court responsibilities for orders which are not being enforced by the Child Support Recovery Unit, and the transfer must be completed by June 30, 1991. Various forms of notice relating to the transfer of responsibilities are required to be provided to the support obligor and the obligee.

Existing law relating to support payment processing is stricken and rewritten in accordance with the division of responsibilities provided in the Act. If enforcement services are being provided by the Child Support Recovery Unit relating to a support order and the payment method involves deductions from various revenues available to the obligor, utilizes an electronic transfer payment, or involves any other mode of payment, the Collection Services Center disburses the payment. However, if enforcement services are not being provided by the Child Support Recovery Unit the Clerk of the District Court receives and disburses the payment.

Procedures are provided for transfer of disbursement responsibilities to the Collection Services Center when the Child Support Recovery Unit begins providing enforcement services relating to an order being processed by the Clerk of the District Court. Notice requirements relating to the transfer of responsibilities in this situation are provided.

The Act also requires a person who is required to provide support for a child by a court order or an administrative order to also provide medical support for the child through a health benefit plan or monetary payment. A person providing medical support for a child may also be required by a court order or an administrative order to provide medical support for a parent or guardian of the child.

The Act contains provisions to bring state law into compliance with the statute of limitations requirements concerning paternity actions set forth in section 111 of the federal Family Support Act of 1988 which requires a number of state actions related to child support. Thus, the Act permits paternity actions involving persons who were minors as of August 16, 1984, even though a paternity action was previously brought and dismissed due to a statute of limitations of less than 18 years then in effect. However, the actions must be brought within 1 year of when the person reaches age 18, or by July 2, 1992, whichever is later. The Act further specifies that past support may be awarded in the judgment of the court in a paternity action. The Act applies to actions brought under either Chapter 252A, the Uniform Support of Dependents Law, or Chapter 675, relating to paternity of children and obligation for support.

The Act also provides for modification of child support orders when services are provided by the Child Support Recovery Unit by authorizing the Unit to review the amount of a support award in accordance with state and federal law at the request of either parent who is subject to the order or upon its own initiation. The Act also provides that the Unit may appear on behalf of the state for the purpose of facilitating modification of support awards.

In addition, the Act provides that in cases of child support ordered pursuant to a divorce proceeding, a substantial change in circumstances authorizing a court to modify child support orders exists when the order for child support deviates from established guidelines for a reason other than that stated in the original order, unless the provisions of the guidelines themselves have changed since the entry or subsequent modification of the original order.

Subject to several conditions, this Act also allows a court, when determining whether a substantial change in circumstances exists in order to modify support orders made pursuant to a divorce proceeding, to consider changes in technology related to determination of paternity. For orders entered before July 1, 1990, the petition to modify must be filed by July 1, 1991, provided that the child is less than 19 years of age at the time the petition is filed. For orders entered on or after July 1, 1990, a petition to modify must be filed within 5 years of the date of entry of the divorce decree or the order establishing paternity, provided that the child is less than 19 years of age at the time the petition is filed. The person requesting the modification is required to pay the cost of testing related to the determination of paternity under these provisions. The Act provides that any modification of child support or child support awards brought pursuant to these provisions or any other chapter of the Code can be made retroactive only to the date on which notice of the pending modification petition is served on the opposing party. A determination of paternity made pursuant to these provisions may be used as a legal basis for other actions.

The Act also directs the Department of Human Services to establish a Child Support Enforcement Program Advisory Committee to assist the Department in reviewing issues related to the implementation of the federal Family Support Act of 1988 and methods of improving service.

HOUSE FILE 324 — Confidentiality of County General Relief Records
BY TRENT. This Act provides that applications, investigation reports, and case records of county general relief recipients are confidential, subject to use and inspection by auditors and other persons whose official duties relate to administration of the general relief program or as authorized by the district court. Examination of an individual's applications, reports, and records may also be authorized by a signed release from the individual.

HOUSE FILE 512 — Support Obligations Paid from Garnisheed Money
BY CARPENTER. This Act provides that in any order for garnishment, any amount garnished for a support order shall be first paid out of the garnisheed funds, after subtracting applicable fees related to issuance of the specific garnishment, prior to other payments being made.

HOUSE FILE 2177 — State Hospital-Schools Training Programs and Employee Records
BY COMMITTEE ON HUMAN RESOURCES. This Act exempts goods and services offered to the public as part of a client training program operated by a State Hospital-School (SHS) under the control of the Department of Human Services from the provision of the Code prohibiting state agencies from competing with private enterprise in the sale or production of goods or services on the following conditions:

1. Any off-campus vocational or employment training program developed or operated by the Department for clients of a SHS is a supported vocational training or employment program offered by a community-based provider of services or other employer in the community.

2. If a resident of a SHS is to participate in an employment or training program which pays a wage in compliance with federal law, the SHS must develop a community placement plan for the resident which identifies the services and supports the resident needs in order to be discharged from the SHS and to live and work in the community.

3. The SHS must make reasonable efforts to implement the plan, including referring the resident to community-based providers of services. If a provider cannot accept a resident referred by the SHS, the provider must indicate in writing to the SHS the provider's reasons for its inability to accept the resident and describe what is needed to accept the resident.

4. A resident who cannot be placed with a community-based provider may be placed by the SHS in an on-campus or off-campus program, so long as the SHS first seeks an off-campus program offered by a community-based provider who serves the county in which the SHS is based or counties contiguous to the county, provided that the resident will not be required to travel more than 30 minutes one way to obtain services.

5. If a resident cannot be placed with a community-based provider as described in paragraph 4, the SHS must offer the resident an on-campus program operated in compliance with the federal Fair Labor Standards Act. The SHS must seek, at least twice annually, an off-campus community-based option for each resident in an on-campus program. The SHS cannot place a resident in an off-campus program when the cost to the SHS would be greater than the provider's actual cost as determined by the Department's purchase of service rules or when the cost of services would not be reimbursed under the Medical Assistance Program.

6. The price of any goods and services offered to a person other than a state agency or political subdivision must be at least sufficient to cover the cost of any materials and supplies used in the program and to cover client wages.

7. This Act does not prohibit a SHS from providing a service a resident needs for compliance with accreditation standards for intermediate care facilities for the mentally ill.

The Act also deletes a requirement to maintain daily records of time worked by institutional staff of the Department.

HOUSE FILE 2294 — Affordable Heating Program
BY COMMITTEE ON ENERGY AND ENVIRONMENTAL PROTECTION. This Act establishes an Iowa Affordable Heating Program within the Division of Community Action Agencies of the Department of Human Rights. The purpose of the program is to assist low-income persons in the payment of natural gas, electricity

or deliverable heating fuel costs when the person's income falls below the level necessary to maintain essential service. Eligibility in the program is based on a formula prescribed by the Act. An Affordable Heating Program Advisory Council is created to provide guidance in the development and administration of the program. Implementation of the program is contingent upon the availability of programmatic and administrative funding.

HOUSE FILE 2368 — Civil Penalty for Noncompliance by Health Care Facilities
BY COMMITTEE ON HUMAN RESOURCES. This Act requires the Department of Human Services to adopt rules which apply civil penalties to certain health care facilities. A health care facility which receives reimbursement under the Medical Assistance Program which does not comply with certain provisions of the federal Social Security Act is subject to a civil penalty not to exceed the amount applied to health care facilities under Chapter 135C. If a health care facility is assessed a penalty under this statute, the facility cannot be assessed a penalty under Chapter 135C, relating to licensing of health care facilities, for the same violation. Any moneys collected must be applied to the protection of the health or property of residents of health care facilities found by the state or by the federal Health Care Financing Administration to be out of compliance. The Act provides purposes to which the collected penalty moneys may be applied.

HOUSE FILE 2421 — Release of Information Relating to an Absent Parent by Child Support Recovery Unit
BY COMMITTEE ON HUMAN RESOURCES. This Act permits the Child Support Recovery Unit of the Department of Human Services to release information relating to an absent parent to certain persons and to another unit of the Department under certain conditions.

Unless prohibited by federal regulation, information relating to the location of an absent parent is available to the resident parent, guardian, attorney, or agent of a child who is not receiving assistance under the federal Social Security Act, Title IV.

Unless prohibited by federal statute or regulation, the release of information relating to an absent parent is also permitted if another unit of the Department submits a written request for the information and the request is approved by the Director of Human Services.

HOUSE FILE 2430 — Disclosure of Mental Health Information
BY COMMITTEE ON HUMAN RESOURCES. This Act provides for the disclosure of a limited type of mental health information to the spouse, parent, adult child, or adult sibling of an individual who has chronic mental illness in order to assist in the provision of care or monitoring of treatment of the individual under certain conditions. A requester of mental health information must submit a written request for the information unless an emergency occurs. Unless the individual has been adjudged incompetent, the individual is required to be informed of the disclosure to a family member.

HOUSE FILE 2437 — Immediate Income Withholding of Child Support Payments
BY COMMITTEE ON HUMAN RESOURCES. This Act amends Chapter 252D relating to delinquent child support payments and assignment of income. An obligor's income may be immediately withheld if services are being provided by the Child Support Recovery Unit of the Department of Human Services without regard to the obligor's record of support payments made.

Specifically, the Act provides that in a support order issued or modified on or after November 1, 1990 for which services are being provided by the Child Support Recovery Unit (CSRU), the income of a support obligor is subject to withholding, on the effective date of the order, regardless of whether support payments by the obligor are in arrears. The CSRU may enter an ex parte order for immediate withholding, may directly implement immediate withholding, or may directly implement immediate withholding if authorizing language is contained in the court order. The income of the obligor is subject to immediate withholding unless one of the parties shows and the court or CSRU finds there is good cause not to require immediate withholding or a written agreement is reached between both parties which provides for an alternative arrangement. If support payments have been assigned to the Department of Human Services, the Department is considered a party to the support order, and a written agreement to waive immediate withholding is void unless approved by the CSRU. Any existing agreement is void at the time an assignment of support is made to the state. The Act requires that notice of immediate income withholding be included in orders for support entered after November 1, 1990, but states that the Act itself is sufficient notice for implementation of withholding without any further notice. The Act also requires notice of a withholding order to be sent to the employer, trustee, or other payor by certified mail and provides that the assignment of income is binding on an existing or future employer, trustee or other payor 10 days after receipt of the notice.

The Act provides procedures for contesting a withholding order due to a mistake of fact (an error in the amount of current or overdue support or the identity of the alleged obligor) or because the conditions for exception of withholding described above existed at the time of implementation of withholding. Upon the filing of a motion to contest a withholding order by a party, the clerk of the district court will schedule a hearing within 7 days and notify the parties as to the motion and the hearing. The payor will continue to withhold and transmit the amount required until notice is received that a motion to stop the order for withholding has been granted. The Act provides that income withholding has priority over a garnishment or assignment for a purpose other than support of the dependents in the court order being enforced. The Act provides that the CSRU or the district court may modify the withholding order by ex parte order if current child support has been terminated, or may revoke the order upon the termination of parental rights, emancipation, death or majority of the child, or upon change of custody. The Act allows the payor to deduct $2.00 or less from each payment of the employee obligor's wages as reimbursement for the payor's costs relating to the withholding. The Act provides that an employer who willfully discharges an employee or refuses to hire a person because of entry of a withholding order is guilty of a simple misdemeanor. The Act does not exclude the use of civil or criminal remedies, other than those provided in the Act, for enforcement of support obligations.

The Act designates the CSRU as the state entity to administer income withholding on cases subject to Title IV-D of the federal Social Security Act. The clerks of the district court will administer cases not subject to Title IV-D. The Act provides a serious misdemeanor penalty for a person who knowingly makes a false statement or representation of a material fact, or knowingly fails to disclose a material fact in order to secure income withholding or assignment against another person and to receive support payments or additional payments. The Act also directs the Code Editor to codify the Act in three subchapter divisions.

HOUSE FILE 2498 — Child Foster Care Licensing
BY COMMITTEE ON HUMAN RESOURCES. This Act provides certain modifications to child foster care licensing requirements applied to an agency which has been accredited by the Joint Commission on the Accreditation of Health Care Organizations or by the Council on Accreditation of Services for Families and Children. The Department of Human Services is directed to adopt administrative rules modifying the state licensing standards applied to the agency to avoid duplicating standards applied through accreditation.

HOUSE FILE 2504 — Personnel of Child Care Facilities
BY COMMITTEE ON HUMAN RESOURCES. This Act relates to criminal and child abuse record checks concerning facilities providing care to children.

Child abuse information may be released to an administrator of a licensed foster care facility if the information concerns a person employed or being considered for employment by the facility. Child abuse information may be released to the superintendent of the Iowa Braille and Sight-saving School, the superintendent of the School for the Deaf, or an administrator of a licensed or registered child day care facility, if the information concerns a person employed by or living in the school or child day care facility. Information may also be released to a child protection agency in another state if the agency is conducting a records check of a person providing care to a child in the other state or to the legally authorized protection and advocacy agency in this state, or if the person identified in the information as a victim or a perpetrator of abuse resides in or receives services from a facility or agency because the person is diagnosed as having a developmental disability or a mental illness.

Unfounded child abuse information must be expunged from the child abuse registry when it is determined by a preponderance of the evidence to be unfounded. Under previous law, the expungement would take place 6 months after the receipt of the initial report of abuse.

When an employee or a prospective employee of a licensed substance abuse program, psychiatric medical institution for children, licensed foster care facility, or child day care facility has been found to have committed a crime or child abuse, the Department of Human Services is required to notify the employer that an evaluation will be conducted to determine whether the crime or abuse warrants prohibition of employment. The evaluation is conducted in accordance with procedures adopted by the Department for this purpose. The employer also performs the evaluation with the Department if it concerns an employee; however, the Department retains authority to determine whether prohibition of employment is warranted. The evaluation is required to consider the likelihood that the person will commit the crime or founded abuse again, in addition to other criteria. The statutory provisions for each of the facilities under former law were stricken and are rewritten to provide a consistent set of procedures.

HOUSE FILE 2508 — Chronic Substance Abuse
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act adds the definition of chronic substance abuser to Chapter 125, relating to chemical substance abuse, which provides that a person must be a danger to the person's self or others and lack sufficient judgment to make responsible treatment decisions as the result of the habitual use of chemical substances to be considered a chronic substance abuser. The Act adds a definition of substance abuse which includes the use of chemical substances by persons suffering from chemical dependency, persons who are incapacitated by a chemical substance, are substance abusers, or are chronic substance abusers. The Act also changes the definition of chemical substance to mean alcohol, wine, spirits, beer, and controlled substances as that term is defined in the Uniform Controlled Substances Chapter.

At a civil commitment hearing for substance abuse, a judge may now immediately order a person into outpatient treatment as a treatment option. The Act also makes numerous technical changes to add the terms chronic substance abuser and chronic substance abuse to the provisions which relate to the terms substance abuse and substance abusers, which previously provided the standard for both voluntary and involuntary commitment.

HOUSE FILE 2517 — Juvenile Care, Treatment, and Corrections
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act relates to the care and treatment of juveniles, youthful adult offenders, and other persons by establishing certain dispositional requirements concerning the state juvenile institutions and their administration, providing for financing and funding of certain facilities serving juveniles and other persons, establishing a youthful offenders program in the Department of Corrections, and providing various effective dates.

A limitation on the number of beds which may be licensed as a psychiatric medical institution for children under Chapter 135H is expanded by 70 beds for applicants which have operated a facility for at least 3 years providing psychiatric services exclusively to children or adolescents. A proposed facility must meet or exceed requirements for licensing as a comprehensive residential foster care facility.

The Director of Human Services is charged with supervisory responsibility over the superintendents of the state juvenile institutions in place of the Administrator of the Division of Child and Family Services, Department of Human Services to accommodate an internal reorganization of administrative responsibilities within the Department. The Act contains various coordinating changes for this purpose.

The Iowa Finance Authority may issue bonds and notes and make loans to nonprofit corporations for the purpose of financing the acquisition or construction of residential housing or treatment facilities serving juveniles or handicapped or disabled persons. In the authorization to issue the bonds or notes, the Authority may provide that the related principal and interest are limited obligations payable solely out of the revenues derived from the debt obligation, collateral, or other security furnished on behalf of the nonprofit corporation and the principal or interest does not constitute an indebtedness of the Authority or a charge against the Authority's general credit or general fund.

The bonding provisions are related to statutory and planning provisions to establish residential programs for children who are currently placed in the State Training School, the Iowa Juvenile Home, and out-of-state facilities. The Department of Human Services may establish supplemental per diem or performance-based contracts which include payment of costs for principal and interest of the bonds and notes issued by the Iowa Finance Authority. The Department of Human Services and the Supreme Court, in consultation with a planning group of legislators and various expert public members, are directed to develop a plan for the types of residential programs which should be developed. The Department of Human Services must implement the plan by issuing a request for proposals by July 1, 1990, to establish by October 1, 1991, 120 new residential slots in community settings. The Department must work with the Iowa Finance Authority to ensure the slots are developed at the lowest possible cost.

The planning group is also to develop a plan for the state juvenile justice system and perform other specified tasks and submit a report containing recommendations to the Governor and the General Assembly by December 1, 1991. As part of its responsibilities, the planning group must seek public-private partnerships for modernizing programs and facilities at the State Juvenile Institutions, develop potential placement and program criteria for the Iowa Juvenile Home based upon the elimination of placements of children found to be in need of assistance (CHINA's) and develop a plan to convert all or part of the State Training School at Eldora to a statewide diagnosis and evaluation center. In addition the plan must include provisions for establishing regional secure treatment facilities for juveniles. This requirement coordinates with a statutory provision converting the State Training School to these purposes effective January 1, 1992.

Significant portions of the Act relate to the State Training School and the Iowa Juvenile Home and to court proceedings for commitment to these facilities. Beginning October 1, 1991, a court order committing a child to the State Training School can only be entered if a child is at least 12 years of age and the placement is in the best interests of the child, or is necessary for the protection of the child and the child has committed an act which is a forcible felony as defined in Chapter 702 or if any 3 of the following 4 conditions exist:

1. The child is at least 15 years of age.

2. The court finds the placement to be in the best interests of the child or necessary to the protection of the public and the child has committed an act which is a crime against a person and which would be an aggravated misdemeanor or a felony if the act were committed by an adult.

3. The child has previously been found to have committed a delinquent act.

4. The child has previously been placed in a treatment facility outside the child's home.

Similar temporary transfer procedures applicable to both the State Training School and the Iowa Juvenile Home are established. Upon receiving an application from the Director of the Department of Human Services, the court must enter an order to temporarily transfer a child from the respective facility to an alternative placement site if the court determines that there is insufficient time to file a motion and hold a hearing for a substitute dispositional order, that immediate removal of the child is necessary to safeguard the child's emotional or physical health, and that reasonable attempts to notify the child's parents, guardian ad litem and attorney have been made. If there is insufficient time to provide notice in accordance with rules of juvenile procedure and the conditions above exist, the court may enter an ex parte order for the temporary transfer. Within 3 days of the child's transfer the Director must file a motion for a substitute dispositional order and the court must hold a hearing for the order within 14 days of the child's transfer. If the court finds during the hearing that the removal of the child from the state juvenile institution is necessary, the court must grant the Director's motion for the substitute dispositional order to place the child in an alternative placement site.

State financial aid to county or multicounty juvenile homes is required to be at least 10 and not more than 50 percent of the total establishment and operating costs of a home. Under former law, there was a 50 percent maximum amount for state aid but no minimum amount.

Provisions of Chapter 242, relating to the State Training School, concerning its official designation, administration, superintendent, and education and training functions are stricken and rewritten to emphasize that the School's purpose is to provide a positive living experience for older juveniles who require secure custody for an extended period of time and that programs must focus upon appropriate developmental skills to prepare the juveniles for productive living.

The Judicial Department, in consultation with the Department of Human Services, must develop population guidelines for the number of children placed at the State Training School and the Iowa Juvenile Home at any one time. Within the population guidelines, the Judicial Department must allocate to each judicial district the number of children which may be placed at the 2 facilities from the district and must develop procedures to manage the number of children placed at the facilities within the population guidelines. These provision must be implemented by January 1, 1991.

Effective July 1, 1992, a youthful offenders program is established within the Department of Corrections to provide for the control, treatment, and rehabilitation of offenders who are 18 to 21 years of age. The Department is to work with a task force consisting of various state agencies, the courts, and other groups to develop a proposal for the program. Various program components are specified and the proposal must be submitted to the Governor and the General Assembly by January 2, 1991.

HOUSE FILE 2546 — Child Day Care Regulation and Financing
BY COMMITTEE ON WAYS AND MEANS. This Act relates to child day care and the state child and dependent care tax credit, makes an appropriation, and provides a retroactive applicability date.

A person who has been convicted of a crime against a person or a person with a record of founded child abuse may be restrained by temporary or permanent injunction from providing child day care. The Department of Human Services may conduct child abuse registry checks and the Department of Public Safety may release criminal record information relating to unregistered child day care providers.

A statewide grant program for child day care resource and referral services is established and placed under the authority of the Department of Human Services. The services are to be delivered by nonprofit or public agencies which are regionally located, based upon the distribution of the child population in the state.

The Department is required to provide oversight and to annually evaluate each resource and referral agency, to provide technical assistance to child day care facilities in meeting their insurance coverage needs at a reasonable cost, and to provide opportunities to facilities for group purchasing of equipment and supplies. Agencies are encouraged to operate in a public-private partnership and to organize assistance to family and group day care homes according to certain priorities. The Act provides a listing of services which may be provided by the resource and referral agencies.

The Department is granted emergency rulemaking authority to implement the grant programs. Appropriations are provided for funding of the statewide grant program and for child day care start-up grants. If unanticipated federal moneys are received which may be used for the purposes of the appropriations, the federal moneys must be used before state moneys are used.

The Department of Human Services is directed to assess the supply of persons in the state who are educated in child development and early childhood education. The College Aid Commission is directed to use the assessment to develop a proposal regarding the establishment of a loan repayment program for persons who are obtaining degrees in child development and early childhood education. The Department of Human Services is to submit a report of the findings, including the Commission's proposal, to the General Assembly by December 1, 1990.

The state child and dependent care tax credit is made refundable and revised to provide a larger credit to low-income taxpayers and is retroactively applicable to tax years beginning on or after January 1, 1990.

The child and dependent care tax credit is included with other credits for withholding purposes. The state child and dependent care tax credit, and its refundability, is included in notification provisions for the earned income tax credit contained in income tax or instruction booklets.

HEALTH AND SAFETY

SENATE FILE 205 — Respiratory Care Practitioners
BY DIELEMAN. This Act revises provisions relating to the credentialing and regulation of respiratory care practitioners. The Act changes the terminology so that a respiratory care practitioner (respiratory therapist or respiratory therapy technician) is "licensed" rather than "registered" or "certified." A person who has not completed a training program, passed a national or state examination, and met other requirements for licensing may not claim to be a respiratory care practitioner.

The Act does not prohibit an unlicensed person engaging in acts constituting the practice of respiratory care, as long as the person does not claim to be a respiratory care practitioner. However, after July 1, 1991, an unlicensed person performing respiratory care must provide to the Iowa Department of Public Health evidence of compliance with the same continuing education requirements as licensees. Exemptions are provided for persons licensed in other health professions, emergency medical personnel, and persons whose function is limited to the home delivery and connection of oxygen tanks or to the delivery, setup, testing, or demonstration of other respiratory care equipment in the home upon the order of a licensed physician.

The Act makes applicable to the licensing of respiratory care practitioners the requirements of Chapter 258A, relating to continuing education and disciplinary and other procedures with respect to professional and occupational licensing. Existing requirements for respiratory care practitioners to submit evidence of continuing education are deferred from July 1, 1988, to July 1, 1991.

SENATE FILE 2011 — Minimum Plumbing Facilities
BY HANNON. This Act requires places of assembly for public use, including but not limited to theaters, auditoriums, and convention halls, and restaurants, pubs, and lounges, constructed on or after January 1, 1991, to conform to the standards for minimum plumbing facilities as provided in the Uniform Plumbing Code. Specifically, places of assembly with a capacity of 1-100 persons are required to have 1 toilet and 1 urinal for males, and 3 toilets for females; for a capacity of 101-200 persons, 2 toilets and 2 urinals for males and 6 toilets for females; and for a capacity of 201-400 persons, 3 toilets and 4 urinals for males and 8 toilets for females etc. Restaurants, pubs, and lounges with a capacity of 1-50 persons must have 1 toilet and 1 urinal for males and 1 toilet for females; for a capacity of 51-150 persons, 2 toilets and 1 urinal for males and 2 toilets for females; and for a capacity of 151-300 persons, 3 toilets and 2 urinals for males and 4 toilets for females, etc. The Act also requires toilets installed pursuant to the Act to be water efficient, using 3 gallons or less of water per flush. The Act also requires the State Building Code Commissioner to adopt rules to enforce the Act and provides for administrative review and appeal of any ruling of the Commissioner.

SENATE FILE 2049 — Blood Center Licensure
BY HUTCHINS. This Act prohibits a person from establishing, conducting, managing, or operating a blood collection, blood processing, or plasmapheresis center without obtaining a license from the Iowa Department of Public Health. Licensure requirements include proper registration with the United States Food and Drug Administration and compliance with all applicable federal regulations. A blood collection, blood processing, or plasmapheresis center is also required to submit to the Department, on an ongoing basis, recent proficiency testing results and on-site inspection reports required for licensure, registration, or accreditation by various national or federal organizations or agencies. The Department is required to provide technical assistance to blood collection, blood processing, and plasmapheresis centers to ensure compliance with federal, national organization, or agency standards. The Department is authorized to assess an annual licensing fee of no more than $100. The provisions of the Act are repealed effective July 1, 1991.

SENATE FILE 2097 — Mediation by Dental Examiners Board
BY COMMITTEE ON STATE GOVERNMENT. This Act provides that the Board of Dental Examiners is authorized to provide for mediation of disputes between dentistry or dental hygiene licensees and their patients when specifically recommended by the Board and also has the power to provide for restitution to patients. The Act also provides that subsequent to an investigation by the Board, the Board may appoint a disinterested third party to mediate disputes between licensees and patients. Mediation of a dispute does not preclude the Board from taking disciplinary action against the affected licensee.

HOUSE FILE 2235 — Community Action Agencies Commission
BY COMMITTEE ON STATE GOVERNMENT. This Act provides for the filing of an annual report with the Governor and the General Assembly regarding community action programs conducted within the state by the Administrator of the Division of Community Action Agencies of the Department of Human Rights.

The Act creates a 9-member Commission on Community Action Agencies made up of ⅓ elected officials, ⅓ persons with incomes below federal poverty levels, and ⅓ from other major interest groups. The Commission's duties are to adopt rules, supervise collection of data, and recommend legislation to the Governor and General Assembly relating to community action agencies and programs and the services provided by each.

The Act also sets out the membership requirements for community action agency boards.

The Act also amends H.F. 2294, enacted in the 1990 Session, by repealing those provisions creating the Affordable Heating Program Advisory Council on July 1, 1992.

HOUSE FILE 2308 — Freestanding Hospice Facilities
BY COMMITTEE ON HUMAN RESOURCES. This Act exempts freestanding hospice facilities which operate hospice programs in accordance with federal standards from state licensure and regulation requirements applied to hospitals and health care facilities.

HOUSE FILE 2372 — Anabolic Steroids
BY SIEGRIST. This Act amends the Iowa Drug, Device, and Cosmetic Act by prohibiting the distribution of anabolic steroids to minors unless necessary for the treatment of disease. The offense is an aggravated misdemeanor. The Act further provides that the Board of Pharmacy Examiners may expand the definition of anabolic steroids by administrative rules.

HOUSE FILE 2486 — Tanning Facilities
BY COMMITTEE ON HUMAN RESOURCES. This Act prohibits a tanning facility from operating without a current valid permit to operate, issued by the Iowa Department of Public Health. The Act also requires a tanning facility to post certain warning signs that describe the hazards associated with the use of tanning devices. The Department is directed to establish requirements for the operation of tanning facilities, adopt rules for the implementation and enforcement of the provisions of the Act, and establish and collect fees to defray the costs of administering the program established by the Act. The Act authorizes the Director of the Department or the Director's designee to inspect a tanning facility at all reasonable times to determine if the provisions of the Act are being violated, and provides for relief, relative to a violation of the Act, in the form of a restraining order or an injunction. A person who operates a tanning device or tanning facility in violation of the Act, or any rule adopted pursuant to the Act, commits a simple misdemeanor.

HOUSE FILE 2489 — Health Care Facilities
BY COMMITTEE ON HUMAN RESOURCES. This Act relates to health care facilities by providing additional categories of health care facilities, eliminating the intermediate care facility and skilled nursing facility categories, and providing additional definitions, a penalty, and coordinating changes.

The Act establishes new definitions for "nursing facility" and "intermediate care facility for the mentally retarded."

The definition of health care facility is amended by striking the references to intermediate care facility and skilled nursing facility and adding references to intermediate care facility for the mentally ill and intermediate care facility for the mentally retarded. The definition of intermediate care facility for the mentally ill is amended to coordinate with the striking of the intermediate care facility definition. The section containing requirements for the nature of care required to be provided in a health care facility is stricken and rewritten to coordinate with the amended definition of health care facility

The Department of Inspections and Appeals is granted authority related to citations applied to a health care facility in place of the Iowa Department of Public Health. The Department of Inspections and Appeals is granted authority to levy an administrative penalty of not less than $1,000 and not more than $2,000 when a person notifies a health care facility of the time and date of a survey or on-site inspection of the facility. A similar provision enacted in the 1989 Session, limited to a survey or inspection in response to a complaint, is stricken. The repeal of the similar provision in the event a federal penalty is provided for the same action is repealed.

Coordinating amendments are provided in various Code sections to change references to an intermediate care facility and a skilled nursing facility to nursing facility. The Act takes effect October 1, 1990.

HOUSE FILE 2518 — Professional Licensure
BY COMMITTEE ON STATE GOVERNMENT. This Act changes several provisions relating to the licensing and discipline of persons in certain licensed health-related practice professions (medicine and surgery, podiatry osteopathy osteopathic medicine and surgery, practice as a physician assistant psychology, chiropractic, nursing, dentistry, dental hygiene, optometry, speech pathology, audiology pharmacy, physical therapy, occupational therapy, cosmetology, barbering, mortuary science, social work, or dietetics). Specifically, the Act provides that the Iowa Department of Public Health may refuse to grant a license to practice a profession to a person upon any grounds for which a license may be revoked or suspended, requires that a licensee display the license in the primary place of practice, requires a licensee to notify the Department upon a change of the licensee's place of practice, and provides that an examining board may require that a recent photograph of an applicant for a licensure examination be attached to the application.

The Act also provides that applications for licensure and related fees from persons wanting to practice medicine and surgery, psychology, chiropractic, dentistry, osteopathy, or osteopathic medicine and surgery must be submitted to the chairperson, executive director, or secretary of the proper examining board.

The Act requires the chairperson, executive director, or secretary of an examining board to keep a record of the proceedings of the board and removes a requirement that the board submit certain information to the Department upon licensure of a professional

The Act also provides that if the Board of Medical Examiners conducts an investigation based on a complaint received or upon its own motion, a hospital, pursuant to subpoena, must make available information and documents requested by the Board, specifically including reports or descriptions of any complaints or incidents concerning an individual who is the subject of the Board s investigation, even though the information and documents are also kept for, are the subject of, or are being used in peer review by the hospital. However, the deliberations, testimony, decisions, conclusions, findings, recommendations, evaluations, work product, or opinions of a peer review committee or its members and those portions of any documents or records containing or revealing information relating to a peer review committee are not subject to the Board's request for information, subpoena, or other legal compulsion. All information and documents received by the Board from a hospital under this portion of the Act are confidential.

The Act also adds licensed osteopaths to the list of those professionals exempt from licensure requirements as speech pathologists or audiologists; changes a reference to the educational "council" to the educational "commission" for foreign medical graduates in relation to licensure for the practice of medicine and surgery; provides that to obtain a license to practice medicine or surgery a person must successfully complete 1 year of internship or resident training in an approved hospital; requires that a graduate of a medical school, who is serving only as a resident physician and who is not otherwise licensed to practice medicine or surgery in Iowa obtain a resident physician's license from the Board; provides that the Board after due notice and hearing, may issue an order to discipline a person licensed to practice medicine or surgery for certain grounds and may include a civil penalty up to $10,000; provides that the Board of Medical Examiners may upon finding probable cause compel a physician to submit to alcohol or drug screening within a time specified by the Board and that failure to submit to alcohol or drug screening constitutes an admission to the allegations made against the physician by the Board; provides that the Board may issue an order to discipline a physician or surgeon for willful or repeated violation of a rule, regulation, or order of the Board, or for violation of an informal settlement between the licensee and the Board; provides that the Board may provide notice of a disciplinary hearing of a licensee by restricted certified mail; and provides a reference to the grounds for revocation of a physician's or surgeon s license in law regarding the authority of licensing boards.

HOUSE FILE 2562 — Flashing White Lights on Motor Vehicles
BY ARNOULD AND VAN MAANEN. This Act allows advanced or basic emergency medical care providers who are members of an ambulance, rescue, or first responder service to operate flashing white lights on their privately owned motor vehicles. The members may only illuminate the white lights in conjunction with hazard lights, when en route to the scene of a fire or in response to an emergency in the line of duty requiring the services of the member, when transporting a person requiring emergency care, or when at the scene of an emergency. The use of the white light is for identification purposes only. To obtain the authority to use white flashing lights on a privately owned vehicle, it is necessary to receive a certificate of authorization issued in accordance with rules adopted by the Iowa Department of Public Health. To be certified, an individual must be a member in good standing with an ambulance, rescue or first responder service and must be recommended by the head of that program

LABOR AND EMPLOYMENT

SENATE FILE 385 — Vetoed by the Governor
BY COMMITTEE ON BUSINESS AND LABOR RELATIONS. This bill was intended to expand the scope of negotiations for purposes of public employment collective bargaining to include matters of discipline and dismissal.

SENATE FILE 2155 — Workers' Compensation Options for Officials
BY SZYMONIAK AND MILLER. This Act provides a method for the computation of workers compensation to be allowed an elected or appointed official whereby the official may choose either of the following payment options: 1) payment based upon the official's weekly earnings as an elected or appointed official, or 2) payment based on an amount equal to 140 percent of the statewide average weekly wage.

SENATE FILE 2159 — Labor Laws
BY COMMITTEE ON BUSINESS AND LABOR RELATIONS. This Act amends provisions regulating occupational safety and health, amusement ride and boiler inspections, asbestos removal and encapsulation, the Division of Labor Services, wage payment collection, and construction contractors, and provides a penalty.

Specifically, the Act provides that volunteers involved in responses to hazardous waste incidences are included in the definition of "employee" in the Iowa Occupational Safety and Health Act and requires workers' compensation coverage of the volunteer.

The Act expands the definition of "concession booth" for safety inspection purposes to include a booth used at only 1 fair or carnival for more than 7 consecutive days.

The Act allows schools, along with business entities, which use their own employees to remove or encapsulate asbestos to be exempt from the permit requirements of Chapter 88B. However, schools would not be exempted from the requirements relating to training of school employees regarding the health and safety aspects of asbestos removal and encapsulation.

The Act also requires the Labor Commissioner to establish rules for issuance and revocation of special inspector commissions for boilers and unfired steam pressure vessels and deletes a provision of the Code relating to boilers used on tourist railroads and trains.

The Act allows the Labor Commissioner to assess a civil penalty against an owner who operates a facility after a safety order has been issued for violation of Chapter 89 relating to boilers and unfired steam pressure vessels. The penalty may not exceed $500.

The Act also separates a related but distinct Code provision from another Code provision allowing deductions to be taken by employers from workers' wages for lost or stolen property which is specifically assigned to and receipt acknowledged in writing by the worker.

The Act authorizes the Labor Commissioner to recover expenses for the benefit of an aggrieved worker under the Wage Payment Collection Act and also allows the Commissioner to request reasonable and necessary attorneys' fees.

The Act allows contractors who are not required to carry workers compensation insurance to show compliance with the workers' compensation statute by providing a statement that they are not required to carry workers' compensation coverage.

The Act removes a requirement that a contractor must state a principal place of business within the state on a registration application, allowing the contractor to state his or her principal place of business inside or outside the state on the application.

The Act provides for a registration fee for contractors, not to exceed $25 every 2 years; provides a procedure for revocation of a contractor's registration by the Labor Commissioner; and requires the Labor Commissioner to adopt rules reasonably necessary to phase in the system of contractor registration. The Act prohibits the issuance of documents required for construction of buildings to contractors who fail to register as required.

The Act also repeals a Code provision requiring the Division of Labor Services to retain certain documents for a period of 2 years.

SENATE FILE 2169 — Wage Deductions, and Non-English Speaking Employee Services
BY STURGEON. This Act prohibits certain employers from taking certain deductions from employees wages requires employers to provide certain services for non-English speaking employees requires certain practices upon recruitment of employees from out-of-state locations and provides penalties for violation of recruitment practice requirements.

Specifically, an employer cannot deduct from an employee's paycheck costs of certain personal protective equipment or costs of more than $20 for an employee's relocation to the place of employment.

An employer who employs for hourly wages 100 or more persons, 10 percent of which are non-English speaking and speak the same non-English language, must provide an interpreter available at the worksite for each shift during which the non-English speaking employees are employed, and must provide a person whose primary responsibility is to serve as a referral agent to community services for these employees.

An employer as described above who recruits non-English speaking residents of other states more than 500 miles from the place of employment must have on file a written statement signed by the employer and the employee which provides certain relevant information regarding the position of employment. If the employee resigns within 4 weeks of the employee's first day of work and requests transportation to return to the location from which he or she was recruited, the employer must provide the transportation at no cost to the employee.

An employer who violates the requirements related to recruitment is subject to a civil penalty of up to $1,000, [illegible] to pay punitive damages upon repeated violation of these requirements. A corporate officer of an employer who repeatedly violates these requirements commits a serious misdemeanor.

The Commissioner of the Division of Labor Services of the Department of Employment Services is given authority to adopt rules to implement and enforce this Act, and also may inspect certain employment records and interview an employer, owner, operator, agent, or employee.

The provisions of this Act are considered minimum standards and are not subject to negotiation in collective bargaining.

SENATE FILE 2187 — Workers' Compensation Second Injury Fund Limits
BY COMMITTEE ON BUSINESS AND LABOR RELATIONS. This Act increases the maximum authorized balance of the Workers' Compensation Second Injury Fund from $500,000 to $1,000,000. Contributions to the Fund are generally required to be made by employers and their insurers when a workers' compensation death benefit is paid. Under the Act, a contribution is required if the balance of the Second Injury Fund is less than $500,000. The assessment threshold under prior law was $300,000. If the Fund balance exceeds $1,000,000, contributions are not required.

The Second Injury Fund is intended to assume the future workers compensation losses of employees who had preexisting injuries or disabilities to the extent a second injury is exacerbated by the prior condition and to encourage the hiring of persons with preexisting disabilities by removing the financial threat to an employer that a prospective employee with a disability may cost more in workers' compensation benefits in the future than an employee with no disability. The increases in authorized balance and the assessment threshold are intended to maintain the financial soundness of the Fund.

SENATE FILE 2249 — Vetoed by the Governor
BY COMMITTEE ON BUSINESS AND LABOR RELATIONS. This bill originated in the recommendations of the Workers' Compensation Interim Study Committee conducted by the General Assembly during the 1989-1990 Interim to address problems with the state's workers' compensation system, especially the backlog of contested cases under the jurisdiction of the Industrial Commissioner.

The bill would have permitted third-party payors such as a worker's health insurance company to participate in the workers' compensation contested case procedures established by the bill. The Industrial Commissioner would have been authorized to order benefits to be paid by a party pending final outcome, with later reimbursement with interest if it was determined that a party ordered to pay benefits was not responsible. Various other provisions were included to resolve disputes between third-party payors and employers or employers' workers' compensation insurers involving disputes which could leave an injured employee with no benefits being paid. To avoid conflicting interpretation of insurance policies or contracts, insurance contract construction would have been delegated to the Commissioner of Insurance for resolution by letter ruling as a question of law.

The bill also would have prevented a health care provider from suing an employee while a contested case was pending before the Industrial Commissioner to determine liability for the cost of the medical care.

The bill would have made an employer responsible for medical expenses incurred if the expenses were incurred under the employer's choice of care provider, even if it was later determined that the injury was not work related. The employer or the employer's workers' compensation carrier would have retained a right of subrogation against the employee's third-party payor health insurer.

The bill would have provided for interest on late payment of medical benefits. Current law provides only for interest on late payment of weekly benefits. Additionally, new penalties would have been authorized for delay in commencement or termination of weekly compensation or medical benefits without reasonable or probable cause or excuse. The formula for calculating minimum weekly benefit amounts for permanent partial disability and permanent total disability would have been altered by the bill.

The bill would have proposed creating an expedited hearing process for certain contested workers compensation cases when an employer is not currently paying for medical benefits. Other procedural changes included the establishment of a deadline for initial hearing within 6 months of the filing of the contested case petition. The new initial hearing deadline was to be made effective July 1, 1991, to apply to all petitions filed on or after that date.

The bill would have further relieved unions of any liability for simple negligence in failure to inspect any place of employment which the bargaining unit represented.

The bill also would have instructed the Industrial Commissioner and the Commissioner of Insurance to cooperate in the compilation of certain data to evaluate the performance of the workers compensation system. The Legislative Council would have been asked to consider the establishment of an interim study committee to further investigate workers' compensation reform, including the following issues: compensation for work-related death, injury, hearing loss and other disabilities; the procedures for adjudicating claims and delivery of medical and other services to claimants to further reduce the backlog of cases; and to assure fair and speedy claim resolution and benefit delivery at a reasonable cost for both employers and employees.

SENATE FILE 2432 — Drug Testing
BY HUTCHINS AND HULTMAN. This Act provides that the restrictions on drug testing of employees or applicants for employment do not apply where the tests are required by federal regulations adopted as of July 1, 1990. The exemption granted is of no effect, however, upon a finding by a court of competent jurisdiction that the particular regulation is unconstitutional or otherwise invalid.

HOUSE FILE 2287 — Employer Disclosure of Unemployment Compensation Experience Record
BY OLLIE. This Act requires a predecessor employer, prior to selling or transferring all or part of the predecessor employer's business to a successor employer, to disclose to the successor employer the predecessor employer's experience record of charges of unemployment benefits payments and any layoffs or incidences since the last record that would affect the experience record. A predecessor employer who violates this requirement is liable to the successor employer for actual damages and attorney fees. This Act also requires the Division of Job Service of the Department of Employment Services to include notice of the requirement of disclosure in the Division's quarterly notification to each employer of benefits charged to the employer's account.

HOUSE FILE 2343 — Employment Agency Fee
BY COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS. This Act prohibits an employment agency from charging a client, for the procurement of a position of employment, a fee exceeding 15 percent of the annual gross earnings of the position. Previously, an employment agency was limited to charging no more than 8 percent of the annual gross earnings of a procured position.

HOUSE FILE 2346 — Vetoed by the Governor
BY COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS. This bill would have changed the minimum amount of wages required in an individual's base period for eligibility for unemployment benefits, commonly referred to as the attachment-to-the-work-force requirement. The bill would have eliminated the current base-period earnings requirement of 1.25 times the highest earnings quarter. The bill would have required that in order to be eligible for unemployment benefits, an individual must have been paid wages for insured work in 2 calendar quarters of the individual's base period in amounts totaling at least 3.5 percent and 1.75 percent respectively, of the statewide average weekly wage, multiplied by 52.

HOUSE FILE 2405 — Employee Access to Personnel Files
BY COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS This Act permits public and private employees to have access to and obtain a copy of their own personnel files maintained by their employers. An employee's access to the employee's personnel file is limited to all of the following: (1) The employer and employee must agree on the time the employee will view the file, and a representative of the employer may be present during the viewing; (2) An employee may not have access to employment references written on behalf of the employee; and (3) An employer may charge a fee for each copy made by the employer for an employee of an item in the employee's personnel file, except that the total amount charged for all copies cannot exceed $5.

HOUSE FILE 2460 — Public Employment Relations Board and Employee Organization Duties
BY COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS. This Act confers upon the Public Employment Relations Board exclusive original jurisdiction over all claims that an employee organization representing public employees has breached its duty of fair representation, altering the previous situation where the Board and the district courts share concurrent jurisdiction over such claims. The Act also specifies that the Board, as a remedy for violation of the Collective Bargaining Chapter, may reinstate employees with or without back pay and benefits. The Act also brings state law concerning the duty of a certified employee organization into conformity with law which exists in the private sector by codifying the standard for judging claims of unfair representation which has been developed by the National Labor Relations Board and the federal courts.

LOCAL GOVERNMENT

SENATE FILE 2163 — Agricultural Extension Councils
BY COMMITTEE ON STATE GOVERNMENT. This Act changes the composition and method of selection of county agricultural extension councils, the governing bodies of county agricultural extension districts. The Act reduces the size of each council to 9 members, elected at large by the qualified electors of the extension district.

Council members will no longer be selected to represent each township in the county. Members will be elected biennially at the time of the general election rather than at an annual township election meeting. Terms will be 4 years rather than 2 years. A gender-balanced nominating committee must be appointed in each county to nominate candidates for election to membership on the council. The nominating committee must consider geographic distribution in selecting nominees. Persons may also be nominated by petition. All nominees must file nominating petitions signed by 25 qualified electors of the district.

The terms of all members of existing extension councils expire on December 31, 1990. Existing extension councils are responsible for transition arrangements and must perform duties with respect to preparations for the election to be held in November 1990. Staggered terms are established by providing that the 5 candidates receiving the largest number of votes are elected to initial terms of 4 years while the next 4 are elected to initial terms of 2 years.

SENATE FILE 2165 — Deposits of Public Moneys
BY COMMITTEE ON STATE GOVERNMENT. This Act abolishes the duty of the Treasurer of State to approve an increase in the maximum deposit limit of a local government in a depository institution.

SENATE FILE 2227 — County and Joint County and City Special Assessment Districts
BY SZYMONIAK. This Act authorizes a county, alone, or by Chapter 28E agreement with a city or another county to create special assessment districts within areas of the county outside cities or within a city by agreement, to construct and repair public improvements benefiting the special assessment districts and assess the costs of the public improvements to the property within the special assessment districts benefited by the improvements. The county or city may issue special assessment bonds in the same manner as cities under Chapter 384, Division IV. The Act also authorizes the establishment and collection of rates and charges to benefited property to pay the cost of operation and maintenance of the public improvements. This Act takes effect March 30, 1990.

SENATE FILE 2244 — Handicapped Parking
BY COMMITTEE ON TRANSPORTATION. This Act authorizes issuance of handicapped registration plates to the owner of a motor vehicle who is the parent or guardian of a handicapped child.

It also authorizes the issuance of permanent handicapped identification hanging devices effective January 1, 1991, to organizations with transportation programs for the handicapped or elderly and to persons in the business of transporting the handicapped or elderly.

The Act authorizes cities and counties to provide by ordinance for a simple notice of a $25 fine for improper use of a handicapped identification device.

The Act allows a physician or chiropractor licensed in a contiguous state to provide a statement acknowledging a person's handicap for purposes of receiving a handicapped identification device.

The Act adds new dimension requirements in accordance with federal regulations, which specify that each parking space designated after July 1, 1990, be at least 96 inches wide with a 60-inch walkway between vehicles. Prior law exempted metered on-street parking from compliance with the dimension requirements for handicapped parking. However, the Act strikes the metered exemption and adds a parallel on-street parking exemption.

The Act requires that a person providing a nonresidential parking area must have the specified number of handicapped parking spaces and reduces the number of required spaces to not less than 2 percent of the total parking spaces in each parking facility. A parking facility which has 10 or more spaces must designate at least 1 parking space as a handicapped parking space. A nonresidential parking facility in which construction has been completed on or after July 1, 1991, which provides parking to the general public must have an increased number of parking spaces. A person providing off-street public parking facilities must review the utilization of the handicapped parking spaces for a 1-month period every 12 months. If the average occupancy rate of the handicapped

parking spaces is greater than 60 percent during normal business hours, then the person must provide additional parking spaces. An individual who possesses a permanent handicapped identification device may request a handicapped parking space in the parking facility of a person providing off-street nonresidential parking as a lessor.

This Act also changes the number of handicapped spaces required in cities which provide on-street parking within a business district. A city must define and establish a business district by ordinance and designate not less than 2 percent of the total parking spaces within the business district as handicapped parking spaces. An individual possessing a permanent handicapped identification device may petition the city to review the utilization and location of existing handicapped parking spaces for a 1-month period but not more than once every 12 months. If the average occupancy rate exceeds 60 percent during normal business hours, the city must provide additional handicapped parking spaces.

The state and each political subdivision may establish a handicapped parking review committee to review individual complaints and to review the location and numbers of handicapped parking spaces.

Finally, the Act adds a scheduled fine of $25 for improper use of a handicapped identification device.

SENATE FILE 2263 — Hospital Depreciation Fund
BY COMMITTEE ON STATE GOVERNMENT. This Act authorizes a board of trustees of certain public hospitals organized under Chapter 347A or of merged area hospitals, in which capital costs are payable from revenue bonds, to establish a separate fund for depreciation. These hospitals are now permitted to fund depreciation in addition to expenditures for operating and maintenance before certifying to the county board of supervisors that revenues are insufficient to pay for expenditures. If the hospital certifies that revenues are deficient, the board of supervisors must provide for the amount of the deficiency from county funds or from a property tax levy.

SENATE FILE 2366 — Councils of Governments
BY COMMITTEE ON LOCAL GOVERNMENT. This Act statutorily establishes local councils of governments and requires a council of governments to coordinate regional planning and development duties through a work program. Each council of governments will coordinate planning services and technical assistance in their own area and will prepare a regional community development plan. The Act provides for one representative of the councils of governments to serve on the advisory council established by the Department of Economic Development.

The Act allows a council of governments to enter into a Chapter 28E agreement.

The Act originally provided that the 7 counties currently not served by a council of governments will be required to form or join a new council of governments or be placed in an existing council of governments within 6 months of the effective date of the Act. This provision of the Act was rewritten by S.F. 2327 so that these 7 counties are not required to form or join but may form or join a new or existing council of governments and no time limit is specified for forming or joining a council of governments.

HOUSE FILE 252 — Candidate Leaves of Absence for Deputy Sheriffs
BY SPEAR. This Act provides that chief deputy sheriffs and second deputy sheriffs, who are currently exempt from the provisions concerning classified civil service positions, are subject to the requirements of Section 341A.18 with respect to civil service officers and employees who become candidates for a partisan elective office. The Act provides that the civil service officers and employees, including deputy sheriffs, may use any accumulated paid leave time during the period in which the person is required to be on leave during the election process. The Act also provides that a leave of absence is required during the 30-day period prior to both the primary election and the general election, until the person is eliminated as a candidate or wins the election. The county is to continue to provide health benefits coverage, and may provide other fringe benefits to any officer or employee subject to civil service, or to any chief deputy sheriff or second deputy sheriff during any leave of absence required pursuant to this Act.

HOUSE FILE 366 — County Assessments for Abatement of Hazards
BY BUHR, CONNORS, JESSE, HOLVECK, CARPENTER, SHOULTZ, BISIGNANO, RENAUD, AND SHERZAN. This Act authorizes a county to require the abatement of a nuisance, removal of dead or diseased trees, repair or dismantling of a dangerous building, numbering of buildings, the connection to public drainage systems, and cutting or destruction of weeds and brush, and authorizes special assessments as provided by city law to pay for the required actions.

HOUSE FILE 724 — Land Surveys and Plats
BY COMMITTEE ON LOCAL GOVERNMENT. This Act creates 2 new chapters relating to land surveying and platting. Chapter 114A establishes uniform standards and guidelines for the practice of land surveying in Iowa. The Act also establishes standards and procedures for preparing, recording and indexing United States public land survey corner certificates, and providing access to public land corner location information.

Chapter 409A establishes requirements and procedures for plats of survey, acquisition plats, subdivision plats, and auditor's plats. It requires that a governing body apply reasonable standards for the review and approval of subdivision plats and give consideration to the comprehensive plan, to the possible burden on public improvements, and to a balance of interests between the proprietor, future purchasers, and the public interest.

The Act repeals Chapter 355, relating to land surveys, and Chapter 409, concerning plats. Sections 441.65 through 441.71, relating to platting for assessment and taxation purposes, are also repealed.

HOUSE FILE 2057 — Prohibited Interests in Public Contracts — Exceptions
BY VAN MAANEN. This Act allows an official or employee of a private regulatory agency to sell goods or services, under limited circumstances, to individuals, associations, or corporations who are subject to the regulatory authority of the agency. The Act permits interests in public contracts which benefit an officer or employee of a county or city, if the benefits do not exceed $1,500 in a fiscal year and allows a county officer or employee to have an interest in a county contract if the contract is competitively bid, in writing, and publicly invited and opened. Finally, the Act prohibits a school board director from having an interest in a school corporation contract unless the benefit to the director does not exceed $1,500 or the contract was competitively bid, in writing, and publicly invited and opened.

HOUSE FILE 2131 — Local Housing Authorities and Sweat Equity Housing Cooperatives
BY BROWN AND JESSE. This Act authorizes local housing authorities to organize sweat equity housing cooperative associations under Chapter 499A, the Municipal Housing Act. A sweat equity cooperative association is organized differently than a standard housing cooperative. A sweat equity cooperative association is owned according to the following formula: 25 percent is initially owned by qualified low-income partners and 75 percent is initially owned by an advisory board. The partners are the primary source of labor. The association, under guidance from a board of directors, must acquire existing housing or small business building stock in need of rehabilitation and establish a rehabilitation plan. The Iowa Finance Authority may provide support to the association. Upon completion, the association becomes wholly owned by the partners.

HOUSE FILE 2142 — City Street Construction Reports and Funds
BY COMMITTEE ON TRANSPORTATION. This Act requires cities with populations of 5,000 or more who receive road use tax funds to submit a comprehensive program of street construction and reconstruction to the State Department of Transportation on May 1 of each fiscal year. Previously, the report was required to be submitted by December 1 of each year. The Act eliminates the requirement that cities include a statement of progress made toward completion of each project contained in the program and eliminates the street construction and reconstruction report required of cities with populations of less than 5,000 and greater than 1,000. Finally, for all cities receiving road use tax funds, the Act extends the time period for delivery of the annual report showing all street receipts and expenditures in a fiscal year, from September 10 to September 30. If a city fails to deliver the report by September 30, the Treasurer of State must withhold funds allocated to the city until the city complies. If the city does not comply by December 31, following the date the report was required, the funds will be withheld until the city complies and will revert to the street construction fund of the cities.

The Act takes effect March 30, 1990.

HOUSE FILE 2143 — Snow Route Parking Violations
BY COMMITTEE ON TRANSPORTATION. This Act allows local authorities to impose up to a $25 fine for snow route parking violations by a simple notice of fine. Fines collected upon a simple notice of fine are not subject to other costs or charges and are retained by the city or county.

HOUSE FILE 2154 — Local Civil Rights Agencies and Commissions
BY HATCH. This Act requires a city of 29,000 population or greater to maintain a local civil rights agency or commission consistent with rules adopted by the Iowa Civil Rights Commission. A city required to maintain this local agency or commission must provide adequate funding in order to effect cooperative undertakings with

the Iowa Civil Rights Commission to effectuate the purposes of the Iowa Civil Rights Act. The Iowa Civil Rights Commission is authorized to reimburse a local agency or commission for expenses incurred in furtherance of the agency's or commission's duties if funds are appropriated by the General Assembly for this purpose.

This Act applies only to an agency or commission of local government in existence on July 1, 1990.

HOUSE FILE 2166 — Marijuana Eradication
BY COMMITTEE ON LOCAL GOVERNMENT. This Act requires all public officers responsible for the care of public highways to report the unlawful growth of marijuana to the county board of supervisors or weed commissioner. The Act requires the weed commissioner to notify the Department of Public Safety of the location of marijuana plants found growing on public or private property. The Act further adds to the duties of the Department of Public Safety, by requiring the Department to identify and eradicate marijuana plants found growing on public or private property when growing marijuana plants are reported to the Department. The Act further requires the Department of Public Safety to adopt rules governing the identification and eradication of marijuana plants in cooperation with local law enforcement officials.

HOUSE FILE 2307 — City Council Member Serving as Volunteer Fire Chief
BY PETERSON OF CARROLL. This Act provides that a city council member may serve as chief of the volunteer fire department during the term for which the member is elected if the fire department serves an area with a population of no more than 2,000 persons and if there is no person who is not a city council member available to hold the position of chief of the volunteer fire department.

HOUSE FILE 2322 — County Recorders' Fees
BY COMMITTEE ON LOCAL GOVERNMENT. This Act changes the procedure for issuing a transcript of an instrument affecting real estate in a county by removing a requirement that the Clerk of the District Court certify to the signature of the County Recorder and the Recorder's official character when a transcript of a real estate instrument is obtained from the County Recorder. The Act also changes a Code reference relating to the fee for recording and indexing name changes. The Act also imposes a recording and indexing fee of $5 per page for certain instruments which are currently filed without fee.

HOUSE FILE 2324 — Disposition of Documents by County Recorders
BY COMMITTEE ON LOCAL GOVERNMENT. This Act provides that documents and records filed with the County Recorder may be returned to the sender or may be disposed of by the Recorder if the sender does not want the record or document. The Act also provides similar procedures to dispose of records or documents filed with the Recorder before July 1, 1990.

HOUSE FILE 2341 — Airport Zoning
BY CHAPMAN. This Act allows a city or county to enact zoning regulations that permit the removal or lowering of trees and structures from air navigation areas to conform to the Federal Aviation Administration's grant assurance provisions.

HOUSE FILE 2450 — Parking Violations
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act requires that a city pay court costs of $2 for a parking violation which is more than 9 months old and which is dismissed by the city prior to January 1, 1991. The Act also allows for an increased fine of up to $10 for overtime and parking meter violations that are not paid within 30 days if authorized by local ordinance and adds a fee for filing and docketing a complaint or information or a uniform citation and complaint for various parking violations. This Act requires a court cost fee of $8 for each information and complaint and for each uniform citation and complaint for parking meter and overtime parking violations which is denied. Former law required court costs of $8 per appearance regardless of the number of parking violations considered at the court appearance.

HOUSE FILE 2495 — Storm Water Drainage Systems
BY COMMITTEE ON LOCAL GOVERNMENT. This Act defines city utility to include storm water drainage systems which has the effect of authorizing individual cities, or 2 or more cities by agreement, to create storm water drainage systems using the procedures provided for sanitary sewage systems. A city council may impose charges to pay for the construction and operation of the system based on a formula of benefits to the property and provide for special assessments. The Act also provides for a special election on the issuance of revenue bonds for a storm water drainage project, which may be called by a petition of 3 percent of the qualified electors

of a city if the project costs and city population meet certain criteria. Another exception is provided if a city is required by the federal Environmental Protection Agency to file an application for a storm water sewer discharge or storm water drainage system under the federal Clean Water Act of 1987.

HOUSE FILE 2557 — Tenant Responsibility for Water Services
BY ARNOULD AND VAN MAANEN. This Act provides an exemption from a lien for residential rental property when the tenant is directly responsible for payment of the water service charge. The landlord must provide written notice to the water utility and a deposit of the usual cost of 90 days of water service must be paid. The Act also provides that when a utility gives a delinquency notice to the tenant, the landlord who requests notification shall also be notified. A utility is also required to give a property owner of record 10 days' written notice of a lien being filed if a request for notice has been filed.

HOUSE FILE 2560 — Community Clusters
BY COMMITTEE ON WAYS AND MEANS. This Act authorizes 2 or more cities, counties, and special taxing districts to enter into a Chapter 28E agreement to form community clusters for the joint exercise of powers to make more efficient use of their resources by providing for joint functions, services, facilities development of infrastructure, and for revenue sharing and to foster economic development. However, before the governmental units making up the community cluster can share revenues from ad valorem taxes on property each unit s electors must approve the revenue sharing agreement

NATURAL RESOURCES AND OUTDOOR RECREATION

SENATE FILE 57 — Handicapped Persons' Use of Crossbow
BY COMMITTEE ON NATURAL RESOURCES. This Act authorizes the Natural Resource Commission of the Department of Natural Resources to adopt rules permitting handicapped persons to use a crossbow for hunting in lieu of a bow and arrow.

SENATE FILE 2048 — Use of Firearms Near a Feedlot
BY SCOTT. This Act prohibits the discharge of firearms within 200 feet of a feedlot, where livestock are present, without consent of the owner or tenant.

SENATE FILE 2137 — Disposal of Forfeited Weapons
BY COMMITTEE ON JUDICIARY This Act provides that the Director of the Department of Natural Resources may transfer certain forfeited legal weapons to the Department of Public Safety for sale at public auction. However, rifles and shotguns must be retained by the Department of Natural Resources for disposal according to its own rules

SENATE FILE 2290 — Ownership and Theft of Fish in a Private Hatchery
BY COMMITTEE ON JUDICIARY. This Act specifically provides that fish within a private fish hatchery are private property, and that the theft of the fish is punishable under Section 714.2, the theft statute

SENATE FILE 2349 — Scheduled Fines
BY COMMITTEE ON NATURAL RESOURCES. This Act provides scheduled fines for violations of most provisions of Chapters 109, 109A, 109B, 110, 111, and 321G. These Chapters relate to game and fish laws, parks, and regulations for snowmobiles and all-terrain vehicles. The scheduled violations and fines will be used in lieu of procedures used for other simple misdemeanor prosecutions and provide some uniformity in the amount of fines, court costs, and surcharges imposed. The Act also requires a violator to give sufficient proof that a valid snowmobile or all-terrain vehicle registration has been obtained when a fine is paid for operating without a valid registration. Also, a court appearance will be required when an animal is taken illegally and civil damages are assessed along with criminal penalties.

HOUSE FILE 2114 — Hunting Licenses
BY COMMITTEE ON NATURAL RESOURCES AND OUTDOOR RECREATION This Act increases the number of nonresident wild turkey and deer licenses which may be issued each year and removes restrictions as to hunting zones and minimum populations required for a biological balance related to hunting within the zones. The Act also provides for the use of revenue from the nonresident licenses to employ additional conservation officers. A reciprocity provision relating to deer and wild turkey licenses is repealed. The Act takes effect February 9, 1990.

HOUSE FILE 2279 — Credit Card Payment of Natural Resources Department Charges
BY LYKAM. This Act permits the Department of Natural Resources (DNR) to accept payments by credit card of any fees, interest, penalties, subscriptions, or other payments due or collected by the DNR. The 1989 Session of the General Assembly generally authorized payments to state governmental entities by credit card, but required that specific statutory authorization be made to each agency or department in order to exercise the general authority.

HOUSE FILE 2296 — Regulation of Dams
BY STUELAND. This Act relates to the regulation and operation of dams under Chapter 469. The Act repeals a number of provisions in the Chapter relating to permits required to erect, construct, maintain, or operate dams on navigable or meandered streams or to erect, construct, use, or maintain dams for industrial or manufacturing purposes. Under the Act, the permits must be obtained from the Department of Natural Resources pursuant to Section 455B.275. That Section has traditionally regulated dams on flood plains and floodways. The Act also repeals a provision providing that the state may take possession of a dam by receivership proceedings if the dam is acquired or controlled in violation of anticompetition or price-fixing laws. A similar provision is added in Chapter 469A regulating hydroelectric generating plants.

HOUSE FILE 2355 — Hunting Law Violations
BY COMMITTEE ON NATURAL RESOURCES AND OUTDOOR RECREATION. This Act increases the civil penalty for illegally taking an elk, antelope, buffalo, or moose from $1,000 to $2,500, and directs the court to revoke the hunting license. A hunting license cannot be issued to the violator for the succeeding 2 calendar years.

HOUSE FILE 2500 — Wildlife Conservation Laws and Penalties
BY COMMITTEE ON NATURAL RESOURCES AND OUTDOOR RECREATION. This Act requires the reporting of hunting accidents with a firearm which result in personal injury or property damage of more than $100 and provides for the suspension of a hunting, fishing, or trapping permit until any assessed civil damages are totally paid by a violator. The Department of Natural Resources is directed to establish, by rule, a point system for the suspension or revocation of licenses and permits based on the seriousness of violations of game, fish, and related laws. The Act also provides for the establishment of a repeat offender program and recordkeeping system.

HOUSE FILE 2522 — Hunting and Fishing
BY COMMITTEE ON NATURAL RESOURCES AND OUTDOOR RECREATION. This Act allows military personnel on active duty who are legal residents of this state to hunt and fish without a license if the person's duty station is outside this state and if the person carries valid leave papers. The military personnel must also contact a conservation officer to obtain a deer or wild turkey tag before transporting the animal. The Act also allows a lifetime hunting and fishing combined license to be purchased for $30 by disabled veterans or former prisoners of war. The Natural Resource Commission may also negotiate fishing reciprocity agreements with other states. The Act takes effect January 1, 1991

STATE GOVERNMENT

SENATE FILE 368 — Federal Jurisdiction
BY COMMITTEE ON STATE GOVERNMENT. This Act provides a procedure for the Governor to accept federal offers to cede or retrocede, in whole or in part, exclusive federal jurisdiction over lands, except Indian lands, in federal enclaves in Iowa. Relinquishment of exclusive federal jurisdiction enables enforcement of state and local laws on lands within federal enclaves. The executive order of the Governor accepting jurisdiction must be filed in the office of the Secretary of State and in the office of the County Recorder of the county where the lands are located.

SENATE FILE 2094 — Auditor of State's Rulemaking Authority for Fees
BY COMMITTEE ON STATE GOVERNMENT. This Act provides rulemaking authority to the Auditor of State to establish a fee schedule for certain services. The Auditor of State must adopt rules establishing a fee schedule for providing advice and counsel to public entities and certified public accountants concerning audit and examination matters and for establishing a filing fee for examinations of governmental subdivisions. Under prior law, the fee schedule had to be approved by the Executive Council and there was no rulemaking procedure.

SENATE FILE 2164 — Distribution to Libraries of State Salary Report
BY COMMITTEE ON STATE GOVERNMENT. This Act provides that the publication and distribution of state employees' salaries is delayed from September 1 of each year to November 1. The State Library is provided 6 copies and each depository of the State Library is provided 1 copy without charge.

SENATE FILE 2232 — Limits on Indemnification for Special Exhibit Items
BY COMMITTEE ON STATE GOVERNMENT. This Act increases the authorized amount of indemnity which the Iowa Arts Council may extend to both a single art exhibition and the total amount of indemnification authorized at any one time. Prior law provided that the exhibitor be responsible for the first $25,000 of any loss. This Act reduces that deductible to $2,000, an amount which most exhibitors are willing to self-insure. Based on the escalating value of art, the maximum indemnification permitted for a single art exhibit is raised by the Act from $2,000,000 to $5,000,000. Similarly, the aggregate coverage of all exhibits indemnified at any one time plus losses paid is increased from $5,000,000 to $10,000,000.

SENATE FILE 2268 — Affirmative Action Plans and Reports
BY COMMITTEE ON STATE GOVERNMENT. This Act changes the deadlines for submitting state agency affirmative action plans and annual reports to the Department of Personnel from December 31 to July 31 of each year. In addition, the Act changes the deadline for the Department of Personnel's report on the condition of affirmative action programs from January 31 to August 31 of each year. The Act does not take effect until February 1, 1991, and contains an implementation section, thus requiring state agencies to file their plans and reports by December 31, 1990, and then not again until July 31, 1992. In addition, the Department of Personnel will be required to submit a report on the condition of affirmative action programs to the Department of Management by January 31, 1991, and then not again until August 31, 1992

SENATE FILE 2274 — Targeted Small Business Procurement Goals
BY HUTCHINS AND HULTMAN. This Act alters the Targeted Small Business Set-aside Program, relating to government purchasing from businesses in the state owned by women and minorities, into a goal oriented program in an attempt to conform with the United States Supreme Court decision in City of Richmond v. J. A. Croson Co. The prior law contained a mandatory 2 percent set-aside required to be purchased from targeted small business with a 10 percent goal. The Act converts the program to a 10 percent goal. The goal program is extended to merged area schools, area education agencies, and school districts. The requirements for becoming a certified targeted small business are expanded. The business must now be located in Iowa, operated for profit, must have 20 or fewer full-time employees, and must have an annual average gross income of less than $3,000,000 in addition to being owned, operated, and actively managed by one or more women or minority persons. The Act imposes new penalties for fraudulent practices in obtaining certification as a targeted small business or in the award of a targeted small business procurement contract under the revised goal program. Financial assistance mechanisms authorized to assist targeted small businesses are expanded to permit revolving loans and loans secured by accounts receivable. Prior provisions permitting the waiver of bond requirements on public projects are expanded by including in addition to lack of experience, 2 new bases for assistance: lack of net worth and lack of capital.

SENATE FILE 2311 — Unclaimed Fees
BY COMMITTEE ON STATE GOVERNMENT. This Act resolves a conflict between Section 12.11 and the later adopted Uniform Disposition of Unclaimed Property Act by repealing Section 12.11. Section 12.11, prior to its repeal, required that various officers, boards, and commissions of state government transfer unclaimed fees to the Treasurer of State twice annually, once in January and once in July.

SENATE FILE 2340 — Disposition of Unclaimed Property
BY COMMITTEE ON STATE GOVERNMENT. This Act provides for the recovery of unclaimed intangible personal property located outside the state, but issued by a state, a political subdivision, or a person organized under the laws of this state. Recovery includes income earned on the property. The property is presumed to be abandoned and subject to recovery if the owner has not made a claim on the property, has not communicated with the temporary custodian of the property, and cannot be notified. The temporary custodian of the property may be an entity residing or organized outside the state, and includes other governments. The Act does not apply to recovery of property subject to another provision of Chapter 556, governing recovery of the property through another procedure.

SENATE FILE 2369 — Historical Resource Development
BY COMMITTEE ON STATE GOVERNMENT. This Act makes several changes to the Historic Resource Development Program. The Act expressly states that the Program is the responsibility of the Historical Division of the Department of Cultural Affairs. The Act changes some references from the Department to the Division.

The Act further specifies that one of the purposes of the Program is to encourage and support the cultural health and development of the state. The Act provides that agencies of certified local governments may participate in the Program.

The Act states that grants and loans are available for the acquisition, development, preservation, and conservation of all historical resources, rather than only historical properties. The Act further provides that Program funds may be expended for the purpose of professional training and educational programs.

The Act modifies the restrictions on allocations for the Program. Under prior law, the Program could not allocate less than 20 percent nor more than 50 percent of the funds to any single category of purposes; the Act establishes new categories of projects eligible for funds, consisting of museums, documentary collections, and historic preservations. The Act then requires that not less than 20 percent nor more than 60 percent of the Program's funds shall be allocated to a single category.

The Act makes additional changes to restrictions on grants and loans under the Program. Previously, grants could not be given to or received by state agencies. Under the Act, state agencies may be given grants under the Program, so long as the grants do not exceed 20 percent of all grants awarded. The Act permits grant and loan funds to be used to support publications and salaries and benefits for employees of recipients, which was not permitted under prior law. The Act applies the limitation concerning grants to recipients within a single county to both grants and loans. Under prior law, not more than $100,000 or 20 percent of the annual appropriation, whichever was more, could be granted to a recipient within a single county. The Act applies this restriction to grants and loans combined. The Act makes additional modifications concerning restrictions on funds.

The Act provides that the Division may contract with in-state lending institutions to administer Program loans, and states that these institutions may have the right of final approval on such loans, subject to the Division's administrative rules. Thus, when the Division contracts with these lending institutions, the loans are not subject to review and recommendation by the State Historical Society Board of Trustees. All other loans and grants in the Program are subject to the Board's review and recommendation.

The Act changes the restriction under prior law which prohibited funds from being expended by employing individuals or businesses out of state. The Act provides that the Division may award grants or loans to be used for goods or services outside the state, if the recipient demonstrates that it is neither feasible nor prudent to obtain the goods or services within the state.

The Act alters the limitation on funds that may be used for the Program. Under prior law, the Department could use 10 percent of its annual appropriation, but no more than $75,000, for administration of the Program. The Act provides that the Division, rather than the Department, may use 10 percent of its appropriation, but no more than $75,000, for administration of the Program.

The Act provides that no single lending institution can hold more than $500,000 worth of outstanding Program loans.

The Act also deletes the Department's authority to sue or be sued in carrying out the Program.

SENATE FILE 2372 — Senatorial Elections After Redistricting
BY COMMITTEE ON STATE GOVERNMENT. This Act updates current references in the Code relating to the redistricting process for the election of senators in conformity with Article III, Section 6 of the Constitution of the State of Iowa so that the Code references relate to the 1991 redistricting process. In addition, the Act requires that a senator who resides in an odd-numbered senatorial district under a plan on March 13, 1992, must reside in either the plan's senatorial district which includes the place of residence of the state senator on the date of the senator's last election to the Senate, or an odd-numbered senatorial district which is contiguous to such district, for the senator to complete the senator's term and not be required to face an election to the Senate until 1994.

SENATE FILE 2426 — Compensation, Powers, and Duties of Lieutenant Governor and General Assembly Members
BY HUTCHINS AND HULTMAN. This Act relates to the person who acts as the President of the Senate by providing for the term of office of the President of the Senate; providing authorization for the compensation of the Lieutenant Governor in the executive branch provisions; removing the Lieutenant Governor from membership on the Legislative Council; making the President of the Senate, the Speaker Pro Tempore, and two additional minority party members Legislative Council members; and making changes in the manner of appointment of Senate members of certain boards, commissions, agencies, councils, associations, and statutory committees. The Act takes effect January 14, 1991.

SENATE FILE 2436 — Vetoed by the Governor
BY COMMITTEE ON APPROPRIATIONS. This bill created a Health and Safety Capital Improvement Fund in the Office of State Treasurer. The Fund was to receive 5 percent of all annual appropriations for operations to carry out health and safety capital improvement projects within state buildings during a fiscal year. The Fund did not receive any funds from grants-in-aid, standing appropriations, capital appropriations, and appropriations made to an institution under the jurisdiction of the State Board of Regents. The Legislative Capital Projects Committee was to make recommendations to the Department of Management concerning projects which should be carried out. Bonding was authorized with approval of the Governor to expedite capital projects, but the annual transfer to the Fund was the only source of revenue to amortize the bonds and interest payments. The Fund and capital program were to be in effect for 20 years.

HOUSE FILE 121 — Vetoed by the Governor
BY PETERSON OF CARROLL. This bill would have made available to state employees up to 12 weeks of paid or unpaid parental leave within a 2-year period for the birth of a child or for the adoption of child who is less than 8 years of age or for the adoption of a child of any age who has special needs. Additional unpaid leave would have been granted to an employee with the approval of the employee's supervisor. The bill would not have applied to an employee who is covered by a collective bargaining agreement providing a parental leave which is equal to or greater than the parental leave provided in the bill.

Several conditions would have applied to the parental leave. To be eligible for parental leave, an employee must have notified the employee's supervisor at least 30 days before the employee intended the parental leave to begin. However, if an employee took a disability leave related to pregnancy, the parental leave would commence immediately following the completion of the disability leave and the 12 weeks of parental leave would include the period of disability leave. The employee could have used a combination of accrued paid leave and unpaid leave but would have been entitled to retain at least 10 days of accrued sick leave and 5 days of vacation leave during a parental leave. Sick and vacation leave would not accrue during unpaid parental leave. If both parents were state employees and qualified for parental leave, unpaid parental leave would only have been available to 1 parent.

According to the bill, health insurance or benefits coverage would have been available to the employee during a period of unpaid parental leave. The employee would prepay both the employee and employer costs for the coverage and might elect to pay through payroll deduction. Upon the employee's returning to work, the amount of the employer portion of the coverage costs would have been refunded to the employee.

At the end of the parental leave, the employee would have been entitled to return to the position held prior to the leave, if available; to a position with an equivalent pay grade for which the employee is qualified; or to another position in accordance with applicable collective bargaining contract provisions and administrative rules.

The bill was to take effect July 1, 1991.

HOUSE FILE 737 — Public Improvement Contract Procedures
BY COMMITTEE ON TRANSPORTATION. This Act requires public corporations to retain from each monthly payment under a contract for the construction of public improvements not more than 5 percent of that amount which is determined to be due according to the estimate of the architect or engineer. Current law requires retention of 5 percent of that amount which is determined to be due. This Act, however, allows State Board of Regents' institutions to make payments without retention until 95 percent of the contract amount has been paid on a contract where a bond is required under Section 573.2 of the Code.

The Act also requires interest to be paid on the retained funds at the time of final payment. However, school corporations, counties, and cities, are exempt from this requirement.

HOUSE FILE 2001 — Voting Booth Requirements
BY BISIGNANO. This Act deletes certain statutory provisions establishing dimensions and other specific construction features for voting booths. The Act explicitly states that the State Board of Examiners for Voting Machines and Electronic Voting Systems has the authority to approve voting booths and to determine whether the booths meet secrecy requirements. A provision is added requiring at least one voting booth in each precinct to be accessible to handicapped persons.

As a result of another enactment (H.F. 2329, Sections 44 and 45), the effective date of this Act is May 3 1990. The Act is retroactively applicable to voting booths and electronic voting systems approved by the Board of Examiners for Voting Machines and Electronic Voting Systems and furnished before that date.

HOUSE FILE 2009 — Vetoed by the Governor
BY FULLER. This bill would have amended the election laws to specify that an elector must have resided in the county for 10 days immediately preceding the election in order to qualify to vote in the election.

The bill would have provided a procedure for special late registration whereby an eligible elector could register in person at the office of the County Auditor, on any day or at another location designated by the Auditor, after the official close of registration in the elector's precinct, including on election day. The County Auditor was to have provided to the precinct a separate listing of those eligible electors who had registered under the special late registration procedures. If time were too short for inclusion in the separate listing, the elector could have obtained an affidavit, notarized by the County Auditor or the Auditor's designee, for presentation at the precinct polling place on election day as proof that the elector was registered to vote. The elector then could have cast a ballot and precinct election officials need not have required that the person vote by special ballot.

The bill would have required the County Auditor to use a random sampling procedure, under rules adopted by the Secretary of State, for immediate verification of special late registrations. Those not in the sample must have been verified as soon as practicable thereafter. Notification must have been given to the Secretary of State and the County Attorney if the verification process had not produced satisfactory proof of the person's eligibility to vote.

The bill also would have changed the crime of improper voting from a serious misdemeanor to an aggravated misdemeanor.

HOUSE FILE 2156 — State Group Insurance Plan Membership by General Assembly Members and Part-time Employees
BY COMMITTEE ON RULES AND ADMINISTRATION. This Act provides that, for the purposes of membership in the state group insurance plan, a member of the General Assembly has the status of a "new hire", full-time state employee following each election of that member in a general or special election, in place of the current provision which provides the status when the member is initially eligible. The Act also provides that the surviving spouse of a former member of the General Assembly, who had elected to continue membership in the state health or medical group insurance plan, may continue membership if the surviving spouse requests continuation, in writing, of the finance officer within 31 days after the death of the former member.

The Act also provides that a part-time employee of the General Assembly, who elects to continue membership in the state group insurance plan during the interim period, must authorize payment of the total annual premium through direct payment of the monthly premium for the plan selected to the state group insurance plan provider. A part-time employee of the General Assembly who elects membership in a state life insurance plan must authorize payment of the premium through a total of 2 payments to the Department of Personnel on dates prescribed by the Department. The Act applies to part-time employees who elected membership in a state group insurance plan on or after January 1, 1990.

The Act also deletes the requirement of payment of administrative costs associated with membership in the state group insurance plan for members of the General Assembly and for part-time employees of the General Assembly.

The Act takes effect March 30, 1990.

HOUSE FILE 2201 — State Construction Bidder Disclosure
BY COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS. This Act requires bidders on certain state construction contracts to disclose the names and certain contract costs of subcontractors who will work on the project being bid. This Act also requires the State Department of Transportation to adopt rules establishing affirmative action requirements to encourage and increase participation of disadvantaged individuals in business enterprise in all federal aid projects made available by and through the Department.

HOUSE FILE 2212 — Boundary Commission Continued
BY PAVICH, ROYER, AND PETERS. This Act extends the repeal date of Section 2.91, which establishes the Iowa Boundary Commission, from July 1, 1990, to July 1, 1993.

HOUSE FILE 2270 — Human Rights Department and Latino Affairs Division
BY COMMITTEE ON STATE GOVERNMENT. This Act provides for the change of the title of the Department of Human Rights Coordinator to the Department of Human Rights Director and redefines the duties of the Director. The Act redefines the title of the Human Rights Council as the Human Rights Administrative-Coordinating Council, redefines the composition of the Council, and amends the duties of the Council. The Act also provides for the renaming of the Commission of Spanish-speaking People of the Department of Human Rights as the Commission of Latino Affairs, and provides for conforming changes throughout the Code.

HOUSE FILE 2312 — Nonsubstantive Corrections
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act makes Code changes and corrections which are considered to be nonsubstantive and noncontroversial, in addition to style changes.

HOUSE FILE 2313 — Substantive Code Corrections
BY COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT. This Act adopts miscellaneous Code corrections of a substantive nature which adjust language to reflect current practices, insert earlier omissions, delete redundancies and inaccuracies delete temporary language, resolve inconsistencies and conflicts, update ongoing provisions, and remove ambiguities.

HOUSE FILE 2329 — Election Laws
BY COMMITTEE ON STATE GOVERNMENT. This Act makes numerous technical and other changes in the laws governing elections and election procedures. The Act restricts the holding of special elections in conjunction with other elections, extends the deadline for voter registration by mail, repeals provisions relating to mobile deputy registrars, prohibits completing any portion of the voter registration form of another person without the person's consent, provides that write-in votes cast on an electronic voting system must be accompanied by a mark in the corresponding space, allows the use of an absentee ballot when the elector expects to be unable to go to the polls on election day, revises provisions relating to the filling of vacancies in elective county offices, and requires schools to provide the County Auditor with lists of students attaining voting age.

The Act also makes changes relating to candidates' statements regarding campaign finance disclosure obligations, officers with whom the names of certain nominees are filed, the deadline for certain filings, ballots in judicial elections, dates for the canvassing of votes at the county level, notice requirements for special elections, the use of separate ballots under certain circumstances, ballot rotation, ballot arrangement to facilitate voting for the Governor and Lieutenant Governor as a team, handling of returned registration receipts, observers at ballot issue elections, persons eligible to serve as poll watchers, procedures for preserving the secrecy of absentee and special ballots during the counting process tabulation of absentee ballots where voting machines are used, resolution of tie votes, submission of county conservation board questions at primary elections, signatures required to submit a question to the voters of a school district, the date of the organizational meeting of school boards, petitions for township division, filing dates for petitions for the office of Soil and Water District Commissioner, and election duties of township clerks.

The Act amends H.F. 2001 by making it effective May 3, 1990.

HOUSE FILE 2339 — Fees for Iowa Management Training System Courses
BY COMMITTEE ON STATE GOVERNMENT. This Act relates to costs associated with the Iowa Management Training Revolving Fund. Costs associated with salaries of employees of the Department of Personnel are not to be included in fees established for the Iowa Management Training System.

HOUSE FILE 2536 — Proprietary Schools Regulation
BY COMMITTEE ON STATE GOVERNMENT. This Act requires all entities, except cosmetology and barber schools licensed under Section 157.8 or 158.7, maintaining or conducting any course of instruction for profit, or soliciting the sale of those courses, to file a $50,000 corporate surety bond with the Director of the Department of Education. Pursuant to changes enacted during the 1989 Legislative Session, the surety bond could have been lower, based upon the total annual tuition collected. The Act does not change this law regarding licensed cosmetology and barber schools.

This Act also requires all proprietary schools, rather than just those located within the state, to provide the disclosures required in Section 714.25. The Act expands those entitled to disclosure of information under Section 714.25 to include the College Aid Commission, the Board of Cosmetology, the Board of Cosmetology Examiners, and the Board of Barber Examiners, where appropriate.

The Act also changes refund policies relating to a course of instruction for profit, by increasing the amount of tuition that must be refunded in some circumstances, and changing the circumstances relating to when a refund is required. The Act requires refunds under Section 714.23 to be paid to the appropriate agency within 30 days of the student's termination, deletes a requirement in prior law prohibiting a person offering a course of instruction from admitting a student to replace a student for which a refund was received, and prohibits charging a monetary penalty for terminating a course of instruction other than a reduction in tuition refund as authorized under Section 714.23. A violation of Section 714.23 is a simple misdemeanor.

HOUSE FILE 2543 — Public Retirement Systems
BY COMMITTEE ON STATE GOVERNMENT. This Act makes changes in the laws governing the Iowa Public Employees' Retirement System (IPERS, Chapter 97B), the Public Safety Peace Officers' Retirement System (Chapter 97A), and city fire and police retirement systems (Chapter 411), and establishes guiding goals for future changes in public retirement systems.

The Act includes a number of significant changes in the Iowa Public Employees' Retirement System (IPERS):

1. Provides increased retirement benefits for future retirees. A member retiring on or after July 1, 1990, will receive 52 percent of the 3-year average covered wage, adjusted to the member's years of service. (Currently the benefit is 50 percent of the 3-year average.) If the costs can be absorbed within current contribution rates, the percentage will be increased to 54 percent for members retiring between July 1, 1991, and June 30, 1992; 56 percent for members retiring between July 1, 1993, and June 30, 1994; 58 percent for members retiring between July 1, 1993, and June 30, 1994; and 60 percent for members retiring on or after July 1, 1994. Sixty percent is the maximum benefit amount. The benefit increases apply to IPERS members retiring from protection occupations as well as to those retiring from other covered employment. Full benefits are paid for 30 or more years of service.

2. Increases the covered wage by $3,000 per year (rather than by $2,000 per year as in prior law) and provides a "cap" of $55,000 (rather than $40,000 as in prior law). The covered wage for calendar year 1990 is $28,000. If costs can be absorbed within current contribution rates, the covered wage for calendar year 1991 will be increased to $31,000; for 1992, to $34,000; for 1993, to $37,000; for 1994, to $40,000; for 1995, to $43,000; and so on to the maximum of $55,000. If the system is not able to absorb the costs of both the benefit increases and the covered wage increases, priority will be given to the benefit increases.

3. Provides a 5 percent increase in the retirement dividend (bonus) for pre-1976 and 1976-1982 retirees and adds a 2 percent retirement dividend (bonus) for 1982-1986 retirees. The bonuses are effective for 1990 and 1991.

4. Allows unrestricted buy-backs, effective January 1, 1991. A member may buy back any period of membership service for which a refund was taken. (Under prior law, buy-backs were permitted for unvested members for membership service between 1953 and 1973. Vested members were not permitted to buy back.) The total years of service, including prior service, need only be sufficient to give the member vested status. (Under prior law the total had to equal or exceed 15 years.)

5. Revises provisions governing buy-ins from other public retirement systems. The 'buy-in' provision is made applicable to membership service in other public retirement systems in this state (including TIAA-CREF) and service in the federal government as well as to public employment in other states. It is no longer limited to nonvested service. However, the cost of the buy-in will be computed on the basis of the member's most recent IPERS covered wages rather than the wage level for the period of service in the other system.

6. Effective July 1, 1990, eliminates the requirement that a member must have completed at least 30 years of service in order to be eligible for early retirement under the "Rule of 92".

7. Provides that commencing July 1, 1994, IPERS members employed by community colleges may elect prospective alternative coverage under TIAA-CREF or a similar alternative retirement system approved by the board of directors, in lieu of continuing coverage under IPERS. Withdrawals from existing IPERS accounts will not be permitted. Also beginning July 1, 1994, all new community college employees will have the opportunity to choose between IPERS and the alternative coverage.

Effective July 1, 1990, any new community college employee who is already a member of an alternative retirement system may elect to continue under that system in lieu of coverage under IPERS.

8. Designates State Department of Transportation enforcement officers as members of a protection occupation eligible for retirement at age 55 with 25 years of service.

9. Revises provisions relating to the designation of employees of the Iowa Department of Corrections as members of a protection occupation eligible for retirement at age 55 with 25 years of service. Included are correctional officers, correctional supervisors, and other employees of the Department whose primary purpose is, through ongoing direct inmate contact, to enforce and maintain discipline, safety, and security within a correctional facility. An addition contained in another Act was item vetoed (see S.F. 2280 in the appropriation section) which would have covered employees whose primary purpose is to provide security within a correctional facility, whether or not there is ongoing direct inmate contact.

10. Provides that the daily expense allowance to a member of the General Assembly during the legislative session constitutes wages for IPERS purposes, excluding the portion which exceeds the maximum established by law for members from Polk County.

11. Allows part-time local elective officials to choose whether or not to be covered under IPERS.

12. Provides that the Board of Regents may permit its employees to elect coverage under TIAA-CREF or another alternative retirement system in lieu of IPERS.

13. Specifies that in computing years of prior service (which is service before July 4, 1953, under the abolished system), service of less than a full quarter must be rounded up to a full quarter. For teachers, a full year of service must be granted if the member had 3 quarters of prior service and a contract for the following school year.

14. Effective January 1, 1991, increases the amount of wages which can be earned after return to covered employment without affecting the retirement allowance. The current limit of $6,120 is increased to $6 840 per calendar year. The limit is completely removed for covered employment consisting of holding an elective office.

15. Amends provisions relating to disability retirement by reducing the penalty for members who retire from IPERS prior to age 55 because of disability, and by specifying that for IPERS purposes the receipt of railroad retirement disability benefits is treated the same as receipt of federal Social Security disability benefits.

16. The Act revises the veterans' credit by allowing purchase in 1-year increments (up to 4 years) and computing the cost on the basis of the member's most recent IPERS covered wages, at the applicable contribution rates in effect.

17. The Act directs a study of the feasibility of initiating an optional, supplemental 'defined contribution' retirement plan which would be available to all IPERS members in addition to the basic IPERS coverage.

The Act also includes numerous benefit and contribution changes under the Public Safety Peace Officers' Retirement System and city fire and police retirement systems (Chapters 97A and 411), effective July 1, 1990:

1. Reduces the vesting requirement from 15 years to 4 years.

2. Provides increased service retirement allowances for future retirees. Members retiring between July 1, 1990, and June 30, 1992 with at least 22 years of service, will receive 54 percent of their average final compensation. The percentage will be increased to 56 percent for those retiring between July 1, 1992, and June 30, 1993;

to 58 percent for those retiring between July 1, 1993, and June 30, 1994; and to 60 percent for those retiring on or after July 1, 1994. (Under prior law the retirement allowance was 50 percent of average final compensation with at least 22 years of service.)

In addition to the percents listed, the service retirement allowance is increased by a portion of a percent for each year of service over 22 years up to 30 years if the member is less than 55 years of age during those years of service. A member retiring between July 1, 1990 and June 30, 1991, will receive .3 percent for each year. A member retiring on or after July 1, 1991, will receive .6 percent for each year.

3. Reduces the accidental disability retirement allowance from 66⅔ percent to 60 percent of average final compensation.

4. Increases the ordinary disability retirement allowance paid to surviving spouses if the member died before July 1, 1986. The allowance will be 40 percent of the average final compensation of the member (the same as the prior retirement allowance available to surviving spouses).

5. Provides that surviving spouses who remarried before July 1, 1988, are eligible for surviving spouse benefits.

6. Revises the "escalator" provisions for members who retired before July 1, 1990, under the service retirement by increasing the esculator percent from 25 percent to 30 percent.

7. Adds a provision for a service retirement optional allowance. At the time of retirement, the member (with the spouse's written acknowledgement if the member is married), in lieu of the benefit specified for the member and the member's beneficiary, may determine a specified portion of the member's retirement allowance to continue to a beneficiary after the member's death. The retirement allowance will be calculated on the basis of the actuarial equivalent of the benefits otherwise payable to the member and the member's beneficiary.

8. Increases the employee contribution rates by adding 1 percent per year until reaching 9.1 percent. Under prior law the rate was 3.1 percent. Thus the rate will be 4.1 percent between July 1, 1990, and June 30, 1991; 5.1 percent between July 1, 1991, and June 30, 1992; 6.1 percent between July 1, 1992, and June 30, 1993; 7.1 percent between July 1, 1993, and June 30, 1994; 8.1 percent between July 1, 1994, and June 30, 1995; and 9.1 percent between July 1, 1995, and June 30, 1996. On and after July 1, 1996, the rate will be 9.1 percent or 40 percent of the costs, whichever is greater.

However, if benefit improvements are enacted in 1991 or thereafter, the employee contribution rate will be increased to pay the additional cost up to 11.3 percent. The cost of benefit increases above 11.3 percent will be paid 40 percent by the employee and 60 percent by the employer.

In lieu of the employee contribution rates specified above, members 45 years of age and older must pay additional amounts according to a scale established in the law. For example, a member 49 years of age or older on July 1, 1990, must immediately pay at the 9.1 percent rate. A member 48 years of age but not yet 49 must pay 8.1 percent from July 1, 1990 through June 30, 1991, and 9.1 percent thereafter. A member 47 years of age but not yet 48 must pay 7.1 percent from July 1, 1990, through June 30, 1991; 8.1 percent from July 1, 1991 through June 30, 1992; and 9.1 percent thereafter.

9. Provides that the employer contribution rate must be not less than 17 percent. Beginning July 1, 1996, the employer contribution rate may exceed 17 percent if the actuarial report requires a higher rate for the employer to pay 60 percent of the costs of the system. House File 2569 provides that the employer contribution amount for FY 1990-1991 for the Peace Officers' Retirement System is 18 percent.

10. Permits members to withdraw employee contributions. Upon termination of service other than by death or disability, a member may withdraw the member's contributions and the interest earned on those contributions and forfeit any claim to retirement benefits.

11. Directs the Legislative Council to employ an actuarial consultant to study possible courses of action with respect to retirement provisions for public safety peace officers, firefighters, and police officers. The study is to include the question of IPERS and social security coverage for members and new hires; establishment of a rating system for the degree of disability; benefit enhancements; equity among systems; and the availability of options for members and beneficiaries.

The Act includes major structural changes whereby existing city fire and police retirement systems will be unified into a statewide system effective January 1, 1992. The Board of Trustees for the statewide system will include 9 voting members (4 firefighters and police officers, 4 city treasurers, and 1 public member) and 4 nonvoting legislative members. The Board will begin meeting in 1990 and will have responsibility for planning and

TAXATION

SENATE FILE 280 — Property Tax Exemption for Certain Buildings
BY COMMITTEE ON SMALL BUSINESS AND ECONOMIC DEVELOPMENT. This Act provides an exemption from real property taxes for speculative shell buildings, if authorized by ordinance of the city council or board of supervisors, which are owned by a community development organization which has constructed or renovated the building for the purpose of attracting new or existing business and industry to locate its manufacturing, processing, or warehousing activities in that building. The property tax exemption ceases once the speculative shell building is sold or leased.

SENATE FILE 514 — Vetoed by the Governor
BY COMMITTEE ON WAYS AND MEANS. The bill would have exempted from the sales and use taxes the sales of tangible property and the providing of services to juvenile shelter facilities licensed by the Department of Human Services, substance abuse agencies under contract with the Iowa Department of Public Health, and agencies under contract with the Department of Human Services to provide family-centered, home-based, and family preservation services. The bill also would have exempted from the sales and use taxes the sales of equipment and supplies to nonprofit child health clinics, maternal health clinics, well-elderly clinics, family planning clinics, area agencies on aging, and Medicare certified hospice programs which receive federal funds.

SENATE FILE 2059 — Workers' Compensation Self-insurance Agreement by Area Schools
BY KIBBIE. This Act provides that a self-insured program established by merged area schools for the payment of workers compensation benefits is exempt from insurance premium or payments taxation. The Act also provides that such a self-insured program is not an insurance program and is not subject to regulation under Iowa's insurance statutes.

SENATE FILE 2114 — Income Tax
BY COMMITTEE ON WAYS AND MEANS. This Act, for state tax purposes:

1. Updates references to the federal Internal Revenue Code, thus continuing the state's use of federal tax provisions for determining state individual income, corporate income, and franchise taxes for tax years beginning on or after January 1, 1989.

2. Makes permanent the individual and corporate income tax credits for increasing research activities in the state which credit is being eliminated for federal tax purposes for tax years beginning on or after January 1, 1991.

3. Increases the earned income tax credit for individuals from 5 percent to 6.5 percent of the federal earned income tax credit received for tax years beginning on or after January 1, 1991.

4. Limits the amount of corporate net operating loss that is the result of corporate equity reduction interest losses that may be carried back or carried forward to that allowed for federal tax purposes beginning with tax years beginning on or after January 1, 1989.

SENATE FILE 2115 — Income Tax Exemption for Agricultural Development Authority Bonds and Notes
BY COMMITTEE ON WAYS AND MEANS. This Act provides that interest on obligations issued by the Agricultural Development Authority for its Beginning Farmer Loan Program is exempt from state income tax, notwithstanding the fact that the obligations are exempt from federal income taxes. Current law makes these obligations exempt from state income tax only to the extent that the interest is included in federal taxable income. The Act is retroactively effective for tax years beginning on or after January 1, 1989.

SENATE FILE 2304 — Penalty and Interest on Taxes
BY COMMITTEE ON WAYS AND MEANS. This Act increases the interest rate on delinquent taxes to 2 percentage points greater than the average prime rate for the 12-month period which ends September 30 for the previous calendar year. The same rate of interest will be paid on overpayments of tax.

The Act also establishes a section in Chapter 421 which sets forth the penalties for all taxes.

The penalties created by the Act are as follows:

1. A 10 percent penalty for failure to timely file a return or deposit form.

2. A 5 percent penalty for failure to timely pay the tax due with a return or deposit form.

carrying out the transition from individual city systems to the unified statewide system and directing the administration of the new system.

As part of the transition, cities must transfer from their fire and police retirement funds amounts sufficient to cover the accrued liabilities of their terminated systems as determined by the actuary of the statewide system. One city system cannot be required to subsidize any portion of another system's unfunded liabilities Cities may be required to pay additional amounts above the normal contribution rate to ensure sufficient financial support for the statewide system.

The Act provides that members of the city fire and police retirement systems and members of the Public Safety Peace Officers' Retirement System must be given the opportunity to vote in a referendum on the question of requiring federal Social Security coverage for all newly hired members. The referendum must be held before January 1, 1991. If the vote is in favor of Social Security coverage, all newly hired members will be members of the Iowa Public Employees' Retirement System (IPERS) with the same benefits as county sheriffs and deputy sheriffs and will have Social Security coverage.

HOUSE FILE 2314 — Partial Payment of Real Property and Mobile Home Taxes
BY COMMITTEE ON LOCAL GOVERNMENT. The Act authorizes the County Treasurer to accept partial payments of current fiscal year real property taxes and mobile home taxes as an alternative to the semiannual or annual payments. The County Treasurer is to establish the minimum payment amount. Upon receipt of this payment amount, the Treasurer deposits the money into a separate taxpayer account. The amount in the account is to be used to pay the semiannual payments as each becomes due. If the moneys in the taxpayer's account are insufficient to pay the semiannual payments when due then the taxes become delinquent and the penalty, interest, and collection provisions apply the same as if only semiannual payments were being accepted by the County Treasurer.

The Act takes effect for property taxes and mobile home taxes payable on or after July 1, 1991.

HOUSE FILE 2407 — Wetlands Protection, Tax Exemption, and Mediation
BY COMMITTEE ON WAYS AND MEANS. This Act provides a property tax exemption for protected wetlands certified by the Department of Natural Resources. Prior to this Act, the law provided for a property tax exemption for wetlands greater than 2 acres, subject to the discretion of the county Board of Supervisors, with a maximum cumulative acreage in each county of 3,000 acres or 1 percent of the acres assessed as agricultural land, whichever is greater.

The Act also directs the Department of Natural Resources to inventory the wetlands and marshes of each county and give a preliminary designation to those wetlands and marshes which constitute protected wetlands. When the preliminary inventory is complete, notice of the list of protected wetlands and a map shall be published in an official newspaper in the county. An interested person may file a petition protesting the designation of a particular wetland or requesting another wetland to be included or may request mediation with the Farm Mediation Service of that designation. Procedures for a hearing on mediation and appeal are provided.

The Act provides that a protected wetland is not to be drained without a permit from the Department of Natural Resources. The Department may not issue a permit to drain unless the wetland to be drained is replaced by one of equal or greater value or unless the wetland in question does not meet the criteria for continued designation as a protected wetland.

A civil penalty of not more than $500 per day may be assessed for failure to obtain a permit to drain a protected wetland. The civil penalty applies from the fourth day after written notice of the violation.

The Act provides that the assessed value of the land designated as a protected wetland is equal to the average value of the land where the wetland is located and which is owned by the person receiving the exemption. The assessing authority may submit a claim for reimbursement for the tax revenue lost each year from the exemption which shall be paid by the Department of Natural Resources based upon either the assessed value set by the assessing authority or the assessed value as determined by the Department.

The Act also strikes a provision of a Code section enacted by H.F. 2404 in the 1990 Session that would have prevented the Department of Natural Resources from receiving a farm mediation release if the farm resident has not waived mediation and has not participated in at least 1 farm mediation meeting.

HOUSE FILE 2540 — Historic Property Tax Exemption
BY COMMITTEE ON WAYS AND MEANS. This Act provides a tax exemption for the increased value of historic property because of improvements to the historic property. The improvement must be a substantial rehabilitation and the improvement must have begun on or after July 1, 1990. The exemption is allowed for 4 years and the taxpayer is entitled to the exemption beginning in the first year for which the improvements are assessed for taxation. Following the 4-year exemption period, the additional assessed value is phased in over a 4-year period.

The Act takes effect for assessment years beginning on or after January 1, 1991.

HOUSE FILE 2549 — Homestead Credit
BY COMMITTEE ON WAYS AND MEANS. This Act provides that a claim for homestead credit shall be allowed in successive years without further filing as long as the person has occupied the homestead for at least 6 months in each calendar year in which the fiscal year for which the credits allowed begins.

The Act applies retroactively to January 1, 1990 for claims filed or on file after that date.

3. A 5 percent penalty for a deficiency found on audit.

4. A 75 percent penalty for willful failure to file a return or deposit form or for willfully filing a false return or deposit form with the intent to evade the tax

There are circumstances set forth under which the penalty will not be assessed.

The Act applies to tax years beginning on or after January 1, 1991, or to deaths occurring on or after January 1, 1991.

The Act also waives penalty provisions for financial institutions for tax years beginning in the 1985 and 1986 calendar years to the extent the institution did not include in state income certain accrued interest because the institution used the cash receipts and disbursement method of accounting for those tax years for federal tax purposes. The institutions must file amended returns by July 1, 1990, in order to receive the waiver.

SENATE FILE 2406 — Sales and Use Tax Processing Exemption's Applicability to Carbon Dioxide
BY COMMITTEE ON WAYS AND MEANS. This Act provides that the sale of carbon dioxide to, or the use of carbon dioxide by, manufacturers of food products is exempt from Iowa sales or use tax. The Act is applicable retroactively to July 1, 1985.

SENATE FILE 2407 — Taxation of Health Maintenance Organizations on Medical Assistance Payments
BY COMMITTEE ON WAYS AND MEANS. This Act provides that payments made under a reimbursement plan for Medicare or other medical benefits under a program administered by the federal government or under the state Medical Assistance Program are not to be considered premiums subject to premium taxation.

SENATE FILE 2411 — Seed Capital Tax Credit, and Expedited Registration of Small Issues of Securities
BY COMMITTEE ON WAYS AND MEANS. This Act creates an income tax credit for an investment in new issues of shares or equity interests by a qualified corporation or a qualified seed capital fund. The credit is 10 percent of a taxpayer's qualified investment and may be credited to the tax liabilities of the following 5 tax years.

A qualified corporation or seed capital fund must meet several requirements in order to qualify for the tax credit.

The Act authorizes an expedited securities registration by filing system for certain securities issued by qualified small issuers. This expedited registration system is intended to reduce the cost of obtaining equity capital while maintaining regulatory oversight of the securities market.

The seed capital tax credit for personal income tax, the expedited registration by filing for small issuers, and a new unnumbered paragraph added to Section 502.611 to aid statutory construction take effect April 26, 1990.

The seed capital tax credit for corporate filers is given a delayed effective date of July 1, 1991, and applies to all investments made after that date through January 1, 1994, when the credit is repealed.

The seed capital tax credit for personal filers is repealed effective January 1, 1993.

SENATE FILE 2415 — Fire District Tax Levy and Reserve Account
BY COMMITTEE ON WAYS AND MEANS. This Act authorizes a benefited fire district to exercise the same taxing authority exercised by township fire departments. If the original rate of 40 and ½ cents per $1,000 of assessed valuation is insufficient, an additional 20 and ¼ cents per $1,000 of assessed valuation may be levied. Also, of the 2 levies authorized, 10 cents per $1,000 of assessed valuation may be credited to a reserve account to purchase or replace fire fighting equipment.

SENATE FILE 2416 — Delinquent Tax Liens
BY COMMITTEE ON WAYS AND MEANS. This Act provides that a real property tax lien transfers with the tax sale certificate and expires when the tax sale certificate expires. The Act eliminates a requirement that a mortgagee, vendor, lessor, or other person with an interest of record in real property must file a request for notice of the expiration of the right of redemption of real property sold for property tax purposes before the notice will be sent to those persons.

The Act also requires a county board of supervisors to abate property taxes due and payable or refund those taxes, if paid, of a nonprofit entity formed for historical purposes that would have been exempt from those property taxes payable in the fiscal year beginning July 1, 1989, but for the fact that the entity failed to apply for the exemption. This provision is repealed August 15, 1990.

The Act takes effect April 27, 1990.

January 1, 1988. The Act also allows liabilities of an estate which exceed the amount of property subject to the payment of the liabilities to be deducted from other property in the estate whether or not the liability is legally enforceable against the estate.

10. Concerning franchise tax, a requirement is eliminated that franchise tax payments must accompany franchise tax returns at the time of filing and a provision is repealed, retroactive to January 1, 1990, for tax years beginning on or after that date, that united community banks, which are formed by the merger of 2 or more banks that are affiliated to each other and that have been in existence for at least 5 years, would pay the state franchise tax in the same manner and on the same basis as if the merger had not occurred.

HOUSE FILE 2554 — Financial Measures Related to Property Taxes
BY COMMITTEE ON APPROPRIATIONS. This Act increases the amount of mobile home tax credit, property tax credit, and reimbursement for rent constituting property taxes paid for the elderly and disabled by making eligible those with incomes of $14,000 or less and increasing the rate schedule. In addition, the Act provides for a circuit breaker for those owners and renters with incomes of $14,000 or less who are 18 years of age or older and who do not qualify for the elderly and disabled property tax credit and reimbursement for rent constituting property taxes paid. The rate schedule for the circuit breaker is 50 percent of the schedule used for the elderly and disabled. The Act creates a family farm tax credit to which $10,000,000 is appropriated annually.

The Act provides that the family farm tax credit is available to certain individual, partnership, or corporate owners who are actively engaged in farming and is patterned after the agriculture land tax credit. "Actively engaged in farming" means receiving or the right to receive all of the production from more than ½ of the tract and materially participating in the production of the crops of the farm operations. If the $10,000,000 is insufficient to pay all of the credits, then each credit will receive a pro rata amount. The Act imposes a penalty of 25 percent of the credit plus interest for fraudulent misrepresentation that the owner is entitled to the credit.

The Act also creates a Special Mental Health Services Fund to reimburse counties for expenditures for mental health services with an appropriation to that Fund for the fiscal year beginning July 1, 1991, of $10,500,000. The Fund is allocated among the counties on a per capita basis and encourages the involvement of each county in providing case management services, community-based services, and support services to assist persons with chronic mental illness.

In regard to county expenditures for mental health, the Act provides that if the General Assembly in the 1991 or 1992 Session does not enact legislation to implement a funding formula for state participation in funding of mental health services beginning in the fiscal year beginning July 1, 1992, the amount of expenditures of counties for those services is frozen at the level of the expenditures made in the fiscal year beginning July 1, 1991. Beginning with the fiscal year beginning July 1, 1992, any excess expenditures would be paid for by the state. To assist in providing for the costs of mental health services, the Act requests the Legislative Council to establish a 1990 Interim Study Committee to develop a funding formula for state participation that ties responsibility for funding the services to administrative control and oversight of the services, and that ensures financial incentives in the formula are directed toward providing care and services to persons in communities and community settings and appropriate services are available to all persons across the state. As part of the mental health costs picture, the Act directs the Department of Management, the Mental Health and Mental Retardation Commission, and the County Finance Committee to cooperate in revising the county chart of accounts to structure an accounting system for use beginning with the fiscal year beginning July 1, 1991, that will provide for the consistent and accurate accounting of expenditures for mental health.

The Act authorizes the City Finance and County Finance Committees to meet at the request of a majority of the Committee.

For homestead tax credits allowed for property taxes payable in fiscal years beginning on or after July 1, 1991, the Act allows a shareholder of a family farm corporation to claim as a homestead the residence occupied by the shareholder which is owned by that corporation. Also, the Act increases the amount of homestead tax credit allowed certain disabled veterans to the amount of tax imposed on the first $25,000 (previously $10,000). This provision is effective for property taxes payable in fiscal years beginning on or after July 1, 1993.

The Act takes effect January 1, 1991, for claims for the mobile home and elderly and disabled property tax credit and family farm tax credit for credits payable beginning July 1, 1991. The claims for the elderly and disabled reimbursement of rent constituting property taxes paid takes effect January 1, 1992, for claims filed on or after that date.

HOUSE FILE 2551 — State Taxes
BY COMMITTEE ON WAYS AND MEANS. This Act amends a number of provisions of Iowa tax law relating to taxes administered by the Department of Revenue and Finance as follows:

1. Concerning tobacco taxes, the license fee required of tobacco product distributors is raised from $25 to $100.

2. Concerning special fuel taxes, dealers may provide consumers who are exempt with exemption certificates if the form is as prescribed by the Director of Revenue and Finance

3. Concerning auditing, valuation of assets, and collection of delinquent taxes the Director of Revenue and Finance may apply to the district court or judicial magistrate for administrative search warrants if necessary to audit a person's books and records, inspect and value assets, or enforce collection of taxes through distress warrants.

4. Concerning the payment of taxes, penalties, interest, and fees, the Director of Revenue and Finance may accept payment by credit card, if all charges in connection with the use of the card for the payments are borne by the taxpayer. The Director may enter into an agreement with the Treasurer of State to implement this payment plan. The Act provides that beginning January 1, 1991, a person contesting an assessment of tax by the Department of Revenue and Finance does not have to pay the amount of the assessment prior to the commencement of the contested case. The Act also waives penalty provisions for financial institutions for tax years beginning in the 1985 and 1986 calendar years to the extent the institution did not include in state income certain accrued interest because the institution used the cash receipts and disbursement method of accounting for these tax years for federal tax purposes. The institutions must file amended returns by July 1, 1990, in order to receive the waiver (Note: This provision was also enacted by S.F. 2304, Section 6).

5. Concerning hotel and motel and local option taxes, and consumer use tax, corporate officers' and partners personal liability applies to hotel and motel and local option taxes and to consumer use tax. The Act also extends the exemption to successor liability to hotel and motel and local option taxes, and consumer use tax.

6. Concerning the collection of delinquent taxes, the Act extends the period that a lien is valid for taxes unpaid on or payable on or after January 1, 1990, from 10 years after the due date to 10 years after an assessment is issued. Previously, there were 3 distinct situations where the liability could be discovered or perfected after the lien would have expired under law prior to the enactment of this Act: (a) if a taxpayer has not filed returns for many years, the Department may not discover a liability for taxes within 10 years after the date the taxes became due and payable; (b) many large corporations, because of the time involved in litigation, do not resolve their controversies with the Internal Revenue Service within 10 years after the taxes became due and payable; and (c) often a taxpayer has protested an assessment where an identical issue is being litigated and action on the protest is held in abeyance pending the outcome of the litigation which may take many years. Without providing for these exceptions, a tax liability may not be discovered or perfected until after 10 years, and there would be no statutory authority to collect the unpaid tax unless the applicable provisions of this Act were enacted

7. Concerning income tax, the Act specifically provides that an income tax certificate of acquittance from the Department is not required if all of the property of the estate is held in joint tenancy by husband and wife alone because the income from this joint property is chargeable to the surviving spouse individually and not to the estate. This provision is retroactive to January 1, 1988, for estates of persons dying on or after that date. The Act also allows the Department to make disclosure of confidential tax information to other states if those states limit the disclosure of such information as strictly as Iowa does.

8. Concerning sales tax, a definition is created of "property purchased for resale in connection with the performance of a service." The Act subjects pay television, rather than only cable television, to the sales and use taxes and also provides sales and use tax exemptions for sales made to regional transit systems, retroactively to July 1, 1985; sales made to nonprofit private museums if used for educational, scientific, historic preservation, or aesthetic purposes; sales of electric energy, gas, or communication services to another state or political subdivision of another state if that state provides a similar exemption; and sales of advertising materials and related items that are to be sent outside the state. The Act allows nonprofit private museums to receive a refund of the sales or use taxes paid by a contractor for materials used in the construction or improvements to nonprofit private museums.

9. Concerning inheritance tax, the inheritance tax lien law is amended to specifically provide that there is no lien on the surviving spouse's share of the estate. Previous to this enactment, Section 450.7 provided that the inheritance tax lien was on the entire estate. The share of the surviving spouse has been tax exempt since

TRANSPORTATION

SENATE FILE 2003 — Credit and Refund of Vehicle Registration Fees
BY SZYMONIAK. This Act expands the number of motor vehicles for which refunds of unexpired registration fees will be paid, but increases the amount of the minimum refund necessary before a refund may be made. Under prior law a refund was not paid for a refund amount under $5. Under this Act the refund will not be paid for a refund amount under $10. Generally under prior law refunds of registration fees were not allowed unless a replacement vehicle was registered. Under this Act the owner is entitled to a refund if no replacement vehicle is purchased and is entitled to a credit or a credit and a refund if a replacement vehicle is registered. In cases where a replacement vehicle is not purchased within 30 days following the date of a vehicle's sale or junking, the owner may apply to the State Department of Transportation for a refund of the sold or junked vehicle's registration fee, subject to the $10 minimum requirement. If a replacement vehicle is purchased within the 30-day period, the person may apply for a credit to be applied to the replacement vehicle's registration fee. If the replacement vehicle's registration fee is less than the amount of the unexpired registration fee of the sold, traded or junked vehicle, the owner is entitled to apply to the State Department of Transportation for a refund of the excess amount, subject to the $10 minimum requirement. Refunds are not allowed unless the owner makes claim for the refund within 6 months of the date of the vehicle's sale, trade, or junking.

SENATE FILE 2235 — Vehicle Certificate of Title Reassignment Reciprocity
BY KINLEY. This Act allows certificates of title to be reassigned by a dealer licensed in this state or in another state if the state in which the dealer is licensed permits Iowa licensed dealers to similarly reassign certificates of title. The Act also exempts licensed Iowa dealers from the requirement of obtaining new certificates of title and registrations for foreign registered vehicles if the state in which the vehicle is registered allows Iowa dealers to reassign that state's certificates of title. The Act takes effect March 30, 1990.

SENATE FILE 2245 — Bridge Beam Construction Contracts
BY COMMITTEE ON TRANSPORTATION. This Act authorizes the State Department of Transportation to contract for specialized construction work for beam straightening, replacement, and repair on bridges, without advertising for bids if the work is of a specialized type in which fewer than 5 contractors engage, the Department solicits bids from all available contractors engaged in the specialized type of work, and the work can be done for less than $40,000.

SENATE FILE 2277 — Highway Signs for Tourists
BY COMMITTEE ON SMALL BUSINESS AND ECONOMIC DEVELOPMENT. This Act relates to tourist-oriented directional signs and authorizes the State Department of Transportation to adopt rules for the signs to conform with federal national standards for tourist-oriented directional signs.

The Act also sets out certain criteria to be included in the rules for tourist-oriented directional signs. These criteria include setting a fee schedule to cover direct and indirect costs, including replacement costs, of sign creation, maintenance, and related administrative costs; eligibility requirements for signage; distance requirements of signs from eligible business, activities, and sites; trailblazing to facilities not on the crossroads; and masking or removing of signs during the off seasons for the businesses, activities, and sites.

The Act establishes a tourist signing committee to assist the Department consisting of the Directors or their designees of the Departments of Economic Development, Agriculture and Land Stewardship, Natural Resources, Cultural Affairs, and Transportation; the Chairperson or the Chairperson's designee of the Iowa Travel Council; and a member of the Outdoor Advertising Association of Iowa.

The Act also directs the State Department of Transportation to place and maintain directional signs upon primary highways which provide information about historic sites which are located on land owned or managed by a state agency. To the extent possible, the location of the historic site must be noted on the transportation maps of the state published under the direction of the Department which are available to the public.

SENATE FILE 2319 — Farm Railway Crossings
BY COMMITTEE ON TRANSPORTATION. This Act restricts the construction and maintenance of private farm railway crossings to persons owning farmland on both sides of a railway crossing and requires that the crossing be used solely for farming or agricultural purposes. Prior law allowed for the construction and maintenance of private railway crossings on any land and did not limit the use of the crossing to agricultural or farming purposes.

HOUSE FILE 2559 — Assessment Appeals
BY COMMITTEE ON WAYS AND MEANS. Prior to the enactment of this Act the law required that a property owner seeking to appeal a decision of a local board of review as to a property tax assessment must serve personal notice upon the chairperson or presiding officer of the Board of Review within 20 days after adjournment of the board or May 31, whichever is later. If notice cannot be served within that time frame, the property owner's right to appeal expires. The Act provides that the appeals shall be taken by filing of written notice of appeal with the Clerk of the appropriate District Court, which preserves the rights of appeal, and then personal service must be made on the chairperson, presiding officer, or clerk of the Board of Review.

The Act also provides for the reinstatement of appeals that were pending or filed after January 1, 1988, and which were dismissed as a result of the inability to serve notice on the chairperson or presiding officer of the Board of Review within the time frame required under Section 441.38. In order for such appeals to be reinstated, a filing of notice of appeal must be made by June 30, 1991, or provided for in this Act for an original filing of notice of appeal.

The Act takes effect April 24, 1990.

Before the State Department of Transportation may issue, renew, or upgrade a commercial driver s license, the applicant must certify that the applicant meets the applicable qualifications and has committed no offense which either alone or with previous actions or offenses could result in commercial driver's license disqualification and must successfully pass a driving skills test and in some cases, a knowledge test, as required by departmental rule. However, an applicant may substitute for a driving skills test the applicant's operating record and either the previous passage of a driving skills test or previous driving experience if all of the following conditions exist: the applicant is currently licensed to operate a commercial motor vehicle; during the 2 years immediately preceding application the applicant has not held commercial driver's licenses from more than 1 state simultaneously, the applicant has committed no offenses which are disqualifying offenses, the applicant has not committed a traffic violation (other than parking) arising in connection with a traffic accident, no record of an accident exists for which the applicant was convicted of a moving traffic violation, and the applicant has not had any motor vehicle license suspended, revoked, or canceled; the applicant certifies and provides evidence that the applicant is employed in a job requiring operation of a commercial motor vehicle; and the applicant has either previously passed a driving skills test given in Iowa representative of the class of motor vehicle the applicant will operate or has operated during the 2-year period immediately preceding the application a motor vehicle representative of the class of motor vehicle the applicant will operate.

The Act contains many provisions other than those which relate to commercial motor vehicles. With regard to chauffeur's licenses, the Act retains the issuance of a driver's license valid for the operation as a chauffeur which is called a Class D driver s license, but does not require its issuance if the operator has a commercial driver's license for the vehicle's operation. The Act raises the minimum weight of a motor truck for which a chauffeur's license is required. Under current law, a chauffeur's license is required for the operation of a motor truck which is required to be registered at a weight classification exceeding 5 tons. Under the Act, a Class D driver's license is not required unless the motor truck has a gross vehicle weight rating exceeding 16,000 pounds. As far as transitional provisions relating to persons who currently have valid chauffeur's licenses, the Act provides that a chauffeur's license issued in the state is valid according to the terms and limitations of the license until the earlier of the expiration date on the license or April 1, 1992. A person who has been issued a valid chauffeur's license in the state which expires on or after July 1, 1990, and before July 1, 1991, may renew the license and be issued a special Class D driver's license which shall be valid according to the terms and limitations of the chauffeur's license previously issued to the person; however, the license is not valid for the operation of a commercial motor vehicle after April 1, 1992. If the person's chauffeur's license expires between July 1, 1990, and April 1, 1992, the holder may apply for a new driver's license and, if qualified, be issued a commercial driver's license valid only until the expiration date appearing on the surrendered chauffeur's license upon payment of a $1 replacement fee together with the fees for any commercial driver's license endorsements obtained. Additionally, if application is made within 1 year preceding the chauffeur's license expiration date and upon payment of required fees, the applicant may be issued a commercial driver's license valid for a 2-year or 4-year period beginning on the expiration date on the surrendered chauffeur s license. The Act raises the minimum age for chauffeur's operation of a school bus from 16 to 18 years.

With regard to other types of motor vehicle licenses, for the first time a driver s license will actually be called a driver's license under the Iowa Code (previously the license was an operator's license, chauffeur s license, or any other number of variety of licenses). Also a single-license concept has been adopted. Previously, a person could have simultaneously been issued several types of motor vehicle license; now generally only 1 license will be issued which will contain on it information necessary to ascertain if it is valid for various types of vehicle operation. In order to coordinate the expiration dates of the various licenses and permits into one license, the expiration date of instruction permits is shortened to correspond with the expiration date of the issued license.

A student is no longer required to have a vehicle registered in another state to be exempt from the requirement of obtaining an Iowa driver's license. Now the student will be deemed not to be a resident for purposes of licensing if the person is attending a college or university in this state and the student has a domicile in another state and has a valid motor vehicle license issued by the state of domicile.

With regard to tests conducted in conjunction with the issuance of a motor vehicle license, the State Department of Transportation is required to make every effort to accommodate a functionally illiterate applicant when taking a knowledge test. A vision test administered by the Department is not required if the applicant files with the Department a vision report which shows that the applicant s visual acuity level meets or exceeds those required by the Department. The vision report must be signed by a licensed vision specialist and is only valid if the visual acuity level of the applicant has been measured by the specialist within 30 days before the application for the new or renewed motor vehicle license. The Department is also required to advise an applicant, other than an applicant for a commercial driver's license that the applicant may request a number other than a social security number for the applicant's motor vehicle license number.

SENATE FILE 2329 — Motor Vehicle Licensing and Regulation
BY COMMITTEE ON TRANSPORTATION. This Act was commonly referred to as the commercial driver's license bill. The Act has greater ramifications than the creation of the commercial driver's license, as it amends virtually every section in the Iowa Code dealing with the various types of driver's licenses which existed prior to the Act's enactment.

With regard to commercial driver's licensing, the Act creates the commercial driver's license category and provides 4 different classifications of commercial driver's licenses: A, B, C, and M. Classes A and B are for operation of vehicles with either a gross combination weight rating or gross vehicle weight rating of 26,001 or more pounds. Class C is for all other types of motor vehicles except motorcycles, and the Class M license is for motorcycles.

Perhaps the most restrictive measures with regard to the use of commercial driver's licenses is the creation of the concept of a "lifetime disqualification" from the operation of a commercial motor vehicle for a single conviction during the operator's life. A person is disqualified from operating a commercial motor vehicle for life upon a conviction that the person used a commercial motor vehicle in the commission of an aggravated misdemeanor or felony involving the manufacturing, distributing, or dispensing of a controlled substance. A person is disqualified from operating a commercial motor vehicle for life (subject to a reduction to a 10-year disqualification according to federal rules) if convicted or found to have committed 2 or more of the following acts any time during the person's lifetime: operating a commercial motor vehicle while under the influence of an alcoholic beverage, drug, or controlled substance; operating a commercial motor vehicle with a blood alcohol concentration of 0.04 or more; refusal to submit to chemical testing when required under Iowa law; failure to stop and render aid at the scene of an accident involving the person's vehicle; or an aggravated misdemeanor or felony involving the use of a commercial motor vehicle. The first time a person commits any of these acts subjects the person to a 1-year disqualification. A person is disqualified from operating a commercial motor vehicle for committing 2 or more of the following offenses within a 3-year period while operating a commercial motor vehicle: speeding 15 miles per hour or more over the legal speed limit, reckless driving, any traffic violation (other than parking or weight violations) which arise in connection with a fatal traffic accident, operating a commercial motor vehicle when not issued a license valid for the vehicle, operating a commercial motor vehicle when disqualified, operating a commercial motor vehicle without having immediate possession of a license valid for the vehicle's operation, improper lane changes, and following another motor vehicle too closely. The period of disqualification for these offenses is 60 days for 2 offenses and 120 days for 3 offenses within any 3-year period. With regard to all of these disqualification provisions, the offenses must have occurred on or after July 1, 1990.

The Act also prohibits a person from operating a commercial motor vehicle in violation of an out-of-service order. The 24-hour out-of-service order is issued for persons having any quantity of alcohol in their blood regardless of how low the blood alcohol content might be.

The Act requires a person to possess a commercial driver's license in order to operate a commercial motor vehicle. A commercial motor vehicle is defined as being a motor vehicle or combination of vehicles used to transport passengers or property if any of the following apply: the combination of vehicles has a gross combination weight rating of 26,001 or more pounds and the towed vehicle has a gross vehicle weight rating of 10,001 or more pounds; the motor vehicle has a gross vehicle weight rating of 26,001 or more pounds; the motor vehicle is designed to transport 16 or more persons (or is of a size and design to transport 16 or more persons but is redesigned or modified to transport less than 16 handicapped persons); or the motor vehicle is used in the transportation of hazardous material of a type or quantity requiring vehicle placarding. The following operators are exempt from the commercial driver's license requirements: a farmer or a person working for a farmer while operating a special truck within 150 air miles of the farmer's farm to transport agricultural products, farm machinery, or farm supplies to or from the farm; a firefighter while operating a fire vehicle for a volunteer or paid fire organization under conditions necessary to preserve life or property or to execute related governmental functions; military personnel while on active duty and operating equipment owned or operated by the United States Department of Defense; a person while operating a motor home solely for personal or family use; and a person operating a motor vehicle with a gross vehicle weight rating of less than 26,001 pounds towing a travel trailer or fifth-wheel travel trailer solely for personal or family use. The Act also allows the State Department of Transportation to exempt suppliers of agricultural inputs or their employees while delivering these products to their customers if allowed by federal law or regulations.

The Act also updates various references to the United States Code and the Code of Federal Regulations in sections relating to minimum liability limits for motor carriers.

HOUSE FILE 2457 — Aircraft Registration and Special Certification
BY COMMITTEE ON TRANSPORTATION. This Act raises the registration fees for aircraft operated in scheduled interstate airline operations and requires registration for aircraft owned by an aviation business located at a publicly owned airport and providing a minimum level of services to the public. Hot air balloons are exempted from registration and fee requirements. The Act strikes duplicate special certificate provisions and requires a manufacturer, transporter, or dealer to pay an initial special certificate fee of $100 with a $10 additional fee for each aircraft in inventory and establishes procedures for additions to or removals from inventory. Finally, the Act changes the accrual time for delinquent registration penalties.

HOUSE FILE 2461 — Odometer Statements
BY COMMITTEE ON TRANSPORTATION. This Act requires that before a certificate of title is issued for motor vehicles less than 10 model years old which are equipped with an odometer by the manufacturer, an odometer statement must be made by the transferor and furnished with the application for title. In addition, the Act requires that if the true mileage is known, the new certificate of title must state the word "actual"; if the odometer reading is not the true mileage or if the true mileage is unknown, the words "not actual" must be stated; and if the odometer reading is greater than the odometer can count, the words "exceeds the mechanical limits" must be stated on the certificate.

The Act strikes the exemption, from Section 321.71, subsection 7, of motor vehicles transferred by operation of law under Section 321.47 and changes a reference from gross vehicle weight to gross vehicle weight rating.

The Act requires a licensed motor vehicle dealer to possess an odometer statement or certificate of title issued in the name of the dealer for used motor vehicles in inventory acquired after the tenth model year prior to the current registration year. A new motor vehicle transferred on a manufacturer's statement of origin ownership document requires an odometer statement only if the motor vehicle is transferred at retail. Finally, the Act authorizes the State Department of Transportation to adopt rules in compliance with the federal Truth in Mileage Act of 1986.

HOUSE FILE 2465 — Railway Tracks Removal from Crossings
BY COMMITTEE ON TRANSPORTATION. This Act provides that upon abandonment of a railway line, or upon interim use of railroad rights-of-way to establish trails, if the tracks adjacent to a crossing have been removed but the tracks in the crossing have not been removed, the jurisdiction having authority over the road may remove the tracks from the crossing. However, the Act does not reduce the obligations or liability of a railway corporation to remove the tracks from the crossing.

Under the Act, a person who has their motor vehicle license suspended due to the person s being physically or mentally incapable of safely operating a motor vehicle may be issued a nonoperator s identification card without being charged a fee. Also, if the person has their driver s license reinstated the license must be issued without fee

A person who has the period of validity of the person s motor vehicle license extended due to the military service exemption may file an application with the State Department of Transportation to have the person's record of issuance of the motor vehicle license retained in the Department's record system during the period for which the motor vehicle license remains valid. If a person has had the record of issuance removed from the Department's records, the person may have their record reentered by the Department upon request accompanied by a letter from the person's commanding officer verifying the military service.

A person whose motor vehicle license has been suspended or revoked solely for violations of Chapter 321J (operating while intoxicated) or who has been determined to be a habitual offender solely for violations of Chapter 321J and who is not eligible for a temporary restricted license under Chapter 321J may petition the court for an order to the Department to issue a temporary restricted license, notwithstanding the habitual violator provisions.

Regarding proportional registration a fleet owner, on a renewal registration, may pay a fee equal to ½ of the applicable fee and post a surety bond certificate of deposit, or letter of credit, equal to ½ of the applicable fee at the time of the first installment. Payment of the first installment entitles the owner to the issuance of full-year credentials. The second installment is to be paid by July 15. If not paid by July 15, the Department must file a claim against the security for payment of fees and penalties due and the owner is not entitled to elect the installment payment option for the following year. Excess surety moneys received must be refunded minus a $50 administrative fee.

Finally, the Legislative Council is authorized to implement an interim study in the 1991 Interim to evaluate the implementation of the Act and to recommend necessary legislative changes

HOUSE FILE 664 — Fine for Vehicle Size and Weight Violations
BY COMMITTEE ON TRANSPORTATION. This Act alters the fine for a first conviction on certain violations regarding motor vehicles of excessive size or weight from an amount of not less than $100 to the amount of $100

HOUSE FILE 2118 — Accident Report Copies
BY COMMITTEE ON TRANSPORTATION. This Act allows the driver of a vehicle involved in an accident, who is required to file an accident report with the State Department of Transportation, to receive a copy of that confidential accident report and provides the Attorney General access to confidential motor vehicle accident reports filed by law enforcement officers.

HOUSE FILE 2119 — Failure to Obey School Bus Warning Devices — Procedures
BY COMMITTEE ON TRANSPORTATION. This Act extends the time periods for delivery of reports of violations of failing to obey school bus warning devices from 24 to 72 hours after the violation has occurred. The Act similarly extends the time period for a peace officer to investigate the reported violation and contact the owner from 48 hours after receipt of the report of the violation to 7 days after receipt. The officer is required to initiate the investigation within 7 days. Prior law required the investigation to be completed within 7 days.

The Act also allows the peace officer to serve the driver with a uniform traffic citation for the violation by certified mail rather than personal service

HOUSE FILE 2338 — Purple Heart Registration Plates
BY COMMITTEE ON TRANSPORTATION. This Act provides that the owner of a motor vehicle subject to registration can order purple heart registration plates if the person was awarded a purple heart medal by the United States government for wounds received in military or naval combat against an armed enemy of the United States The plates include a representation of the purple heart medal and ribbon centered on the left side of the plate and the words "Combat Wounded" centered on the bottom of the plate.

HOUSE FILE 2393 — Carrier Liability Limits
BY COMMITTEE ON TRANSPORTATION. This Act requires that an intrastate regular route motor carrier of passengers or a charter carrier operating a motor vehicle with a seating capacity of 16 or more persons have minimum liability coverage of $300,000 for 1 person per accident, $2 000 000 for more than 1 person per accident, and $10 000 for property damage per accident.

ERISA: SOME BASICS

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ERISA: SOME BASICS[1]

I. PURPOSE AND SCOPE

A. Introduction

More than 30 million Americans are covered by private pension and welfare benefit plans involving employers whose activities affect interstate commerce. Over the years, plan assets have been misused, embezzled, and poorly managed. Until 1974, fringe benefit programs were not subject to any specific uniform regulation. Further, state trust laws have had dubious applicability to employee pension and welfare plans. The Employee Retirement Income Security Act of 1974 was enacted in response to these problems. ERISA is found at 29 U.S.C. § 1001 et seq.

B. Purpose

The basic purposes of ERISA are to insure that employees covered by plans receive full benefits and to protect the interests in fringe benefit programs such as medical plans. 29 U.S.C. § 1001(b).

C. Scope and Application

ERISA applies to any "employee benefit plan," which is defined as an employee welfare benefit plan, an employee pension plan, or a plan which is a combination of both of these. 29 U.S.C. § 1002(5). Once a "plan" is found to exist, ERISA imposes certain specific requirements.

1. Procedural and Substantive Requirements

For example, ERISA's procedural and substantive requirements address reporting, disclosure, and vesting among others. Failure to follow these requirements will result in fines, court actions and even criminal penalties.

2. Fiduciary Duties

ERISA imposes demanding standards upon fiduciaries with regard to the administration of plans. Fiduciaries must act solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits under the plan.

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[1] The assistance of Grace Shaff, third-year student at the University of Iowa College of Law, is gratefully acknowledged.

3. Applicable Law and Forum

ERISA contains a broad preemptive provision, therefore the question of whether a plan is covered by ERISA often determines which law applies. Likewise, the appropriate forum will frequently be determined by whether or not the plan is an ERISA plan.

4. Remedies

The remedies available to a claimant may also vary depending upon whether or not ERISA applies.

II. COVERAGE: IS THERE A PLAN?

A. Coverage

ERISA coverage of a benefit plan is contingent on the presence of five elements: (1) a plan, fund or program; (2) established or maintained; (3) by an employer, employee organization (such as a labor union) "in commerce," or both; (4) for the purpose of providing certain specified benefits (depending on the type of plan); and (5) to participants or beneficiaries. Of these elements, courts have most frequently been called upon to determine the presence of a plan, fund or program. 29 U.S.C. §§ 1002(1) and (2).

B. Is There A Plan?

To conclude that a plan, fund, or program exists, a court must determine whether "from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982).

Courts draw all inferences in favor of the existence of a plan. For example, it is not necessarily required that a plan be recorded in a formal written statement. However, no single act necessarily constitutes a plan, fund or program. Thus, the mere decision to extend benefits is insufficient. Harris v. Arkansas Book Co., 794 F.2d 358 (8th Cir. 1986). A further act or event that implements or records the decision is necessary.

The following benefits are not plans:

(1) insurance mutual funds providing group insurance rates for employers who are too small to qualify on their own. Taggart Corp. v. Life & Health Benefits Administration, Inc., 617 F.2d 1208 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981).

(2) benefits such as health care which are offered by an unincorporated association of heterogeneous employers. Credit Managers Ass'n v. Kennesaw Life & Accident Ins., 809 F.2d 617 (9th Cir. 1987).

(3) severance benefits payable only to employees who lose their jobs due to the closing or relocation of the plant in which they are employed. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987).

(4) self-administering benefits in which the employer's role is limited to "little more than writ[ing] a check." Id at 12.

In addition to excluding these non-benefits from ERISA, courts have held that once a valid plan is written, it cannot be modified by an oral agreement. Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986).

A plan, fund, or program must be part of an employee pension benefit plan or an employee welfare benefit plan in order for ERISA to apply. A pension plan provides retirement and other types of deferred income, while a welfare plan provides benefits upon the occurrence of certain contingencies.

1. Employee Benefit Plan

An employee pension benefit plan is defined as any plan, fund or program established or maintained by an employer, an employee organization, or both which:

> provides retirement income to employees ... [or] results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2). A pension plan thus accumulates funds for retirement or other deferred income and pays them to employees at a future date, generally the time of retirement. Internal Revenue Code regulations require that a pension plan must provide for the payment of definitely determinable benefits. Pension plans must provide primarily for retirement benefits, detailing the circumstances under which benefit payments are due and the basic options under which payments will be made. These benefits, which cannot be based on profits, are calculated by using a predetermined formula. The systematic deferral of payments is an essential characteristic of ERISA coverage in employee pension plans.

Certain pension benefits are excluded from ERISA by the act itself and by Department of Labor regulations. Unfunded excess benefit plans and many top hat plans are not subject to ERISA's requirements. Other plans not considered pension plans are severance and bonus programs meeting specified contingencies, various individual retirement accounts, voluntary tax sheltered annuities, and certain supplemental payment plans.

2. Welfare Benefit Plans

An employee welfare plan is a plan, fund or program which is established or maintained for the purpose of:

> providing for its participants or their beneficiaries through the purchase of insurance or otherwise,
>
> > (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs or day care centers, scholarship funds, or prepaid legal services, or
> >
> > (B) any benefit described in Section 302(c) of the Labor Management Relations Act of 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1). Certain "payroll practices" are exempt from this coverage. Payroll practices include payments such as overtime pay, shift premiums, holiday and vacation pay, and payments for an employees normal compensation upon absence from work for medical reasons. Severance pay plans, however, are covered by ERISA.

C. <u>"Established or Maintained" and "Employer, Employee Organization or Both" Requirements</u>

In addition to finding an employee benefit plan, a program must be established or maintained by an employer, employee organization or both in order to be subject to ERISA coverage. An employer or employee organization can establish or maintain a plan quite easily. A Department of Labor regulation clarifies the requirement that a plan be "established or maintained" by providing the circumstances under which such a plan has <u>not</u> satisfied this criteria. A plan is not covered by ERISA if <u>all</u> of the following factors are satisfied:

(1) the employer or employee organization makes no contributions or other payments;

(2) participation in the program is purely voluntary;

(3) the sole function of the employer or employee organization is to permit the insurance company to publicize the program to its employees; and

(4) other than reasonable compensation, the employer or employee organization receives no consideration in connection with the program.

29 C.F.R. § 2510.3-1(j). ERISA itself defines the terms employer, employee and employee organization. An employer is "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5).

An issue raised frequently is whether an individual shareholder or an officer is an employer within this definition. The 8th Circuit holds that these people can be included, depending upon the degree of control which they exercise over corporate affairs and operations. See Peckham v. Board of Trustees, 653 F.2d 424 (8th Cir. 1981) (union members who were sole proprietors and who hired other union members to work with them were "contributing employers"). However, the definition of employer has not been expanded to include an employer's surety or an employee benefit association taking the form of an unincorporated association.

Less confusion exists over the meaning of an "employee organization." It is clearly defined as:

> [A]ny labor union or any organization of any kind, or any agency or employee representation committee, association, group or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

29 U.S.C. § 1002(4).

D. Participant or Beneficiary Status Requirement

In addition to all of the requirements discussed here, an employee benefit plan must provide the benefits to participants or beneficiaries. Participant or beneficiary status is important under ERISA because it is the policy of the Act to protect the benefit plans of these people. A participant is:

> [A]ny employee or former employee of any employer, or any member or former member of an employee organization who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). A beneficiary is defined as: "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA provides no protection for persons other than participants or beneficiaries. The Department of Labor has promulgated regulations which clarify these definitions. 29 C.F.R. § 2610.2.

III. REPORTING REQUIREMENTS

A. Reporting Requirements

ERISA requires the plan administrators of covered pension and welfare plans to report information concerning a plan's structure, financing and individual benefit entitlements to the Department of Labor. 29 U.S.C. 1021. This information must also be disclosed to plan participants and beneficiaries. Id. ERISA's reporting provisions are designed to create certainty as to the plans and to protect employee interests through employee disclosure and federal monitoring.

B. Summary Plan Descriptions

The structure and operation of plans are disclosed in Summary Plan Descriptions ("SPD's"). SPDs are intended to be non-technical explanations of a plan's administration, funding, eligibility requirements, benefit provisions and claims procedures. The plan description provided in an SPD should be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1). The SPD must not mislead, misinform, or fail to inform plan participants and beneficiaries. The person responsible for the preparation and distribution of SPDs is the plan administrator.

1. Timing Requirements

Every participant and each beneficiary receiving benefits under an ERISA plan shall receive an SPD. The SPD must be provided within 90 days after an individual becomes a participant or beneficiary or within 120 days after the plan becomes subject to ERISA, whichever is later.

Any material modification to the information reported in an SPD must be provided to participants and beneficiaries in a summary material modification ("SMM") within 210 days after the end of the plan year in which the change takes place. 29 U.S.C. § 1024(a)(1)(D). Amendments are subject to the 210 day requirement from the end of the plan year in which they were adopted. If a separate summary of change is issued within 5 years of the SPD's issuance, a new SPD must be issued at the end of the 5 years. A new SPD must be issued every 10 years.

2. Content

There is no specific form for an SPD, but ERISA does regulate the content and style of a document. The SPD must be complete and understandable. It must also include information such as the type of plan, names and addresses of the parties involved and the financing of the plan. These requirements, which vary slightly between welfare benefit plans and pension plans, are found in 29 U.S.C. § 1022(2)(b).

3. Reliance Upon SPDs

Employees rely heavily on SPDs. The SPD has the potential of creating confusion rather than eliminating it if it is ambiguous or inconsistent with the plan. Administrators should be aware that any explanatory documents given to participants may be held to be SPDs. Kochendorfer v. Rockdale Sash and Trim Co., Inc. Profit Sharing Plan, 653 F.Supp. 612 (D. Ill. 1987). SPDs should therefore be explained clearly and carefully.

Increasing litigation surrounds the adequacy of SPDs. SPDs may be declared inadequate because they are silent, inconsistent or misleading. An employee can obtain relief by showing reliance on this inadequacy. Anderson v. Alpha Portland Industries, 836 F.2d 1512 (8th Cir. 1988). Employers should also be careful to include in the SPD a reservation of the right to terminate the plan.

C. Additional Reporting Requirements

In addition to filing an SPD, a plan administrator is required to file an annual report with the Department of Labor. 29 U.S.C. § 1023. This requirement entails the filing of an Annual Return/Report with the IRS. A Summary Annual Report must also be given to each participant of a plan. Finally, plan administrators must comply with certain requests of participants and beneficiaries for the presentation of general plan documents and information regarding their benefit entitlements. 29 U.S.C. § 1024(b)(4). ERISA imposes penalties on administrators who do not promptly reply to these requests. 29 U.S.C. § 1132(c).

IV. FIDUCIARY DUTIES

A. Introduction

A key element of ERISA is the protection of the interests of participants and beneficiaries by making sure that assets are managed with an "unwavering duty of complete loyalty." NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981). To achieve this goal, ERISA imposes strict standards of conduct and responsibility upon the fiduciaries involved with the management of employee benefit plans. All employee benefit plans are covered by ERISA's fiduciary liability provisions. These provisions adopt many principles of traditional trust law, making them applicable to ERISA fiduciaries.

B. Who Is A Fiduciary?

Under ERISA, each employee benefit plan is required to provide for at least one fiduciary who will "have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102. A fiduciary who is subject to ERISA's strict standards is someone who: (1) exercises discretionary authority or control respecting the management of a plan or disposition of its assets; (2) renders investment advise with respect to a plan for a fee or other compensation or has the authority to do so; or (3) has discretionary authority or responsibility in the administration of such a plan.

Fiduciary status depends upon a person's authority and responsibility, not his title. However, some people are fiduciaries merely because of the position they hold in a plan's operation. For example, investment managers, plan administrators and administrative managers of ERISA plans are fiduciaries.

Deciding whether a person is a fiduciary under ERISA is a factual question requiring an analysis of the facts and circumstances of each case. Given the statutory definition, it is apparent that plan officers, trustees, directors and members of any investment or administrative committees are fiduciaries. However, the duties of many persons involved with pension benefit plans are not as clear. Courts have interpreted the meaning of a fiduciary liberally in testing the outer limits of this definition.

1. Investment Advisors

Courts have applied fiduciary principles to a wide variety of factual contexts. For example, a person rendering investment advice is a plan fiduciary only if that person renders regular advice as to the value of securities and addresses the individual needs of a particular plan pursuant to an agreement.

Stanton v. Shearson Lehman/American Express, Inc., 631 F.Supp. 100 (N.D. Ga. 1986). The result may be different if there is specific unsolicited advice.

2. Insurance Companies and Brokers

Insurance companies and brokers have been held to be fiduciaries when they exercise a degree of authority or control over plan management or plan assets. Chicago Board of Options v. Connecticut General Life Insurance Co., 713 F.2d 254 (7th Cir. 1982).

3. Employer or Employers Sponsoring the Plan

The employers who sponsor a plan and their officers, directors and shareholders may be fiduciaries if they exercise the requisite degree of authority or control over the named fiduciary. Fruend v. Marshall & Ilsley Bank, 485 F.Supp. 629 (D. Wis. 1979). Plan administrators have also been held to be fiduciaries in certain circumstances. Eaton v. D'Amato, 581 F.Supp. 743 (D. D.C. 1980). However, administrators who merely perform functions within a set framework established by others are not fiduciaries. Anderson v. Alpha Portland Industries, Inc., 647 F.Supp. 1109 (D. Mo. 1986), aff'd., 836 F.2d 1512 (8th Cir. 1988). Likewise, employers making basic employment and business decisions are not subject to ERISA's fiduciary standards of care. Hickman v. Tosco Corp., 840 F.2d 564 (8th Cir. 1988).

C. Fiduciary Duties

A fiduciary subject to ERISA has broad responsibilities in discharging his duties with respect to a plan. He must act solely in the interests of the plan participants for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable administration expenses. 29 U.S.C. § 1104(a)(1). A fiduciary must act "with the care, skill, prudence, and diligence under the circumstances" of a prudent man. 29 U.S.C. § 1104(a)(1)(B). Finally, a fiduciary must diversify the investments of the plans to minimize the risk of large losses unless it is clearly not prudent to do so and must act in accordance with the governing plan documents and instruments consistent with other ERISA provisions. 29 U.S.C. § 1104(a)(1).

V. PREEMPTION

A. Statutory Preemption

Given the requirements of ERISA, an important question to be asked is whether ERISA applies at all. Section 514(a) (codified at 29 U.S.C. § 1144(a)) provides that ERISA shall

"supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan...." Federal jurisdiction is exclusive except in suits by participants or beneficiaries to recover benefits or to enforce or clarify rights where federal jurisdiction is concurrent with that of state courts. See. 29 U.S.C. § 1132(a)(1)(B) and § 1332(e). This federal preference exists without regard to the amount in controversy or to the citizenship of the various parties.

B. Exceptions (29 U.S.C. § 1144)

ERISA's broad preemptive provision has several exceptions:

(1) Actions arising before January 1, 1975 (§ 514(b)(1));
(2) Claims in which the enforcement of ERISA will interfere with the enforcement of other federal laws (§ 514(d));
(3) Actions governed by a generally applicable state criminal law (§ 514(b)(4)); and
(4) Situations in which the "SAVINGS CLAUSE" applies (§ 514(b)(2)(A)). The Savings Clause provides that ERISA does not preempt any state law which regulates insurance, banking or securities. The clause thus "saves" state laws governing these industries from preemption.

C. The Deemer Clause

To prevent abuse of the savings clause, Section 514(b)(2)(B) includes a "deemer clause." This clause states that no employee benefit plan "shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for the purposes of any law of any state purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." This statute prevents states from directly regulating ERISA plans by claiming that they are insurers.

D. Application of § 514

The application of § 514 is very broad.It encompasses all laws, decisions, rules and regulations of states which directly or indirectly purport to regulate employee benefit plans. The preemption provision is therefore intended to displace all state laws which fall within its sphere, whether or not they are consistent with ERISA requirements.

E. Preemption by ERISA

The judicial analysis of three factors determines whether a state law is preempted by ERISA: (1) whether the law "relates to" an employee benefit plan; (2) whether the state law attempts to reach the terms and conditions of an employee benefit plan; and (3) whether the state law is subject to one of ERISA's exemptions.

1. Relation to an employee benefit plan.

Section 514(a) states that ERISA shall supersede any state laws which "relate to any employee benefit plan...." A law is considered to "relate to" such a plan if it has a connection with or reference to such a plan. Although it has been recognized that a connection can be too tenuous or remote to warrant ERISA preemption, the term "relates to" has been given a broad interpretation by courts. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), for example, the Supreme Court held that New York's human rights law prohibiting employers from considering pregnancy in structuring employee benefit plans clearly related to benefit plans. Similarly, in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985), a Massachusetts law specifying minimum health-care benefits to residents insured under some accident or sickness policies related to ERISA plans but was subject to the insurance savings clause. On the contrary, a Maine statute requiring employees not covered by severance pay plans to be paid severance pay if affected by a plant closing did not relate to an ERISA plan since it required only a one-time payment upon the occurrence of a single event. Ft. Halifax Packing Co. v. Coyne, 107 S.Ct. 2211 (1987).

2. Whether state law reaches terms of employee benefit plan.

As to the second factor of preemption, a law affects the terms of an employee benefit plan when it directly or indirectly purports to regulate the terms, conditions or administration of that plan. Thus, ERISA preempts all state laws which apply to employee benefit plans even if they do not expressly concern such plans.

Examples of preempted state laws include the following:

(1) State age discrimination laws;

(2) Workers compensation laws purporting to regulate the terms of ERISA plans. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981);

(3) State wage payment and collection laws;

(4) Tort, contract and fraudulent misrepresentation claim under state law. Dedeaux v. Pilot Life Insurance Co., 481 U.S. 41 (1987);

--8TH CIRCUIT and IOWA CASES--

(1) State subrogation doctrines. Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989); and

(2) Vexatious refusal to pay statutes. In Re Life Insurance Co. of North America, 857 F.2d 1190 (8th Cir. 1988).

On the other hand, the following state laws are not preempted by ERISA:

(1) State garnishment statutes under which the benefits being attached are welfare plan benefits. Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988);

(2) Statutes addressing claims against non-fiduciary administrators of self-funded employee benefit plans; and

(3) Claims for damages of lost pension benefits on a breach of employment contract action when the pension issue is an incidental aspect of the action.

--8TH CIRCUIT and IOWA CASES--

(1) Principle that personal liability can only be imposed on party to compensation agreement or those who agreed to be bound by it. Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989);

(2) Statutes involving equitable estoppel claim brought against employer and not plan, administrator or fiduciaries. Bricker v. Maytag, 450 N.W.2d 839 (Iowa 1990); and

(3) State provision relating to support and property division in dissolution disputes when life insurance included in decree. Stackhouse v. Russell, 447 N.W.2d 124 (Iowa 1989).

4. Exceptions to Preemption

Once a court determines that a state law falls within the scope of § 514(a), it must decide whether or not the savings clause or another exemption prevents ERISA preemption. Courts use a "common sense" approach in deciding preemption questions, which typically concern the savings clause. In applying this clause, three factors are considered: (1) whether the law affects the spreading of the policyholder's risk; (2) whether the law is integral to the insured-insurer relationship; and (3) whether the law is limited to the insurance industry. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

Generally, a law will be preempted by ERISA if its regulation of insurance contracts directly applies to employee benefit plans. See Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311 (5th Cir. 1985), rev'd, 481 U.S. 41 (1987) (for state law to come within savings clause, it must be specifically related to insurance industry, not just have impact upon it). If it appears that a law is exempt from preemption under the savings clause, the court will then look to the deemer clause before it applies state law. Courts have narrowly construed the savings clause and broadly read the deemer clause. This approach has strengthened the preemptive power of ERISA.

CONCLUSION

Although ERISA has been in effect since 1974, its structure and doctrine are still incomplete. ERISA is slowly gaining its form through fact-specific cases and many degrees of application. With further development, plan sponsors, fiduciaries, administrators and advisors will become better prepared to comply with ERISA's provisions.

Iowa Defense Counsel Association
West Des Moines, Iowa
Saturday, October 20, 1990 - 10:40-11:30 A.M.

TO DISINTER THE GOOD[1]

[Remembering Honorable Lawyers and Judges]

I. Good Judges

Listen Attentively
[Martin D. Van Oosterhout]

Decide Promptly
[Harvey C. Uhlenhopp]

Teach Patiently
[C. Edwin Moore, Maurice E. Rawlings]

Maintain a Certain Distance
On the Bench
Off the Bench
[Roy L. Stephenson]

Err on the Side of Recusal
(Stay Out of One Side of the Balance or the Other)
[Learned Hand on Benjamin Cardozo]

II. Good Lawyers

Use Friendly Persuasion --
[D. P. Shull, John J. Vizintos, Allan A. Herrick]

Yet Persuade Forcefully
[Jim Crawford, Frank Margolin]

Refer Unhesitatingly (but serve when appointed)
[Burton Parriott]

Teach Willingly
[Dean Mason Ladd, Allen Loth]

Do Community Service
[Maurice Te Paske]

---

[1]Shakespeare, Julius Caesar ("The Evil that men do lives after them; the Good is oft interred with their bones.").

V

III. We Are All Always Officers of the Court

Accentuate the Positive -- Generate Public Confidence

Our Not-So-Private Lives
(Importance of the appearance of quality)

Court Officers are the Yardsticks
By Which Courts are Measured

Appendix A -- Consider a Court Watch Program

IV. How Rules 11 and 80 Fit This Picture

Federal Rule 11:

> . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Iowa Rule 80

> . . . Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the

> extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. . . . If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party who is not represented by counsel shall impose a similar obligation on such party.

Recent cases:

Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989); Cooter & Gell v. Hartmarx Corp., 58 U.S.L.W. 4763 (1990); see Gregory P. Joseph, Supreme Court Shapes Rule 11: Guidance to Lower Courts, 26 Trial 65 (Sept. 1990).

V. Comments and Questions Invited.

V

Volunteers appear in court

By Louise Zerschling
Journal staff writer

Some 40 Sioux Cityans are appearing these days in District Court where criminal cases are being heard — and most of them never before have been inside a courtroom.

True, they have been charged — but not in the courtroom definition of the word, "charge." They have been charged with a very weighty responsibility — that of watching and recording what takes place in the courtroom where they are intent observers.

They are volunteers in Sioux City's current Court Watch program. They have taken a Morningside College training course which extended from the classroom to a courtroom, and they have dedicated themselves for at least two months of court watching. It is a process that can be both tedious and fascinating, and one which the Court Watch sponsors hope will bring affirmative results in courtroom procedures here.

The Court Watch is a project of the Crime Prevention Committee of the Chamber of Commerce, and has received its major impetus through research and investigation by Bill Heubaum, Court Watch chairman, and committee chairman Clark Meyer. When the Crime Prevention Committee received a "go-ahead" from the chamber board, Claire Miethke was drafted by Heubaum to become the committee's coordinator.

In turn, Miethke enlisted the help of Colleen Snyder. Snyder already was teaching a continuing education class, "Understanding the Criminal Justice System," at Morningside College, and agreed to teach a Court Watch procedure class for the watchers.

An appeal for volunteers was made by Miethke through The Journal, and to such groups as Welcome Wagon, Junior Women's Club, Telephone Pioneers and the Siouxland Crime Prevention Coalition. The first group of more than 40 studied in Snyder's Morningside course, and — in the final session — at the Woodbury County Courthouse. There was an impressive group of teachers in the courtroom — former Judge David Blair, court administrator David Boyd of the 3rd Judicial District, Judge Charles Wolle and Dennis Hendrickson, assistant county attorney.

Judge James Kelley, chief judge of the 3rd Judicial District, tells Court Watch volunteers Ethel Sever and Norbert Gloden that much work during a trial is done in the judge's chambers. (Staff photo by George Johnson)

Barbara Work, director of the Volunteer Bureau, is coordinating the volunteers. Clerk of Courts Colleen Moiskow has agreed to accept the daily forms filled out by the volunteers, and the eventual tabulating will be done by Work and her bureau. Court administrator Ed Moran has been of great help, said Miethke, and has made his office available to the watchers.

"Part of the purpose of our program," said Heubaum, "is to encourage citizen involvement in the court system through observation of the whole court system. This extends from the physical facilities to the judges, prosecutors, defense counsel, probation officers and how juries function. What we want to do is foster and promote judicial efficiency and fair administration of justice."

"We have had a good reception from the judges," said Miethke. "They have been great."

"I think they welcome the court watch," declared Heubaum.

Court Watch is a six-month project. The initial volunteers were asked for two-month commitments but Miethke and Snyder hope that some of them will continue. More volunteers are needed for the coming months, they said. A major part of their work will be filling out forms based on their observations, from which conclusions will be drawn eventually.

Three courtrooms — each handling criminal cases only — were chosen for the watch. These are a district courtroom in the courthouse and two associate courtrooms on the Municipal Building third floor.

At this week's meeting of the Crime Prevention Committee, members suggested that Miethke ask associate court volunteers to observe conditions in the Municipal Building third floor halls where "juries, defendants, attorneys and witnesses are forced to mingle because of crowded conditions and inadequate facilities."

APPENDIX A

DAILY SUMMARY SHEET

(one a day per courtroom)

County: _____ Name of judge: _____

Location of courtroom: _____ Type of proceedings being heard today: _____

Name of monitor: _____

MORNING

Time court scheduled to start _____

Time 1st case called _____ *Total # a.m. hours in session* _____ If late start, how late? (9) [ ] mins.

Time adjourned for lunch _____

AFTERNOON

Time court scheduled to start _____

Time 1st case called _____ *Total # p.m. hours in session* _____ If late start, how late? (10) [ ] mins.

Time adjourned for lunch _____

TOTAL TIME COURT IN SESSION FOR DAY *(Add a.m. and p.m. hours above.)* (11) [ ] hrs.

TOTAL # CASES ON CALENDAR (12) [ ]

TOTAL # CASES REPRESENTING VICTIMLESS CRIMES (13) [ ]

CONTINUANCES

TOTAL # REQUESTED BY:

Defense	(14)	[ ]
Prosecution	(15)	[ ]
Agreement	(16)	[ ]
Order of Court	(17)	[ ]

TOTAL # CONTINUANCES GRANTED (18) [ ]

TOTAL # CONTINUANCES REFUSED (19) [ ]

REASONS GIVEN:

Obtaining defense counsel	(20)	[ ]
Jury Demand	(21)	[ ]
Defense not ready	(22)	[ ]
Defense lawyer busy	(23)	[ ]
Prosecution not ready	(24)	[ ]
Complainant or witness absent	(25)	[ ]
Deferred Prosecution/DWI School	(26)	[ ]
Other	(27)	[ ]
None	(28)	[ ]
Don't know	(29)	[ ]

V

EVALUATION OF FACILITIES AND PERSONNEL

AUDIBILITY AND FACILITIES

30. Seating space in the courtroom today was: [ ] Adequate [ ] Inadequate.

31. Upkeep and cleanliness in courtroom were: [ ] Adequate [ ] Inadequate

32. How much of the proceedings could you hear? [ ] Nearly all [ ] Some [ ] Almost none

33. How much of the proceedings do you think the audience could hear? [ ] Nearly all [ ] Some [ ] Almost none

34. Did the judge usually speak loudly and distinctly enough to be heard by the audience? [ ] Yes [ ] No

35. Did any of the following interfere with the audience's ability to hear?

	Yes	No
a. Talking among audience	[ ]	[ ]
b. Talking among court personnel (other than judge, lawyers on case)	[ ]	[ ]
c. Noise of audience entering, leaving, moving about	[ ]	[ ]
d. Noise of court personnel entering, leaving, moving about	[ ]	[ ]
e. Heating or cooling systems	[ ]	[ ]
f. Sounds from outside courtroom	[ ]	[ ]
g. Other: _____		

BEHAVIOR OF BAILIFFS

36. Did bailiffs adequately explain to people when to step forward, where to stand, when to exit? [ ] Yes [ ] Sometimes [ ] No

37. Were they courteous when doing so? [ ] Yes [ ] Sometimes [ ] No

38. Were they patient, polite and dignified in keeping order and answering questions? [ ] Yes [ ] Sometimes [ ] No

BEHAVIOR OF CLERKS

39. Was the clerk polite in calling cases and answering questions? [ ] Yes [ ] No

40. Did the clerk appear to accord special treatment to certain individuals? If yes, explain on back page. [ ] Yes [ ] No

INFORMING THE PUBLIC

41. With what questions and problems did people most often turn to bailiffs and clerks? Put typical questions and responses on back page. [ ] Check here if answered on reverse side.

INTERPRETERS

42. Did you see any non-English speaking defendants or witnesses today? [ ] Yes [ ] No

How many? _____

43. If "yes": how many were given court-appointed interpreter? _____

44. How many provided own interpreter? _____

45. If neither of above, what happened? Please explain on back. [ ] Check here if answered on reverse side.

CONDUCT OF JUDGE

46. Before accepting a guilty plea, did the judge always give the proper admonishments? (Refer to Column 8 on CASE OBSERVATION REPORT.) If "no," explain circumstances on back page. [ ] Yes [ ] No

47. Before granting a continuance, did the judge usually make an effort to find out why it was necessary? [ ] Yes [ ] No

48. Did the judge seem to exert proper control over attorneys and court personnel to give the courtroom a businesslike atmosphere? [ ] Yes [ ] No

49. Did the judge appear to discriminate against certain groups or kinds of people (e.g. minorities, "long hairs," ethnic groups)? If "yes," explain on back page. [ ] Yes [ ] No

50. Did the judge give the appearance of favoring either defense or prosecution? [ ] Yes [ ] No

If "yes", which? (Explain on back page.) [ ] Def. [ ] Pros.

51. Did the judge usually give the defendant a chance to tell his side of the story? [ ] Yes [ ] No

52. Did he usually try to explain the sentence to the defendant? [ ] Yes [ ] No

53. Did the judge use language that most defendants appeared to understand? [ ] Yes [ ] No

54. Did you usually understand the judge? [ ] Yes [ ] No

55. Was he attentive when someone spoke to him? [ ] Yes [ ] No

56. Was he patient when someone did not fully understand or was not satisfied? [ ] Yes [ ] No

57. In general, which of these best describe the courtesy and respect the judge showed to:

	Excellent	Adequate	Sometimes Inadequate	Often Inadequate
a. Defendants	[ ]	[ ]	[ ]	[ ]
b. Defense attorneys	[ ]	[ ]	[ ]	[ ]
c. State's witnesses/complainants	[ ]	[ ]	[ ]	[ ]
d. Prosecutors	[ ]	[ ]	[ ]	[ ]

58. Was there anything about the judge's conduct on the bench that gave the appearance of impropriety? If "yes," explain on back page. [ ] Yes [ ] No

59. If you wish, describe on back any noteworthy aspects--good or bad--of the judge's performance, such as: decisiveness, legal ability, dignity, competence, discipline of unprofessional conduct of attorneys, diligence in trying to ascertain the facts. [ ] Check here if described

IMPRESSION

60. Put yourself in the place of a defendant, complainant or witness in the courtroom you have just observed. Taking everything into account--actions and attitudes of judge, bailiffs, clerks; behavior of prosecutor and defense attorney; the general feeling of the place--would you have left the court with the feeling that justice was being fairly administered? If not, explain on back. [ ] Yes [ ] No

PLEASE BE SURE YOU HAVE ANSWERED ALL QUESTIONS.

V

I N D E X

Iowa Defense Counsel Association

1965 through 1989 Annual Meetings

This Index is supplied as a service to the members of the the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
520 35th Street
Des Moines, IA 50312
515/275-5918

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