VOLUME I

IOWA DEFENSE COUNSEL ASSOCIATION

2001

37th Annual Meeting & Seminar

September 26-28

Iowa Defense Counsel Association
431 East Locust Street, Suite 300 • Des Moines, IA 50309
(515) 244-2847 phone • (515) 243-2049 fax
staff@iowadefensecounsel.org • www.iowadefensecounsel.org

2001 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR SCHEDULE

Wednesday, September 26, 2001

9:00 a.m. **Registration**

11:00 a.m. **Board of Directors Meeting**

1:00 - 1:15 p.m. **Welcome and Report of the Association**
IDCA President, Marion Beatty

1:15 - 1:55 p.m. **Appellate Review I (Negligence, Torts, Indemnity)**
Paul P. Morf
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, IA

1:55 - 2:20 p.m **Five Iowa Rules of Civil Procedure You Can't Live Without**
Chad M VonKampen
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, IA

2:20 - 3:00 p.m. **Worker Compensation Update**
Honorable Iris J. Post
Iowa Industrial Commissioner
Des Moines, IA

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

3:15 - 3:45 p.m. **Independent Medical Exams**
Lyle W. Ditmars
Peters Law Firm, P.C.
Council Bluffs, IA

3:45 - 4:15 p.m **Recent Developments and Thoughts on Defending Professional Liability Claims**
Joseph L. Fitzgibbons
Fitzgibbons Law Firm
Estherville, IA

4:15 - 5:00 p.m **Professional Liability: Malpractice by the Divorce Lawyer**
George A. La Marca
La Marca & Landry, P.C.
West Des Moines, IA

5:00 – 5:15 p.m. **Executive Director's Report**
Robert (Bob) Kreamer
IDCA Executive Director/Lobbyist
Des Moines, IA

5:30 - 7:00 p.m. **Welcome Reception**
Embassy Suites, 1st Floor

Thursday, September 27, 2001

7:30 a.m. **Registration**

7:30 - 8:30 a.m. **Continental Breakfast**

8:30 - 9:10 a.m. **Appellate Review II (Appellate Procedure, Civil Procedure, Courts-Jurisdiction and Trial, Evidence, Insurance, Judgement and Limitation of Actions, Worker Compensation)**
Matthew J. Haindfield
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, IA

9:10 - 9:40 a.m. **Ethical Behavior in and out of the Courtroom: The Law of Contempt**
Judge John D. Ackerman
Sioux City, IA

9:40 - 10:10 a.m. **Interviewing the Treating Physician, Getting the Records and Related Topics**
Cameron A. Davidson
Lane & Waterman
Davenport, IA

10:10 - 10:25 a.m **BREAK**

10:25 - 11:00 a.m. **The New Federal and Local Rules**
James D. Hodges, Jr.
Clerk U.S. District Court, Northern District of Iowa
Cedar Rapids, IA

11:00 - 11:30 a.m. **Civil Liability for Improper Handling of Worker Compensation Claims – Erosion of the Exclusive Remedy Doctrine**
Charles E. Cutler
Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P.
Des Moines, IA

11:30 - 12:00 p.m. **A Primer on Defending a Product Liability Case**
Richard J. Kirschman
Whitfield & Eddy, P.L.C.
Des Moines, IA

12:00 -12:30 p.m. **LUNCH**

12:30 - 1:15 p.m. **Luncheon Speaker: Issues Confronting the Iowa Supreme Court (and Iowa Lawyers)**
Supreme Court Chief Justice Louis A. Lavorato
Des Moines, IA

1:15 - 1:45 p.m. **Recent Discipline Decisions of Interest**
David J Grace
Assistant Ethics Counsel, Iowa State Bar Association
Des Moines, IA

1:45 - 3:00 p.m **Developments in Motor Vehicle Litigation, Low Impact Crashes, the Little Black Box and Roadway Design**
David E. Daubert, P.E.
Search Engineering, Inc.
Hopkins, MN

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

3:15 - 3:30 p.m **What's Happening at the Defense Research Institute**
Timothy P. Schimberg
DRI Representative
Denver, CO

3:30 - 3:50 p.m **Issues of Importance to the Iowa Bar**
C. Joseph Holland
President, Iowa State Bar Association
Holland Law Office
Iowa City, IA

3:50 - 4:30 p.m. **Employment Law Update**
James C. Hanks
Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C.
Des Moines, IA

4:30 - 5:00 p.m. **Defending the Recreational Motor Vehicle Case**
William G. Nicholson
White & Johnson, P.C
Cedar Rapids, IA

5:00 – 5:15 p.m **General Meeting and Election of Officers**

6:30 - 9:00 p.m. **Reception and Banquet - Glen Oaks Country Club**

6:30 - 7:30 p.m. Reception

7:30 p.m. Dinner/Banquet

FRIDAY SCHEDULE ON NEXT PAGE ⇨

Friday, September 28, 2001

7:00 - 8:30 a.m.	**Board of Directors Meeting**
8:00 – 8:30 a.m.	**Continental Breakfast**
8:30 - 9:00 a.m.	**Iowa Product Liability Law and Tobacco Litigation** Michael W. Thrall Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C. Des Moines, IA
9:00 - 10:30 a.m.	**Techniques to Limit Damage Awards** Aaron Abbott, Ph.D. Jury Behavior Research, Inc. Portland, OR
10:30 - 10:45 a.m.	**BREAK**
10:45 - 11:15 a.m.	**New Ethical Issues for the Trial Lawyer** David L. Brown Hansen, McClintock & Riley Des Moines, IA
11:15 - 12:00 p.m.	**Ten Ways to Successfully Defend a Lawsuit in Federal Court** Judge Mark W. Bennett Sioux City, IA
12:00 - 12:30 p.m.	**LUNCH**
12:30 - 1:00 p.m.	**Luncheon Speaker: Issues Confronting the Attorney General's Office (and Iowa Lawyers)** Thomas J. Miller Attorney General Des Moines, IA
1:00 - 1:30 p.m.	**The Defenses of Sole Proximate Cause and Superceding and Intervening Cause** Mark W. Thomas Grefe & Sidney, P.L.C. Des Moines, IA
1:30 - 2:00 p.m.	**The Impaired Lawyer and Related Issues** Hugh G. Grady Iowa Lawyers Assistance Program Des Moines, IA
2:00 - 2:30 p.m.	**Appellate Update III** Stephen E. Doohen Whitfield & Eddy, P.L.C. Des Moines, IA

2000 - 2001 OFFICERS AND DIRECTORS

PRESIDENT
Marion L. Beatty
PO Box 28
Decorah, IA 52101

PRESIDENT-ELECT
Michael W. Ellwanger
522 Fourth Street, Suite 300
Sioux City, IA 51101

SECRETARY
J. Michael Weston
PO Box 1943
Cedar Rapids IA 52406

TREASURER
James A. Pugh
5400 University Avenue
West Des Moines, IA 50266

BOARD OF DIRECTORS
(DATE IS EXPIRATION OF TERM)

DISTRICT I
David L. Riley – 2002
PO Box 960
Waterloo, IA 50704

DISTRICT II
Mark S. Brownlee – 2003
PO Box 957
Fort Dodge, IA 50501

DISTRICT III
Daniel B. Schuck – 2002
PO Box 3086
Sioux City, IA 51102

DISTRICT IV
Lyle W. Ditmars – 2003
PO Box 1078
Council Bluffs IA 51502

DISTRICT V
Richard G. Santi - 2002
100 Court Avenue, Ste. 600
Des Moines, IA 50309

DISTRICT VI
Terry J. Abernathy - 2003
PO Box 74170
Cedar Rapids, IA 52407

DISTRICT VII
Greg A. Egbers - 2002
111 East Third Street
Davenport IA 52801

DISTRICT VIII
Wendy N. Munyon - 2001
PO Box 790
Grinnell, IA 50112

AT-LARGE

Robert V.P. Waterman, Jr. – 2002
220 North Main Street, Suite 600
Davenport IA 52801

Deborah M. Tharnish – 2002
666 Walnut Street, Suite 2500
Des Moines IA 50309

Michael W. Thrall – 2003
700 Walnut Street, Suite 1600
Des Moines, IA 50309

Les V. Reddick – 2002
2100 Asbury Road, Suite 2
Dubuque IA 52001

Sharon Soorholtz Greer – 2001
PO Box 496
Marshalltown, IA 50158

IOWA DEFENSE COUNSEL ASSOCIATION STAFF

EXECUTIVE DIRECTOR/LOBBYIST
Robert M. Kreamer
431 East Locust Street, Suite 300
Des Moines, IA 50309

ASSOCIATE DIRECTOR
Julie A. Garrison
431 East Locust Street, Suite 300
Des Moines, IA 50309

PAST PRESIDENTS

* Edward F. Seitzinger, 1964 – 1965
* Frank W. Davis, 1965 – 1966
D.J. Goode, 1966 – 1967
Harry Druker, 1967 – 1968
* Philip H. Cless, 1968 – 1969
Philip J. Willson, 1969 – 1970
* Dudley J. Weible, 1970 – 1971
Kenneth L. Keith, 1971 – 1972
Robert G. Allbee, 1972 – 1973
Craig H. Mosier, 1973 – 1974
* Ralph W. Gearhart, 1974 – 1975
Robert V.P. Waterman, 1975 – 1976
* Stewart H.M Lund, 1976 – 1977
* Edward J Kelly, 1977 – 1978
* Don N. Kersten, 1978 – 1979
Marvin F. Heidman, 1979 – 1980
Herbert S. Selby, 1980 – 1981
L.R. Voigts, 1981 – 1982
Alanson K. Elgar, 1982 – 1983
* Albert D Vasey (Hon.), 1983
Harold R. Grigg, 1983 – 1984
Raymond R. Stefani, 1984 – 1985
Claire F. Carlson, 1985 – 1986
David L Phipps, 1986 – 1987
Thomas D. Hanson, 1987 – 1988
Patrick M. Roby, 1988 – 1989
Craig D. Warner, 1989 – 1990
Alan E Fredregill,1990 – 1991
David L. Hammer, 1991 – 1992
John B. Grier, 1992 – 1993
Richard J Sapp, 1993 – 1994
Gregory M. Lederer, 1994 – 1995
Charles E. Miller, 1995 – 1996
Robert A. Engberg, 1996 – 1997
Jaki K. Samuelson, 1997 – 1998
Mark L Tripp, 1998 – 1999
Robert D. Houghton - 1999-2000

IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

* Edward F. Seitzinger
President

* D.J. Fairgrave
Vice President

Frank W. Davis
Secretary

Mike McCrary
Treasurer

William J. Hancock

* Edward J. Kelly

Paul D. Wilson

* Deceased

ANNUAL MEETING PROGRAM CHAIR

Michael W. Ellwanger

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association from September 2000 through August 2001.

Jodi Ahlman, Des Moines, IA

Kristin Borchert, Grinnell, IA

John Breitbach, Cedar Rapids, IA

Christine L. Conover, Cedar Rapids, IA

Stephen Doohen, Des Moines, IA

Robert L. Ford, Waterloo, IA

Mary E. Funk, Des Moines, IA

Michael Jones, Des Moines, IA

Joe P. Mc Laughlin, Des Moines, IA

Mark A. Roberts, Cedar Rapids, IA

Mike Rolling, Des Moines, IA

Peter Sand, Des Moines, IA

Todd Strothers, Des Moines, IA

Brenda K. Wallrichs, Cedar Rapids, IA

Jeff W. Wright, Sioux City, IA

IOWA DEFENSE COUNSEL ASSOCIATION
STANDING COMMITTEES

COMMITTEE NAME	COMMITTEE CHAIRPERSON
AMICUS CURIAE Monitors cases pending in the Iowa Supreme Court and identifies significant cases warranting amicus curiae participation by IDCA. Prepares or supervises preparation of amicus appellate briefs.	Michael W. Thrall Nyemaster, Goode Voigts, West, Hansell & O'Brien P.C. 700 Walnut Street, Suite 1600 Des Moines, IA 50309 (515) 283-3189 (515) 283-8045 fax E-mail: mwt@nyemaster.com
CLE COMMITTEE Assists president-elect in organizing annual meeting events and CLE Programs.	Michael W. Ellwanger Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, L.L.P 522 Fourth Street, Suite 300 Sioux City, IA 51101 (712) 277-2373 (712) 277-3304 fax E-mail: RawlingsNieland@aol.com
CLIENT RELATIONS Liaison role with constituent client groups such as insurance companies and businesses. Acts as resource for maintaining and improving satisfactory relations between defense attorneys and clients.	Marion L. Beatty Miller, Pearson, Gloe, Burns, Beatty & Cowie P.C. 301 West Broadway PO Box 28 Decorah, IA 52101-0028 (319) 382-4226 (319) 382-3783 fax E-mail: Beatty@salamander.com
COMMERCIAL LITIGATION Monitor current developments in the area of commercial litigation and act as resource for the Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues	Richard G. Santi Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee P.C. 100 Court Avenue, Suite 600 Des Moines, IA 50309-2231 (515) 243-7611 (515) 243-2149 fax E-mail: rsanti@ahlerslaw.com
JURY INSTRUCTIONS Monitor activities is ISBA civil jury instructions committee and changes in civil jury instructions, recommend positions of IDCA on proposed instructions and addition to IDCA recommended jury instructions.	Lyle W. Ditmars Peters Law Firm P.C. 233 Pearl Street PO Box 1078 Council Bluffs, IA 51502-1078 (712) 328-3157 (712) 328-9092 fax E-mail: LyleD@peterslawfirm.com

COMMITTEE NAME	COMMITTEE CHAIRPERSON
LAW SCHOOL PROGRAM/TRIAL ACADEMY Liaison with law school trial advocacy programs and young lawyer training programs.	Sharon Soorholtz Greer Cartwright, Druker & Ryden 112 West Church Street PO Box 496 Marshalltown, IA 50158 (641) 752-5467 (641) 752-4370 fax E-mail: sharon@cdrlaw.com
LEGISLATIVE Monitor legislative activities affecting judicial system; advise Board of Directors on legislative positions concerning issues affecting members and constituent client groups.	J. Michael Weston Moyer & Bergman P.L.C. 2720 First Avenue NE PO Box 1943 Cedar Rapids, IA 52406-1943 (319) 366-7331 (319) 366-3668 fax E-mail: mweston@moyerbergman.com
MEMBERSHIP/DRI STATE REPRESENTATIVE Review and process membership applications and communications with new Association members. Responsible for membership roster. To be held by the current State DRI representative.	Gregory M. Lederer Simmons, Perrine, Albright & Ellwood P.L.C. 115 Third Street SE Suite 1200 Cedar Rapids, IA 52401-1266 (319) 366-7641 (319) 366-1917 fax E-mail: gledere@simmonsperrine.com
TORT AND INSURANCE LAW Monitor current developments in the area of tort and insurance law; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on tort and insurance law issues.	Terry J. Abernathy Pickens, Barnes & Abernathy 101 Second Street SE PO Box 74170 Cedar Rapids, IA 52407-4170 (319) 366-7621 (319) 366-3158 fax E-mail: tabernathy@pbalawfirm.com
PRODUCT LIABILITY Monitor current development in the area of product liability; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on product liability issues.	Kevin M. Reynolds Whitfield & Eddy P.L.C 317 Sixth Avenue, Suite 1200 Des Moines, IA 50309-4195 (515) 288-6041 (515) 246-1474 fax E-mail: reynolds@whitfieldlaw.com

COMMITTEE NAME	COMMITTEE CHAIRPERSON
RULES Monitor activities of ISBA and supreme court rules committees and monitor changes in Rule of Civil Procedure, recommend positions of IDCA on proposed rule changes.	Michael W. Thrall Nyemaster, Goode, Voigts, West, Hansell & O'Brien P.C. 700 Walnut Street, Suite 1600 Des Moines, IA 50309-3899 (515) 283-3189 (515) 283-8045 fax E-mail: mwt@nyemaster.com
WORKERS' COMPENSATION	E. J. Kelly Hopkins & Huebner P.C. 2700 Grand Avenue Suite 111 Des Moines, IA 50312-5213 (515) 244-0111 (515) 244-8935 fax E-mail: ejkelly@hopkinsandhuebner.com
PROFESSIONAL LIABILITY	Joseph L. Fitzgibbons Fitzgibons Law Firm 108 North 7th Street PO Box 496 Estherville, IA 51334 (712) 362-7215 (712) 367-3526 fax E-mail: jfitz@ncn.net
EMPLOYMENT LAW	Gordon R. Fischer Bradshaw, Fowler, Proctor & Fairgrave P.C. 801 Grand Avenue, Suite 3700 Des Moines, IA 50309-2727 (515) 246-5895 (515) 246-5808 fax E-mail: fischer.gordon@bradshawlaw.com

2001 ANNUAL MEETING & SEMINAR

TABLE OF CONTENTS

2001 ANNUAL MEETING & SEMINAR

TABLE OF CONTENTS

IOWA APPELLATE COURT UPDATE

NEGLIGENCE,

TORTS,

& INDEMNITY

PAUL P. MORF
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids and Iowa City, Iowa
pmorf@simmonsperrine.com

The author wishes to thank Jason Steffens, an Iowa law student, who assisted with this outline.

Table of Contents:

I. DUTY AND CAUSATION

A. DUTY TO RESCUE/SPECIAL RELATIONSHIP TEST

1. Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647 (Iowa Sept. 7, 2000)

Facts

Matt Garofalo was an associate member of Lambda Chi Alpha, a national fraternity with a local chapter in Iowa City, IA. Matt was nineteen and a sophomore at the University of Iowa when he died after consuming excessive quantities of beer and hard liquor. Matt Garofalo's fraternity mentor was Defendant Chad Diehl. Diehl purchased alcohol with the intent of sharing it with Garofalo and co-defendant Tim Reier, who was also under 21. Garofalo drank heavily and eventually passed out on a couch after having been helped along to the couch by Diehl and Reier. There was no evidence of hazing.

Garofalo was checked on by various people throughout the night and into the morning, including Tim Reier at both 3:00 a.m. and again at 8:30 a.m. Around 11:30 a.m it was discovered that Garofalo was dead. A later autopsy revealed the time of death between 7 and 8 a.m.

Garofalo's parents filed a wrongful death action against the national fraternity, its Iowa chapter, Tim Reier, and Chad Diehl. The district court dismissed the action against all parties except for Diehl. A majority of the Supreme Court affirmed the dismissals.

Holding and Analysis:

1. General Rule: No Duty to Rescue w/o Special Relationship: There is no Duty to Rescue or to act for the protection of third parties in the absence of a special relationship. A special relationship is generally a relationship of dependence of mutual dependence. (citing Restatement (2d) of Torts § 314A & cmt. B & § 315). (For example, a saloon owner generally has no duty to prevent a patron from drinking himself to death, but a duty may arise where a saloon wrongfully expels a patron late at night, to die of cold and exposure).

2. Fraternity Had No Special Relationship Giving Rise to Duty to Rescue. Neither the national chapter nor the Iowa chapter had a "special relationship" with Garofalo (a member) so as to create a legal duty to protect him, at least where there was no evidence that either organization provided the alcohol or that Garofalo was coerced into excessive drinking. Previous cases have imposed liabilities on fraternities where the fraternities have committed an affirmative harm toward the victim–i.e., where the fraternity's activities contributed to the problem–such as where drinking occurs during an initiation ritual. Here, the drinking occurred after the official fraternity function had concluded, the fraternity did not buy the alcohol or require the consumption, and there was no affirmative harm, but simply a failure to rescue a pledge from harms to which they did not contribute.

Note: This ruling was affirmed by operation of law, on a split 3-3 vote. Three justices dissented from this holding, stating

(1) Members of an unincorporated association may be liable for the acts of officers, agents, or members of the association when such acts are known to the membership and actively or passively approved, and it necessarily

follows that the association as an entity may be vicariously liable for such acts. Where, as here, (a) the drinking, although voluntary, was "steeped in" fraternity tradition and followed a formal big-brother/little-brother ceremony, (b) the alcohol was purchased by the pledge's "big brother" who was an officer in the frat, and was consumed by the victim at a post-ceremony frat party in the frat house, and (c) at least three pledges passed out from drinking at that party, *a genuine issue of material fact exists as to the Iowa chapter's vicarious liability under section 213 of the Restatement (Second) of Agency*.

(2). The evidence supports a finding that Diehl and Reier realized that the decedent in his helpless condition was at risk for vomiting and choking on his own vomit - the very thing that killed him–and that their actions constituted a lack of reasonable care on their part. This breach of duty under section 322 of the Restatement (Second) of Torts could be imputed to the Iowa chapter.

3. Fraternity Brother Had No Special Relationship. Reier's status as Garofalo's fraternity brother did not create a "special relationship", custodial in nature, that gave rise to a heightened duty to protect him. Moreover, Reier did not "take charge" of Garofalo's care when he permitted Garofalo to lie down on the couch for purposes of establishing a duty of care under Restatement (Second) of Torts § 324 ("Duty of One Who Takes Charge of Another Who is Helpless"). Even assuming arguendo that Reier had such a duty, Reier's conduct did not constitute a breach of that duty. The rule requires only acting in "good faith and with common decency," which Reier did.

> **Note:** Two justices dissented from this holding, opining that the facts support a finding that Reier had a duty to Garofalo because he "took charge" of Garofalo by repositioning him on the couch and by not making an objection to Garofalo's remaining in the room.

2. Jain v. State of Iowa, 617 N.W.2d 293 (Iowa Sept. 7, 2000)

Facts:

Sanjay Jain, a freshman at the University of Iowa, committed suicide in his dormitory room. The University had been aware of earlier suicide attempts, but had failed to follow its policy of notifying Jain's parents of such attempts. His father and administrator of his estate, Uttam Jain, brought a wrongful death action against the University, claiming the University was negligent because it failed to follow its policy of notifying parents of a student's self-destructive behavior. The district court granted the University's motion for summary judgment, and Jain appealed.

Holding and Analysis:

1. Duty to Rescue. A duty to rescue exists only where a special relationship exists–usually a custodial relationship.

2. Special Relationship Test. No special relationship existed in this case between the University and Jain, either by nature of the University-student relationship, or by the University's knowledge of Jain's prior suicide attempts and failure to follow its own unwritten policy which required informing parents of such attempts. The University's limited intervention in this case neither increased the risk that Jain would commit suicide nor led him to abandon other avenues of relief from his distress. Thus, the University had no legal duty to rescue or protect (see Restatement section 323).

3. Supervening/Intervening Cause Defense. Although suicide is generally considered a supervening/intervening cause, this would not be the case where, as here, that intervening cause is within the scope of the original risk. However, because the University had no duty to rescue/protect Jain, the supervening/intervening cause analysis is beside the point–causation is irrelevant if there is no duty.

B. SPECIAL DUTY ISSUES INVOLVING STATE ACTORS

1. School Guidance Counselor Malpractice

Sain v. Cedar Rapids Comm. Sch. Dist., 626 N.W.2d 115 (Iowa Apr. 25, 2001)

Facts:

Plaintiff Sain received an athletic scholarship to play basketball at Northern Illinois University, a NCAA Division I school. Shortly after graduating from high school, Sain received a letter from the NCAA Clearinghouse informing him that the "Technical Communications" course he took during the second trimester did not satisfy the core English requirements. As a result, he was ineligible to play Division I basketball as a freshman and he lost his scholarship.

Sain brought an action against the school district based on separate claims of negligence and negligent misrepresentation. Sain claimed Larry Bowen, his high school guidance counselor, breached a duty to provide competent academic advice concerning the eligibility to participate in Division I sports as a freshman. He also claimed the school district was negligent in failing to submit the "Technical Communications" course to the NCAA for pre-approval. The district court granted the school district's motion for summary judgment, finding that the negligence theory was a claim for educational malpractice, that a counselor has no duty to a student as a matter of law to use reasonable care in providing course information, and that a claim for negligent misrepresentation is limited to commercial or business transactions.

Holding and Analysis:

1. Educational Malpractice. Iowa law recognizes no tort of educational malpractice. However, this case presents issues different from those usually labeled "educational malpractice," and we must be careful not to reject all claims that arise out of a school under the umbrella of educational malpractice. Rather, each case must be considered in light of the relevant policy concerns that led the Court to reject educational malpractice as a tort. This case is not controlled by any previous decision of this court, and merits an independent legal analysis.

2. Negligent Misrepresentation by Guidance Counselor. After a lengthy discussion of its case law and the restatement, the Court concluded that the tort of negligent misrepresentation extends to high school guidance counselors, because they are in the business of supplying

information to others, and because this information is supplied in an advisory, non-adversarial context, with indirect pecuniary interest. The Court explained

> Considering the rationale which supports the imposition of a duty of care on a person in the business or profession of supplying information, we discern no reason why a high school counselor should not fall within the category as a person in the profession of supplying information to others to support the imposition of a duty of reasonable care in the manner he or she provides information to students. We should not confine the tort to traditional commercial transactions when the rationale for the tort allows it to be applied beyond those factual circumstances which originally gave rise to the tort.
>
> The tort of negligent misrepresentation is broad enough to include a duty for a high school guidance counselor to use reasonable care in providing specific information to a student when the guidance counselor has knowledge of the specific need for the information and provides the information to the student in the course of a counselor-student relationship, and a student reasonably relies upon the information under circumstances in which the counselor knows or should know that the student is relying upon the information

The district court erred in granting summary judgment on this claim.

3. Negligence of School in Failing to Get Course Approved by NCAA. The failure of a school district to submit a course for approval by the NCAA Clearinghouse would not increase the hazard of a student taking an unapproved course. If a school fails to submit a course, the course would not be included on the approved list. The school's inaction would accordingly not induce reliance, and it is not foreseeable that harm would result to a student by taking an unapproved course under the belief that the course was in fact approved. Thus, there is no duty to students for a school district or a high school counselor to submit courses to the NCAA Clearinghouse. (citing duty to rescue or protect cases, including Garofalo, and stating that duty to act only exists where there is a "relationship of dependence and an expectation of protection.").

Dissent (Neumann & Ternus):

To accept the majority's decision, one must be willing to view the mentoring relationship between a guidance counselor and a student as no different than a business relationship between a purveyor of information and a consumer. I disagree with that premise. We may live in an information age, but experience tells me the sharing of knowledge in school is different than the sale of information in the marketplace. This decision will discourage advising altogether.

2. Duty: Negligent Issuance of Drivers License (No Right of Action)
Kolbe v. State, 625 N.W.2d 721 (Iowa Apr. 25, 2001)

Facts:

On Jun 28, 1997, Justin Allen Schulte, while driving a motor vehicle, struck Plaintiff Kolbe, who was riding a bicycle at the time. Kolbe suffered severe injuries. Schulte was driving

with a restricted license, which required him to wear corrective lenses and to not operate a motor vehicle in excess of 45 miles-per-hour. Schulte has a vision condition known as Stargardt's disease, which results in loss of central vision and decrease in sharpness of peripheral vision.

The doctors on the medical advisory board for the Iowa Department of Transportation all recommended issuance of a driver's license to Schulte. Additionally, the IDOT subjected Schulte to testing, including yearly drives with an IDOT officer.

Kolbe filed suit against the State of Iowa and the IDOT, alleging that the defendants "negligently and without adequate investigation issued driving privileges" to Schulte. Kolbe later dropped the IDOT as a defendant. The district court sustained the State's motion for summary judgment, ruling that the State was immune from suit under the discretionary function exception of the State Tort Claims Act. *See* IOWA CODE § 669.14(1) (1997). The court also ruled that the State owed no duty to Kolbe. Kolbe appealed.

Holding and Analysis:

1. Iowa Code section 321.177(7)[1] and rule 761-600.4(2) do not provide Kolbe with a right of action against the State because there is no explicit or implicit legislative intent to create such a private remedy.

2. The common law also does not provide Kolbe with a right of action. A recognition of the tort for "negligent issuance of a driver's license" would likely chill the State's licensing determinations, making it unreasonably difficult for certain segments of our society to secure a driver's license. The policy decision to impose liability in a case such as this should be the legislature's choice, not the court's.

3. Duty: School's Duty to Supervise.

Anderson v. Webster City Comm. Sch. Dist., 620 N.W.2d 263 (Iowa Dec. 20, 2000)

Facts:

Drew Anderson broke his leg while sledding during a noon recess at Pleasantville Elementary School in Webster City. The injury occurred when Drew fell from his sled after it went over a bump or ramp. Teachers were present to supervise the sledding activity.

Drew's mother and legal guardian, Melissa Anderson, filed this action claiming that the school was negligent in failing to properly supervise the sledding activity, inspect the hill for ramps, and remove the ramps from the hill. The jury returned a verdict in favor of the school district after finding the school was not negligent. The trial court subsequently overruled Plaintiff's motion for a new trial based on a challenged jury instruction. Plaintiff appealed, and the Supreme Court affirmed.

Holding and Analysis:

1. The jury was given the responsibility to decide whether or not the school district

[1]This section provides that the IDOT "shall not issue a motor vehicle license . . . [t]o any person when the director [of the IDOT] has good cause to believe the person by reason of physical or mental disability would not be able to operate a motor vehicle safely."

breached its duty of care under the circumstances. Under this reasonableness standard, it was unnecessary (and apparently improper) for the jury's determination to be instructed that some risks are inherent in a particular activity, as this is akin to giving examples of conduct that would constitute negligence, which is forbidden.

2. Nevertheless, this error was harmless, because the instruction neither identified which risks were inherent in the activity nor applied the inherent risk standard to any particular facts, and because all the instructions when read together properly explained the applicable law to the jury.

For another case dealing with a school's supervisory duties, see City of Cedar Falls v. Cedar Falls Comm. Sch. Dist., 617 N.W.2d 11 (Iowa Sept. 7, 2000), infra at p. 20.

C. RES IPSA LOQUITER

1. Novak Heating & Air Conditioning v. Carrier Corp., 622 N.W.2d 495 (Iowa Feb. 14, 2001)

Facts:

Plaintiff Novak ordered a roof top heating and air conditioning unit through Defendant Carrier's distributor, Defendant Yeoman Distributing. Yeoman never saw or handled the unit. Carrier instead shipped it directly to Novak. Defendant Yellow Freight, a common carrier, picked up the packaged unit at Carrier's dock and Novak picked up the unit at Yellow Freight's warehouse. At no time did Yellow Freight inspect or unpack the unit. Novak removed the packaging and discovered that the unit's condensing coil was severely damaged. Estimated cost of the repairs to the unit totaled $3450.75.

Novak brought an action against the three defendants in small claims court to recover the cost of repairs. The court determined Yeoman's had no liability based on its contract with Novak, which did not require delivery to a specific destination. *See* IOWA CODE § 554.2509(1)(a) (1997).[2] The court then found Carrier and Yellow Freight jointly and severally liable. On Carrier's appeal to the district court, the court affirmed the small claims court's reasoning. On a 2-1 vote, the Court of Appeals affirmed the district court. The Supreme Court granted further review, with only Carrier appealing.

Holding and Analysis:

The doctrine of res ipsa loquitur does not apply where, as here, multiple defendants have been sued, and these multiple defendants have exercised control over the instrumentalities at issue at different times ("consecutive" rather than "shared" control) and when it is impossible to determine during which defendant's control the negligence occurred. In such a case, neither defendant could be shown to have had exclusive control when the negligence occurred. Because the record in this case plainly reveals consecutive rather than shared control of the air conditioning unit by Carrier and Yellow Freight, the trial court and court of appeals improperly inferred negligence based on the doctrine of res ipsa loquitur.

---

[2]When buyer does not require seller to deliver goods to specific destination, risk of loss passes to buyer when goods delivered to common carrier.

Moreover, the burden-shifting rule of Restatement § 433B(3) is inapplicable to the facts of this case, and the district court and court of appeals incorrectly applied it. Novak cannot recover from Carrier as well as Yellow Freight because Novak has failed to show that the conduct of either defendant was negligent, which it was required to do in order to shift the burden to each of the defendant to show that they were not the one who caused the harm.

2. Weyerhaeuser Comp. v. Thermogas Comp., 620 N.W.2d 819 (Iowa 2000)

Facts:

Defendant Thermogas supplied Plaintiff with fifteen liquid propane (LP) fuel tanks each day to meet Plaintiff's daily needs. The LP tanks were used in Plaintiff's forklifts. One of Plaintiff's new employees was driving a forklift with the parking brake unknowingly engaged. The driver began to smell something overheating. He went to tell another employee. When they returned, they saw flames coming out from the underside of the truck. Within 45 seconds, the LP tank exploded, igniting rolls of paper and corrugated boxes in the building. The fire destroyed roughly half of the Weyerhaeuser plant as well as most of its paper stock. No one was injured, but Weyerhaeuser sustained $5.8 million in property damage.

Weyerhaeuser sued Thermogas, the installer of the plant's sprinkler system (Blackhawk Automatic Sprinklers, Inc.) and the forklift manufacturer (Clark Equipment Co.). The jury returned a verdict finding Weyerhaeuser seventy percent at fault, Blackhawk five percent at fault, and Thermogas twenty percent at fault. Plaintiff moved for a new trial, claiming the district court erred in (1) directing a verdict for Thermogas on Weyerhaeuser's claims of strict liability and breach of implied warranty of merchantability, (2) refusing to instruct the jury that the cause of the fire was legally irrelevant with respect to the negligence of Weyerhaeuser, and (3) refusing to give the jury a *res ipsa loquitur* instruction on Weyerhaeuser's negligence claim against Thermogas. The district court overruled the motion, and Plaintiff appealed with only Thermogas remaining as a defendant (Plaintiff and the other two defendants settled).

Holding and Analysis:

1. The container - the tank - cannot logically be separated from its contents - the liquid propane - when the two are placed in the stream of commerce as a unit. As a result, Thermogas was an assembler as a matter of law as that term is used in Iowa Code section 613.18(1)(a). Therefore, the immunity provisions of section 613.18(1)(a) do not apply to Thermogas in this case, and the district court erred in concluding otherwise.

2. The jury could properly make a finding that there was a defect in the tank where tests supported Plaintiff's premature explosion theory, federal regulations provide that LP tanks like the one involved here must not explode when placed in a fire, there had been previous problems with the tank, and the tank was 2 ½ years past its mandatory testing date when the explosion occurred. The jury could also reasonably find that the explosion was unreasonably dangerous because it was not one that a user or consumer would contemplate in the normal and intended use of the tank

3. The district court should have made the following findings: First, Thermogas had a duty to foresee that its LP tanks might be exposed to fire. Second, Thermogas had a duty to

foresee that, if one of its tanks was so exposed and was defective, it exploded and caused harm. Third, there was evidence that the LP tank in question was exposed to fire, and because it was defective, it exploded and caused harm. Last, the fire and the resulting explosion were therefore foreseeable intervening causes that did not supersede Thermogas's responsibility. Because the fire and the resulting explosion were foreseeable intervening causes, the cause of the fire was irrelevant to Thermogas's liability. As a result, the district court erred in refusing to instruct the jury that as to Thermogas the cause of the fire was irrelevant.

4. The evidence was sufficient to generate a jury question on the elements of *res ipsa loquitur*. The district court thus erred in not instructing on *res ipsa loquitur*. Thermogas had notice of the incident in which the doctrine was to be applied. There was sufficient evidence to support a finding that the tank had been under the exclusive control of Thermogas and that there was no change in the tank and liquid propane from the time it left Thermogas' possession until explosion. There was also sufficient evidence to support a finding that someone must have been negligent or the tank would not have exploded.

5. Failure to submit strict liability and implied warranty and failure to instruct on *res ipsa loquitur* was not harmless error.

Partial Dissent:

The trial court correctly refused to instruct on the *res ipsa loquitur* doctrine. The expert testimony provided by Plaintiff's expert, while establishing that the explosion would not have occurred unless there was a defect in the tank, did not establish that the explosion would not have occurred in the absence of Thermogas's negligence.

3. Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa Sept. 7, 2000)
(Also discussing **LEGAL EXCUSE, FAILURE TO KEEP A PROPER LOOKOUT, & COMPARATIVE FAULT)**

Facts:

Plaintiff, Judith Graber, was involved in a car accident. She had entered an intersection on a green light and was turning left. As she did so, she was struck broadside by another car who had entered the intersection on a red light. Graber sustained extensive and serious injuries. Graber sued both the driver and the City. Her theory concerning the City was that the City was negligent in failing to properly maintain and properly set the timing of the traffic lights at the intersection. (Prior to trial, Graber settled with the other driver). The case was tried and submitted, and the jury returned a verdict in favor of the City. Graber appealed. The Supreme Court reversed the judgment and remanded for a new trial.

Holding and Analysis:

1. Legal Excuse: The burden was on the Plaintiff to show that the other driver (who had settled) had a legal excuse for being in the intersection on a red light, because Plaintiff stood to gain by having that driver exonerated. (If the jury were not allowed to allocate a percentage of fault to the driver, more fault would likely be attributed to the City).

2. Res Ipsa Loquitur: Plaintiff was not entitled to a res ipsa loquitur instruction. She failed to produce substantial evidence of the first element–that the Defendant City had exclusive

control over the instrumentality causing the accident (here, the other driver who had settled). (quoting Prosser & Keeton on Torts § 38, at 248).

3. Proper Lookout: Substantial evidence existed to support submission of an instruction to the jury on the City's comparative-fault defense that Plaintiff was negligent in failing to maintain a proper lookout. if the other driver could see the Plaintiff, it is reasonable to assume that had the Plaintiff been looking, she would have seen the other driver speeding toward the intersection. One is not entitled to assume the other driver will obey the law where, as here, "in the exercise of due care," one should have known otherwise. (citing Matuska v. Bryant, 150 N.W.2d 716, 721 (Iowa 1967)).

4. Traffic Light Standards: The trial court did not err in refusing to instruct the jury, as requested by Plaintiff, that the red clearance light must be of sufficient duration to allow the clearance of "vehicles who could not stop safely prior to its display." Plaintiff had not cited any manual, statute, or case that imposed such a requirement.

5. Comparative Fault in Two-Party Action. Contrary to Plaintiff's assertion, Chapter 668 (which limits the "collateral source rule") applies to all actions in which "fault" is at issue, regardless of the number of parties allegedly at fault. (citing Waterloo Savings Bank v. Austin, 494 N.W.2d 715 (Iowa 1993)).

1. Evidence of Settlement: The trial court abused its discretion in admitting the evidence of the settlement with the driver in this case. (This holding is probably discussed in the separate *evidence* portion of this outline).

D. SPECIFICATIONS OF NEGLIGENCE & JURY INSTRUCTIONS

1. Herbst v. State of Iowa, 616 N.W.2d 582 (Iowa Sept. 7, 2000)

Facts:

Herbst, an Iowa City Community band member sought recovery for injuries sustained when she fell from make-shift stairs while descending from a stage in the University of Iowa building where the band was rehearsing. The jury returned a verdict finding the University was not at fault, and the district court entered judgment in favor of the University.

Herbst filed a motion for a new trial, arguing that the district court erred in instructing the jury on the specifications of negligence concerning defendant. The court had instructed the jury only on the following specification of negligence: "The defendant . . . was negligent in failing to provide safe and secure access onto the stage . . . ." The court overruled the motion. The Court of Appeals affirmed the judgment.

The Supreme Court granted Herbst's application for further review, vacated the decision of the Court of Appeals, reversed the judgment of the district court, and remanded for a new trial.

Holding and Analysis:

Jury instructions should be formulated so as to require the jury to focus on each specification of negligence that finds support in the evidence. Bigalk v. Bigalk, 540 N.W.2d 247 (Iowa 1995). The court's instruction did not adequately ensure that the jury would give separate consideration to both (1) the alleged negligent *act* of permitting makeshift stairs to be used for

access to the stage and (2) the alleged negligent *omission* of failing to provide safe and secure access onto and off the stage.

2. Hartzer v. Super One Foods, 627 N.W.2d 925 (Iowa Mar. 21, 2001)

Facts:

Plaintiff Kenneth Hartzer brought a personal injury action, claiming that the Defendant (Super One Foods) failed to exercise reasonable care to discover and correct or warn against the consequences of vandalism to the restroom by third parties, which left the floor in a slippery and unsafe condition. The jury found that the Store was without fault. There was a special verdict form on the issue of proximate cause, and it was left unanswered. Plaintiffs appealed, contending that they were unfairly prejudiced by the district court's instructions to the jury concerning the defense of sole proximate cause.

Holding and Analysis:

Because jury properly found no fault on the special interrogatories and did not need to answer the proximate cause interrogatory, any error in proximate cause instruction was harmless.

3. Spahr v. Kriegel, 617 N.W.2d 914 (Iowa Oct. 11, 2000)

Facts:

Plaintiff was injured when she stepped in a hole while attending an estate auction conducted by Defendants Kriegel and Imster. It was Plaintiff's theory in the district court that she stepped in a vertical hole that was dug along the cable route for purposes of locating the depth of sewer lines or other underground utilities. Both the construction company and the telephone company, also defendants, testified that no vertical holes had been dug in the parking fronting the property during the cable installation.

The jury returned a series of special verdicts finding no fault on the part of any of the defendants and attributed 100% of the causal fault to the plaintiff. Plaintiff appealed.

Holding and Analysis:

This decision primarily pertained to evidence (covered in another outline), but two holdings are relevant to this outline:

1. Any Error in Comparative Fault Instruction is Harmless Where Jury Apportioned No Fault to Any Defendant.. Error, if any, in the instructions dealing with Plaintiff's contributory fault did not affect the verdict (and was therefore harmless) where the instructions first required the jury to allocate fault to the defendants, and the jury bound that no defendant had any causal fault.

2. Negligence Instruction. The trial court was not required to instruct the jury according to section 386 of the Restatement (Second) of Torts (1965) with regard to the contractor's liability. The trial court properly submitted the issue on a particular specification of negligence, as required by Iowa law.

II. SPECIFIC TORTS

A. BREACH OF FIDUCIARY DUTY

1. Breach of Fiduciary Duty–Preparation to Form Competing Business

Midwest Janitorial Supply Corp. v. Greenwood, 629 N.W.2d 371 (Iowa July 5, 2001)

Facts:

Plaintiff Midwest Janitorial Supply is in the business of selling janitorial supplies. Beginning in 1981, Midwest was equally owned by three brothers – Bruce, Craig, and Steve Hotchkiss – and their brother-in-law Defendant David Greenwood. Steve was president of Midwest and Greenwood was vice president. As Midwest grew in the 1980s, Steve managed the home office of Midwest in Cedar Rapids, and Greenwood managed Midwest's only other office located in Davenport

Beginning in 1989 and continuing through 1994, Greenwood operated Midwest's business in Davenport autonomously from the Cedar Rapids operation. The Davenport operation grew substantially faster and was more financially successful than Midwest's Cedar Rapids business. Greenwood's success was such that he was soon taking a salary and bonuses substantially exceeding those of Steve.

In a 1994 board meeting, the three brothers voted to deny Greenwood's request for a $25,000 bonus and salary increase for 1995. By February of 1995, the Hotchkisses, led primarily by Craig, increased their control over the Davenport operation. At an April 1995 board meeting, the brothers outvoted Greenwood three to one on several issues limiting Greenwood's control in the operation of the company and shifting the focus to the Cedar Rapids operation. On April 17, Craig fired his sister, Greenwood's wife, from the company.

During the last two weeks of April and first four days of May 1995, Greenwood began preparation for a likely separation from Midwest. These preparations involved looking for warehouse space, office supplies, telephone and computer service, lines of credit, and signs. They did not include any solicitation of sales staff, telling vendors he was leaving, or soliciting customers. No preparations took place on company time or property. Greenwood resigned as director and vice president on May 5 and requested redemption of his shares in accordance with the shareholder's agreement. That same day the Greenwoods went to their attorney's office to prepare articles of incorporation to begin a new janitorial supply company. On May 8, they opened their new business, Greenwood Cleaning Systems. Several salespersons left Midwest for Greenwood Cleaning. During the first month it was in business, Greenwood Cleaning had sales of $63,000, only $433 of which was derived from customers that had not previously been served by Midwest.

Midwest and the Hotchkisses sued Greenwood for breach of fiduciary responsibility. The district court dismissed plaintiffs' claim following a bench trial. Plaintiffs appealed, and the Supreme Court affirmed.

Holding and Analysis:

Directors and Officers owe a Fiduciary Duty to act wholly for the benefit of the corporation in all things. This duty terminates, however, when the director or officer resigns or is

removed.

Preparation to form a competing business [as opposed to actually competing] is not actionable as a breach of fiduciary obligation unless it is shown that something in the preparation to compete produced a discreet harm to the former business beyond the eventual competition that results from the preparation.

The acts Greenwood undertook in preparing to form a competing business do not appear to have provided a discreet harm to Midwest beyond the eventual competition. Moreover, they took place over only a 2-3 week period. The district court did not err in holding for Greenwood as a matter of law.

2. Waste of Trust Assets/Breach of Fiduciary Duty: Remainder Beneficiary Standing

Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 (Iowa Jan. 18, 2001)

Summary: This appeal involves fiduciary duty law, but the analysis pertains almost exclusively to damages (covered in a different outline), not liability. The Court did hold, however, that a contingent remainderman of a trust has no standing to bring an action at law against the trustees, because the trustee has no present obligation to pay or turn over the assets. This rule is set forth in Casrstens v. Central Nat. Bank & Trust Co., 461 N.W.2d 331 (Iowa 1990), and the remainderman's attempt to circumvent this rule by pleading their action as one for "waste" is without merit. "Waste" is a right of action that pertains only to persons with remainder interests in real estate–not to trust remaindermen. Because a trustee is not a life tenant, an action for waste does not exist. See Iowa Code section 658.1.[3] Actions against a trustee must be brought at equity. ("But for actions to redress an immediate and unconditional entitlement to money or chattels, a beneficiary's remedies against a trustee are exclusively equitable.").

B. PRODUCTS LIABILITY

Mercer v. Pittway Corp., 616 N.W.2d 602 (Iowa Sept. 7, 2000).

Facts:

Plaintiffs alleged that a smoke detector manufactured by Defendants was defective and failed to alarm to a fire in Plaintiffs' home. The Fire Captain estimated that the smoke detector alarm sounded approximately 2 ½ minutes after firefighters had arrived at the scene. The smoke detector was located three rooms away from the children's bedroom, where the fire began. All experts agree that the smoke should have reached the detector within three minutes. Plaintiffs' three-year-old son died from injuries he received during the fire and their eighteen-month-old son was severely burned.

Plaintiffs' theory of liability partially rested on Defendants' decision to market its model 83R ionization smoke detector as a "stand-alone" safety device when it knew that the model 83R did not promptly alarm to certain types of home fires. Plaintiffs presented evidence of more than

[3] "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commit waste thereon, that person is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefore."

360 complaints made by consumers to Defendants regarding the failure of the model 83R to alarm to smoke.

The trial court submitted the case to the jury on each of the Plaintiffs' theories: (1) negligence, including negligent design, negligent testing, and negligent failure to warn; (2) strict liability theory of defective condition as a "stand-alone" detector; (3) breach of implied warranty of merchantability; and (4) fraudulent nondisclosure. The court also submitted the issue of punitive damages.

The jury found in favor of plaintiffs on all theories. The jury awarded plaintiffs $8.8 million in compensatory damages (Defendants' liability was reduced to $4.4 million because they and the manufacturer of the baby monitor that started the fire were each found to be 50% at fault) and $12.5 million in punitive damages. The district court overruled Defendants' post-trial motions and Defendants appealed. The Supreme Court affirmed in part and reversed in part the rulings of the district court, reversed the district court's judgment, and remanded for a new trial.

HOLDINGS AND ANALYSIS

1. SIMILAR ACCIDENT EVIDENCE: The rule allowing evidence of similar incidents is generally limited to incidents occurring prior to the one in question. Therefore, only those complaints received by Defendants prior to the incident in question were properly subject to consideration for admission into evidence.

Plaintiffs failed in their burden of proving that all the consumer complaints received by Defendants prior to this incident were substantially similar to the facts and circumstances of this fire. The consumer complaints reveal that some of the smoke detectors referenced in the complaints failed to alarm for reasons unrelated to those advanced by Plaintiffs in this case. The failure of a smoke detector to alarm for these reasons is not relevant because it was unlikely to make a finding that the Plaintiffs' detector was defective more or less probable.

The court's admission of all 300-plus consumer complaints constitutes reversible error.

2. PUNITIVE DAMAGE STANDARD: "An award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and the device at issue." Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994). The parties' experts disagreed regarding the relative risks and utilities of Defendants' conduct in the manufacture and production of the smoke detector, and the evidence showed that this disagreement was reasonable. Consequently, a rational fact finder could not find by clear, convincing, and satisfactory proof a willful and wanton disregard by Defendants for the rights of another, and the district court erred in submitting Plaintiffs' claim of punitive damages to the jury.

3. STRICT LIABILITY FOR DESIGN DEFECT CLAIM: To prove a "defective condition unreasonably dangerous" in a design defects case, the plaintiff must show that the defect in the product was not one contemplated by the consumer, which would be unreasonably dangerous to the plaintiff in the normal and intended use of the product. Restatement (Second) of Torts § 402A. Plaintiffs presented substantial evidence to meet this burden and justify submission of their claim that the "stand alone" smoke detector was defectively designed in that it fails to alarm to certain kinds of fires and that the manufacturer was strictly liable for this

defect.

(This is not a "benefit of the bargain" case (like Kemin, 578 N.W.2d 220 (Iowa 1998)), where strict liability is inappropriate.

> **Note:** The court noted that the Restatement (Third) of Torts: Product Liability (1997) dropped the distinction between strict liability and negligence for design defect cases and also eliminated the consumer expectation test used in the strict liability analysis. The Restatement now follows the risk-utility approach traditionally found in negligence analysis, which requires proof of a reasonable alternative design in most cases. The Court explained that because the parties did not argue that the Restatement (Third)'s approach should be adopted, court applied its established principles from section 402A of the Restatement (Second) of Torts regarding strict liability in design defect cases in this case. (Footnote 4).

4. NEGLIGENCE AND BREACH OF WARRANTY CLAIMS: Plaintiffs' evidence with respect to Plaintiffs' negligence theory of liability is sufficient to create a jury question on Plaintiffs' breach of implied warranty claim. Since Negligence and Breach of Implied Warranty of Merchantability require the same proof, both of these claims were properly submitted.

5. STATE OF THE ART DEFENSE: The evidence presented created a jury question concerning Defendants' state of the art defense (as found in Iowa Code section 668.12) because Plaintiffs' expert had testified that the test used to test Defendants' smoke detector wasn't adequate to determine whether the smoke detector in question could detect the type of smoke in Plaintiffs' fire.

6. FAILURE TO WARN THEORY: Plaintiffs submitted sufficient evidence to create a jury question concerning their failure to warn theory, as Defendants were aware that the model 83R ionization detector might have a delayed response time in detecting certain types of common house fires–smoldering.

7. NEGLIGENT DESIGN THEORY: Plaintiffs submitted sufficient evidence to create a jury question concerning the negligent design theory. Defendant was on notice that its product had a delayed response time to certain fires, and the danger to consumers was reasonably foreseeable, triggering a duty to warn.

8. NEGLIGENT TESTING CLAIM: The evidence presented by Plaintiffs in support of their negligent testing claim is in reality a negligent failure to warn claim. Defendants had knowledge of the performance limitations of ionization smoke detectors. No amount of further testing would have increased that knowledge. Therefore, the negligent testing claim should *not* have been submitted to the jury.

C. OTHER SPECIFIC TORTS

1. Legal Malpractice Involving Fraud: Duty, Indemnity, & Comparative Fault

Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818 (Iowa July 5, 2001)

Facts:

Anderson, Wilmarth & Van Der Maaten (Anderson) is a law firm that was sued for legal malpractice arising out of the lawyers' handling of a commercial transaction. Anderson filed a cross-petition against Defendant Michael Kennedy. Kennedy had represented Precision Torque Convertors of Iowa, Inc. (PTCI) and Ronald Riccardi, the parties that had sold the assets of PTCI to Plaintiff's clients. Anderson's clients had been sued by a part owner of PTCI and had been assessed damages after a jury trial.

The purchase agreement had required Riccardi to provide proper evidence that he had appropriate corporate authority to execute the sales documents. Defendant Kennedy provided two such documents. Those documents, however, had been fabricated by Kennedy. Anderson relied on those documents in allowing the sale to be consummated.

Kennedy moved for summary judgment. The district court granted the motion and dismissed the indemnity claim, finding that there was no special relationship between Anderson and Kennedy which could give rise to something more than a general duty not to harm through tortious acts. Anderson appealed.

Holding and Analysis:

1. Duty to be truthful with opposing counsel in arms-length negotiation. While a lawyer may refuse to provide information to an opposing party or attorney, once a lawyer responds to a request for information in an arm's-length transaction and undertakes to give that information, the lawyer has a duty to the lawyer requesting the information to give it truthfully. Such a duty is an independent one imposed for the benefit of a particular person or class of persons.

2. Action for indemnity. It is established that an injured lawyer may sue an opposing counsel for fraud or reckless misrepresentation the defrauding lawyer directly (See Restatement (Third) of the Law Governing Lawyers § 98 & cmt. c). The rule should be no different where the injured lawyer sues the defrauding lawyer for indemnity. A breach of that duty supports a claim of equitable indemnity by the defrauded lawyer against the defrauding lawyer. (The decision includes a long discussion of the common law doctrine of immunity)

3. Active-Passive Indemnity Doctrine Inapplicable. Kennedy also argued that indemnity should not be allowed because the Anderson defendants are really asserting a theory of active-passive liability (which Iowa abandoned in favor of comparative fault where two parties are negligent). Not so. The indemnity theory of active-passive liability does not apply here because Anderson is alleging fraudulent misrepresentation–an intentional tort–not negligence. Shifting full responsibility for the loss to the intentional tortfeasor serves the policy of deterring conduct which society considers to be substantially more egregious than negligence. Here, Anderson should be allowed to pass through its entire liability to Kennedy, because Kennedy is the real party responsible for the injury. See 42 C.J.S. Indemnity § 2 at 73 (1991).

Query: What would have happened if the allegation was reckless

misrepresentation? See quotation from Restatement § 98 cmt. c–suggesting indemnification would be allowed.

2. Conversion & Malicious Prosecution
Whalen v. Connelly, 621 N.W.2d 681 (Iowa Jan. 31, 2000)

Facts:

This is a very complex case, and this decision marks the third appeal involving these parties regarding the same dispute. To simplify, Connelly offered to tender Whalen $61,000 and 56,000 shares of stock in 1993, in payment for Whalen's interest in a limited partnership. Whalen initially declined this offer, but after a district court determined that this was the appropriate buy-out price, Whalen indicated that he would accept it, and demanded tender. Connelly refused, citing Whalen's then-pending appeal from that judicial determination. When the stock was eventually delivered to Whalen after the appeal concluded (in 1996), it had depreciated in value. Whalen filed this third appeal, claiming that Connolly had converted the stock at issue by failing to tender it upon demand, and that the intervening loss (diminution in value) should be born by Connelly. Connelly counterclaimed, alleging malicious prosecution. The district court threw the conversion claim on summary judgment, holding that Whalen's appeal attacked the judgment he was seeking to collect, and that the Iowa tender rule did not apply because the partnership at issue was organized under Delaware law. The district court threw out the malicious prosecution claim, citing Connelly's failure to show special damages. Both parties appealed.

Holding and Analysis:

1. **Conversion:** Where goods are withheld (not delivered) after an offer of tender has been accepted, the tenderee may maintain replevin or trover/conversion therefore against the withholding party. Trover (or conversion) is "the wrongful control or domination over another's property contrary to that person's possessory right to the property. (citing 86 C.J.S. Tender § 45, at 449 (1997); Condon Auto Sales v. Crick, 604 N.W.2d 487, 593 (Iowa 1999)). When tender is refused, the tenderer becomes a bailee, "and it is his duty as such to take care of the property" at the tenderee's expense. 86 C.J.S. Tender § 45, at 449. However, if the tenderer wrongfully withholds the property from its owner upon his demand, the tenderee no longer bears the risk. Iowa Code § 538.7. Accordingly, if the tenderer allows the goods to be damaged, in such a situation, this loss will be born by the tenderor.

In this case, the offer of tender was eventually accepted by Whalen, and then was not honored by Connelly, who retained the stock and cash. The acceptance of the tender by Whalen made Whalen the legal owner of the property, but by failing to timely deliver the property, Connelly reserved for itself the risk of loss. Because Connelly had no good faith reason for withholding the stock (having admitted that it owed Whalen at least that amount), the decline in stock value between the time tender was demanded by Whalen and the time the stock was eventually delivered by Connelly is born by Connelly, who acted as a bailee for Connelly during that period. See Iowa Code § 538.4-7. The pendency of the appeal in no way trumped the Iowa Tender Statute.

2. Malicious Prosecution: There are six elements of malicious prosecution: (1) a previous prosecution; (2) investigation of that prosecution by the defendant; (3) termination of that prosecution by acquittal or discharge of the plaintiff [of the m.p. action]; (4) want of probable cause; (5) malice on the part of defendant for bringing the prosecution; and (6) damage to the Plaintiff [of the m.p. action]. Because expenses incidental to defending a lawsuit are not special damages sufficient to satisfy element 6, Connelly's malicious prosecution claim fails as a matter of law. Even though the Restatement (2d) of Torts (1977) no longer requires this element (see § 674 cmt. e, at 455), 681 cmt. d, at 470), Iowa law does. See Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 643 (Iowa 1996).

3. Bad Faith/Abuse of Process/Interference with Contract/ Tortious Misrepresentation Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388 (Iowa Jan. 18, 2001)

Facts:

Gibson suffered an injury on the job that aggravated pre-existing problems of his. A dispute arose regarding workers compensation benefits. Gibson filed suit against ITT on January 12, 1995, alleging first party bad faith, abuse of process, intentional interference with a contract, misrepresentation, breach of fiduciary duty, and intentional infliction of severe emotional distress. He sought compensatory and punitive damages on each claim, and his wife sought spousal consortium.

Following the close of all of the evidence, the court sustained ITT's motion for directed verdict on Gibson's claims for punitive damages, and on Gibson's claims for intentional infliction of emotional distress and breach of fiduciary duty. The remaining claims were submitted, and the court entered judgment for Gibson in the amount of $17,183 and judgment for his wife for $7,000. The court then granted ITT's motion for judgment notwithstanding the verdict on all claims *except* bad faith and abuse of process. Gibson appealed; ITT did not.

Holding and Analysis:

1. Regarding Punitive Damages: The standard for punitive damages is discussed at length. This should be covered in the "damages" outline.

2. First Party Bad Faith in Workers Compensation Cases: Elements are (1) the absence of a reasonable basis for denying benefits of the policy, and (2) defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. A reasonable basis exists if the claim is "fairly debatable" as to matters of either fact or law. This common law tort theory extends to workers compensation cases. This common law action exists side-by-side with the remedy afforded under Iowa Code § 86.13 (allowing industrial commissioner to award penalty benefits "if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse"). The evidence to submit the bad-faith claim in this case was also sufficient to submit the punitive damages claim. Willful and wanton disregard for the rights of another can be shown by the defendant's intentional violation of a statutory right. The evidence showed that ITT acted with legal malice when it refused to pay the additional twenty weeks of payments that Gibson was statutorily entitled to under Iowa Code section 85.34(2)(u) and when it refused to pay for Gibson's psychiatric treatments to which he was statutorily

entitled pursuant to Iowa Code section 85.27. The evidence also established that it was "highly probable" harm would follow from ITT's decision not to pay the twenty weeks and not to pay for the psychiatric treatments.

2. Punitive Damages for First Party Bad Faith. Punitive damages may be awarded only where the Plaintiff establishes by a preponderance of clear, convincing, and satisfactory evidence, that the conduct of the defendant constituted willful and wanton disregard for the rights or safety of another. Iowa Code § 668A.1. This generally requires an intentional act of unreasonable character in disregard of a known or obvious risk that was so great as to make harm "highly probable," and usually involves a "conscious indifference" to this consequence.

At least in this case, where the evidence was sufficient to create a jury question on question of first party bad faith, the district court erred in refusing to submit Plaintiff's punitive damage claim. In this case, the evidence required to establish first party bad faith in this case was necessarily sufficient to establish legal malice. Legal malice can be established by showing defendant's intentional violation of a statutory right, and in this case, the coverage at issue involved psychiatric treatments to which Gibson was statutorily entitled under Iowa Code § 85.27. Moreover, the evidence was sufficient to show that it was highly probable that harm would follow. *The Court clarified that it did not mean to imply that "in every case, evidence sufficient to submit a bad-faith claim will be sufficient to support submission of a punitive-damage claim."*

3. Abuse of Process: Elements (1) the use of legal process, (2) in an improper or unauthorized manner, (3) that causes the plaintiff to suffer damages as a result of that abuse. Element 2 requires a showing that the defendant used the legal process "primarily for an impermissible or illegal motive."

4. Punitive Damages for Abuse of Process: The evidence to submit the abuse of process claim in this case was also sufficient to submit the punitive damages claim. By its verdict, the jury found that ITT intentionally denied compensability in its answer to Gibson's petition for benefits for the primary purpose of preventing Gibson from obtaining statutory benefits. Because it is undisputed that the evidence was sufficient to submit this abuse of process claim to the jury on this theory, it was error not to also instruct the jury to consider awarding punitive damages on this issue. *The Court clarified that it did not mean to imply that "in every case, evidence sufficient to submit an abuse-of-process claim will be sufficient to support submission of a punitive-damage claim."*

5. Intentional Interference with Contract: Elements: (1) P had a contract with a 3rd party; (2) D knew of the contract; (3) D intentionally and improperly interfered with the contract; (4) the interference cause the third-party not to perform, or made performance more burdensome or expensive; and (5) damage to P resulted. In this case, even if a contract were assumed to exist, there is no sufficient evidence to support a finding that the Defendant's conduct caused the contract not to be performed by the third party. The evidence instead shows that Gibson's doctor made his decisions on his own without any interference from ITT. The district court correctly found as a matter of law for defendant on this claim.

6. Fraudulent Misrepresentation. Elements: (1) D made a representation to P, (2) representation was false, (3) representation was material, (4) D knew representation was false, (5) D intended to deceive P, (6) P acted in reliance on the truth of the representation and was

justified in relying on the representation, (7) representation was a proximate cause of P's damages, and (8) amount of damages. Held: The district court correctly granted ITT's motion for judgment notwithstanding the verdict on this claim. There was insufficient evidence that Gibson's doctor relied on statements made by ITT that work would be available for Gibson when his doctor released him to work. The evidence clearly showed that the doctor's release was based upon his evaluation of Gibson's physical condition.

4. Lemon Law

Cato v. American Suzuki Motor Corp., 622 N.W.2d 486 (Iowa Feb. 14, 2001)

Facts:

Plaintiff leased a new 1996 Suzuki "Sidekick" sport utility vehicle from Defendant on May 30, 1996. On several occasions in 1996, Plaintiff had problems starting the vehicle. Additionally, at times the vehicle would stall and would shake in the process. On two occasions, Defendant brought the vehicle in for inspection but was unable to duplicate the problem and made no repairs. On a third occasion, Defendant still was unable to identify the problem but decided to replace the idle air control valve. In June 1997, Plaintiff exercised her option under the lease to purchase the car. Problems resurfaced in the fall of 1997. Plaintiff returned the vehicle to Defendant on November 10. Defendant kept the vehicle for four days in an unsuccessful attempt to diagnose the stalling problem. When similar problems developed on November 18, Plaintiff again returned the car to Defendant, who decided to replace the idle air control valve again. When this repair was completed on November 25, the car had been in for repairs a total of fifty-four days since Plaintiff acquired it in May 1996.

In January of 1998, on advice of legal counsel, Plaintiff sent Defendant a letter informing it of the various problems with the vehicle, and giving Defendant an opportunity to correct these problems. Plaintiff filed suit on February 4, 1998, seeking damages under Iowa Code chapter 322G, known as the lemon law. Defendant answered and claimed in part that the suit was premature because Plaintiff had not given Defendant an opportunity to cure the alleged nonconformities under Iowa Code section 322G.4(1).

The district court denied Defendant's motion for summary judgment, which had been filed on the basis that as a matter of law the alleged nonconformities had been repaired. The issue of liability was submitted to the jury on two theories of liability,[4] the latter of which did not include the requirement that Plaintiff provide Defendant with a final opportunity to cure the alleged nonconformity. The jury found Defendant liable on the latter theory and the court entered judgment in the amount of $26,120.70, plus attorney's fees. Defendant appealed.

---

[4]The two theories corresponded with Iowa Code section 322G.4(3)(a) and (c). Subsection (a) provides for a presumption that the manufacturer had been given a reasonable number of opportunities to repair the vehicle if the car had been in for examination or repair at least three times and the manufacturer had been given a final opportunity to correct the problem, as provided in section 322G.4(1). Subsection (c) allows for a presumption if the car had been out of service by reason of repair for "a cumulative total of thirty or more days." Over Defendant's objection, the court provided that the subsection (c) presumption did not include the "final opportunity" requirement of section 322G.4(1).

Holding and Analysis:

1. To obtain the statutory presumption that Defendant enjoyed a reasonable opportunity to repair when the vehicle had been in for repairs for thirty or more days, Plaintiff did not have to show that she had given notice to Defendant of a final opportunity to cure the nonconformity. *See* IOWA CODE § 322G.4(3)(c). In contrast, in order to even commence an action, a consumer must give the manufacturer a final opportunity to cure as provided in section 322G.4(1). *See* IOWA CODE § 322G.8(1). As a result, the trial court should have instructed the jury that Plaintiff was required to prove her compliance with section 322G.4(1) in order to recover. This was reversible error.

2. Defendant is not entitled to judgment as a matter of law based on the jury's answer to Interrogatory #5.[5] It is unclear when the jury answered "no" to this interrogatory whether its answer was based on a finding that the vehicle was *not* out of service for less than thirty days, or was based on a finding that the plaintiff did not give the defendant a final opportunity to cure. Contrary to Defendant's argument, the vehicle was not out of service for less than 30 days as a matter of law. There is nothing in chapter 322G that provides for a new or different lemon law rights period when the vehicle is subsequently sold after having been leased. Therefore, the days on which Plaintiff's car was in for repairs during the lease period are included in determining the cumulative days the vehicle was out of service.

3. The district court correctly held that Defendant had not established as a matter of law that the nonconformities in the vehicle had been remedied so as to entitle it to summary judgment. A fact finder could properly conclude that replacing the valve was only a temporary solution, and did not resolve the stalling problem, which occurred only during cold weather. There was also other evidence in the record that the car continued to have other problems, such as running sluggishly and "incessant rattling."

III. DEFENSES TO TORTS–STATE ACTORS

A. SOVEREIGN IMMUNITY (& NEGLIGENT SUPERVISION CLAIM).

City of Cedar Falls v. Cedar Falls Comm. Sch. Dist., 617 N.W.2d 11 (Iowa Sept. 7, 2000)

Facts:

A kindergarten student died from injuries inflicted by a golf cart kept on hand for use during a safety program put on by the City for the students. Several children had been playing on the cart, one of whom stepped on the accelerator and forcefully pinned the decedent against the side of an ambulance, which was also being used. The keys had been left in the cart by a police officer. The schoolteacher and the two parents chaperoning were watching the children near the ambulance.

A judgment was entered against the City of Cedar Falls after it admitted liability, and the City sought contribution from the Cedar Falls Community School District. A jury determined the District was 34% at fault for the accident. The District appealed.

---

[5]Interrogatory #5 asked the jury, "If the vehicle was out of service for less than 30 days, did plaintiff . . . provide defendant . . . a final opportunity to cure the alleged nonconformity." The jury's answer was "no."

Holding and Analysis:

1. Negligent Supervision & Implementation of Board Policy. Sufficient evidence existed to support a finding of negligence. There was sufficient evidence for the jury to find that the district failed to use ordinary care in (1) implementing school board policy for field trips and (2) supervising the kindergarten class at the safety program.

2. Proximate Cause. Sufficient evidence existed to support a finding of proximate cause. The care would not have started had the children been prevented from playing on it, and it was foreseeable that (1) children would be enticed to play on the cart, and (2) some injury might result from (a) the failure to supervise, and (b) the failure to timely intervene when the children began playing on the care. The children's actions did not constitute a supervening/intervening cause, because the intervening cause fell squarely withing the scope of the original risk caused by the District's negligence.

3. Sovereign Immunity–Damages Caused by 3rd Party. Even though a third party left the key in the ignition, the immunity of Iowa Code § 670.4(10)[6] has no application if the jury finds the accident was, in part, proximately caused by a failure of the District to adequately supervise and control them. The District is held to the same standard of care as a parent of ordinary prudence in similar circumstances.

4. Sovereign Immunity–Discretionary Functions. The discretionary function immunity doctrine[7] does not provide the District an exemption from liability because the requirements for its application are not met. The principal was required under the District's policy manual - and thus did not have discretion–to determine the amount and type of supervision appropriate for the activity. He failed to do so. Additionally, while the teacher's actions in carrying out her supervisory duties did involve matters of judgment, the judgment was not of the kind the discretionary function was designed to shield (i.e., it did not "involve considerations of public policy, grounded in social economic, or political reasons.").

5. Presumption 3rd Parties Will Exercise Due Care. The District could not presume due care of 3rd Parties if it was not itself exercising ordinary care. Whether the District could assume the golf cart was safe to lay on, or whether in the exercise of ordinary care it was required to intervene, was a jury question. (citing 65A C.J.S. Negligence § 118(e) (1966).

6. Indemnity/Contribution. The jury reasonably determined that the death was caused by breaches by both the City (leaving the key in the ignition) and the District (failure to supervise children). While City owed duty to District to conduct its program safely, the District owed a duty to supervise and control the children. The District's fault was not the failure to discover a dangerous condition created by the City, but rather breach of its independent duty to supervise the children. Accordingly, Restatement (2d) of Torts § 886B is inapplicable and the District has no equitable right of indemnity against the City which would preclude the City's claim for

---

[6]This section creates an exception to tort liability of governmental subdivisions under Iowa Code chapter 670 where "the damage was caused by a third party, event or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense."

[7]Iowa Code section 670 4(3) immunizes the District from "any claim based upon . . . th exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

contribution.

B. SOVEREIGN IMMUNITY: EMERGENCY RESPONSE DOCTRINE

1. Kershner v. City of Burlington, 618 N.W.2d 340 (Iowa Oct. 11, 2000)

Facts:

Plaintiff discovered a fire in the clothes dryer located in the enclosed back porch of her home in Burlington. She unsuccessfully tried to put the fire out and then called 911. The Burlington Fire Dept. dispatched one fire truck and three firefighters. They determined that they could not safely fight the fire from the interior (the proper technique for this fire) with only three men, so they called for backup. Help arrived three to five minutes later. Despite their efforts, the fire spread and destroyed the home and its contents. Plaintiff sued.

The district court sustained the city's summary judgment motion based on its conclusion that Plaintiff's negligence claim against the city for not dispatching a sufficient number of fire trucks and personnel was barred by the emergency response provision of Iowa Code section 670.4(11). Plaintiff appealed.

Holding and Analysis:

The decision concerning the type of equipment and number of personnel to dispatch to a fire qualifies as an "act or omission in connection with an emergency response." Consequently, the city has met its burden of showing that the emergency response exemption applies in this case. There is no convincing argument as to why the immunity provisions of chapter 670 should not apply in this case even though the fire department may not have followed its written service response policy in dispatching fire equipment and personnel to Plaintiff's fire. The language of section 670.4(11) plainly states that the only relevant inquiry in determining whether the city has immunity under the emergency response provision is whether plaintiff's claim is "based upon or arising out of an act or omission in connection with an emergency response" by officers or employees carrying out their official duties. No policy of the fire department was intended to waive this immunity.

> Query: Under the recent line of "no duty" cases, City could perhaps have gotten out of this case for lack of a duty, unless Plaintiff abandoned self-help in reliance on fire department.

2. Adams v. City of Des Moines, 629 N.W.2d 367 (Iowa July 5, 2001)

Facts:

Plaintiff Adams operated a telescopic conveyor as part of a roofing project at a residence in Des Moines. The conveyor was mounted on a flatbed truck that Adams had parked in the home's driveway. Evidently unknown to Adams, the boom on his truck came in contact with high voltage wires crossing the driveway, starting a fire in the house. Five emergency vehicles from the Des Moines fire department responded to the fire. After the fire had been extinguished, the firefighters instructed Adams to move the boom truck out of the driveway. Adams believed, mistakenly, that the electrical power had been turned off. When he grabbed the door of the truck,

he was thrown to the ground by a jolt of electricity.

Adams filed suit against the city and against MidAmerican Energy for the injuries he suffered as the result of the shock. He settled with MidAmerican. The city moved for summary judgment, claiming immunity from liability based on Iowa Code section 670.4(11) (the "emergency response" provision). The district court granted the city's motion. Adams appealed.

Holding and Analysis:

Iowa Code section 670.4(11) affords the city of Des Moines immunity, as a matter of law, for its firefighter's action in telling Adams to move his truck. It is the occurrence and continuation of an emergency response, rather than just an emergency, that extends the city's immunity from liability. *See* IOWA CODE § 670.4(11) (immunizing a city from liability for "claim[s] based upon or arising out of an act or omission *in connection with an emergency response* . . . .") (emphasis added).

C. SOVEREIGN IMMUNITY TO DOGBITE CASE.
Smith v. City of Bayard, 625 N.W.2d 736 (Iowa Apr. 25, 2001)

Facts:

Plaintiff was seriously bitten by a dog while she was walking to the post office. She sued the city, alleging that it was negligent in failing to control a dog that was running at large in the city. The city moved for summary judgment on the basis that (1) it owed plaintiff no duty to protect her from the dog, and (2) it is immune from the liability sought to be imposed on it. The district court granted the city's motion for summary judgment.

Holding and Analysis:

The city is immune from liability in this case under Iowa Code section 670.4. Although the City regulated all dogs in the community to some degree, the City was not supervising or controlling this particular dog in a manner that denies it the immunity conveyed in section 670.4(10).

D. SOVEREIGN IMMUNITY TO SLIP-AND-FALL ON ICE ON PARK PATH
Hoskinson v. City of Iowa City, 621 N.W.2d 425 (Iowa Jan. 18, 2001)

Facts:

Plaintiff slipped and fell on ice while walking his dog on an asphalt walkway in a city park located in Iowa City, Iowa. Plaintiff suffered a head injury. The jury found the city was not at fault. The district court overruled Plaintiff's motion for a new trial. Plaintiff appealed, contending the district court erred in concluding that the walkway in question is not a "sidewalk" under Iowa Code section 364.12(2)(b) and that the district court erred in instructing the jury on municipal immunity under Iowa Code section 668.10.

Holding and Analysis:

1. A "sidewalk," as that term is used in Iowa Code section 364.12(2)(b), has two

characteristics: (1) A sidewalk is a part of the street, constructed at or alongside the street, and (2) it is exclusively reserved for pedestrian use. Here, the walkway upon which Plaintiff was walking in City Park was not located along the side of a road, street, or highway. For that reason, the district court was correct in ruling that the walkway is not a "sidewalk" for the purposes of section 364.12(2)(b). As a result, the statutory exception to government immunity that holds municipalities liable for injuries stemming from negligently maintained sidewalks under section 364 12(2)(b) does not apply here.

2. Iowa Code section 668.10 provides that a city has immunity from liability for a suit based on negligence in its failure to remove "natural or unnatural accumulations of snow or ice" if it meets three requirements: (1) the snow or ice in question was on a highway, road, or street; (2) the city had a policy or level of service for snow and ice removal; and (3) the city complied with that policy or level of service. *Humphries v. Methodist Episcopal Church*, 566 N.W.2d 869, 872 (Iowa 1997). It is undisputed that the walkway in question is not a street or road because it was not intended to be open to the public for vehicular traffic. The walkway is also not a highway. As a result, the municipal immunity afforded by section 668.10(2) does not apply and the district court erred in giving the instruction. Such an instruction was prejudicial error. While the city is not liable under section 364.12(2)(b), it may be liable under other provisions of section 364.12(2) without the immunity of section 668 10(2).

IV. DEFENSES TO TORTS FOR NON-STATE ACTORS

1. Limits on Exclusive Remedy Bar of Workers Comp. Act.

Nelson v. Winnebago Industries, Inc., 619 N.W.2d 385 (Iowa Nov. 16, 2000)

Facts:

On Plaintiff's last day of work at Defendant Winnebago, his co-employees threw a pizza party for him. After the party, co-employees taped Plaintiff with duct tape and carried him to a shower in the plant. In the process, he claims he was dropped from approximately two feet, causing the injuries for which he brought suit. The suit alleged both false imprisonment and battery.

The district court granted summary judgment in favor of defendants Winnebago and the co-employees. The district court ruled that Winnebago was liable only under workers' compensation law and not at common law. The court also ruled the plaintiff's co-employees may not be sued at common law because the plaintiff failed to generate a genuine issue of material fact on the issue of gross negligence under Iowa Code section 85.20(2). Plaintiff appealed.

Holding and Analysis:

1. False Imprisonment: Elements (detention or restraint against a person's will, an d(2) unlawfulness of the detention or restraint. (Also citing the 4-element articulation in Restatement (2d) of Torts § 35 (1965)). This tort does not require any finding of physical injury.

2. Battery: Battery is defined as a harmful or offensive touching or contact. The "offensive touching" prong of this tort does not require physical injury–rather it requires only (1) D acts intending to cause a harmful or offensive contact with P or a third person, or the imminent

apprehension of such a contact, and (2) an offensive contact with P directly or indirectly results. Ho actual injury (other than offense) need be shown.

3. Workers Comp. Act–Exclusive Remedy Against Employer–Scope of Bar: As a matter of law, Winnebago, as the employer, is not liable at common law for the intentional torts of its supervisor, Robert Miller, unless Plaintiff's injuries fall outside the workers' compensation act, which provides an exclusive remedy for "all personal injuries sustained by an employee arising out of and in the course of the employment." Iowa Code §§ 85.3(1) & 85.20. This Act bars court actions based even on purely mental injuries caused by the workplace. Although Plaintiff claims its suit for damages based on false imprisonment and battery do not require an "personal injury" within the meaning of the workers' compensation Act, Plaintiff's action is nonetheless barred, because the essence of this action is one for recovery for physical injury. As the Larson treatise states,

> If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injuries being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, including in "physical' the kinds of mental or nervous injury that cause disability, the action should be barred even if it can be cast in the form of a normally non-physical tort."

(citing Larson, The Law of Workmen's Comp 2A § 68.34(a)). Plaintiff's case is in fact based on Plaintiffs' physical and mental injuries, and creative pleading will not suffice to circumvent the exclusivity of the Workers Comp. Act as a remedy for such injuries. Plaintiff's suit against the employer is in essence a claim for damages covered by workers' compensation and is therefore barred by Iowa Code section 85.20.

> Note: The Court could have reached the same holding by stating that both battery and false imprisonment do require some mental injury–an "offensive" touching (battery) or awareness of the confinement and resulting mental harm (false imprisonment, as articulated by Restatement (2d) of Torts § 35).

4. Workers Comp. Act–Bar Against Co-Employee Suits–Scope: The Workers' Comp Act bars suits against co-employees for on the job injuries unless such injuries are caused by the co-employee's gross negligence, which requires a showing of wanton neglect for the safety of another. Iowa Code § 85.20(2); Thompson v. Bohlken, 312 N.W.2d 50, 504 (Iowa 1981). Wantonness is indifference to whether an act will injure another. Thompson at 505. Elements to establish gross negligence are (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the danger. Id.

Held: A reasonable fact finder could not conclude that, when a person who was supported by seven or eight full-grown men was carried a distance of only ten to fifteen (or as many as thirty) feet, at a height of only two feet, an injury was probable as opposed to possible. As such, the record does not support a finding that establishes gross negligence amounting to such a lack of care as to amount to wanton neglect under Iowa Code section 85.20(2). The trial court thus properly dismissed the claim against the co-employees because workers' compensation is the exclusive remedy for Plaintiff in this case.

Partial Dissent:

Plaintiff generated a genuine issue of material fact on the probability-of-injury element. There was deposition testimony from which it could be determined that the pranksters were warned that they were going to drop Plaintiff, who was struggling with them and whose legs were not taped, at which time common sense should have told them to cease their prank in order to prevent injury.

2. Limits of Failure to Mitigate Damages Defense
Greenwood v. Mitchell, 621 N.W.2d 200 (Iowa Jan. 18, 2001)

Facts:

Plaintiff was struck by Defendant's vehicle while walking on a sidewalk. Plaintiff experience pain in his right arm and shoulder and left leg and sought medical attention, including visits to a physical therapist. Plaintiff brought suit two years later, while he was still experiencing pain. Defendant admitted fault for the accident, but denied that the accident was a proximate cause of Plaintiff's injuries, arguing that Plaintiff had failed to consistently follow his prescribed home exercise program.

At the close of trial, Plaintiff objected to the proposed instructions concerning his alleged failure to mitigate. The court overruled Plaintiff's objections and the failure-to-mitigate issue was submitted to the jury. The jury returned a verdict finding both parties to be the proximate cause of Plaintiff's injuries, with Plaintiff sixty percent at fault. The district court then entered a judgment in favor of Defendant. The district court then denied Plaintiff's request for a new trial. The Court of Appeals of affirmed, and the Supreme Court granted further review.

Holding and Analysis:

1. Failure to Mitigate Damages: Elements: (1) substantial evidence that there was something that (a) the plaintiff could do to mitigate his losses, and (b) requiring plaintiff to do so reasonable under the circumstances, (2) Plaintiff acted unreasonably in failing to undertake the mitigating activity, and (3) a causal connection between plaintiff's failure to mitigate and the particular damages at issue. Defendant bears the burden to establish all of these elements.

2. Limit on this Defense: The causation element requires a causal connection between the unreasonable failure to mitigate and the particular damages at issue. (citing Unif. Comp. Fault Act § 1, cmt. 12 U.L.A. 128 (1996)). Accordingly, this defense will bar recovery only for damages that could have been averted if the Plaintiff had timely acted to mitigate its damages. It cannot bar or reduce damages incurred before mitigation could reasonably have occurred.

3. Holding: Defendant failed to introduce substantial evidence to prove that Plaintiff's failure to continue his home exercise program was unreasonable. The defendant also failed to show proximate cause (Defendant lacked expert testimony that Plaintiff's subsequent symptoms were caused by his failure to follow his home exercise program) Consequently, the trial court erred in submitting the instructions on failure to mitigate, and the plaintiff was entitled to a new trial. On retrial, the failure-to-mitigate comparative fault defense must be limited to damages only occurring after the alleged failure to mitigate, and does not extend to all damages.

4. Separate Verdict Forms on Retrial. On retrial, the Court should use separate

verdict forms regarding damages before and after the alleged failure to mitigate. While the use of such forms is generally up to the trial court, in this case, this will avoid an inequitable result.

V. MISCELLANEOUS CASES OF INTEREST

A. VICARIOUS LIABILITY: Respondeat Superior: Limits on Scope of Employment. Riniker v. Wilson, 623 N.W.2d 220 (Iowa App. 2000).

This Court of Appeals decision includes a long discussion of Iowa cases applying the respondeat superior doctrine of vicarious liability, as well as the Restatement (2d) of Agency § 229(2), which describes the limits on the scope of employment for such purposes. In the end, the Court reaches the predictable conclusion that sexual abuse of an employee's wife by the employer's general manager was not within the "scope of employment" and respondeat superior accordingly did not apply (even though general manager became acquainted with wife by virtue of position with employer and some abuse occurred on employer's premises). Sexual abuse of an employee's wife is a "substantial deviation" from his duties and did not advance the purpose of his employment. This abuse was not "one of the normal risks" to be born by a dealership.

B. SPOLIATION OF EVIDENCE

Phillips v. Covenant Clinic, 625 N.W.2d 714 (Iowa Apr. 25, 2001)

Summary: In Iowa, it is now clear that spoliation is not an independent cause of action. Thus, spoliation is an evidentiary matter, and as such, is beyond the scope of this outline. This case represents perhaps the Iowa Supreme Court's most lengthy discussion to date of what must be shown before a spoliation instruction will be given. In this case, the Court rejected a med mal plaintiff's argument that failure to produce medical records necessary to establish proximate cause should give rise to an spoliation instruction and a reasonable inference that the alleged breach of the health provider's duty of care caused the damages at issue. Both the lack of intentionality and the lack of control of the records were cited by the court. Please refer to the Evidence case law update for further information.

C. DERIVATIVE ACTIONS.

1. Weltzin v. Nail, 618 N.W.2d 293 (Iowa Oct. 11, 2000)

(Should be covered in procedure section--case says you don't have a right to jury trial in a derivative shareholder action).

2. Rieff v. Evans, 630 N.W.2d 378 (Iowa May 31, 2001)

Summary: This interesting case deals with alleged breaches of fiduciary duties by officers and directors of a mutual insurance company, brought both derivatively and as a class action. The issues on appeal are purely procedural, and beyond the scope of this outline, but the Supreme Court did hold that Iowa case law provides policyholders with standing to bring a derivative suit, and discusses the difference between the shareholders' derivative claims and their individual class-action claims. It may be of assistance to practitioners dealing with breaches of fiduciary duty in other corporate contexts.

D. SUFFICIENCY OF EVIDENCE CASE–IDENTITY OF TORTFEASOR

Walls v. Jacob North Printing Co., 618 N.W.2d 282 (Iowa Oct. 11, 2000)

Facts. Plaintiff was up on a latter doing gutter repair. The ladder partially obstructed the owner's garage door. Dawson, one of Plaintiff's co-employees, overheard a conversation about moving the ladder to get a shipment in the garage door. Shortly thereafter he saw the top of the ladder "slant a little bit." He testified that he assumed anyone that would move the ladder would move it back. Later in the afternoon, Plaintiff attempted to descend the ladder, it gave way, and he fell 15 feet to the ground. He sued the owner and a company that had made a delivery that morning.

The district court granted defendants' motions for summary judgment. The Court of Appeals, with one dissent reversed and remanded. The Supreme Court granted further review, vacated the Court of Appeals decision, and affirmed the district court.

Holding and Analysis:

The record is devoid of either direct or circumstantial proof identifying which one or more of the several persons in the alley *talked about* moving the ladder, let alone proof that one of those unidentified persons actually *moved* the ladder *and replaced it* without exercising due care. Thus, a fact finder would be forced to speculate who, if anyone, individually committed the alleged tortious act (moving the ladder) or conspired with others to do so, and summary judgment was accordingly appropriate.

IOWA APPELLATE COURT UPDATE

•APPELLATE AND CIVIL PROCEDURE

* * *

•COURTS, JURISDICTION AND TRIAL

* * *

•EVIDENCE

* * *

•INSURANCE

* * *

•JUDGMENT AND LIMITATION OF ACTIONS

* * *

•WORKERS' COMPENSATION

MATTHEW J. HAINDFIELD
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 GRAND AVENUE, SUITE 3700
DES MOINES, IA 50309-2727

haindfield.matt@bradshawlaw.com

* * *

TABLE OF CONTENTS

* * *

WORKERS' COMPENSATION

★ ★ ★

APPELLATE AND CIVIL PROCEDURE

★ ★ ★

1. APPELLATE PROCEDURE - PROPER TIMING FOR FILING NOTICE OF APPEAL

Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 (Iowa Jan. 18, 2001).

Facts: Following trial the Appellants filed their Notice of Appeal within thirty days of receiving an adverse verdict, but before trial court had ruled on various post-trial motions. Appellee moved to dismiss the Appellants' appeal as having been filed too early, since the Supreme Court is not generally afforded appellate jurisdiction until such post-trial motions have been decided and final judgment entered.

Holding: The Iowa Supreme Court allowed the Appellants to proceed with their appeal even in light of the Appellants' premature filing of their Notice of Appeal.

Analysis: The Court allowed the Appellants' appeal to proceed since the post-trial motions had little bearing on the Appellants' substantive claim against the Appellee. The Court acknowledged that the Appellants admittedly "jumped the gun," but chose not to penalize them for the premature filing their Notice of Appeal.

2. CIVIL PROCEDURE - AUTOMATIC DISMISSAL UNDER IOWA R. CIV. P. 215.1

Ray v. Merle Hay Mall, Inc., 621 N.W.2d 696 (Iowa Ct. App. Sep. 27, 2000).

Facts: Plaintiff filed suit against Defendant for personal injuries. A trial date was selected and agreed upon by the parties which was subsequently endorsed by the trial court in its Uniform Scheduling Order. However, the trial date selected by the parties fell outside the case processing time standards contained in Iowa Rule of Civil Procedure 215.1. As a result, the parties were mailed a 215.1 dismissal notice some six months before the dismissal deadline.

In response, the Plaintiff failed to file a motion for relief from 215.1 prior to the dismissal of the case. The Plaintiff's case was ultimately dismissed for want of prosecution. The Plaintiff appealed the dismissal on the grounds that it was unwarranted because the Defendant and trial court had previously endorsed the trial date selected in its Uniform Scheduling Order.

Holding: The Iowa Court of Appeals affirmed the trial court's decision dismissing the Plaintiff's case for want of prosecution.

Analysis: The court held that a Uniform Scheduling Order will not save a case from dismissal under 215.1 unless affirmative steps are taken to seek a continuance or other relief under Iowa Rule of Civil Procedure 215.1. The court specifically noted that such

dismissal is mandatory; not discretionary. The Plaintiff has the burden of keeping their case alive by avoiding an automatic dismissal under Rule 215.1. Without effort on the Plaintiff's part in moving for a continuance or other relief under 215.1, the court does not have the discretion to withhold the application of the Rule.

3. CIVIL PROCEDURE - PROFESSIONAL COMMUNICATIONS PRIVILEGE

City of Cedar Falls v. Cedar Falls Comm. Sch. Dist., 617 N.W.2d 11 (Iowa Sep. 7, 2000).

Facts: Certain police officers with the Cedar Falls Police Department witnessed and were partially responsible for causing an accident resulting in the death of a student enrolled in kindergarten at the Cedar Falls Community School District. These police officers later attended debriefing sessions about the accident which the department referred to as "critical incident stress debriefings." These debriefing sessions were conducted by a licensed mental health professional for the purpose of assisting the officers deal with the stress of the traumatic incident they had just experienced. The debriefing sessions were also attended by fellow officers not involved in the accident at issue in the case.

Documents compiled during these debriefing sessions were sought by the school district during the course of discovery in the city's contribution action against the District. The city refused to produce the documents on the grounds that they were subject to the professional communications privilege set forth in Iowa Code Section 622.10. The district contended that these documents were not protected by the privilege since the communications between the officers were made in the presence of third parties and, thus, were not confidential communications.

Holding: The Iowa Supreme Court held that the presence of the third parties in this case did not defeat the professional communications privilege since these officers were counseling or assisting in the counseling services provided to the officers involved in the accident.

Analysis: The presence of third parties in counseling sessions does not defeat the professional communications privilege if the third parties are counseling or assisting in the counseling provided to the party seeking to invoke the privilege.

4. CIVIL PROCEDURE - REMOVAL TO FEDERAL COURT IN CASES WITH MULTIPLE DEFENDANTS

Marano Enterps. of Kansas v. Z-Teca Restaurants, 254 F.3d 753 (8th Cir. June 25, 2001).

Facts: Defendants #1 and #2 were served with Plaintiff's state court action two days prior to the service of Defendants #3 and #4. All four Defendants consented to the removal of the action to federal court, but Defendants #1 and #2 filed their Notice of Removal two days after the 30-day removal deadline prescribed in 28 U.S.C. 1446(b). Plaintiff

sought a remand of the action to state court on the grounds that the Notice of Removal was tardy as to Defendants #1 and #2. The district court allowed the case to remain in federal court. The Plaintiff appealed the district court's decision denying their motion to the Eighth Circuit Court of Appeals.

Holding: The Eighth Circuit affirmed the decision of the district court, subscribing to the "last served defendant" rule. Specifically, the court held that later-served defendants have thirty days from the date of service of a state court action to file a Notice of Removal with the unanimous consent of their co-defendants.

Analysis: Although the "last served defendant" rule is the minority rule, the "first served defendant" rule is subject to more abuse by manipulating the timing of service in cases involving multiple defendants.

5. CIVIL PROCEDURE - CITATION OF UNPUBLISHED DECISIONS

Anastasoff v. U.S., 223 F.3d 898 (8th Cir. Aug. 22, 2000) and
Anastasoff v. U.S., 235 F.3d 1054 (8th Cir. Dec. 18, 2000).

Facts: A taxpayer sought review of an IRS decision denying her claim for a refund on her taxes. On appeal to a panel of the Eighth Circuit, the IRS cited an unpublished decision directly on point in the dispute at hand. However, the taxpayer sought to avoid the effect of the unpublished decision by invoking the Eighth Circuit's Rule 28A(i) which deems unpublished decisions to be generally lacking of any significant precedential value.

The panel sided with the IRS and found itself to be bound by the unpublished decision. In so doing, the panel wrote extensively about the unconstitutional nature of the Circuit's rule prohibiting the citation of unpublished decisions. In addition, the Court took issue with the rule's denigrating effect on the doctrine of precedent. In sum, the panel decided that unpublished opinions could and should be cited and relied upon as legal authority where appropriate and relevant to the disposition of an action.

The taxpayer petitioned for a rehearing *en banc*. In response, the IRS promptly paid the taxpayer the refund she had previously sought, along with interest. In addition, the IRS used the interim between the original hearing and the rehearing to pass a regulation rendering the issue moot. On rehearing, the Circuit sitting *en banc* vacated the panel's previous decision since the issue had become moot in the interim. In so doing, the Circuit noted that "the controversy over the status of unpublished decisions is, to be sure, of great interest and importance" to the bar and bench, but would remain an open question because the actual case at hand had become moot.

Holding: It is an open question as to whether unpublished decisions may be cited as authority in the Eighth Circuit.

Analysis: See the panel's decision for an extensive and thorough examination of the constitutionality of the Circuit's rule prohibiting the citation of unpublished decisions.

★ ★ ★

COURTS, JURISDICTION AND TRIAL

★ ★ ★

1. COURTS/JURISDICTION - EFFECT OF CONCURRENT FOREIGN STATE COURT CASE

Edward Rose Bldg. Co. v. Cascade Lumber Co., 621 N.W.2d 193 (Iowa Jan. 18, 2001).

Facts: Cascade Lumber Company (Cascade) initiated a lawsuit against Edward Rose Building Company (Rose) in Iowa arising out of a construction dispute involving an Illinois project. Rose filed a similar suit against Cascade in Illinois. Cascade did not participate in the Illinois action and a default judgment was filed against Cascade in the Illinois proceeding.

Rose then proceeded to file the Illinois judgment in the Iowa district court. Cascade filed an objection to the filing of the judgment in Iowa on the grounds that the Iowa action, filed first, preempted jurisdiction in the Illinois case. The district court rejected Cascade's argument and ruled the Illinois judgment was enforceable in Iowa.

Holding: The Full Faith and Credit Clause of the United States Constitution controls the issue. The Illinois judgment was deemed to be enforceable against Cascade in Iowa.

Analysis: Full Faith and Credit must be accorded a valid judgment entered by a sister state, even if such judgment is by default. Illinois was not required to defer jurisdiction to Iowa, even though the Iowa action was filed first. Such deference is discretionary and is not required until there is a final judgment in one of the two jurisdictions.

2. TRIAL - MITIGATION INSTRUCTION AS AFFECTING FAULT PERCENTAGES

Greenwood v. Mitchell, 621 N.W.2d 200 (Iowa Jan. 18, 2001).

Facts: Greenwood was struck by Mitchell in an automobile/pedestrian accident. Greenwood allegedly sustained an injury to his right shoulder as a result of the accident. Greenwood failed to consistently treat his shoulder injury with the home exercises prescribed by his physician and physical therapist.

The case was tried to a jury. Over Greenwood's objection, the court delivered an instruction to the jury concerning Greenwood's apparent failure to mitigate his damages through the use of the home exercise program prescribed by Greenwood's physician and physical therapist.

The jury found Greenwood to be 60% at fault in the case and the district court entered judgment in favor of Mitchell. Greenwood filed a motion for a new trial on the grounds that the district court's instruction on the Plaintiff's failure to mitigate his damages was improper. Specifically, Greenwood contended that the failure-to-mitigate instruction was unsupported by substantial evidence and that it improperly affected the jury's assessment of the percentage of comparative fault when read in connection with the court's comparative fault instruction. The district court denied Greenwood's motion for a new trial and Greenwood appealed.

Holding: The court held that the district court's failure-to-mitigate instruction was not supported by substantial evidence and was improper. The court also concluded that the failure-to-mitigate instruction improperly interfered with the amount of comparative fault assessed to Greenwood when read in connection with the district court's comparative fault instruction. The Iowa Supreme Court determined Greenwood was entitled to a new trial.

The Court determined that, on retrial, a separate verdict form should be used to differentiate between the plaintiff's post-injury damages as being subject to a reduction for failure to mitigate, while the remainder of the plaintiff's damages should be addressed on a different verdict form as damages subject to reduction for comparative fault only.

Analysis: The court deemed this case to be the perfect example of a case in which certain damages are subject to a reduction for comparative fault since these damages were exacerbated by the plaintiff's post-accident failure to mitigate, with the remainder of the damages occurring at the time of the accident not being subject to a reduction for the plaintiff's failure to mitigate.

* * *

EVIDENCE

* * *

A. HEARSAY

1. ADMISSIBILITY OF EVIDENCE OTHERWISE CONSTITUTING HEARSAY WHEN RELIED UPON BY EXPERT WITNESSES

Kurth v. Iowa Dept. of Transp., 628 N.W.2d 1 (Iowa May 31, 2001).

Facts: A letter relied upon by a party's expert witness for purposes of supplying the basis for the expert's opinions was admitted into evidence over a hearsay objection. The trial court's decision to allow the admission of the letter was appealed.

Holding: The Iowa Supreme Court deemed the admission of the letter relied upon by the expert witness to have been proper.

Analysis: Courts and rule makers have yielded to the pressures of expediency so as to recognize a relaxation of the exclusion of otherwise inadmissible hearsay, to the extent that is may be considered as a part of the witness's legitimate cumulation of knowledge if the hearsay information is of the sort as is customarily relied upon by experts in the practice of their profession. Accordingly, admission of the letter in this case was characterized as an "indirect exception to the hearsay rule." As long as the expert can establish such evidence is reasonably relied upon by experts in his field, it is admissible.

2. ADMISSIBILITY OF STATEMENTS REGARDING SUBSTANTIALLY SIMILAR INCIDENTS OTHERWISE CONSTITUTING HEARSAY

Mercer v. Pittway Corp., 616 N.W.2d 602 (Iowa Sep. 7, 2000).

Facts: In a products liability action against the manufacturer of an allegedly defective smoke detector, the trial court allowed the plaintiffs to introduce evidence of more than 300 consumer complaints regarding other alleged problems with such smoke detectors, over the manufacturer's hearsay and relevancy objections. Some of the 300 complaints were received prior to the incident at issue in the case, some were received after the incident. The trial court did not make a distinction between complaints received before versus after the incident at issue in the case. Instead, the district court allowed all 300 consumer complaints into evidence. The manufacturer appealed the court's evidentiary ruling on this point.

Holding: On appeal, the Iowa Supreme Court ruled that the customer complaints received by the manufacturer after the date of the alleged malfunction were ineligible for consideration on the issue of admissibility. Of the remaining customer complaints received prior to the date of the alleged malfunction, the court held that an examination of each customer complaint would be required in order to determine whether each complaint was "substantially similar" to the alleged malfunction at issue in the case before it could be deemed admissible.

Analysis: Although statements regarding substantially similar incidents typically constitute hearsay, such evidence is generally admissible as tending to show the manufacturer's notice or awareness of the danger, provided the incidents alleged in the prior complaints are "substantially similar" to the one at issue. The party seeking to introduce such statements carries the burden of proof to show substantial similarity.

B. SPOLIATION OF EVIDENCE

1. PROPRIETY OF SPOLIATION SANCTIONS WHERE NO INTENT PRESENT

Phillips v. Covenant Clinic, 625 N.W.2d 714 (Iowa Apr. 25, 2001).

Facts: Phillips passed away while undergoing treatment at Defendant's health care facility. The executor of Phillips' estate filed a medical malpractice action against the Defendant. During discovery, it was realized that Phillips' medical records were missing, although Phillips medical file was present in the intensive care unit of the hospital as the doctors attempted to revive Phillips from a heart attack. There was no evidence to suggest that the decedent's file was intentionally destroyed or mislaid. Without the ability to review the decedent's medical records, Plaintiff's expert witness was unable to determine the proximate cause of the Plaintiff's death. On this basis, the Defendant moved for summary judgment.

In response to the Defendant's motion for summary judgment, the Plaintiff contended that spoliation sanctions should be imposed upon the Defendant for the Defendant's failure to produce the decedent's medical records. Specifically, the Plaintiff sought a negative inference against the Defendant regarding the proximate cause issue in view of the Defendant's failure to produce the requested documents. The district court refused to apply the spoliation doctrine and granted the Defendant's motion for summary judgment. The Plaintiff appealed.

Holding: The Iowa Supreme Court determined that spoliation sanctions were unwarranted in this case since there was no intentional destruction or non-production of the decedent's medical records. The court affirmed the district court's decision granting the Defendant's motion for summary judgment.

Analysis: The party seeking an inference based upon an alleged spoliation claim must generate a genuine issue of material fact as to whether the party in control of the evidence intentionally altered or destroyed the evidence at issue.

* * *

INSURANCE

* * *

A. POLICY INTERPRETATION

1. INTENTIONAL ACT EXCLUSION - LEVEL OF INTENT REQUIRED

Pekin Ins. Co. v. Auto-Owners Ins. Co., ___ N.W.2d ___, 2001 WL 355667 (Iowa Ct. App. Apr. 11, 2001).

Facts: Two friends were playing a game of "bump and run" with their vehicles. These friends had played such games several times in the past. The driver of the lead vehicle (Buckingham) was injured when the driver of the trailing vehicle (Vinson) struck him from behind at highway speeds. At issue in the case was the level of intent required in order to preclude coverage based upon an intentional act exclusion.

Holding: Actual intent to injure Buckingham could not be inferred from facts of this case where parties had safely played such games in the past. The district court was overruled and reversed for inferring an intent to injure from "totality of circumstances" surrounding the incident taking place at highway speeds.

Analysis: In order to properly deny coverage based upon an intentional act exclusion, the exclusion requires both:

(1) An intent to do the act which caused the injury; and

(2) An intent to cause some kind of injury.

Even though the district court felt it could infer such intent from the "totality of the circumstances" surrounding the incident at issue in this case, the Iowa Court of Appeals reversed because of Vinson's apparent lack of an actual intent to injure Buckingham.

2. EXCESS V. PRIMARY COVERAGE - *PRO RATA* PAYMENTS

Westfield Ins. Cos. v. Economy Fire & Cas. Co., 623 N.W.2d 871 (Iowa Mar. 21, 2001).

Facts: Two individuals were involved in a car accident. The driver at fault in the accident (Edwards) was operating a rental vehicle leased by his employer, the Bettendorf Medical Clinic (Bettendorf) from Dollar-Rent-A-Car (Dollar), who had leased the vehicle from Bi-State Leasing (Bi-State). Edwards, Bettendorf, Dollar, and Bi-State were sued by the injured party (Clark). These four entities were insured by four separate insurance carriers. Each policy contained excess liability clauses.

These four carriers and their insureds entered into a settlement agreement to pay Clark the following amounts:

Economy Fire & Cas. (Edwards)	$102,000
Westfield Ins. Co. (Bettendorf)	280,000
Empire (Dollar)	0
Universal Underwriters (Bi-State)	0
Total Settlement	**$382,000**

However, by the terms of the settlement agreement, Westfield reserved the right to dispute the issue of whether its settlement amount was appropriate under the circumstances. Specifically, Westfield sought a determination of whether its policy, when read in conjunction with the other policies, should be construed as providing pure excess coverage requiring the application of the *pro rata* distribution standard. Westfield appealed following an adverse decision from the district court.

Holding: The Supreme Court reversed the district court since multiple and conflicting excess clauses require the application of the *pro rata* distribution standard.

Analysis: The district court improperly applied the "closer to the risk" rule which had previously been rejected by the Iowa Supreme Court. The district court should have applied the *pro rata* distribution standard since there were multiple and conflicting excess clauses in the remaining policies.

3. POLICY TERMS AND DEFINITIONS - "USE" OF A "VEHICLE"

West Bend Mut. Ins. Co. v. State Farm. Auto. Ins. Co., 624 N.W.2d 422 (Iowa Ct. App. Jan. 10, 2001).

Facts: A Steamatic employee was performing professional carpet cleaning services in the home of some customers when a fire originating in the cargo compartment of Steamatic's van spread to the customers' home, completely destroying their residence. The engine of Steamatic's van was not running at the time of the fire, but the cleaning equipment inside the cargo compartment of the van was running when the fire started.

West Bend had previously issued a commercial general liability (CGL) policy to Steamatic. State Farm also had previously issued an automobile policy to Steamatic covering Steamatic for damage "caused by an accident resulting from the ownership, maintenance or use of" the van at issue. State Farm refused to indemnify or defend Steamatic against the liability claim ultimately filed by the customers. West Bend assumed the defense of Steamatic and ultimately settled the claim for the sum of $242,000. West Bend incurred $30,050.88 in legal, expert, and investigatory fees in defending against the customers' claim.

West Bend filed a petition in equity against State Farm, claiming State Farm breached its contract by refusing to defend or indemnify Steamatic and seeking a judgment against State Farm to compensate West Bend for its defense and indemnification of Steamatic against the customers. West Bend appealed after a bench trial and an adverse decision by the district court.

Holding: The court examined the policy language at issue in the case and determined that, since the engine of Steamatic's van was not running at the time of the fire, the van was not "used" as a "vehicle" at the time of the fire, nor was the use of the carpet cleaning equipment inside the van a "use" of a vehicle under Iowa insurance law.

Analysis: Because the engine of the van was not running at the time of the fire, the van was not being "used" under Iowa insurance law. (citing Keppler v. Amn. Fam. Mut. Ins. Co., 588 N.W.2d 105 (Iowa 1999)). In addition, because the fire was caused by the malfunction of the non-motor-vehicle-related act of carpet cleaning, the cleaning equipment was not an "integral part" of the vehicle such that it operated together with the van constituting a "vehicle" under the policy.

B. EXCESS LIABILITY - EFFECT OF COVERAGE ISSUES AND SETTLEMENT DISCUSSIONS

1. INSURER'S DUTY TO ACCEPT REASONABLE SETTLEMENT OFFERS

Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637 (Iowa Jan. 22, 2000).

Facts: Leo Kelly (Kelly) was killed while making repairs to a farm implement owned by McCarthy (McCarthy). Iowa Mutual Insurance Company (Iowa Mutual) insured McCarthy. Kelly's estate (Estate) sued McCarthy who, in turn, sought insurance coverage from Iowa Mutual.

Iowa Mutual believed Kelly was McCarthy's employee and it disputed coverage based upon the policy's employee exclusion. Iowa Mutual initiated a declaratory judgment action against McCarthy and the Estate. Kelly's Estate answered and filed a cross-claim against McCarthy for its damages. Iowa Mutual provided a defense to McCarthy on the Estate's cross-claim and obtained a severance of the declaratory judgment action from the Estate's wrongful death claim.

The declaratory judgment action proceeded to trial on the sole issue of whether Kelly was McCarthy's employee. The jury returned a verdict that Kelly was not McCarthy's employee. This result was ultimately affirmed on appeal and the Iowa Supreme Court's review established that coverage was afforded coverage under his Iowa Mutual policy.

Meanwhile, the Estate and McCarthy entered into settlement negotiations. Iowa Mutual refused to participate in these settlement discussions and refused to settle the case filed against McCarthy by Kelly's Estate. Despite Iowa Mutual's objection, McCarthy settled the Estate's wrongful death claim for roughly $500,000, and a consent judgment was entered thereon. McCarthy also assigned his claim against Iowa Mutual to Kelly's Estate.

After the coverage issue had been resolved by the Iowa Supreme Court, Kelly filed suit against Iowa Mutual to seek payment on the $500,000 consent judgment. Iowa Mutual filed a motion for summary judgment, claiming McCarthy had breached his duty to cooperate with his insurer and refrain from entering into obligations prejudicial to the insurer. The district court granted Iowa Mutual's motion for summary judgment and Kelly's Estate appealed.

Holding: The Iowa Supreme Court reversed the decision of the district court on the grounds that Iowa Mutual had a duty to accept the Estate's reasonable settlement offer. Specifically, the Court held that, because Iowa Mutual provided a defense to McCarthy, the carrier had a contractual duty and obligation to settle the claim without litigation, where a reasonable and prudent insurer would pay. Specifically, when in insurer provides a defense under a reservation of rights and rejects a fair and

reasonable settlement demand that a reasonable and prudent insurer would pay, the insured is free to consummate the settlement on terms that protect the insured from any personal exposure.

Because a fact issue existed as to whether the Estate's settlement offer was reasonable, the case was remanded for trial on that issue.

Analysis: Because of the inherent conflict associated with providing a defense versus controlling settlement, the insurer must make a decision to either (1) abandon its defense of the insured and pay the demand; or (2) lose control of the conditions of settlement.

If the insurer prefers to debate coverage and lose control of the conditions of settlement, the insured is then free to either (1) pay the settlement demand; or (2) stipulate to the entry of judgment in the amount of the demand.

C. UNDERINSURED MOTORIST COVERAGE

1. LIMITATION OF ACTIONS

Nicodemus v. Milwaukee Mut. Ins. Co., 612 N.W.2d 785 (Iowa Jul. 6, 2000).

Facts: Donna Nicodemus (Nicodemus) was insured by Milwaukee Mutual Insurance Company (Milwaukee Mutual). Her policy provided underinsured motorist (UIM) coverage, subject to certain conditions and limitations. One limitation on the UIM coverage was contained in the policy's "exhaustion requirement" precluding coverage until such time as all other available insurance coverage was exhausted through payment of other judgments or settlements. A second limitation contained in the policy required the insured to commence suit against Milwaukee Mutual within two years, otherwise such claims are barred.

Nicodemus was involved in an automobile accident on November 19, 1994. Nicodemus filed suit against the tortfeasor within the statute of limitations and settled her lawsuit against the tortfeasor on October 2, 1997; more than two years after the date of the accident. This settlement agreement exhausted the tortfeasor's underlying insurance coverage.

Nicodemus then sought coverage from Milwaukee Mutual as her UIM carrier. Milwaukee Mutual filed a motion for summary judgment on the grounds that Nicodemus failed to file suit against it within the two-year limitations period for filing suit contained in the policy. The district court granted Milwaukee Mutual's motion for summary judgment and Nicodemus appealed on the grounds that such limitations period was unreasonable and unenforceable.

Holding: The Iowa Supreme Court reversed the decision of the trial court on the grounds that the two-year limitations period contained in the policy was unreasonable and unenforceable. The unenforceability of the two-year statue required the application of the ten-year statute of limitations applicable to written contracts.

Analysis: A contractual limitations provision that would require a plaintiff to bring an action before his loss or damage can be ascertained is unreasonable per se.

* * *

JUDGMENT AND LIMITATION OF ACTIONS

* * *

1. JUDGMENT - FULL FAITH AND CREDIT TO JUDGMENTS OF FOREIGN JUDGMENTS

Edward Rose Bldg. Co. v. Cascade Lumber Co., 621 N.W.2d 193 (Iowa Jan. 18, 2001)

Facts: Cascade Lumber Company (Cascade) initiated a lawsuit against Edward Rose Building Company (Rose) in Iowa arising out of a construction dispute involving an Illinois project. Rose filed a similar suit against Cascade in Illinois. Cascade did not participate in the Illinois action and a default judgment was filed against Cascade in the Illinois proceeding.

Rose then proceeded to file the Illinois judgment in the Iowa district court. Cascade filed an objection to the filing of the judgment in Iowa on the grounds that the Iowa action, filed first, preempted jurisdiction in the Illinois case. The district court rejected Cascade's argument and ruled the Illinois judgment was enforceable in Iowa.

Holding: The Full Faith and Credit Clause of the United States Constitution controls the issue. The Illinois judgment was deemed to be enforceable against Cascade in Iowa.

Analysis: Full Faith and Credit must be accorded a valid judgment entered by a sister state, even if such judgment is by default. Illinois was not required to defer jurisdiction to Iowa, even though the Iowa action was filed first. Such deference is discretionary and is not required until there is a final judgment in one of the two jurisdictions.

2. LIMITATION OF ACTIONS - UNDERINSURED MOTORIST CASES

Nicodemus v. Milwaukee Mut. Ins. Co., 612 N.W.2d 785 (Iowa Jul. 6, 2000)

Facts: Donna Nicodemus (Nicodemus) was insured by Milwaukee Mutual Insurance Company (Milwaukee Mutual). Her policy provided underinsured motorist (UIM) coverage, subject to certain conditions and limitations. One limitation on the UIM coverage was contained in the policy's "exhaustion requirement" precluding coverage until such time as all other available insurance coverage was exhausted through

payment of other judgments or settlements. A second limitation contained in the policy required the insured to commence suit against Milwaukee Mutual within two years, otherwise such claims are barred.

Nicodemus was involved in an automobile accident on November 19, 1994. Nicodemus filed suit against the tortfeasor within the statute of limitations and settled her lawsuit against the tortfeasor on October 2, 1997; more than two years after the date of the accident. This settlement agreement exhausted the tortfeasor's underlying insurance coverage.

Nicodemus then sought coverage from Milwaukee Mutual as her UIM carrier. Milwaukee Mutual filed a motion for summary judgment on the grounds that Nicodemus failed to file suit against it within the two-year limitations period for filing suit contained in the policy. The district court granted Milwaukee Mutual's motion for summary judgment and Nicodemus appealed on the grounds that such limitations period was unreasonable and unenforceable.

Holding: The Iowa Supreme Court reversed the decision of the trial court on the grounds that the two-year limitations period contained in the policy was unreasonable and unenforceable. The unenforceability of the two-year statue required the application of the ten-year statute of limitations applicable to written contracts.

Analysis: A contractual limitations provision that would require a plaintiff to bring an action before his loss or damage can be ascertained is unreasonable per se.

3. LIMITATION OF ACTIONS - SAVINGS STATUTE

Berntsen v. Coopers & Lybrand, L.L.P., 623 N.W.2d 843 (Iowa Mar. 21, 2001).

Facts: Berntsen commenced a lawsuit against Coopers & Lybrand in Nebraska state court which was time-barred under Nebraska's statute of limitations. The Nebraska state court dismissed Berntsen's claim on these grounds.

Having realized his claim would not have been time-barred in Iowa had it originally been filed there, Berntsen re-filed his action in Iowa district court within six months of the dismissal of the Nebraska state court proceeding. However, during the pendency of the Nebraska action, Iowa's statute of limitations had also expired.

Berntsen's decision to re-file his lawsuit in Iowa even after the expiration of the statute of limitations was apparently based upon Iowa's savings statute which allows for the re-filing of an unsuccessfully prosecuted action within six months of its dismissal, with certain exceptions. IOWA CODE § 614.10 (2001). Under the savings statute, such a re-filed action is generally deemed to be a continuation of the first action even if the applicable statute of limitations has otherwise expired. At issue in this case was whether the savings statute could apply where the action was filed

within Iowa's statute of limitations period, but commenced in another state and after the expiration of that state's statute of limitations period.

Holding: The Iowa Supreme Court held that the savings statute could not be applied where an action was untimely filed in the first proceeding commenced in a foreign jurisdiction.

Analysis: Because the application of the savings statute in this case would have enlarged Iowa's applicable statute of limitations period the savings statute could not be applied in this case. In addition, because the Nebraska action was dismissed because of the expiration of the Nebraska limitations period, the savings statute could not be applied in this case because such dismissal constituted a final judgment barring the application of the savings statute.

4. LIMITATION OF ACTIONS - ACTIONS AGAINST DECEASED PARTIES

Thompson v. Estate of Herron, 612 N.W.2d 798 (Iowa July 6, 2000).

Facts: On May 10, 1991, Donna Thompson (Thompson) was a passenger in an automobile involved in an automobile accident with Raymond Herron (Herron), who was killed in the accident. Herron's estate was opened on May 20, 1991 and closed on December 17, 1991.

On April 26, 1993, Thompson moved to reopen Herron's estate in order that she could assert her personal injury claim against the estate. The district court initially declined Thompson's application to reopen the estate. On May 6, 1993, Thompson then filed suit on against the estate and others.

The estate then filed a motion for summary judgment against Thompson on the grounds that the estate had been closed for more than sixteen months and was no longer an entity capable of being sued. This decision was affirmed on appeal.

The district court's decision to deny Thompson's application to reopen Herron's estate was also appealed to the Iowa Supreme Court. As the result of this appeal, Herron's estate was ultimately reopened, but the issue in the case was whether the reopening of Herron's estate would allow Thompson to proceed with her action against the estate. Specifically, because there was no case pending against the estate filed within the two-year statute of limitations, Thompson's action filed after the reopening of the estate was clearly outside the two-year statute.

Holding: Although Herron's estate was ultimately reopened, there was no action filed against the estate within the two-year limitations period. Thompson's action filed at the conclusion of her appeals and after the reopening of Herron's estate in 1997 was dismissed on the grounds that it was not filed within the appropriate limitations period.

Analysis: The two-year limitations period contained in Iowa Code Section 614.1(2) governs in cases such as these. The limitations period is not extended by the provision of the probate code contained in Iowa Code Section 633.415 authorizing an extension of the limitations period where the action has been delayed beyond the applicable statute of limitations.

5. LIMITATION OF ACTIONS - RELATION BACK OF AMENDMENTS ADDING PLAINTIFF

Estate of Kuhns v. Marco, 620 N.W.2d 488 (Iowa Dec. 20, 2000).

Facts: On December 23, 1996, Plaintiff Dorothy Kuhns (Kuhns) was involved in a motor vehicle accident with Dale Marco (Marco). Kuhns sustained injuries as a result of the accident. Less than a year later, Kuhns died of causes unrelated to her accident with Marco. On December 22, 1998, an action was filed against Marco with the Plaintiff having been named as "The Estate of Dorothy Kuhns."

Marco responded to this lawsuit by filing a Motion to Dismiss on the grounds that the action was required to be brought in the name of Kuhn's legal representative under Iowa Code Section 611.20, not in the name of Kuhn's estate.

The estate did not resist Marco's motion to dismiss. Instead, the estate filed a motion to amend its petition to add Kuhns' legal representatives as plaintiffs to the action. The estate's motion to amend was granted and the motion to dismiss was denied. Marco then filed an answer to the amended petition and a motion for summary judgment on the grounds that the petition naming the new plaintiff was barred by the two-year statute of limitations. The district court granted Marco's motion for summary judgment, asserting the amendment naming the new plaintiff did not relate back to the original petition since it substituted a new plaintiff as a party.

At issue in the case was the question of whether Iowa Rule of Civil Procedure 69(e) requires a defendant to receive notice of the action prior to the expiration of the statute of limitations before an amendment to the petition to add a plaintiff may be deemed to relate back to the original petition when the action was filed prior to the statute of limitations.

Holding: Iowa Rule of Civil Procedure 69(e) does not require a defendant to receive notice of an action prior to the expiration of the statute of limitations before an amendment to the petition to add a plaintiff may be deemed to relate back to the original petition when the action was filed prior to the statute of limitations. The decision of the district court was reversed and remanded.

Analysis: The court undertook a lengthy and detailed analysis of the relation back doctrine and determined that, since Marco had notice of the claim filed against him within the limitations period, the relation back doctrine operated to allow the substitution of the proper legal entity to prosecute the action. Specifically, Marco had notice of the

action within the limitations period such that there was no prejudice to Marco in maintaining the defense of the action where a different plaintiff was substituted as the party prosecuting the action.

* * *

WORKERS' COMPENSATION[1]

* * *

1. EXCLUSIVE REMEDY PROVISION, GROSS NEGLIGENCE

Nelson v. Winnebago Indus., Inc., 619 N.W.2d 385 (Iowa Nov. 16, 2000).

Facts: On Nelson's last day of work for Winnebago, several of his coworkers threw a party for him, and at some point decided to tape Nelson's feet together and carry him to a shower. Nelson claimed he was dropped from knee height while being carried, and sustained injuries. Nelson brought suit in district court against Winnebago and the coworkers, claiming intentional torts of false imprisonment and battery, as well as gross negligence. The district court granted summary judgment, finding that the claims against Winnebago were barred by the exclusive remedy provision, and further finding that Nelson could not prove that the actions of the coworkers rose to the level of gross negligence. Nelson appealed to the Iowa Supreme Court.

Holding: Affirmed. The Supreme Court held that where the injuries claimed are those for which workers' compensation provides a remedy, the tort label applied to the claim is not determinative in whether the claims are barred by the exclusive remedy provision. Intentional torts such as those alleged by Nelson resulted in bodily injuries for which workers' compensation provided a remedy, and unless the employer actually commanded or expressly authorized the intentional tort, the claims are barred by the exclusive remedy provision. Similarly, the court held Nelson could not prove gross negligence as a matter of law, since the conduct described could not be said to show "willful or reckless conduct" or "wanton neglect for the safety of another."

2. INDUSTRIAL DISABILITY - EMPLOYER REFUSAL OF ACCOMMODATION PRESERVATION OF ERROR

Cargill, Inc. v. Conley, 620 N.W.2d 496 (Iowa Dec. 20, 2000).

Facts: Conley sustained a series of three work-related back injuries while working for Cargill. Following the third injury, Cargill refused to allow Conley to bid into several other positions, claiming Conley was physically restricted from performing the work. Conley claimed he had been released without restrictions by his physician. Conley brought workers' compensation and A.D.A. claims. Following the workers' compensation hearing, Conley was awarded 20% industrial disability, in part because

---

[1] The author would like to thank Michael L. Mock of Bradshaw Fowler, Proctor & Fairgrave, P.C. for preparing the workers compensation section of this outline

Cargill had refused to allow Claimant to bid into several higher paying jobs. Cargill appealed to the workers' compensation commissioner who affirmed the award. Cargill sought judicial review, and argued for the first time that the agency's consideration of the work refusal issue was inappropriate because any damages from such refusal were subsumed into the still-pending A.D.A. claim. The district court agreed and remanded to the agency for a reconsideration of industrial disability without considering the work refusal issue. Conley appealed to the Iowa Supreme Court.

Holding: Reversed and remanded. The Iowa Supreme Court held that, although Cargill's attorney mentioned the A.D.A. claim in passing during an opening statement at the workers' compensation hearing, Cargill never explicitly raised any argument as to the agency's ability to consider the work refusal issue either at hearing or on intra-agency appeal. Since the argument was not raised until judicial review, Cargill had failed to preserve error and the issue was waived. The supreme court also found that the award of industrial disability benefits was supported by substantial evidence, and remanded the case to the district court for an order affirming the agency's appeal decision.

3. BAD FAITH - UNREASONABLE DENIAL OF WORKERS' COMPENSATION CLAIM

Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388 (Iowa Jan. 18, 2001).

Facts: Gibson sustained a work-related low back injury with a Nebraska employer in November of 1990. The injury required five separate surgeries by Dr. Bowman before Gibson was released to return to work. Gibson began work as a cook for The Garden Cafe in May of 1992, and shortly thereafter sustained a non-work-related low back injury in a motor vehicle accident which temporarily aggravated his prior low back condition. Gibson was released to full-duty work on May 6, 1993, and the following day, slipped and fell at work, aggravating his low back condition, and resulting in hospitalization for one week. A claim representative for the workers' compensation insurer (ITT Hartford) investigated the injury, determined it was compensable, and began providing medical benefits and weekly compensation benefits.

Dr. Bowman eventually referred Gibson to Dr. Gutnick for psychiatric care related to his work injury. ITT refused to pay for the care. ITT also failed to pay the permanent impairment rating given by Dr. Bowman without explaining why they paid less than the rating. After Gibson filed a petition for workers' compensation benefits, ITT's attorney filed an answer denying that his injury arose out of his employment. ITT also filed an answer denying liability to a petition for alternate medical care.

Gibson subsequently brought a district court claim for: a) bad faith, b) abuse of process, c) intentional interference with a contract (related to his medical care with Dr. Bowman), d) misrepresentation (also related to his treatment with Dr. Bowman), e) breach of fiduciary duty, and f) intentional infliction of emotional distress. The

district court dismissed the last two counts on a directed verdict, but allowed the first four claims to go to the jury. The jury returned a verdict in favor of Gibson on all four claims. The district court subsequently granted a motion for judgment notwithstanding the verdict on the intentional interference and misrepresentation claims, but allowed the jury verdict to stand as to the bad faith and abuse of process claims (after adjusting the verdict to remove duplicative damages). Gibson appealed the dismissal of his various claims, and also appealed the district court's dismissal of his claims for punitive damages.

Holding: Affirmed in part, reversed in part, and remanded. The Iowa Supreme Court affirmed the district court's dismissal of all of the claims except the bad faith and abuse of process claims, holding that these claims required Dr. Bowman to rely upon the information and representations made by ITT. The evidence showed, however, that Dr. Bowman acted independently in his treatment decisions, so there was no causal connection between the alleged misconduct by ITT and the alleged improper treatment by Dr. Bowman. The Supreme Court did rule, however, that ITT's conduct in unreasonably refusing to pay statutory benefits did permit submission of a claim for punitive damages under the bad faith and abuse of process theories of recovery. The Supreme Court stated that not all such cases would allow punitive damages, but held that ITT's conduct in the present case was sufficient to permit a jury to find the conduct was "willful and wanton". Consequently, the supreme court reversed the district court's decision on punitive damages and remanded the case for a new trial on that issue.

4. CAUSAL CONNECTION AND INDUSTRIAL DISABILITY - SUBSTANTIAL EVIDENCE

IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa Jan. 18, 2001).

Facts: Harpole sustained a left knee injury in 1991 while employed by IBP; she eventually entered into an agreement for settlement of that claim. Harpole later sustained a non-work-related slip and fall injury to her knee in February of 1993, and also alleged she sustained additional work-related knee injuries at IBP in May of 1993 and April of 1994. Harpole left IBP and began work at Perry Manor nursing home in August of 1994. Harpole then sustained another knee injury in September of 1994 while working at Perry Manor. Harpole's various injuries required five separate surgeries from 1991 to 1996. Also, in 1996, Harpole began to develop right knee, hip, and low back problems related to her gait derangement from the left knee conditions.

Harpole eventually brought petitions in arbitration for the 1993 and 1994 injuries at IBP, as well as the 1994 injury at Perry Manor. Harpole also sought review-reopening of the 1991 settlement with IBP. All four claims were consolidated for hearing. The deputy commissioner found that Perry Manor was responsible for one day of healing period and an emergency room bill. The deputy also found that Harpole was permanently and totally disabled, and that the disability and further care was related to her 1991 injury at IBP. IBP appealed to the commissioner; no party appealed the

Perry Manor decision. The commissioner affirmed the deputy's findings as to causation, but reduced the permanent disability award to 40% industrial disability. IBP then sought judicial review in the district court; again, no party sought review of the Perry Manor claim. On judicial review, the district court noted that Perry Manor was not a party to the proceedings. The court then found that the medical evidence did not support the commissioner's findings as to causation of Harpole's disability, reversed the award against IBP, and remanded to the agency for further consideration of Perry Manor's liability. Harpole appealed to the Iowa Supreme Court, and Perry Manor sought a writ of certiorari.

Holding: Reversed on appeal, and writ of certiorari sustained. The Supreme Court first held that, although the various claims had been consolidated for trial, there was no true merger of the claims. Consequently, the district court did not have jurisdiction over the Perry Manor claim because no party had ever appealed the decision to the commissioner or sought judicial review in district court. The supreme court then held that the commissioner's award was supported by substantial evidence, and the district court had improperly substituted its view of the medical evidence for that of the commissioner. Consequently, the district court's decision was reversed and the commissioner's appeal decision was reinstated.

5. FAILURE TO FILE BRIEFS AND *SUA SPONTE* AGENCY REVIEW

Aluminum Co. of Am. v. Musal, 622 N.W.2d 476 (Iowa Feb. 14, 2001).

Facts: Musal sustained a work-related fracture of his right clavicle in February of 1994. After a hearing, a deputy commissioner awarded Musal two percent industrial disability. Musal appealed and ALCOA cross-appealed to the commissioner. Neither party filed briefs. The commissioner subsequently entered an appeal decision which stated the case was being reviewed "generally" because of the parties' failure to file briefs specifying issues to be reviewed. The commissioner then increased the award of industrial disability to four percent. ALCOA sought judicial review, claiming it had not had an opportunity to present an argument on the issue of extent of industrial disability. The district court agreed, reversed the commissioner's decision, and reinstated the deputy's prior decision. Musal appealed to the Iowa supreme court, arguing that the commissioner had full authority to consider the appeal *sua sponte*, even if briefs are not filed.

Holding: Reversed and remanded. The Iowa Supreme Court agreed that the commissioner had the authority to consider an appeal *sua sponte*, even if no briefs are filed. However, procedural due process requires the commissioner to identify issues to be considered to the parties, and to afford them an opportunity to brief and argue the issues. Consequently, the supreme court held that the district court had properly reversed the commissioner's decision, but had improperly reinstated the deputy's decision. Instead, the case was remanded to the commissioner for further proceedings,

including providing the parties an opportunity to submit briefs once the commissioner identified issues to be reviewed on the appeal.

6. CAUSATION: APPLICATION OF LAST INJURIOUS EXPOSURE RULE AND CUMULATIVE INJURY RULE

Brown Bros. Electrical Contractors v. Thompson, ___ N.W.2d ___, 2001 WL 427370 (Iowa Ct. App. Apr. 27, 2001).

Facts: Thompson was a journeyman electrician employed by Brown Brothers from May of 1995 to July of 1995. Prior to his employment at Brown Brothers, Thompson had undergone conservative treatment for an apparent rotator cuff tear in his left shoulder. After working for Brown Brothers for approximately eight weeks, Thompson broke his leg in a jet ski accident on his day off. Approximately three weeks later, Thompson reported to Brown Brothers that he had sustained a shoulder injury in late May of 1995. Thompson subsequently underwent surgery to repair his torn rotator cuff.

Thompson commenced an arbitration proceeding in July of 1996 requesting an award of workers' compensation benefits for a disabling cumulative injury to his left shoulder. The deputy commissioner's arbitration decision found Thompson's injury to be noncompensable based upon physicians' reports indicating that Thompson's rotator cuff tear occurred up to six months prior to Thompson's first report of injury. From these reports, and other evidence surrounding the circumstances of Thompson's claim, the deputy commissioner concluded that Thompson's shoulder condition was not related to his employment at Brown Brothers.

On further review, the workers' compensation commissioner reversed the deputy's arbitration decision, holding that Thompson's employment at Brown Brothers was the last injurious exposure to the condition which aggravated and ultimately necessitated his need for shoulder surgery. The commissioner based this decision on the fact that Thompson merely underwent conservative treatment to his shoulder prior to his employment at Brown Brothers. The commissioner held that Thompson's injury was cumulative in nature and was causally related to his employment at Brown Brothers. The commissioner determined that Thompson suffered a resulting industrial disability of twenty-five percent and ordered Brown Brothers to pay TTD and PPD benefits, along with all of Thompson's past and future medical expenses.

Brown Brothers then sought judicial review at the district court level, claiming that the commissioner's decision was based upon an erroneous legal standard, was not supported by substantial evidence, and that the commissioner erred in awarding medical expenses which were not placed in issue by Thompson at the hearing or supported by the evidence. The district court affirmed the commissioner's ruling and Brown Brothers appealed, claiming the district court incorrectly affirmed the commissioner's decision which:

(1) Improperly applied the last injurious exposure rule and the cumulative injury rule;

(2) Improperly affixed the twenty-five percent industrial disability rating without taking into account Thompson's preexisting disability; and

(3) Improperly awarded medical expenses which were not placed in issue and which were without evidentiary support.

Holding: Affirmed in part, conditionally affirmed in part, and remanded in part. Each of the aforementioned assignments of error are addressed individually below:

(1) The Iowa Court of Appeals held that the last injurious exposure rule has no application in the context of a disabling accidental injury, cumulative or otherwise. Therefore, the Court reversed the decision of the district court and the commissioner regarding the issue of causation. The Court remanded the issue of causation to the commissioner in order to determine whether Thompson could sustain his burden of proof on the issue of causation under the cumulative injury rule without the application of the last injurious exposure rule.

(2) The Iowa Court of Appeals conditionally affirmed the decision of the district court, pending the commissioner's resolution of the issues set forth above. Pending resolution of those issues, the Court of Appeals held that the twenty-five percent disability was proper, and that the district court and the industrial commissioner considered all of the issues necessary to make a proper determination as to Thompson's industrial disability rating.

(3) The Court of Appeals remanded this issue to the commissioner on the grounds that such issue is best decided within the commissioner's discretion.

7. SUBJECT MATTER JURISDICTION - OUT OF STATE EMPLOYEES

Heartland Express, Inc. v. Terry, ___ N.W.2d ___, 2001 WL 748169 (Iowa Jul. 5, 2001)

Facts: In February of 1994, Terry, a Georgia resident, applied for a job as truck driver with Heartland Express, a company headquartered in Coralville, Iowa. Terry filled out an application in Georgia, and was notified two days later by phone call that he had been hired. Terry subsequently suffered a brain injury in October 1995 while working in Louisiana for Heartland. Heartland provided medical benefits and weekly benefits for the injury under Iowa workers' compensation law. In August 1996, Terry filed a petition before the Iowa workers' compensation commissioner seeking additional benefits. At that time, Heartland raised a defense of lack of subject matter jurisdiction

pursuant to Iowa Code § 85.71 (1995) which relates to coverage under the Iowa Workers' Compensation Act for out of state employees. At a hearing in May 1998, a deputy commissioner held that there was subject matter jurisdiction, and awarded additional benefits. The deputy further ruled that subsequent amendments to § 85.71 enacted in 1997 did not apply retroactively to the 1995 provisions of § 85.71. Heartland appealed the decision to commissioner.

In 1999, while the underlying deputy's arbitration decision was still on appeal to the commissioner, Terry filed a separate petition for alternate medical care. Heartland again raised lack of subject matter jurisdiction, but the defense was rejected because the deputy held he lacked authority to overrule a finding by another deputy. Alternate care was granted, and Heartland sought judicial review in the district court. On September 7, 1999, the district court affirmed the alternate care decision and Heartland appealed to the Iowa supreme court.

On November 30, 1999, the commissioner entered an agency appeal decision on the underlying claim, affirming the deputy's findings that Terry's contract for hire had been made in Iowa, and consequently the commissioner had subject matter jurisdiction over the claim, regardless of whether the 1997 amendments applied retroactively (the commissioner also found that Terry had spent a substantial amount of time working in Iowa). Heartland sought judicial review in the district court. A different district court judge then reversed the commissioner's decision, holding that the contract of hire had been made in Georgia, not Iowa, and consequently there was no subject matter jurisdiction under Iowa Code § 85.71. Terry appealed to the Iowa supreme court, and his appeal was consolidated with the prior pending appeal filed by Heartland with respect to the commissioner's alternate care decision.

Holding: Affirmed in part, vacated in part. The Iowa supreme court held that, under contract law, because Terry had accepted the offer of employment by phone while in Georgia, the contract of hire was made in Georgia. Consequently, the supreme court affirmed the district court's decision that the commissioner lacked subject matter jurisdiction over Terry's claims, regardless of whether the 1997 amendments applied retrospectively to Iowa Code § 85.71 (the court specifically stated it was not addressing the issue of prospective versus retrospective application of those amendments). Because there was no subject matter jurisdiction, the supreme court also vacated the agency decision awarding Terry alternate medical care.

Better than Shepardizing:
The Year in Review – Significant Decisions from the Iowa Supreme Court and Court of Appeals

IOWA APPELLATE COURT UPDATE

Employment, Attorneys, Commercial, Constitutional, Contracts, Damages and Government

Stephen E. Doohen
Whitfield & Eddy, P.L.C.
317 6th Avenue, Suite 1200
Des Moines, Iowa 50309
(515) 288-6041
doohen@whitfieldlaw.com

I. EMPLOYMENT

Nelson v. Winnebago,
619 N.W.2d 385 (Iowa 2000)

Nelson had worked for the Defendant, Winnebago, but quit to take a different job. On his last day of work, his co-employees threw a pizza party for him. After the party, co-employees taped Nelson with duct tape and carried him to a shower in the plant. In the process, Nelson claimed he was dropped from an approximately two foot height and injured. Nelson sued Winnebago, his employer, for the intentional torts of false imprisonment and battery, arguing such claims did not require physical injury and therefore were not barred by the exclusivity provisions of Iowa's workers' compensation law. Nelson argued Winnebago was liable in particular because a supervisor gave implicit approval to the prank. Nelson also brought suit against co-employees under gross negligence theories.

HELD: Winnebago is only liable under workers' compensation laws. The Court indicates in Iowa, purely mental injuries caused in the workplace, even in the absence of physical injury, are compensable. A mere labeling of claims of injury as false imprisonment or battery, however, because in some circumstances those claims may be compensable without injury, cannot avoid exclusivity if the gist of the claim is for bodily injury. Suit against co-employees for gross negligence also failed because of Plaintiff's failure to meet substantial burden of showing "wanton" neglect.

Riniker v. Wilson,
623 N.W.2d 220 (Iowa App. 2000)

Former employee of a dealership and his wife brought claims for assault, battery, intentional infliction of emotional distress and loss of consortium against the former corporate manager and the employer's general manager, relating to the manager's sexual demands and threats against the former employee's wife. Michael Riniker worked at the dealership between 1988 and 1996. Allegedly, John Wilson, part owner and general manager of the dealership violently raped Patricia Riniker in 1991 and thereafter terrorized and threatened her for several years. Wilson admitted to a sexual relationship with Patricia Riniker, but alleged any relationship was consenting. In their original action, Michael and Patricia Riniker proceeded as "Jane and John Doe," which became a further defense, as did a statute of limitations issue related to the timing of the alleged conduct.

HELD: (1) No procedure exists for the filing of Jane and John Doe petitions in Iowa. The Court of Appeals defers to the legislature and/or the Supreme Court to make such rules. No prejudice occurred with such a filing here, however, because it was reasonable to assume the defendants knew the identities of the Doe plaintiffs based upon the nature of the allegations in the petition; (2) In a continuing tort situation, the burden of proving a statute of limitations defense falls upon the defendant; (3) damage awards were not excessive; and (4) the question

of whether an act was in the scope of employment is ordinarily a jury question, however, the question as to whether an act that departs so markedly from the employer's business is still within the scope of the employer's business may well be for the court–here the conduct was so far removed from work duties the decision was properly made by the court.

Lee v. Employment Appeal Bd.,
616 N.W.2d 661 (Iowa 2000)

Mitchell County hired Lee in 1982. His duties included plowing snow and using a dump truck to spread gravel and sand during and after snowstorms. In 1991, Lee was given an oral warning about his poor job performance. A written record of the warning suggested Lee had experienced a drop in morale and attitude, had damaged property without making reports, and that several public complaints had been made about his work. In 1995 Lee received similar warnings and wasnoticed that he faced possible termination if improvement did not occur. Lee then received a notice of termination with the understanding he could return to work after alcohol treatment. Upon returning to work, Lee was involved in an incident with his truck that resulted in damage to a private home. He had another accident with his county truck in 1998 and a third accident two days later. In later termination hearings, Lee rejected a proposal that would have allowed for continued employment contingent upon his agreement to submit to, and pay for, drug and alcohol testing four times yearly. Lee was then terminated and applied for unemployment benefits. He was ultimately denied benefits for misconduct.

HELD: Whether misconduct occurred requires proof that the employee acted intentionally-a showing of mere negligence is not enough. There was not evidence to support a finding that the accidents were intentional. Multiple negligent acts, however, may amount to misconduct. Again though, the multiple events could not add up to a finding of intentional activity. It was not allowable to leap to the conclusion that misconduct occurred because Lee had been repeatedly warned about his attitude and morale. Reimbursement of unemployment benefits ordered.

O'Malley v. Gundermann,
618 N.W.2d 286 (Iowa 2000)

Veteran's home employee whose employment was terminated filed a petition for a writ of certiorari and an application to vacate, challenging an arbitrator's decision, which denied his grievance that he was discharged without proper cause.

HELD: The employee belonged to a protected class of persons to whom preference was granted, under a statute permitting a veteran who holds a public position by employment or appointment, to challenge his removal from such position by a petition for writ of certiorari; employee's petition for writ of certiorari was required to be filed within thirty days from the date he was terminated, instead of thirty days from the date the arbitrator issued the opinion;

the employee was not entitled to a substantial evidence review of the arbitrator's decision.

II. ATTORNEYS

Bd. Of Prof'l Ethics v. Herrera, 626 N.W.2d 107 (Iowa 2001)

Herrera was admitted to practice in 1991 and practices primarily in the area of criminal defense, frequently representing defendants in federal drug cases. Prior to this matter, Herrera was publically reprimanded on three occasions. This matter concerned the handling of two criminal defenses. Herrera deposited a retainer fee in a personal account rather than a trust account, failed to timely pursue appellate matters, returned a retainer check to a client with an insufficient funds check, was dilatory in responding to Board inquiries, and met with two criminal defendants already defended by other lawyers. The Commission recommended dismissal of all matters except neglect of a client matter.

HELD: Herrera's conduct in issuing the insufficient funds check constituted dishonesty because it was written on an account he knew to be short of funds and perpetually overdrawn. This is further supported by the fact that a second check was also written on insufficient funds. As to the meeting with clients already represented, Herrera argued he only discussed with the individuals the possibility of taking their representation, as they were unhappy with their current lawyers. The Court identifies the thin line this argument presents but found for Herrera in this respect. Three month suspension ordered, based in part on the prior three public reprimands.

Hansen v. Anderson, Wilmarth & Van Der Maaten In the Iowa Supreme Court No. 91/99-1229

Legal malpractice action with clients suing their lawyers for malpractice stemming from their handling of a commercial transaction for the clients. The lawyers, in turn, sought indemnity from the lawyer representing the opposing party in the transaction for alleged fraudulent misrepresentation. The district court concluded there was no duty supporting an indemnity claim and sustained a motion for summary judgment dismissing the indemnity claim.

HELD: The Supreme Court holds there was a duty supporting an indemnity claim and reversed and remanded. The Court stated generally that because of confidentiality prohibitions, a lawyer may generally refuse to provide information without breaching any duty. However, once a lawyer undertakes to provide information, that lawyer has a duty to provide the information truthfully. If not, a viable claim for equitable indemnity exists.

Sup. Ct. Bd. Of Prof'l Ethics v. Wickey,
619 N.W.2d 319 (Iowa 2000)

Attorney Wickey was charged with five counts of willful failure to pay Iowa income tax owed and one count of failure to pay income tax withheld from employees, all class "D" felonies. In a plea arrangement, Wickey pled guilty to an aggravated misdemeanor charge and all other charges were dropped.

HELD: While the Court did recognize Wickey's argument that Wickey was under rather serious financial hardship in the years involved, a six month license suspension was imposed, in particular because of a previous public reprimand issued to Wickey.

Sup.Ct. Bd. Of Prof'l Ethics v. Fay,
619 N.W.2d 321 (Iowa 2000)

Fay represented Havlik, who consulted with Fay regarding her concerns about her financially struggling business. Havlik told Fay she was interested in relocating her business, in part because her current lease was nearing expiration. During the course of an office conference, Fay suggested Havlik lease his residence (actually owned by Fay's daughter). An agreement was made that Fay would move out, repair the exterior of the home, and Havlik would repair/remodel the interior to suit her needs. The house was zoned residential but Fay indicated to Havlik there would likely be a home occupancy exception for her business. In the alternative, Fay agreed to either gain approval for the planned use or obtain a zoning change/variance. Fay and Havlik entered a lease agreement without Fay ever disclosing any potential conflict or counseling Havlik to seek independent legal advice. Ultimately, Havlik became disenchanted with the arrangement and quit making monthly lease payments, to which Fay responded with a notice for eviction. Havlik initiated a lawsuit against Fay and succeeded on a claim for negligent misrepresentation. A disciplinary complaint was eventually filed.

HELD: Because it was reasonable for Havlik to expect Fay would exercise his professional judgment for her benefit during the course of their relationship, because the lease arrangement also constituted a business transaction with a client, and because the transaction involved a clear conflict of interest, a license suspension of one month was enacted.

In Re Hanus,
627 N.W.2d 223 (Iowa 2001)

Bar exam applicant Hanus was found to have failed to carry his burden showing he has the requisite character and fitness to be allowed to take the bar examination. Hanus was refused the opportunity to take the bar examination in Nebraska and Iowa upon graduation from Creighton Law School. Refusal stemmed in large part from a 1987 shoplifting arrest and Hanus and his wife's subsequent lawsuit against Sears for false arrest, assault and battery, conspiracy, etc. The suits were found to be without merit and Hanus was also cautioned for

making unsubstantiated accusations against the judge and opposing counsel. Hanus managed, however, to litigate the matter for almost eight years. Hanus had also litigated for six years an arrest for improper license plates. Witnesses from both proceedings, including a deputy county attorney and opposing counsel, testified Hanus lacked the character to practice law, indicating he showed several levels of dishonesty throughout the proceedings. Hanus argued the Nebraska bar examination proceedings should not be considered in this Iowa matter.

HELD: Applicant failed to establish the necessary honesty, integrity, and trustworthiness to be permitted to take the Iowa bar examination. Nebraska proceedings were considered.

Sup. Ct. Bd. Of Prof'l Ethics v. Lyzenga,
619 N.W.2d 327 (Iowa 2000)

Former State Public Defender moved to Davenport to handle her mother's estate. Unable to find work in Davenport, Lyzenga quit practicing law. Between 1996 and 1999, while not practicing law, Lyzenga was convicted of three aggravated misdemeanor counts of prostitution, three aggravated misdemeanor counts of theft, four simple misdemeanor counts of theft, a simple misdemeanor count of trespass, a misdemeanor count for deceptive practices and a felony count of forgery. All convictions occurred either in Iowa or Illinois.

HELD: Citing the importance of considering the nature of the alleged violations, the need for deterrence, the protection of the public, the maintenance of the reputation of the bar, and Lyzenga's fitness for continued practice, a license revocation was enacted.

Sup. Ct. Bd. Of Prof'l Ethics v. D'Angelo,
619 N.W.2d 333 (Iowa 2000)

Case involves solo practitioner from Oakland, Iowa with previous history of attorney disciplinary proceedings, including a prior admonishment for taking probate fees prematurely, and a prior reprimand for obtaining a judge's signature on an order that varied from a draft agreed upon by opposing counsel. The Grievance Commission found that D'Angelo violated at least seven provisions of the Iowa Code of Professional Responsibility in connection with the probate of five separate estates. Allegations with respect to the handling of the five estates included continued inattentiveness to client inquiries, taking fees prior to obtaining court authorization, depositing funds into an operating account rather than an interest bearing trust account, failing to timely file necessary documents, disregarding court orders and, ultimately, failure to cooperate with disciplinary officials.

HELD: Considering the sheer number of current proven allegations and D'Angelo's previous disciplinary history, license was suspended for three years.

Sup. Ct. Bd. Of Prof'l Ethics v. Furlong,
625 N.W.2d 711 (Iowa 2001)

The complaint against Furlong alleged that while acting as a lawyer for two female clients, he engaged in a prolonged sexual relationship with one and unprofessionally harassed the other in a manner carrying strong sexual connotations. Three women testified Furlong made unwelcome sexual advances to them in various settings and situations. All three women were clients of Furlong's. One of the women brought a sexual harassment suit Furlong settled for $25,000. Furlong also paid another of the women $5,000 to settle her threatened suit for sexual harassment. One of the women, who had maintained an extended affair with Furlong, testified Furlong asked her to write a letter to ethics authorities withdrawing her complaint against Furlong and encouraged her to move out of the state and refuse to cooperate with the ethics investigation.

HELD: Citing Ethical Consideration 5-25 concerning sexual relations with clients, Furlong's license was suspended for 18 months.

Bd. Of Prof'l Ethics v. Adams,
623 N.W.2d 815 (Iowa 2001)

Complaint against Adams alleged attorney failed to complete work undertaken for clients, multiple misrepresentation to clients, failure to deposit advances for court costs and retainers into trust accounts and failure to return clients' files as requested. Specific harm resulted to certain bankruptcy clients due to Adams' continued delay in taking certain actions. Adams self imposed a suspension against himself for failing to file his continuing education certificate and asked that this be taken into consideration as a mitigating factor.

HELD: Need for deterrence required suspension of three months. Self imposed suspension cannot be considered a mitigating factor.

Bd. Of Prof'l Ethics v. Naylor,
623 N.W.2d 814 (Iowa 2001)

While under suspension for failing to file certificate of compliance with continuing education requirements, Naylor continued to advertise in local telephone book yellow pages under the listing of practicing attorneys. Further, Naylor did not actively participate in the disciplinary proceedings and was said to have approached the proceedings with complete indifference.

HELD: License suspended for one year.

Bd. Of Prof'l Ethics v. Pracht,
627 N.W.2d 567 (Iowa 2001)

Pracht practiced law in Davenport since 1976, primarily in real estate. His practice often found him spending time in the offices of the Scott County auditor, recorder and clerk. An honor system had been developed in Scott County in which lawyers could check out court files for twenty four hours after leaving a check out card with pertinent information. Over the years, problems developed with the check out and timely return of court files. As a result of the problems, the Chief Judge instituted a sensor system on the files that activated an alarm if files were removed from various offices. Prior to the installation of the system, local bar members received a notice of the pending installation and were asked to return all court files. Pracht himself returned more than 100 files. Pracht was concerned about missing files and felt other attorneys probably held files they had not appropriately checked out and decided to take matters into his own hands. Pracht stole all remaining check out cards from the clerk's office thinking it would force the office to perform an exhaustive accounting. An expensive D.C.I. investigation ensued and several members of the local bar were interviewed and polygraphed. It was ultimately discovered Pracht had the missing check out cards. Pracht then alleged the clerk's office was involved in a misappropriation of funds scandal and more expensive but fruitless investigation ensued.

HELD: Two year license suspension.

Bergantzel v. Mlynarik,
619 N.W.2d 309 (Iowa 2000)

Jan Mlynarik, the defendant in this action, was seriously injured in a car accident. He entered into a written contract with Bergantzel (non-attorney) to assist in negotiating with the insurance company for settling the claim resulting from the accident. In consideration for this assistance, Bergantzel was to receive 15 % of the amount recovered after payment of doctors' bills. The contract specifically stated Bergantzel was not an attorney and that, if necessary, Bergantzel would pay for the consultation with an attorney. Bergantzel obtained a policy limits settlement with the tortfeasor's insurance company and was paid according to the arranged percentage. Bergantzel then began negotiations with Mlynarik's UIM carrier. Mlynarik desired a higher settlement from the UIM carrier than Bergantzel was able to negotiate. At Mlynarik's request, Bergantzel consulted with an attorney who negotiated a settlement agreeable to Mlynarik. The attorney took a fee as did Bergantzel. A dispute arose, however, as to the amount of Bergantzel's fee. Bergantzel brought suit for the disputed fee. The defense was that Bergantzel was engaged in the unauthorized practice of law and that the contract was therefore unenforceable on public policy grounds.

HELD: The court gives a detailed review of what to consider in determining what constitutes the practice of law. At the core, the court determines, is the exercise of professional judgment. Whether negotiation with an insurance company constitutes practicing law is an

issue of first impression. The court finds here Bergantzel's negotiation of a settlement required the exercise of professional judgment. The court next determines whether the action was unauthorized (non-lawyers preparing tax returns, e.g., is authorized). The action was deemed unauthorized. Finally, the court finds that public policy under the circumstances dictates that the contract be declared unenforceable.

Sup. Ct. Bd of Ethics v. Bjorklund,
617 N.W.2d 4 (Iowa 2000)

Disciplinary action commenced based on advertisement in local movie review magazine indicating lawyer could help those arrested for drunk driving. The attorney's defense was that the ad was placed in the magazine without his involvement by a publisher for whom he had authored a book relating to defending drunk driving matters, as a means of promoting the book.

HELD: Based on notion that lawyer was unable to fully explain his involvement with the publisher, public reprimand is warranted.

[Note: see also]

Sup. Ct. Bd. of Prof. Ethics v. Mulford,
625 N.W.2d 672 (Iowa 2001)

Criminal contempt conviction resulting from willful avoidance of prosecution on a federal indictment for almost ten years, evasive testimony before Grievance Commission and attempts to improperly influence and intimidate the Supreme Court warrants indefinite suspension with no possibility of reinstatement for one year.

Sup. Ct. Bd. of Prof. Ethics v. Stowers,
626 N.W.2d 130 (Iowa 2001)

Attorney's neglect of immigration matter (failing to file petition) and then misrepresenting the situation to cover up the neglect warranted a suspension of his license to practice law for thirty days.

Sup. Ct. Bd. of Prof. Ethics v. Gallner,
621 N.W.2d 183 (Iowa 2001)

Writing letters to the Social Security Administration misstating the amount of an attorney fee for representing an injured party in a workers' compensation claim, all for the purpose of helping clients receive more benefits than they were entitled to receive, warranted an indefinite suspension with no possible reinstatement for six months.

Tom Riley Law Firm, P.C. v. Glass,
620 N.W.2d 252 (Iowa 2000)

Attorneys brought action against clients to recover a fee for work on a condemnation case. The clients counterclaimed for malpractice alleging failure to perfect an appeal of the compensation commission's award. Jury verdict was entered in favor of the attorneys. Held on appeal: the attorney's negligent failure to perfect an appeal did not cause damage to the clients.

Gilbride v. Trunnelle,
620 N.W.2d 244 (Iowa 2000)

Owner of one-fifth interest in 160 acre parcel of land brought a real estate partition action against the other owners. The parties' attorneys entered a purported settlement agreement under which the plaintiff was to receive 37 acres in exchange for dismissing the lawsuit. Two defendants then refused to execute the deed. Held on appeal: If an attorney enters a settlement with authority, that settlement is binding on the client. An attorney is presumed to act within authority, but that presumption may be rebutted with clear and satisfactory proof. The court also makes a lengthy discussion of what constitutes a professional statement.

Sup. Ct. Bd. Of Prof. Ethics v. Wagener,
620 N.W.2d 484 (Iowa 2000)

Attorney's failure to file tax return, which resulted in a conviction, warranted a six month suspension of the license to practice law.

Sup. Ct. Bd. Of Prof. Ethics v. Hovda,
620 N.W.2d 485 (Iowa 2000)

Attorney's neglect of a real estate matter, indirectly seeking the withdrawal of an ethics complaint against him as a part of a lawsuit against him, and ignoring of a disciplinary notice warranted public reprimand.

Sup. Ct. Bd. Of Prof. Ethics v. Remer,
617 N.W.2d 269 (Iowa 2000)

Attorney disciplinary proceedings were initiated against attorney for unprofessional conduct while acting as the guardian and conservator for the attorney's aunt. Issue and holding on appeal: Doctrine of issue preclusion did not apply so as to give preclusive effect to findings made in underlying civil action brought against attorney by administrator of aunt's estate. Court's rulings therefore, were not admissible in attorney disciplinary proceeding where the propriety of the conduct in the civil action was determined by a mere preponderance of the

evidence standard.

Sup. Ct. Bd. Of Prof. Ethics v. Sherman,
619 N.W.2d 407 (Iowa 2000)

Attorney's neglect of client's domestic relations matter and failure to cooperate with Ethics Board warranted public reprimand.

III. COMMERCIAL

Flanagan v. Consolidated Nutrition,
627 N.W.2d 573 (Iowa App. 2001)

Flanagan and Consolidated Nutrition dispute whether they had a contract to buy and sell pigs. Flanagan raises pigs at a wean to finish operation. Consolidated sells livestock feed products and pigs. Flanagan considered acquiring pigs from Consolidated. The parties exchanged various contractual documents and ultimately, Flanagan signed an agreement with self made changes and left it at the Consolidated offices. A Consolidated representative then called Flanagan and the parties discussed the delivery of several hundred pigs. Both parties agreed however, that the parties were not buying and selling pigs pursuant to the written agreement because Consolidates had not signed, accepted and returned the document to Flanagan. Consolidated then sent another version of the document to Flanagan which was never signed by Flanagan. Flanagan then refused a second delivery of pigs telling Consolidated there was no contract. Consolidated supplied more documents to Flanagan, including a version of the agreement he had previously signed that now contained a signature on behalf of Consolidated but had additional changes. The parties agreed to disagree and continued with a buying-selling arrangement under terms somewhat different than those contained generally in the earlier versions, primarily with respect to price. Flanagan filed a declaratory action seeking a finding no contract existed under the Iowa Uniform Commercial Code.

HELD: The Court begins with a discussion of how Article 2 of the Iowa U.C.C. changes common law contract rules. While common law contract rules provide for offer and strict "as is" acceptance, Article 2 relaxes the requirements concerning the means and medium of acceptance to a particular offer. Flanagan and Consolidated's efforts never culminated in a binding contract, however, because of both parties' continued attempts to alter various terms. Not overlooked is the fact that Flanagan accepted various deliveries of pigs from Consolidated.

Com'n on Unauth. Law Practice v. A-1 Assoc.,
623 N.W.2d 803 (Iowa 2001)

A-1 Associates, Ltd. is an Iowa corporation providing debt collection services for creditors in

central Iowa since 1982. A-1's debt collection services range from contacting debtors by letter and telephone, to initiating legal action. The creditor received the proceeds of any recovery made with a fixed percentage of 30-50% retained by A-1 as a fee for its services. A-1 also obtained an assignment of the account as part of its written agreement with each creditor. Based on the assignment, A-1 typically commenced small claims actions either pro se or by an attorney selected by A-1. When attorneys were not retained, A-1 employees (non-attorneys) prepared legal documents and handled trials. The district court ruled A-1's activities constituted the unauthorized practice of law and permanently enjoined A-1 from such activity. Debt collection services generally were legitimate but the activity in the court system was enjoined. A-1 argued legislative enactments authorizing the taking of assignments (sections 539.1 and 539.3) and authorizing small claims actions on assignments (section 631.14) allowed their activity.

HELD: Small claims activity came within any reasonable definition of practice of law. Argument that small claims court, a legislative and not constitutional creation, is not subject of same admission practices, is rejected. A-1's claimed status as a bona fide assignee is defeated because the assignment, though absolute in form, is in fact a transfer intended primarily to secure payment for services rendered. Technically speaking, the Court held, A-1 was not representing its own legal interests in court, but was representing the legal interests of others, without license or authorization.

Edward Rose Building Company v. Cascade Lumber Co.,
621 N.W.2d 193 (Iowa 2001)

Cascade Lumber Company, an Iowa corporation, contracted with Edward Rose Building Company, a Michigan corporation, to manufacture building trusses and deliver them to a building site in Illinois. A dispute arose and Cascade filed a declaratory judgment action in Iowa to determine the parties' rights and obligations. While that action was pending Edward Rose in turn sued Cascade for breach of contract in Illinois. Cascade received notice of the Illinois suit but did not defend and a default judgment was entered. Edward Rose then transferred the judgment to Iowa pursuant to the Uniform Enforcement of Foreign Judgments Act (Iowa Code Ch. 626A). Cascade filed an objection to the filing of the Illinois judgment arguing the Illinois court lacked jurisdiction because the Iowa case had been filed first, preempting jurisdiction.

HELD: In view of the full faith and credit clause of the federal constitution, once the proceeding on a case has been finally adjudicated by a court of a sister state, res judicata effect must be given to it by the court of the forum state. Illinois judgment was enforceable.

Baumhoefener v. A&D,
618 N.W.2d 363 (Iowa 2000)

A subcontractor which provided labor and materials necessary to dig up and prepare 400 trees

for installation at a construction site filed an action against the real estate developer to enforce a mechanic's lien. The principle issue became whether or not the labor and materials furnished by the contractor were "lienable" under Iowa code sections 572.1(2) and 572.2. The subcontractor seeking to enforce the lien was actually a sub-sub contractor and the real estate developer did not know of his involvement until it was confronted with the lien. Based on this fact the real estate developer argued the sub-sub contractor neither provided materials or labor entitling it to the protection of section 572.2.

HELD: While not all state's mechanic's lien statutes offer protection to sub-sub contractors, the court's review of other state's case law leads it to a finding that Iowa's mechanic's lien statute should not be limiting protection to only first tier subcontractors. Further, the preparation and packaging of trees at a site remote from their ultimate destination on the real estate developer's property does not mean there was not an "improvement" of the real estate developer's land as required for a mechanic's lien. Off site labor can still be considered an "improvement."

IV. CONSTITUTIONAL*

(*Note: In the interest of brevity, this outline does not include a number of criminal law decisions that arguably entail certain constitutional issues related to due process, search and seizure, etc.)

Loder v. Iowa Dept. of Transporation, 622 N.W.2d 513 (Iowa App. 2000)

Motorist petitioned for judicial review of an administrative order revoking his driver's license for a chemical test failure. Loder urged the revocation violated his constitutional rights arguing (1) the presence of marijuana metabolites in his urine sample bore no rational relationship to his ability to drive; and (2) an earlier conviction for driving with a blood alcohol content over .02 while under the age of twenty-one should not be used to enhance this revocation. There was evidence that Loder smoked marijuana but had not smoked it in the five days prior to his arrest. At issue was the constitutionality of the 1998 amendment to section 321J.12(1) concerning chemical testing.

HELD: As to Loder's first claim, the Court conducted a rational basis analysis concluding a statute is constitutional unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. Loder presented evidence that a forensic toxicologist and then head of the Iowa D.C.I. crime laboratory had earlier testified "there is not a direct mathematical relationship or correlation between a urine/drug test and drug effect with this drug (marijuana) as there is with the drug alcohol." In addition, there was a notation on Loder's urine sample stating "clinical studies have not established a numerical correlation between urine drug concentration and impaired driving ability." Recognizing there is not in

existence a test to measure marijuana impairment, the Court still finds a rational basis for the statute, i.e., protection of the public. The Court likewise rejects Loder's ex post facto argument relating to the use of his earlier conviction for enhancement purposes.

State of Iowa v. Hy-Vee, Inc.,
616 N.W.2d 669 (Iowa App. 2000)

Food store was convicted in the district court of selling alcoholic beverages to an underage patron. On May 13, 1998 an employee of Hy-Vee sold alcohol to two minors. Hy-Vee was convicted under Iowa code sections 123.49 (2)(h) and 123.50(1). Section 123.50(1) was changed, effective July 1, 1997, to hold an employer vicariously and criminally liable for such a sale conducted by an employee, regardless of the culpability, or lack thereof, of the employer. The Iowa legislature later struck the vicarious liability language effective July 1, 1998. Hy-Vee was directly effected by these revisions because of the timing of the sale at issue to the under aged patrons. In other words, the sale occurred when vicarious liability was in force. Conviction and sentencing occurred after the change. Hy-Vee argues the statute under which it was convicted was unconstitutional violating due process or, in the alternative, they should have been sentenced based upon the removal of the vicarious liability language. Hy-Vee argued it cannot be convicted of a crime without culpability. The state argued criminal sanctions can be imposed when issues of public welfare are involved.

HELD: Examining the public welfare standard, the Court concludes the stigma of a serious misdemeanor conviction without culpability required a finding of unconstitutionality.

V. CONTRACTS

Walsh v. Nelson,
622 N.W.2d 499 (Iowa 2001)

Lessee sought declaratory judgment regarding his right to terminate an eighteen year commercial lease before its term, and the lessor counterclaimed for unpaid rent. The final lease signed by the parties was the product of four drafts and was the result of a year and a half of negotiations between the parties concerning the amount of rent, the length of the lease, financing issues, and the building's eligibility for a historic building tax credit. The final lease included a termination option indicating the lease was terminable "at the end of the first six year term ...." Plaintiff did not attempt to terminate the lease until nearly five years after the end of the first six year term. This suit was initiated and the defense argued the termination language precluded breaking the lease at any time other than after the first six years. The District Court and the Court of Appeals engaged in a review of the argument concerning whether or not the termination language was ambiguous.

HELD: In a thorough review of contract principles, the Supreme Court agreed to "interpret"

(the process of determining the meaning of contract terms) rather than "construct" (the process of determining the legal effect of terms) the language of the lease. The Court then conducts an exhaustive review of the concept of ambiguity and indicates a two step process is required. First, there must be a finding that certain language is ambiguous. Second, there must be a "choosing among possible meanings for the ambiguous terms. The Court remanded for findings of fact as to the intent of the parties, authorizing consideration of appropriate extrinsic evidence given the ambiguity.

Iowa Waste Systems, Inc. v. Buchanan County,
617 N.W.2d 23 (Iowa App. 2000)

In 1980 the County leased to Nishna Sanitary Service a large plot of land in order to operate what was to be the County landfill. The lease was to continue year to year unless notice was given prior to September 1. In 1994 the County landfill commission entered into an agreement with Nishna delineating responsibilities for the operation of the landfill. This agreement was to run three years and automatically extend unless notice was given prior to January 1 on the final year. The agreement charged Nishna with daily operational costs and the commission was charged with leachate (liquid produced at landfill sites due to rain and runoff) control and closure costs. In 1996 Nishna sold out to Iowa Waste Systems which assumed the responsibilities under the agreement. The commission shortly thereafter terminated the lease pursuant to appropriate notice with Iowa Waste expecting to negotiate a new long term lease. Negotiations ensued with the commission submitting a proposal to Iowa Waste for a twenty five year lease under various terms, subject to Board of Supervisor approval. The Board of Supervisors then voted to close the landfill and the lease negotiations were ceased. Because of the timing, Iowa Waste had the right to remain on the property but had lost the right to continue the operating arrangement. This situation lasted eight months. The commission, however, was still under an obligation to perform leachate control but was denied access to the property. The commission repeatedly informed Iowa Waste of its need to perform the leachate control and its idea that Iowa Waste would be responsible for damages to the land should no control be performed. Iowa Waste continued to refuse to allow the commission on the property and chose to simply recirculate the leachate as a temporary measure. Iowa Waste filed for declaratory relief arguing: (1) the commission breached the operating agreement; (2) the commission's obligation to pay for leachate control; (3) entitlement to indemnification for the costs of the temporary leachate control measures; (4) specific performance of the operating agreement was required; (5) promissory estoppel precluded the commission from ceasing the operating agreement; (6) the termination of the operating agreement was an unconstitutional taking as it rendered the disposal permit worthless. The commission counterclaimed, alleging negligence and breach of contract.

HELD: One may recover on the theory of quantum meruit, or more accurately a breach of an implied in fact contract, the reasonable value of the service provided and the mareket value of the materials furnished. Unjust enrichment is not based in contract but is a quasi-contract remedy created for reasons of justice even without assent, and even in times of dissent.

Damages under unjust enrichment are limited to the value of what was inequitably retained. Quantum meruit has no application here because the commission expressly did not assent and specifically told Iowa Waste they were responsible for leachate control if the commission was not to be allowed on the property. Under the theory of unjust enrichment, Iowa Waste did not meet its burden of proving the commission benefitted from the temporary leachate control efforts. Also discussed by the court are the operation of specific lease terms and concepts of "surrender" of the lease and impossibility of performance, all resolved in favor of the commission.

VI. DAMAGES

Greenwood v. Mitchell, 621 N.W.2d 200 (Iowa 2001)

Plaintiff pedestrian was struck by a vehicle being driven by the defendant. Plaintiff was treated for his injuries and received physical therapy. However, six months after the accident, plaintiff continued to experience pain. Plaintiff conceded on cross-examination that he had been given a home exercise program but that he had not been very consistent in following the program. The jury found the plaintiff to be 60% at fault based on his failure to mitigate damages and judgment was entered in favor of the defendant.

HELD: The Court held that the defendant failed to introduce substantial evidence to prove that plaintiff's failure to continue the home exercise program was unreasonable, and there was insufficient evidence to establish a causal connection between plaintiff's failure to mitigate and his damages. Plaintiff had followed the exercise program for some time but felt it was not doing any good. His failure to continue the program in perpetuity was not unreasonable. The jury was not required to ignore the distinction between the damages sustained prior to the alleged failure to mitigate and those sustained during the time the plaintiff failed to mitigate his damages. The Court recommended the use of separate verdict forms for the periods before and during the alleged failure to mitigate. On remand the jury could then distinguish between damages sustained prior to and during plaintiff's alleged failure to mitigate damages.

The Court also points out that in some cases, medical testimony would be necessary to establish the requisite "causal connection" between the alleged failure to mitigate and the plaintiff's damages. The Court indicates there is no distinction between the plaintiff's burden to prove the defendant's fault was a proximate cause of the plaintiff's damages and the idea that a defendant must prove a causal connection between failure to mitigate and damages. "If expert medical testimony is required to establish a causal link between fault and damages in one situation, such testimony would be equally required in the other."

Gibson v. ITT Hartford Ins. Co.,
621 N.W.2d 388 (Iowa 2001)

Gibson and his wife filed a bad faith action against his employer's workers' compensation carrier related to the handling of a work related injury claim. Gibson slipped and fell at work on May 7, 1993 and aggravated a previous and non-work related injury to his back. Allegations included an unreasonable denial of a petition for alternative care and refusal to pay for a doctor recommended procedure, knowingly taking advantage of a doctor's mathematically erroneously reported impairment rating, overlooking ITT's retained attorney's answer that groundlessly denied the existence of a workplace injury, wrongfully terminating benefits, failure to pay for doctor recommended psychiatric treatment, wrongfully denying a second petition for alternative medical care whereby causing further delay, and other matters. Among other things, the Petition requested punitive damages. The case was tried to a jury. The district court granted ITT's motion for a directed verdict on the claim for punitive damages, stating that while ITT's conduct was intentional, it did not rise to the level of actual malice required for an award of punitive damages.

HELD: Unlike the district court, the Supreme Court decided the evidence was sufficient to show that it was "highly probable" that harm would follow from ITT's failure to pay benefits and authorize psychiatric care. Loss of function of the mind and mental pain and suffering accounted for a substantial portion of the award made by the jury on the Plaintiffs' surviving claims. While every case with evidence sufficient to submit bad faith and abuse of process claims will not warrant a submission of punitive damages, a case by case determination results, in this case, of a finding that the submission of the punitive damages claims was warranted.

Hamilton v. Mercantile Bank of Cedar Rapids,
621 N.W.2d 401 (Iowa 2001)

Trust beneficiary and contingent remaindermen brought an action against the bank alleging negligence, breach of fiduciary duty, and waste in the administration of the trust. Following a jury trial, judgment was entered awarding the beneficiary $276,000 in compensatory damages and $750,000 in punitive damages. Mismanagement of the trust assets was conceded by the bank at the time of trial but the amount of damages were disputed. Trust assets consisted of three pieces of real property on which seventeen apartments existed. The trust properties were sold on contract to a private individual in 1991. Mercantile Bank and its predecessors never investigated the private individual's financial status nor did they monitor the physical condition of the properties, despite the fact that due diligence called for such actions. The physical condition of the properties declined markedly during the private individual's contract purchase. Further, the bank knowingly allowed casualty insurance to lapse and one of the properties was destroyed by fire. The private individual failed to pay property taxes and the property was sold for unpaid taxes without the bank making any attempt to rectify the situation. After the trial, the bank contended the amount of damages was capped at $112,000, the amount the trustee could have received had the private purchaser fulfilled his obligations. Evidence was

presented that if the properties were maintained, they could have produced a larger stream of income. The original trust arrangement was for the beneficiary to receive $1,115 per month but the testimony suggested that if properly cared for, the property could earn $4,000 per month.

HELD: The beneficiaries damages were not limited to the amount of the contract for the deed holder's original obligation; compensatory damages fell within the range of evidence presented at trial; and evidence was sufficient to support the award of $750,000 in punitive damages because there was evidence showing a persistent course of conduct in which the bank acted with "no care."

VII. GOVERNMENT

Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)

Bicyclist sued the State of Iowa, alleging that it was negligent in the issuance of a driver's license to a visually impaired motorist who struck the bicyclist, causing personal injuries. The vehicle driver held a restrictive license that required the wearing of corrective lenses and further required that he not operate a vehicle at more than forty-five miles per hour. The vehicle driver had received a "discretionary" license after the IDOT required a medical review and oral and practical driver testing. The medical review team authorized the issuance of a license and the vehicle driver passed several oral and practical driving examinations.

HELD: (1) Even if the state breached a statutory and regulatory duty by issuing the license, such breach did not give rise to a negligence claim; (2) public duty doctrine (if a duty is imposed to the public generally, there is no liability to an individual member of that group) precluded the imposition of a common law duty on the state; and (3) the state is not liable for issuing a driver's license when there is no special relationship existing between the state and the victim, for fear of an undesired chilling effect on certain segments of society attempting to obtain a driver's license.

Smith v. City of Bayard, 625 N.W.2d 736 (Iowa 2001)

Dog bite victim brought an action against the city of Bayard, alleging the city was negligent in failing to control a dog running at large. Smith was seriously bitten by a dog at a private home adjacent to the post office where she was walking. Earlier that same day, another citizen had complained to the city's mayor that the dog had also harassed her. The mayor walked by the home and found the dog sitting quietly on the front porch. No action was taken by the city. Plaintiff produced evidence in resistance to the city's motion for summary judgment that the city council had discussed at council meetings complaints of problems with dogs running at

large. Plaintiff urged the city regulated dogs running at large by ordinance, thereby creating a special relationship required for liability under Restatement (Second) of Torts section 315 which states "there is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless...(a) s special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.

HELD: The city did not maintain supervision or control over the dog required to be held liable for the victim's injuries.

Hoskinson v. City of Iowa City,
621 N.W.2d 425 (Iowa 2001)

Pedestrian brought negligence action against city arising from head injury received when he slipped and fell on ice on a walkway located in a city park. The suit alleged negligence in failing to clear ice and snow, failure to cover the surface with sand or salt, designing the walkway and landscaping to allow the formation of water and ice, and failure to give notice of the icy walkway. At issue was code section 364.12(2) stating generally the city shall keep all public ways in repair and free of nuisance and further stating the abutting property owner shall be responsible for removal of natural accumulations of snow and ice. If the city is the abutting landowner, the statute applies the same liability to the city as it would to a private owner. The ultimate question then centered on whether or not the area was a "sidewalk" for the purposes of Chapter 364.

HELD: Under the facts of the case, the area was not a "sidewalk" as defined in numerous cases over the years. The district court erred, however, in giving a municipal immunity instruction under 668.10(2) because the walkway was likewise not a highway, road, or street for purposes of section 668.10(2). The walkway was not designed for vehicular use, a triggering factor for the use of municipality immunity provisions found in Chapter 668.

Kershner v. City of Burlington,
618 N.W.2d 340 (Iowa 2000)

Plaintiff Kerschner was the owner of a home in Burlington and operated a business out of that home. Plaintiff one day discovered a fire in a clothes dryer in the back porch of the home. She tried to put the fire out but was unsuccessful. She called 911 asking the fire department to respond. One truck and three firefighters were dispatched. Due to the nature of the fire at the time of the first crew's arrival, additional personnel was summoned and arrived three to five minutes later. The fire spread and eventually consumed the home. Plaintiff filed suit alleging the City of Burlington was negligent for not sending sufficient trucks and personnel to the scene. The city filed a motion for summary judgment alleging immunity under section 670.4 (11), known as the emergency response provision. The city's motion was granted.

HELD: The homeowner's negligence claim was barred by the emergency response provision

of Tort Liability of Governmental Subdivisions Act.

Knudson v. City of Decorah,
622 N.W.2d 42 (Iowa 2000)

City residents brought an action against the city for declaratory judgment against approval of tax increment financing bonds for an urban renewal project.

HELD: Public improvements were "related to housing and residential development" in the urban renewal areas; the city was thus statutorily required to give assurances that the improvements would be included in calculating assistance for low and moderate income family housing; senior citizen's housing to be built in the urban renewal area was "affordable housing"; the city thus did not violate the Urban Renewal Law or the constitutional provision against using public money for a private purpose; the city's approval of a subdivision plat with a restrictive covenant prohibiting modular or factory built homes violated the requirement to allow manufactured homes; 4000 foot street ending in a cul-de-sac violated the statute requiring uniformity to the city's general plan; and, the plan did not prohibit leapfrog development.

Dunn v. City Development Bd.,
623 N.W.2d 820 (Iowa 2001)

The city filed a petition to involuntarily annex certain land adjoining the city. The city development board denied the objector's request to dismiss the petition for lack of an accurate legal description. The objectors sought judicial review. The district court dismissed the petition for review as premature.

HELD: The Supreme Court held that the objectors were not entitled to judicial review, due to their failure to exhaust remedies and procedures available through the entire annexation process.

Crippen v. City of Cedar Rapids,
618 N.W.2d 562 (Iowa 2000)

The operators of a private recycling business, who had lost business after cities implemented a residential curbside recycling service through their respective solid waste management departments, brought suit against the cities, seeking damages and injunctive relief based on a claim of impermissible interference with business. Summary judgment was granted to the cities.

HELD: Recycling services were "city enterprises" excluded from the statute prohibiting governmental competition with private enterprises; the services came within the exemption to the State Competition Law; assessments imposed to finance the services were not an

impermissible unauthorized tax and did not violate the due process clause; the statute requiring the state to utilize private enterprise in implementing solid waste management policies does not apply to cities or their agencies; operators' loss of business due to city programs did not result in a compensable taking.

Keokuk Junction Railway Co. v. IES Industries, Inc.,
618 N.W.2d 352 (Iowa 2000)

Railroad over whose property city had previously obtained highway easement through condemnation proceeding brought an action seeking declaratory judgment that the erection of utility poles and power lines within easement by a private utility company entitled it to just compensation. The utility received summary judgment.

HELD: The easement obtained by the city through condemnation proceedings did not include a right on the part of the utility to install utility poles and power lines without compensating the railroad. Reversed and remanded.

Brazelton Group v. Iowa Dept. of Transportation,
623 N.W.2d 581 (Iowa 2001)

Motel owner sought review of the decision of the Department of Transportation ordering it to remove its sign which was located on adjoining landowner's property.

HELD: The owner's sign was not an "on-premise" sign warranting the DOT's decision to order the removal of such sign; rule establishing criteria to be used to determine if an advertising device qualified as an "on-premise" sign was not unconstitutionally vague.

FIVE IOWA RULES OF CIVIL PROCEDURE YOU CAN'T LIVE WITHOUT

By: Chad M. VonKampen
SIMMONS, PERRINE, ALBRIGHT & ELLWOOD, P.L.C.
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401
Tel: (319) 366-7641; Fax: (319) 366-1917

Table of Contents

1. IOWA RULE OF CIVIL PROCEDURE 82

A. Text: **Judicial Notice; Statutes.** Matters of which judicial notice is taken, including statutes of Iowa, need not be stated in any pleading. A pleading asserting any statute of another state, territory or jurisdiction of the United States, or a right derived therefrom, shall refer to such statute by plain designation and if such reference is made the court shall judicially notice such statute.

B. Related rules/statutes.

1. **Iowa Code § 622.61. Foreign Unwritten Law.** The unwritten laws of any other state or government may be proved as facts by parol evidence, or by the books of reports of cases adjudged in their courts.

2. **Iowa Code § 622.62(1)-(2). Ordinances of City.**

    1. The printed copies of a city code and of supplements to it which are purported or proved to have been compiled pursuant to section 380.8 shall be admitted in the courts of this state as presumptive evidence of the ordinances contained therein. When properly pleaded, the courts of this state shall take judicial notice of ordinances contained in a city code or city code supplement.

    2. The printed copies of an ordinance of any city which has not been compiled in a city code or a supplement pursuant to section 380.8 but which has been published by authority of the city, or transcripts of any ordinance, act, or proceeding thereof recorded in any book, or entries on any minutes or journals kept under direction of the city, and certified by the city clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes, or journals would be received, and with the same effect. The clerk shall furnish such transcripts, and be entitled to charge therefor at the rate that the clerk of the district court is entitled to charge for transcripts of records from that court.

3. **Iowa Rule of Evidence 201.** Iowa Rule of Evidence 201 deals with judicial notice of adjudicated facts. Accordingly, the issue of judicial notice of city ordinances, Iowa law, and the laws of other jurisdictions is governed by the Iowa Rules of Civil Procedure and Iowa statutes.

C. Case Law.

1. **Iowa Law.** Iowa courts will take judicial notice of Iowa statutory law. Larsen v. Cady, 274 N.W.2d 907 (Iowa 1979).

2. **Other Iowa Cases.** The Iowa court is permitted to take notice of the record and prior proceedings in the same court action. However, an Iowa court may not take notice of its own records in a different proceeding, such as a companion case. For example, a prior judgment in another proceeding which is relied upon must be pleaded and proven. Hawkeye-Security Insurance Co. v. Ford Motor Co., 174 N.W 2d 672, 685 (Iowa 1970); Perry v. Reeder, 17 N.W.2d 89, 100 (Iowa 1945).

3. **Federal Statutes.** As a general rule, Iowa court will take judicial notice of federal statutes. Hills Savings Bank v. Cress, 218 N.W 74 (Iowa 1928); Caughran v. Gilman, 46 N.W. 1005 (Iowa 1890).

4. **Municipal Ordinances.** Judicial notice of municipal ordinances is controlled by Iowa Code § 622.62, set forth in Section B above. When an ordinance is not codified under Iowa Code § 380.8, and is therefore not qualified for judicial notice under Iowa Code § 622.62(1), the ordinance shall be received into evidence upon presentation of a copy certified by the city clerk. Cedar Rapids v. Cach, 299 N.W.2d 656, 659 (Iowa 1980). The court is not to take judicial notice of a municipal ordinance if the ordinance has not in some proper manner been made part of the record in the case. Weldon v. Zoning Board, 250 N.W.2d 396 (Iowa 1977).

5. **Statutes of Other Jurisdictions.** Pursuant to Iowa Rule of Civil Procedure 94, a statute from another jurisdiction must be referred to in the pleadings by a "plain designation." While reference to the statutory provision may be sufficient, the better practice is to set forth the statutory language in the pleading itself. Berger v. General United Group, Inc., 268 N.W.2d 630 (Iowa 1978). Where a party does not plead the statutes or prove another jurisdiction's laws by stipulation or evidence, the trial court has no basis to take judicial notice of another state's laws. Iowa Kemper Insurance Co. v. Cunningham, 305 N.W.2d 467 (Iowa 1981). If the procedures for proving foreign law are not followed, the Iowa court will presume that the foreign law is the same as that of Iowa. Matter of Allen's Estate, 239 N.W.2d 163 (Iowa

1976); EFCO Corp. v. Norman Highway Constructors, Inc., 606 N.W.2d 297, 300 (Iowa 2000). However, in a case where both parties relied upon Delaware law without properly pleading or proving Delaware law, the Supreme Court decided to consider the Delaware law referred to in the parties' appeal briefs and determine the appeal based upon Delaware law. However, the court cautioned that its decision was not precedent for ignoring the rules of pleading or proving foreign law in other cases. "[A] party pursues a risky course by proceeding in that fashion." National Equipment Rental, Ltd. v. Estherville Ford, Inc., 313 N.W.2d 538 (Iowa 1981); Berger v. General United Group, Inc., 268 N.W.2d 630 (Iowa 1978). An Iowa court will also presume that a foreign country's laws (both statutory and common law) are the same as Iowa law if no proof of the foreign country's laws is made Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511 (Iowa 1976).

6. **Common Law of Other Jurisdictions.** The provisions of Iowa Code § 622.61 (as set forth above in Section B) must be followed. A mere citation in a brief of opinions or case law from another state does not suffice to prove foreign law. In Re: Estate of Allen, 239 N.W.2d 163 (Iowa 1976).

D. Practice Pointers. If your case involves laws from other jurisdictions, then a careful review of the applicable statutes and Rule 82 is in order. Proving the laws of other jurisdictions is not particularly difficult, but certain hoops must be jumped through in order to make a proper record. Making the proper evidentiary proof of a foreign law could often be done by stipulation. If a party intends to rely upon another jurisdiction's laws, planning before trial is essential to make a proper record.

2. IOWA RULE OF CIVIL PROCEDURE 107(b)

A. Text: **Additional time after service by mail.** When by these rules a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period. Such additional time shall not be applicable where a court has prescribed the method of service of notice and the number

of days to be given or where the deadline runs from entry or filing of a judgment, order or decree.

B. Related rules/statutes.

> **Iowa Code § 4.1(34). Time-Legal Holidays.** In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday. However, when by the provisions of a statute or rule prescribed under authority of a statute, the last day for the commencement of an action or proceedings, the filing of a pleading or motion in a pending action or proceedings, or the perfecting or filing of an appeal from the decision or award of a court, board, commission, or official falls on a Saturday, a Sunday, a day on which the office of the clerk of the district court is closed in whole or in part pursuant to the authority of the supreme court, the first day of January, the third Monday in January, the twelfth day of February, the third Monday in February, the last Monday in May, the fourth day of July, the first Monday in September, the eleventh day of November, the fourth Thursday in November, the twenty-fifth day of December, and the following Monday when any of the foregoing named legal holidays falls on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time shall be extended to include the next day which the office of the clerk of the court or the office of the board, commission, or official is open to receive the filing of a commencement of an action, pleading or a motion in a pending action or proceeding, or the perfecting or filing of any appeal.

C. Case Law. This rule providing an additional three days to respond to notice served by mail only applies to deadlines established by the Rules of Civil Procedure. This rule does not apply to situations where the time in which a particular action needs to be taken is fixed by statute. Accordingly, this rule did not extend the statutory thirty day period for land owners to appeal a compensation commission's award for condemned property. Norgard v. Iowa Department of Transportation, 555 N.W.2d 226, 229 (Iowa 1996).

Similarly, this rule does not provide an additional three days in which to respond to an offer to confess judgment. The statute creating the offer to confess judgment established a five day period

in which the party may respond. This Rule of Civil Procedure would have no application to such a statutory time frame Harris v. Olson, 558 N.W 2d 408, 410 (Iowa 1997).

D. Practice Pointers. A party anxious to expedite a ruling on a motion may chose to serve the motion by a method other than mail in order to decrease the amount of time the other party has to respond to the motion. It may be better office practice to avoid routinely relying upon the three additional days created by Iowa Rule of Civil Procedure 107(b). If an attorney always calculates his deadlines without adding in the three extra days, then the possibility of missing a deadline is reduced. Before relying upon the three extra days created by the rule, the attorney must satisfy himself that the deadline is created by the Rules of Civil Procedure and not by a statute or other authority. Furthermore, if the deadline "runs from entry or filing of a judgment, order or decree" then the mail rule has no application.

3. IOWA RULE OF CIVIL PROCEDURE 177

A. Text: **Demand for jury trial.**

(a) Jury trial is waived if not demanded according to this rule; but a demand once filed may not be withdrawn without consent of all parties not in default.

(b) A party desiring a jury trial of an issue must make written demand therefor not later than ten days after the last pleading directed to that issue. A jury demand may be made in the pleading of a party and shall be noted in the caption. If filed separately with the petition, the jury demand shall be served with the original notice and petition. If filed after the petition, the jury demand shall be served and filed in accordance with R.C.P. 106.

(c) Unless limited to a specific issue, every demand shall be deemed to include all issues triable to a jury. If a limited demand is filed, any other party may, within ten days

thereafter or such shorter time as the court may order, file a demand for a jury trial of some or all other issues.

(d) Notwithstanding the failure of a party to demand a jury in an action in which a demand might have been made of right, the court, in its discretion on motion and for good cause shown, but not ex parte, and upon such terms as the court prescribes, may order a trial by jury of any or all issues.

B. Related rules/statutes.

1. Iowa Constitution, Article I, Section 9 provides "The right of trial by jury shall remain inviolate."

2. **Iowa Rule of Civil Procedure 178. To Court or Jury.** All issues shall be tried to the court, except those for which a jury is demanded Issues for which a jury is demanded shall be tried to a jury unless the court finds that there is no right thereto or all parties appearing at the trial waive a jury in writing or orally in open court.

C. Case Law.

1. **Issue.** Iowa Rule of Civil Procedure 177(b) allows for jury demands to be filed "not later than ten days after the last pleading directed to that issue." An amendment of a pleading is itself a "pleading." Universal C.I.T. Credit Corp. v. Jones, 227 N.W 2d 473 (Iowa 1975). Often times an issue arises about whether or not a pleading has raised a "new issue" which would permit a new jury demand. In a negligence action, the Iowa Supreme Court held that an amended answer asserting the defense of sole proximate cause did not create a "new issue" as that defense could have been raised under the defendant's general denial which was initially pled. Mills v. Lyon, 240 N.W.2d 189 (Iowa 1976) However, in that same case, the defendant's amended answer was held to create a "new issue" with regard to an allegation that the plaintiff and the plaintiff's driver were engaged in a joint venture which would permit negligence to be imputed to the plaintiff. Id. at 191. The case was reversed and remanded for a jury trial. Where a counterclaim is filed, the jury demand must be filed within ten days after the reply to the counterclaim. Moser v. Thorp Sales Corp., 312 N.W.2d 881 (Iowa 1981).

2. **Interpleader.** Parties to an interpleader action are entitled to demand a jury trial for any issue which is triable by ordinary proceedings. C.F. Sales, Inc. v. Amfert, Inc., 344 N.W.2d 543 (Iowa 1983).

3. **Federal Jury Demand.** A jury demand filed in federal court does not constitute a "demand for jury in state court." Federal Deposit Insurance Corp. v. National Sur. Corp., 281 N.W.2d 816 (Iowa 1979). There the case had been removed to federal court where the jury demand was filed. However, once the case was remanded back to state court, no new jury demand was filed. The court found that the jury demand filed in federal court did not constitute a proper demand for a jury in state court.

4. **Good Cause.** The district court may permit a late jury demand for "good cause shown." Rule 177(d). The fact that an attorney was not acquainted with the need to file a jury demand has been held to be insufficient to prove good cause. Beneficial Finance Co. v. Lamos, 179 N.W.2d 573, 576 (Iowa 1970). The words "good cause shown" are meant to be flexible and their meaning is not "fixed and definite." Each late jury demand should be evaluated upon the circumstances appearing and then determined by the "sound discretion of the trial court." "Each case must stand upon its own facts." Katcher v. Heidenwirth, 118 N.W.2d 52 (Iowa 1962). An attorney's inadvertence and oversight which resulted in a 15 month delay in demanding a jury was not "good cause." Peoples Natural Gas Co. v. City of Hartley, 497 N.W.2d 874, 875 (Iowa 1993).

After an initial bench trial which was remanded on appeal, a party argued that the case should be tried to a jury because a different trial judge might be reluctant to differ with the factual findings from the original judge who tried the case. The Supreme Court held that this argument was not "good cause" for granting a jury trial. Iowa Development Co. v. Iowa State Highway Commission, 122 N.W.2d 323 (Iowa 1963). However, in general, the waiver of a jury in one trial does not affect the right of either party to demand a jury on the second trial. Nedrow v. Michigan-Wisconsin Pipeline Co., 70 N.W.2d 843 (Iowa 1955).

5. **Limited Jury Demand.** A party may file a jury demand limited to a particular issue. Unless a jury demand is specifically limited, it shall "be deemed to include all issues triable to a jury." Rule 177(c). Accordingly, if a party desires to file a limited demand, it should specify the issues it is requesting a jury trial on. Otherwise, the court could deny what it deems to be a general demand if there are issues triable to a jury and issues which are not triable to a jury. Universal C.I.T. Credit Corp. v. Jones, 227 N.W.2d 473, 475-76 (Iowa 1975).

D. Practice Pointers. Pursuant to an amendment to Iowa Rule of Civil Procedure 177(b), a jury demand no longer needs to be filed as a separate document. "A jury demand may be made in the pleading of a party and shall be noted in the caption." Id. Counsel should remember that any amended pleading or new issue raised through a pleading permits counsel to revisit the issue of a jury demand. Accordingly, in cases in which no jury demand has been filed, counsel should be alert to the opportunity for filing a jury demand when a new issue arises.

4. IOWA RULE OF CIVIL PROCEDURE 195

A. Text: **Arguments.** The parties may either submit the case or argue it. The party with the burden of the issue shall have the opening and closing arguments. In opening, the party shall disclose all points the party relies on, and if the party's closing argument refers to any new material point or fact not so disclosed, the adverse party may reply thereto, which shall close the argument. A party waiving opening argument is limited, in closing, to reply to the adverse argument; otherwise the adverse party shall have the closing argument. The court may limit the time for argument to itself, but not for arguments to the jury.

B. Related rules/statutes.

1. **Iowa Rule of Civil Procedure 191(a)-(b). Procedure After Jury Sworn.** After a jury is sworn, the trial shall proceed in the following order:

   (a) The party having the burden of proof on the whole action may briefly state the party's claim, and by what evidence the party expects to prove it;

   (b) The other party may similarly state that party's defense and evidence; ....

2. **Iowa Code § 624.11. Matters Excluded.** On a trial before a jury it shall not be necessary to take down arguments of counsel or statements of the court, except the rulings, when not made in the presence of the jury.

C. Case Law.[1]

1. **Burden.** The party having the "burden of the issue" is granted two closing arguments (including a "reply" or rebuttal argument). The trial court is given broad discretion in determining which party has the burden of proof. An erroneous decision of the trial court in this regard is not normally considered reversible error. Steckelberg v. Randolph, 448 N.W.2d 458 (Iowa 1989); In Re: Cocklin's Estate, 5 N.W.2d 577 (Iowa 1942). If a defendant relies solely on his affirmative defense, then the defendant may have the burden of proof and can be permitted to provide the opening and closing arguments to the jury. General Motors Acceptance Corp. v. Whiteley, 252 N.W. 779 (Iowa 1934). However, if the plaintiff has the burden of proof on damages, the plaintiff is entitled to open and close even if the defendant has the burden of proof on other issues. McVay v. Carpe, 29 N.W.2d 582 (Iowa 1947).

2. **Reply Arguments.** The scope of a reply argument is limited by the text of the rule. "[I]f the party's closing argument refers to any new material point or fact not so disclosed, the adverse party may reply thereto, which shall close the argument." Iowa Rule of Civil Procedure 195. Once again, the court is given broad discretion in determining the scope of arguments. In a personal injury case, defense counsel did not refer to the plaintiff's injuries or damages in defendant's closing argument. It was not an abuse of discretion for the trial court to permit plaintiff in the reply argument to reargue the extent of the plaintiff's injuries and damages. Tilghman v. Chicago & Northwest Railroad Co., 115 N.W.2d 165, 174-175 (Iowa 1962). In that case, there was no claim that plaintiff's opening argument did not disclose all points relied on in the reply. Id. The trial court is not required to limit the plaintiff's final closing argument to a "strict reply" to the defendant's argument, at least so long as no new matter is introduced in the argument. Id. However, where the plaintiff in a reply argument referred to an exhibit which neither party had mentioned in their initial closing arguments, it was held that the court did not abuse its discretion in permitting the defendant to reply to the plaintiff's reply argument. Janvrin v. Broe, 33 N.W.2d 427, 433 (Iowa 1948).

---

[1]This outline will review the procedures for closing arguments pursuant to Rule 195 but will not discuss under what circumstances the substance of a closing argument is considered improper.

3. **Time Limits.** The court is prohibited from limiting the time for a closing argument to a jury. Interestingly, Iowa Rule of Civil Procedure 191 (as set forth above in Section B), does not prescribe time limitations for opening statements but says counsel "may briefly state" his client's position. However, the court may place time limits on closing arguments in a bench trial. Iowa Rule of Civil Procedure 195.

4. **Waiving Closing Argument.** Either party in a case may waive closing argument and waiving such an argument is not to be considered a concession by that party. Smith v. Penn Mutual Life Insurance Co., 7 N W 2d 41 (Iowa 1942).

5. **Comments by Court.** The trial judge is not to "telegraph" to the jury, by exclamations, gestures or facial expressions, his or her approval or disapproval, belief or disbelief, in the testimony of witnesses or the arguments of counsel. State v. Larmond, 244 N.W.2d 233, 236 (Iowa 1976). The Iowa Supreme Court has also found it was prejudicial error for a trial court, when sustaining an objection to closing argument, to advise the jury what a particular witness had testified to. State v. Droste, 232 N.W 2d 483, 490 (Iowa 1975). The court is not to attempt to

> equalize what he perceives to be disparity in the trial ability of opposing counsel. Such practice is apt to proceed from disparity and the rightness of one side or the other, rather than the preparation or ability of counsel. It is often difficult for the presiding judge to distinguish exactly where the one disparity begins and the other ends.

Id. at 490-91, citing State v. Glanton, 231 N.W.2d 31, 35-36 (Iowa 1975).

6. **Record.** As indicated in Iowa Code § 624.11 (as set forth in Section B above), normally closing arguments to the jury are not court reported. Accordingly, when there is no certified transcript, the record on a closing argument should be pursuant to a bill of exceptions. Connelly v. Nolte, 21 N.W.2d 311, 318 (Iowa 1946). (But see discussion in § 5 below).

D. Practice Pointers. Defense counsel should consider having closing arguments reported if there are any concerns about opposing counsel's oratory. Defense should be vigilant during a plaintiff's rebuttal argument to look for arguments or issues which have not been addressed

in the first two closing arguments. If something new is argued in the rebuttal, then defense counsel may get to have the highly coveted "last word."

5. IOWA RULE OF CIVIL PROCEDURE 241

A. Text: **Bill of exceptions.**

(a) When necessary. A bill of exceptions shall be necessary only to show material portions of the record of the cause not shown by the court files, entries, or legally certified shorthand notes of the trial, if any.

(b) Affidavits. Not more than five affidavits in support of any exception may be filed with the bill. Controverting affidavits, not exceeding five, may be filed within seven days thereafter. The court, for good cause shown, may extend the time for filing such affidavits.

(c) Certification; Judge; Bystanders. The proposed bill of exceptions shall be promptly presented to the trial judge, who shall sign it if it fairly presents the facts. If the judge refuses, and counsel so certifies, and at least two bystanders attest in writing that the exceptions are correctly stated, the bill thus certified and attested shall be filed and become part of the record.

(d) Disability. Whenever the judge or master who tried the cause is for any reason unable to sign a bill of exceptions or certify the shorthand reporter's record, the same may be done by a successor, or by any judge of the court in which the proceeding was pending.

B. **Related rules/statutes.**

1. **Iowa Code § 624.9** governs the portions of trial which should be court reported. It provides, in part, that the court reporter must report "any other proceedings before the court or jury which might be preserved and made of record by bill of exceptions ..."

2. **Iowa Code § 624.10** provides that when the court reporter's report has been certified by the judge and reporter, it shall "constitute a complete bill of exceptions."

3. **Iowa Rule of Civil Procedure 247. Time for Motions and Exceptions.** Motions for R.C.P. 243 and 244 and bills of exception under R.C.P. 241 must be filed within ten days after filing of the verdict, report or decision with the clerk or discharge of a jury which failed to return a verdict, unless the court, for good cause shown and not ex parte, grants an additional time not to exceed 30 days. Resistances and replies may be filed and supporting brief may be served as provided in R.C.P. 100(d) and (e).

C. **Case Law.**

1. **Timeliness.** Pursuant to Iowa Rule of Civil Procedure 247, a bill of exceptions "must be filed within ten days after filing of the verdict, report or decision with the clerk" unless the court extends the deadline for up to 30 days for good cause shown. The provisions of Iowa Rule of Civil Procedure 107(b) providing an additional three days for service by mail do not apply to a bill of exceptions as this is a deadline which "runs from entry or filing of a judgment, order or decree."

2. **Purpose.** The purpose of the bill of exceptions is to create a basis for an appellate record, and failing to prepare such a bill waives the asserted error if it is not otherwise shown of record. Bixler v. Nielsen, 521 N.W 2d 475, 479 (Iowa App. 1994). For example, when a trial judge makes exclamations, gestures and facial expressions, counsel may make a record in chambers of the offending conduct with an objection or make an objection supported by a bill of exceptions. State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976). Similarly, misconduct of counsel in an unreported argument to the jury could be preserved by a bill of exceptions and certified by the court. Failure to do so waived any appellate review of that issue. Schwennen v. Abell, 471 N.W 2d 880 (Iowa 1991).

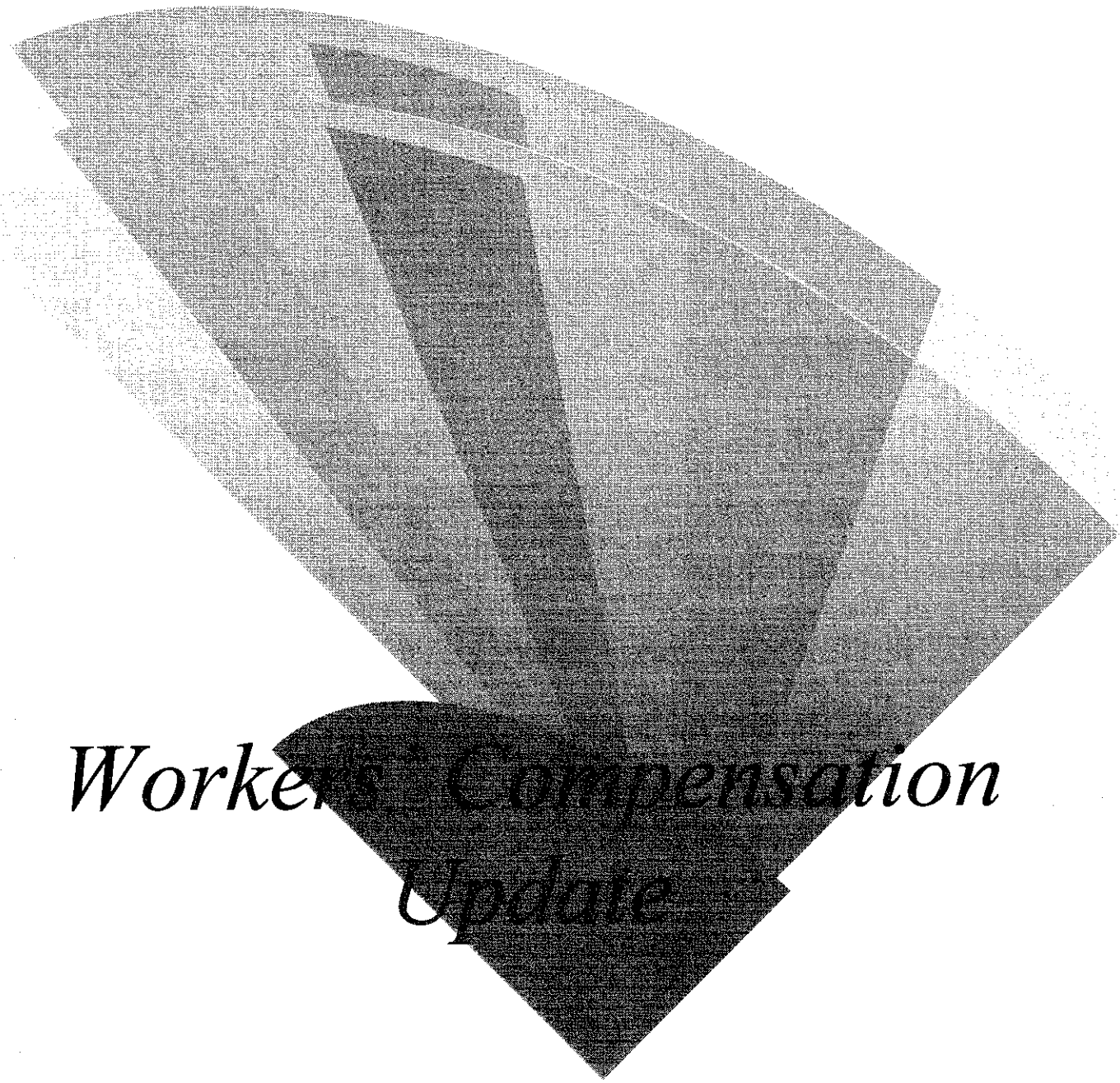
3. **Bystanders.** Parties to the underlying action could not serve as attesting bystanders for a proposed bill of exceptions regarding alleged prejudicial

conduct of the trial court. Millis v. Hute, 587 N.W.2d 625, 630 (Iowa App. 1998); Music v. DeLong, 229 N.W. 673, 676-77 (Iowa 1930).

4. **Alternatives.** The Iowa Supreme Court has stated a strong preference for an immediate objection at the time of the offending conduct, rather than a bill of exceptions. For example, in a closing argument, if an objection is made at the time of the arguments, the court could correct the situation by admonishment or instruction to the jury. Failure to object at the time may waive a later objection. Accordingly, counsel is well advised to make his objection at the time the conduct occurs, rather than only using a bill of exceptions at a later date. Agans v. General Mills, Inc., 48 N.W.2d 242, 245-46 (Iowa 1951). Furthermore, making an immediate objection avoids the risk that the trial court may refuse to certify a bill of exceptions on the grounds of lack of memory or because the court does not believe the proposed bill of exceptions is accurate. Schroedel v. McTague, 169 N.W.2d 860, 868-69 (Iowa 1969). A better practice is to make an immediate objection and attempt to get a stipulation on the record regarding the alleged conduct or occurrence. If no record has been made, then counsel is required to use a bill of exceptions and cannot substitute affidavits attached to a motion for new trial. Connelly v. Nolte, 21 N.W.2d 311, 318 (Iowa 1946). The trial court may issue findings of fact to settle any dispute as to what occurred as an alternative method of making a record. Elkin v. Johnson, 148 N.W.2d 442, 444 (Iowa 1967).

D. Practice Pointers. Bills of exception should be viewed as a last resort. Some factual scenarios when a bill of exceptions may become necessary include: (1) misconduct by opposing counsel in an unreported closing argument; (2) conversations between the court and counsel which do not appear in the record; and (3) improper conduct by the court which does not appear in the record. In each of these three instances, it is preferable and the better practice to try to make a record as soon as the conduct occurs. For example, counsel can dictate into the record what he has observed and either ask the opposing counsel or the court to agree with the recitation he has made. Such a stipulation would be simpler and less time consuming than a later bill of exceptions. It is better to make an immediate objection to misconduct rather than waiting to file a bill of exceptions at a later date.

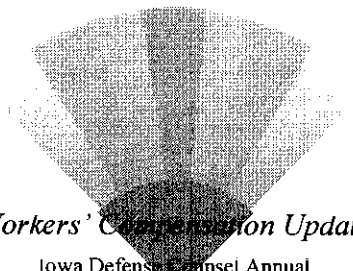
However, the bill of exceptions is available as a tool of last resort. If a bill of exceptions is to be prepared, time is of the essence. Given busy dockets, the trial judge may soon forget the conduct which is complained of or may remember it differently than counsel. Accordingly, the bill of exceptions should be presented to the judge as soon as possible while the case is still fresh in the court's memory. If the court refuses to sign the bill of exceptions, it may be exceedingly difficult for the attorney to obtain the two bystander attestations required by the rule. This is especially true as parties to a case are not considered "bystanders." One unresolved issue is how the appellate court will determine what actually occurred at trial if the trial court refuses to sign the bill of exceptions (or issues its own fact findings regarding what occurred) but counsel is successful in obtaining the attestations of two bystanders.



Workers' Compensation Update

Iowa Defense Counsel
Annual Seminar

Iris J. Post



Workers' Compensation Update

Iowa Defense Counsel Annual Seminar

Iris J. Post

Division of Workers' Compensation

- Staff consists of 1 Assistant, 3 Chief Deputies, 10 Deputies, 1 EDI Project Coordinator, 1 Hearing Administrator, 4 WCCA's and support staff for a total of 32 full-time employees.
- 10 hearing/mediation deputies.
- FY 03 status quo budget.

Technology Advances

- Agency on a Server/Network environment.
- All staff have PC's with access to all decisions, research capabilities, E-mail and the Internet.
- Agency's Web site at www.state.ia.us/iwd/wc.
- "Live" hearing/mediation schedule on website.

EDI Update

- Iowa mandated electronic reporting of FROI and SROI on July 1, 2001.
- Until November 5, the agency will accept paper filed or hard copy Subsequent Reports of Injury (SROI's) or "2A's" if filed with a settlement. Thereafter, all SROI's must be filed via EDI.

FY 2001 Statistics

- Reported injuries numbered 28,957.
- Petition to Hearing, 352 days, 15% decrease in time from FY00.
- Time from Hearing to Decision was 72 days.
- Time from "Hearing Ready" to Hearing was 132 days, or less than 5 months.

FY01 Statistics (Continued)

- Deputies issued 768 decisions.
- Fifty-four percent of deputy decisions were appealed to Commissioner, or 413 decisions.
- Appeals staff issued 404 appeal decisions.
- Appeals are decided within six months or less of full submission.

Legislative Update – HF356

- Limited liability partner may elect coverage under workers' compensation act.
- Amends section 85.27 to include occupational disease statutes.
- Amends section 85.35 to add Social Security offset language.
- Applications for stays for judicial review in district court should be filed with court.

Legislative Update – HF356 (Continued)

- Amends UCC law to exempt workers' compensation benefits from collection proceedings.
- Amends variable rate of interest to Federal Court standard.

Administrative Rules Update

- Payroll tax tables.
- Transportation expense to $.29 per mile.

Revision of Prehearing Procedures

- Anticipated roll-out date in 2002.
- Goal is that every case be heard within 6 to 9 months of petition. Currently "average" is 132 days.
- Options being discussed include civil district court scheduling orders.

Changes in Docketing

- No continuances for hearings/mediations except for emergencies.
- May still reschedule for 14 days following receipt of the Scheduling Order.
- Mediations only scheduled in Des Moines.
- All deputies handle both hearings and mediations.

SUPREME COURT DECISIONS

Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388 (Iowa 2001)

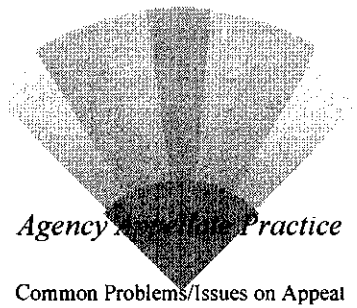
- First party bad faith action involving a workers' compensation claim.
- Evidence that carrier paid only 10 weeks of benefits on a 2% functional impairment rating, knowing that the true rating was 6%, and that it knew that it had no reasonable basis to refuse payment for psychiatric services.

Heartland Express, Inc. v. Terry, __ N.W.2d ___ (Iowa 2001)

- Issue:whether the Workers' Compensation Commissioner had jurisdiction of claim pursuant to section 85.71.
- Holding:Because the "contract for hire" occurred where the claimant was when he accepted the telephone offer of employment in Georgia, Iowa had no subject matter jurisdiction of claim.

Aluminum Co. of America v. Musal, _ N.W.2d _ (Iowa 2001)

- Holding: Without an appellee's brief identifying issues for review, the Commissioner has no authority to determine an appeal.
- If no brief filed, the Commissioner may dismiss appeal, or convert appeal into a "sua sponte" appeal and request briefs from the parties with identified issues.



Agency Appellate Practice

Common Problems/Issues on Appeal

Notice of Appeal - 876 IAC 4.27

- Commenced within 20 days from a deputy's decision, order or ruling.
- Date received by the agency – not mailed, not served.
- Notice of appeal may be faxed to agency. See 876 IAC 4.39.

Untimely Appeal

- Agency lacks authority to decide appeal.
- Untimely notice of appeal will be dismissed by agency sua sponte or on motion.
- Cross appeal not filed within original 20 days will also be dismissed.

Cross Appeal – 876 IAC 4.27

- Must be received within 20 days from deputy's decision or within 10 days after appeal is filed, whichever is later.
- When both parties appeal – 876 IAC 4.28(2) – first to serve notice is appellant or if served on same day, claimant is appellant.

Inappropriate Appeals

- Deputy decision, ruling or order which does not dispose of entire case.
- Interlocutory matters – 876 IAC 4.2 and 4.27.
- Examples include: Denial of motions for continuance/summary judgment/partial summary judgment/sanctions/discovery matters.

Transcript

- Affidavit of ordering filed within 10 days of notice of appeal, Code section 86.24 (4).
- Filed within 30 days of notice of appeal – 876 IAC 4.30.
- Paid for by appealing party.
- No free transcript for indigent – Reid v. Landess, 252 N.W.2d 442 (Iowa 1977).

Transcript (Continued)

- Cross-appeal – parties initially share equally the cost – 876 IAC 4.30.
- If initially paid by non-appealing party, appealing party must reimburse within 30 days or the appeal will be dismissed. See Judkins v. Flying J., (Appeal decision Nov. 30, 2000, File No. 1160788).
- Expense taxed as costs – 876 IAC 4.33 (2).

Transcript (Continued)

- If transcript not timely filed – agency sua sponte order to file with warning.
- If not filed, appeal can be dismissed. 876 IAC 4.36.

Briefs

- Promptly filed with agency following service. 876 IAC 4.28.
- Deadlines are determined by service date.
- Form – 876 IAC 4.28 (4).
- Length – 876 IAC 4.45.
  - 50 pages for principal brief.
  - 25 pages for reply brief.

Briefs W/ No Cross Appeal

- Appellant or principal brief – served within 50 days after notice of appeal or 20 days after filing the transcript, whichever is later – 876 IAC 4.28 (1).
- Appellee or response brief – served within 20 days of service of appellant's brief.
- Appellant's reply brief, if any – served within 10 days of service of appellee's brief.

Briefs W/ Cross Appeal

- Appellant or principal brief – served within 50 days after notice of appeal or 20 days after filing the transcript, whichever is later – 876 IAC 4.28 (1).
- Appellee's (cross-appellant) served within 20 days after service of appellant's brief.

Briefs W/ Cross Appeal (Continued)

- Appellant's (cross-appellee) responsive reply brief served within 20 days of service of appellee's brief.
- Appellee's (cross-appellant) reply brief, if any – served with 10 days of appellant's responsive reply brief.
- If multiple adverse parties, Commissioner establishes briefing schedule – 876 IAC 4.28 (3).

Brief Extensions

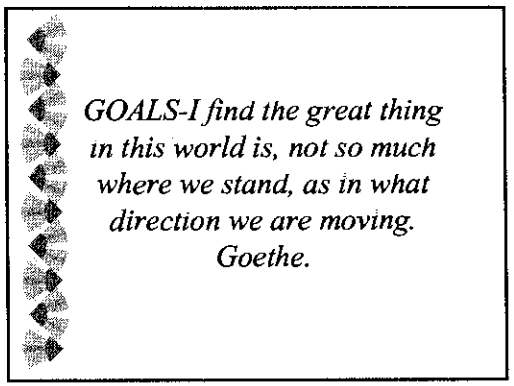
- Liberally granted, if timely requested.
- Can be submitted in any form.
- Granted for time requested if reasonable.
- No more than two extensions, unless extraordinary circumstances.
- Extensions should not be requested unless needed and necessary.

No Briefs/Late Briefs

- An appellant's late brief is the same as no brief. See Musal case.
- Motions to dismiss because of no brief or late brief may be granted if no showing of "good cause." Commissioner will raise issue sua sponte with Order to Show Cause.

Rehearing

- 876 IAC 4.24, 4.25
  - File motion for rehearing within 20 days after issuance of decision.
  - Deemed denied unless granted within 20 days after filing of motion.
- Ambiguities include a pending motion for rehearing and simultaneous appeal to district court.


GOALS-I find the great thing in this world is, not so much where we stand, as in what direction we are moving.
Goethe.

INDEPENDENT MEDICAL EXAMINATIONS
by Lyle W. Ditmars, Esq.

I. THE PERTINENT RULES:

A. Rule 132. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a health care practitioner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B. Rule 133. REPORT OF HEALTH CARE PRACTITIONER.

a. If requested by the party against whom an order is made under R.C.P. 132 or the person examined, the party causing the examination shall deliver a copy of the examiner's detailed written report setting out the findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, if requested by the party causing the examination, the party against whom the order is made shall deliver a like report of any examination of the same condition, previously or thereafter made, unless the party shows an inability to obtain a report of examination of a nonparty. The court on motion may order a party to deliver a report on such terms as are just. If an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

b. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

c. This rule applies to examination made by agreement of the parties, unless the agreement expressly provides otherwise. This rule does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule or statue.

C. RULE 125. DISCOVERY OF EXPERT

a. **Expert who is expected to be called as a witness.** In addition to discovery

provided pursuant to R.C.P. 133, discovery of facts known, mental impressions, and opinions held by an expert whom the other party expects to call as a witness at trial, otherwise discoverable under the provisions of R.C.P. 122 (a) and acquired or developed in anticipation of litigation or for trial may be obtained as follows:

> (1) A party may through interrogatories require any other party to state the name and address of each person whom the other party expects to call as an expert witness at trial and to state, with reasonable particularity:
>
> (A) The subject matter on which the expert is expected to testify;
>
> (B) The designated person's qualifications to testify as an expert on such subjects; and
>
> (C) The mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to, or form the basis of, the mental impressions and opinions held by the expert.
>
> Nothing in this rule shall be construed to preclude a witness from testifying as to (1) knowledge of the facts obtained by the witness prior to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge.

In the case of an expert retained in anticipation of litigation or for trial, answers to interrogatories asking for the qualifications of the person expected to testify as an expert, the mental impressions and opinions held by the expert, and the facts known to the expert shall be separately signed by the designated expert witness. If the party serving such interrogatories believes that the answers were required to be signed by the expert and they were not so signed, the party may object on that basis and move for an order compelling discovery. An objection based on the failure of such answers to be signed by the designate expert shall be asserted within thirty days of service of such answers, otherwise the objection is waived.

b. **Expert who is not expected to be called as a witness.** The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness. Otherwise, a party may discover the identity of and facts known, or mental impressions and

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

II. THE ANALYSIS:

The decision whether to request an IME involves a number of factors:

1) The facts of the case
2) The nature and extent of the injury
3) The anticipated testimony of the treating physician(s) and his or her tendencies
4) The availability of a suitable health care provider to do an IME

The analysis always requires a thorough review of the facts of the case.

In order to apply the above factors to the case, the available facts pertaining to the injury must be obtained. This is not limited to just the medical records generated in connection with the particular injury alleged which serve as the basis of the lawsuit Other information may be obtained from:

1) Discovery responses from the plaintiff (requests for production, interrogatories, requests for admissions and depositions)
2) Employment files from current and former employers.
3) Records of all medical providers who have provided treatment to the plaintiff
4) Records pertaining to worker's compensation claims made by the plaintiff, past and present.

Other records and information may also be available.

The next step is a consideration of the treating physicians and their tendencies. In addition to the reports and records of the particular physician, defense counsel should insist upon a detailed and signed Rule 125 interrogatory answer to the extent possible. The goal is to determine exactly what opinions will be given by the treating practitioner.

Then there are other considerations:

1) Are there facts which allow for effective cross examination?
2) Will the practitioner listen to reason and potentially modify his/her opinions?
3) Is the practitioner patient oriented?

The availability of alternative must also be considered - just because the testimony of the treating physician is not favorable, it does not mean there are other solid, qualified

individuals available who have a contrary opinion. The goal would be to retain an individual who is qualified by experience, education and training, who presents him/herself well and who will give testimony very favorable to the defense.

The qualifications are usually easy enough to determine by a review of his/her curriculum vitae, conversations with other attorneys, etc.

The second part, which is how the IME practitioner will look at the particular facts, is more difficult. Other than what that practitioner has done in the past with similar factual circumstances, the only other way to get a feel for what the ultimate opinions will be in a particular case is to provide the doctor with a complete set of all records and all other available information prior to the time of the IME with a request that he/she contact you and discuss the matter further.

Rules 132 and 133 do not require a report unless there has been an IME. Rule 125 does not provide for the discovery of an "expert" who is not to be called at time of trial, except under certain limited circumstances, i.e., Rule 133 or exceptional circumstances. A "post record review" and pre-IME conference allows counsel for the defendant to get a fairly good idea what the report is likely to contain without having to disclose that information to the other side.

Assuming that a decision has been made to request an IME, the next issue is whether or not the defendant will be given that opportunity. The rule which allows for an Independent Medical Examination does contain certain prerequisites:

A) The medical or physical condition of the party, or person in question must be in controversy.

B) There must be "good cause" shown for the examination.

The court is given the discretion to grant the independent medical exam and to specify "the time, place, matter, condition and scope of the examination and the person or persons by whom it is to be made."

In the Fourth Judicial District, it is common practice for plaintiff's counsel to agree to independent medical examinations without the need of a court order. This, of course, assumes defense counsel has made a reasonable effort to accommodate the plaintiff and the examination is conducted at a location which is reasonably close to either where the case is pending or where the plaintiff resides. However, there may be some movement to the contrary. A recent article, which appeared in the September-December 2000 issue of In Brief, written by Bruce Braley, discusses Iowa rulings on the issue of medical examinations and the rulings of other jurisdictions pertaining to the same as well. This article is recommended for reading.

As a practical matter, as long as the person's physical or mental condition is at issue

an order should be granted allowing an Independent Medical Examination so long as the examination pertains to the condition in question and the particulars pertaining to the same are reasonable as far as time, proximity, etc. This should be a simple matter of preparation and presentation to the court.

The other issues, as to the conditions of the examination, such as the presence of counsel, and the use of tape recorders, video cameras, etc., will require resolution.

III. CONCLUSION

The only thing worse than damaging testimony from a treating physician is the same testimony from your own independent examiner. Consideration of the above factors should help minimize the potential for a devastating result.

RECENT DEVELOPMENTS IN DEFENDING PROFESSIONAL LIABILITY CLAIMS

Joseph L. Fitzgibbons of
Fitzgibbons Law Office
108 North 7th Street
P.O. Box 496
Estherville, Iowa 51334

2001 IOWA DEFENSE COUNSEL 37TH ANNUAL MEETING & SEMINAR
SEPTEMBER 26-28, 2001
DES MOINES, IOWA

TABLE OF CONTENTS

VIII. BREACH OF MEDICAL PROFESSIONALISM CLAIMS.

1. Oswald v. LeGrand
2. Elements of Oswald v. LeGrand
3. Damages

IX MOTION IN LIMINE ISSUES

1. Damages
2. Designation of Experts
3. Insurance Coverage
4 Retention of Defendant's Experts
5 Shared Insurance Coverage
6. Plaintiff as Underdogs
7. Sending a Message

X INSTRUCTIONS ISSUES.

1. Result of Treatment Instruction
2. Mistake in Treatment Instruction
3. Honest Errors in Judgment Instruction
4. Specialist's Duty of Care
5 Guarantee of Result Instruction
6 Alternate Methods of Treatment Instruction

XI. LIFE EXPECTANCY

XII. FRAUDULENT CONCEALMENT.

1. Elements
2. Level of Proof

XIII. FAULT OF RELEASED PARTIES.

1. Iowa Code Section 668.3(2)(b)
2. Burden of Proof
3. Beyer v. Todd

XIV. ISSUES OF VICARIOIUS LIABILITY

1 Current Trend
2. Agency
   (a) Apparent Agency
   (b) Implied Agency
   (c) Ostensible Agency

XV. DUTY TO "PASS ALONG" SAFETY ALERTS.

1. FDA Notices.

XVI. INFORMED CONSENT.

1. Elements
2. Patient Rule
3. Iowa Code Section 147.137

XVII. EXPERT WITNESS STANDARDS.

1. Iowa Code Section 147.139
2. Discretion of the Court
3. Nurses v. Physician
4. Unnecessary to Have an Expert

XVIII. CAUSATION.

1. Causation as an Element of the Prima Facia Case
2. Substantial Factor
3. Reasonable Degree of Probability

XIX. EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT ("EMTALA") CLAIMS.

1. EMTALA
2. History and Purpose of EMTALA
3. Patient Dumping
4. Possible EMTALA Claims

XX. CLOSING COMMENTS.

I. Iowa Code Section 668.11 Issues.

Section 668.11 governs the disclosure of expert witnesses in liability cases involving licensed professionals. The party in a professional liability case brought against a licensed professional pursuant to this chapter (668) who intends to call an expert witness of their own selection, shall certify to the court and all other parties the experts name, qualifications and the purpose for calling the expert within the following time period:

(a) Plaintiff – within 180 days of Defendant's Answer unless the court, for good cause not ex parte, extends the time of disclosure.

(b) Defendant-within 90 days of Plaintiff's certification

If a party fails to disclose an expert pursuant to this Section, the expert shall be prohibited from testifying in the action unless leave for the experts testimony is given by the court for good cause.

1. Purpose.

This statute is designed to require the Plaintiff to have his or her proof prepared at an early stage in the litigation in order that the professional does not have to spend time, effort, and expense in defending frivolous actions. Hantsbarger v. Coffin, 501 N.W.2d 501 (Iowa 1993).

2. Extension of Time.

The District Court has discretion in granting or denying a request for an extension of time to file designation of expert witnesses and that discretion is broad Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990). "Good cause" for extension of time to designate experts in professional liability cases must be more than an excuse, plea, apology, extenuation or some justification for resulting affect (Plaintiff's counsel's ignorance of this section was not "good cause.")

3. Exclusion of Testimony

Medical malpractice Plaintiff failed to show good cause for failing to designate his only expert until more than a year after the statutory deadline and therefore the expert was properly struck. Cox v. Jones, N.W.2d 470, 23 (Iowa 1991).

4. Is It a Professional Liability Case

An action in which patient sued a hospital for negligence in leaving patient unattended in a bathroom was not a "professional liability action" for purposes of Chapter 668. Landes v. Women's Christian Association, 504 N.W.2d 139 (Iowa App. 1993)

5. Necessity of Expert Testimony.

Dentist's alleged lack of care and technical procedures of removing a nickel bridge in patient's bottom left jaw and extracting two teeth was not evident without expert testimony even though procedure resulted in immediately swelling of patients face and eye. Swelling did not prove dental malpractice. Hill v. McCartney, 590 N.W.2d 52 (Iowa App. 1998). In rare instances in a professional liability case the alleged occurrence or event may be non-technical or so obvious that only common knowledge within the comprehension of a lay juror is needed to judge whether negligence occurred.

6. Admissions as Expert Testimony

A dentist's statement to a patient that he "did something freaky" was enough of an admission to stand as patient's expert testimony for trial in malpractice claim arising out of removal of a nickel bridge from patient's mouth and extraction of two teeth Hill v. McCartney, 590 N.W.2d 52 (Iowa App. 1998)

7. Treating Physicians.

Designation or disclosure of the opinions and testimony of an expert who has not been retained in anticipation of litigation or for trial may be treated differently under Rule 125 than Iowa Code Section 668.11, depending upon the nature of the opinions and circumstances under which they were formed. Rule (125) itself specifically provides that "nothing in this rule shall be construed to preclude a witness from testifying to: (1) knowledge of the facts obtained by the witness prior to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge. See IRCP 125(a)(1) However, a treating physician who acquires factual knowledge or forms mental impressions and opinions in the normal course of care, diagnosis, and treatment of a patient does not have to be disclosed as a Rule 125 expert witness, and the physician is not required to sign a Rule 125 answer. Day v. McIlrath, 469 N.W. 676 (Iowa 1991). A treating physician's testimony may touch upon matters, that are more closely related to litigation than to the diagnosis, care, and treatment of a patient. Opinions regarding whether another physician violated a proper standard of medical care, whether a particular event caused the condition for which treatment is being rendered, and the extent of any impairment suffered by a Plaintiff may be matters that fall outside the scope of opinions and mental impressions formed in the regular course of treatment and care of a patient. To the extent that the treating physician holds such opinions, Rule 125 may apply, as does Iowa Code Section 668 11. Cox v. Jones, 470 N.W.2d 23 (Iowa 1991); T. Riley, Trial Handbook for Iowa Lawyers, Section 54.5.

8. Extension of Deadlines.

The deadlines imposed by Section 668.11 can only be extended by leave of court, and the trial court has broad discretion in deciding whether to grant such an extension Donovan v. State, 445 N.W.2d 763 (Iowa 1989); Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990).

II RCP 125 Issues.

1. RCP 125(a).

RCP 125(a) sets forth those rules relevant to discovery of facts known, mental impressions and opinions held by an expert whom the other party expects to call as a witness at trial.

2. Scope of Rule 125.

Where discovery has been undertaken pursuant to Rule 125, the expert's trial testimony may not be inconsistent with or go beyond the fair scope of the expert's testimony in the discovery proceedings, as set forth in the Interrogatory answer, deposition, report or supplement thereto See IRCP 125(d)

3. Discretion Regarding IRCP 125

The trial court has broad discretion in applying this rule and may limit, or even exclude expert opinions that have not been disclosed either in the original discovery responses or supplements served pursuant to RCP 125(e). Milks v. Iowa Oto-Head and Neck Specialists, P.C., 519 N.W.2d 801 (Iowa 1994). But note, where no prejudice to the party seeking exclusion would occur, the court may in its discretion allow a change of expert testimony. Beeman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247 (Iowa 1993).

4. Treating Physicians.

The rule governing discovery of experts' facts and opinions only subjects to discovery opinions and facts acquired by the expert in anticipation of litigation or for trial, and does not preclude expert from testifying to facts and opinions derived prior to being retained as expert, and thus testimony of treating physician is generally not subject to discovery under that rule. Morris-Rosedail v. Schechinger, 576 N.W.2d 609 (Iowa App. 1998) (NOTE: This is not a professional liability case.)

5. Supplementation of Responses.

IRCP 125(e), requiring a party to supplement his or her answers to discovery directed opinions held by expert, is to avoid surprise to litigants and to allow parties to formulate their positions on as much evidence as is available. Golden Circle Air, Inc. v. Ferry, 543 N.W.2d 629 (Iowa App. 1995). Trial court was correct in allowing party to redepose a physician because of physician's changed expert testimony, which was based on an x-ray surfacing after deposition of the expert. Beeman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247 (Iowa 1993).

6. Continuing Duty to Supplement

A party responding to interrogatories has a continuing duty to supplement responses concerning identity, subject matter and substance of testimony of expert witnesses. Krugman v. Palmer College of Chiropractic, 422 N.W.2d 470 (Iowa 1988.); RCP 125(c). Failure to do so may result in preclusion of the experts' testimony.

III. Fees for Taking Expert's Deposition.

1. RCP 125(f).

There are no specific rules for determining a fair expert's fee in RCP125(f).

2. Reasonable Relationship

The treating physician's deposition fee should bear some reasonable relationship to the physician's customary hourly charge for patient care and consultation. Pierce v. Nelson, 519 N.W.2d 471 (Iowa 1993). (Orthopedic surgeon's $500.00 per hour fee for deposition testimony was not "totally outrageous.") The proper standard, under the rule, is a fee that is reasonable and the party defending expert's fee must produce sufficient evidence to support a finding of reasonableness.

3. When a court is asked to determine the reasonableness of a fee of an expert witness, the court should measure that request by the following factors:

a Witness' area of expertise
b. Education and training required to provide expert insight which is sought.
c Prevailing rates of other comparable respected available experts.
d. Nature, quality and complexity of discovery responses provided.
e Fee actually being charged to the party who retained expert.
f Fees traditionally charged by experts on related matters.
g. Any other factor likely to be of assistance to the court in balancing the interest in compensating experts for participation in litigation against the interest in preventing opposing parties from obtaining expertise free of cost.
h. In the case of treating physicians, the reasonable compensation for loss by virtue of the physicians required participation of legal proceedings. Pierce v. Nelson, 509 N.W.2d 471 (Iowa 1993)

IV. Peer Review and Credentialing Issues

1. Hospital Peer Review

"Peer review records" are privileged and confidential and are not subject to discovery, subpoena, or other means of legal compulsion for release to a person other than an affected licensee or a peer review committee and are not admissible in evidence in a judicial or administrative proceeding other than a proceeding involving licensee discipline or a proceeding brought by a licensee who is the subject of a peer review record and whose competence is at issue. Iowa Code Section 147.135.

2. What is Peer Review?

"Peer Review" means evaluation of professional services rendered by a person licensed to practice a profession. Iowa Code Section 147.1(2)(d).

3. Statutory Privilege.

The statutory privilege for writings and other records generated by a peer review committee precluded medical malpractice Plaintiff's discovery of documents generated by defense expert's review of Defendant hospital anesthesia department, even though review was not related to specific licensee. Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996).

4. Peer Review v. Credentialing

Because the privilege has "broad meaning", claims of privilege from production of materials that are evaluations of professional services rendered by an agent or member of the medical staff of a licensed hospital may be privileged. Determination must be made whether the records are peer review, or otherwise. If peer review, there is no production because privilege attaches. If documents are "credentialing" records, whether they are subject to discovery is less clear. In Logue v. Veleze, 699 N.E.2d 365 (N.Y.Supp. 188), the appellate court held that initial and renewal applications for hospital staff privileges come within the scope of a privilege protecting records related to the performance of the quality assurance review function of a hospital and, hence, are not discoverable in a medical malpractice action.

V. Negligent Credentialing.

1 Although many states have done so, Iowa Supreme Court has not specifically recognized a claim against a hospital for negligent credentialing and retention of a staff physician.

2 Necessity of expert testimony. Since the competency and medical judgment of a licensed professional would be at issue, expert testimony would be necessary to establish a prima facia case of negligent credentialing and retention of a staff physician. Thompson v. Embassy Rehabilitation Care Center, 604 N.W.2d 643, 646 (Iowa 2000)

VI. Governmental Immunity for Emergency Response.

1. Statute

Iowa Code Section 670.4(11) provides that a municipality shall be immune from liability for claims based upon or arising out of an act or omission in connection with an emergency response including, but not limited to, acts or omissions in connection with emergency response communication services

2 Constitutionality.

Iowa Code Chapter 670, which governs the tort liability of governmental sub-divisions, subjects every city to liability for the torts of its officers and employees unless such torts fall within exemptions spelled out in Section 670 4. Baker v. City of Ottumwa, 560 N.W.2d 582 (Iowa 1997).

3. Municipalities

County Hospitals, EMT's, and First Responders are "municipalities" as defined by Iowa Code Chapter 347 of the Code. Kulish v. Ellsworth, 566 N.W.2d 885, (Iowa 1997).

4. Fact Question Under Section 670 4(11).

Did the alleged acts of negligence arise separately from the emergency response for purposes of statutory immunity? This is typically a question of fact and, accordingly, the court would not conclude as a matter of law that the Hospital is immune from liability under the emergency response exception. Keystone Electrical Mfg. Co. v. City of Des Moines, 586 N.W.2d 340, 350 (Iowa 1998)

VII Spoliation of Evidence

1. Prima Facia Case.

To establish a prima facia case for medical malpractice, the Plaintiff must demonstrate the applicable standard of care, the violation of the standard of care, the causal relationship between the violation and the harm allegedly suffered by the Plaintiff. Kennis v. Mercy Hosp. Med. Ctr., 491 N.W.2d 161, 165 (Iowa 1992).

2 Spoliation.

It is a well-established legal principle that the intentional destruction of, or the failure to produce, documents or physical evidence relevant to the proof of an issue in a legal proceeding supports an inference that the evidence would have been unfavorable to the party responsible for its destruction or non-production. Hendricks v. Great Plains Supply Co., 609 N.W.2d 489, 491 (Iowa 2000). When established, the inference is regarded as an admission, by conduct, of the weakness of the party's case. Edward W. Cleary, et al., McCormick on Evidence, §273, at 808 (3d ed. 1984); Philips v. Covenant Clinic, 625 N.W.2d 713 (Iowa 2001)

3. Inference.

The inference can arise in a variety of circumstances, including medical malpractice cases involving the failure to produce relevant medical records. See generally Thomas G. Fischer, Annotation, Medical Malpractice, Presumption or Inference From Failure of Hospital or Doctor to Produce Relevant Medical Records, 69 ALR 4th 906, (1989) and Supp. 2000.

4. Intentional Destruction.

The inference can only be based upon the intentional destruction of evidence. Hendricks, 609 N.W.2d at 491. It is not warranted if the disappearance of the evidence is due to mere negligence or the evidence was destroyed during a routine procedure.

5. Control

The missing evidence must be within the control of a party whose interest would naturally call for its production. Quint Cities Petroleum Company v. Maas, 143 N.W.2d 345, 348 (Iowa 1966)

6. In Philips v. Covenant Clinic, 625 N.W.2d 714 (Iowa 2001), the Clinic's failure to produce patient medical records did not rise to spoliation of evidence inference, and without such inference, executor of patient's estate was unable to establish proximate cause for purposes of a medical malpractice claim against Clinic and doctors.

VIII. Breach of Medical Professionalism Claims.

1. Oswald v. LeGrand.

The Iowa Supreme Court carved out a cause of action based on a breach of medical professionalism in Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990). In Oswald, the Plaintiff claimed that the care provided by the Defendants fell below the standard of medical professionalism understood by laypersons and expected by them. The conduct complained of in Oswald v. LeGrand was allegedly extremely rude behavior or gross insensitivity coupled with an unusual vulnerability on the part of the person receiving professional services.

2. Elements of Oswald v. LeGrand.

In order to recover, a Plaintiff must produce substantial evidence of extremely rude behavior or gross insensitivity coupled with an unusual vulnerability on the part of the person receiving professional services. A professional person does not answer in tort for rudeness even in a professional relationship.

3 Damages

Plaintiff must establish substantial and severe emotional distress to recover for emotional distress damages. Emotional distress must be serious or severe. This is a limiting requirement for the court to "weed out" non-compensable claims. Barnhill v. Davis, 300 N.W.2d 104, 107 (Iowa 1981).

IX Motion in Limine Issues

1 Damages.

Evidence regarding any claim of damages that was not properly and timely disclosed in response to Defendant's discovery pleadings produced to Plaintiffs should be excluded for failing to comply with the discovery rules. See IRCP 136(e); IRCP 134(b)(2)(B)

2. Designation of Experts.

Any expert not properly designated should be excluded from testifying. Any expert opinions that have not been properly disclosed pursuant to the Iowa Rules of Civil Procedure and the Scheduling Orders of the Court should be excluded. See Dunlavey v. Economy Fire & Casualty Company, 526 N.W.2d 845, 859 (Iowa 1995)

3. Insurance Coverage.

Evidence of insurance coverage for any claim should be excluded pursuant to Iowa Rule of Evidence 411

4. Retention of Defendant's Experts.

Plaintiffs and their counsel should be prohibited from mentioning that any of Defendants' experts were contacted or retained by an insurance carrier. See Strain v. Heinssen, 434 N.W.2d 640 (Iowa 1989), holding plaintiff not entitled to cross-examine defense experts regarding their retention by defendant physician's malpractice insurer.

5 Shared Insurance Coverage

Plaintiffs and their counsel should be prohibited from mentioning that any of the Defendants experts are or have been insured by the same insurance carrier. See Wallace v. Leedhancocke, 949 S.W.2d 624, 628 (Ky Ct. App. 1996) ("The mere fact that the two physicians [expert and defendant] shared a common insurance carrier- absent a more compelling degree of connection – does not clearly evince bias by the expert, and its arguable relevance or probatable value is insufficient to outweigh the well established rule as to the inadmissibility of evidence as to the existence of insurance ")

6 Plaintiff as Underdogs.

7 Sending a Message.

X. Instructions Issues

1. Result of Treatment Instruction.

While the result of the treatment administered to the Plaintiff by a physician is not in itself evidence of negligence, it is a circumstance that may be considered by the jury in

determining whether the result was caused by the physician's negligence Daiker v. Martin, 250 Iowa 75, 81, 91 N.W.2d 747, 750 (1958)

2. Mistake in Treatment Instruction

Any instructions to the effect that the defendant doctors "cannot be found negligent" merely because of a mistake in the treatment of their patients should not be given. Instructions of this nature are not statements of the law. They are comments on potential factual scenarios in which a standard of care may or may not have been adhered to. Peters v. Peters by Vander Kooi, 494 N.W.2d 708, 712-14 (Iowa 1993)

3. Honest Errors in Judgment Instruction

The same rational regarding mistake in treatment should apply to honest errors of judgment. Peters, 494 N.W.2d 714

4 Specialist's Duty of Care

Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner. The violation of this duty is negligence Iowa Civil Jury Instruction 1600.3; Perkins v. Walker, 406 N.W.2d 189, 191 (Iowa 1987).

5 Guarantee of Result Instruction.

Instructions stating something similar to: "Nor does a physician, in accepting employment for the purpose of making a diagnosis in treatment, make any implied guarantee of results" are not proper instructions and should not be given Bratton v. Bond, 408 N.W.2d 39, 44, (Iowa 1987).

6 Alternate Methods of Treatment Instruction.

In order for an instruction on alternative methods of treatment to have an adequate factual basis in the record, two elements must be shown by substantial evidence These are:

(1) That, with respect to a particular act or omission upon which the claim of negligence is predicated, there was more than one method of treatment acceptable to a physician exercising the degree of skill, care and learning ordinarily possessed and exercised by the physicians in similar circumstances; and

(2) That the physician considered these alternatives and exercised his or her best professional judgment in choosing the methods of treatment that were utilized

Where the testimony presented by the defendant did not connect a general statement regarding alternate methods of treatment to the specific acts or omissions that are alleged in the litigation or submitted to the jury, the defendant doctor is not entitled to submission of an instruction on alternate methods of treatment. Peters by Peters v. Vander Kooi, 494 N.W.2d 708, 713 (Iowa 1993)

XI Life Expectancy.

Life expectancy is relevant to future damages, which should be projected from the time of trial Miller v. Bonar, 337 N.W.2d 523, 530 (Iowa 1983). Compare Commissioner's Standard Ordinary Mortality Tables v United States Life Tables.

XII Fraudulent Concealment.

1 Elements.

To establish fraudulent concealment, the general rule is that a Plaintiff must show that (1) the Defendant did some affirmative act to conceal the cause of action and (2) the Plaintiff exercised diligence to discover the cause of action Pride v. Peterson, 173 N W 2d 549 (Iowa 1970) However, the close relationship between patients and physicians "gives rise to duties of disclosure which may obviate the need for a patient to prove an affirmative act " Langner v. Simpson, 533 N.W.2d 511, 523 (Iowa 1995).

2 Level of Proof.

Despite this special relationship, which calls for a reduced level of proof of fraudulent concealment in certain cases, the acts of concealment must nevertheless be independent of the alleged acts relied upon to establish liability Van Overbeke v. Youberg, 540 N.W 2d 273 (Iowa 1995)

XIII Fault of Released Parties.

1. §668 3(2)(b)

Iowa Code Section 668.3(2)(b) explains that in the trial of a case involving the fault of more than one party to the claim, the District Court should instruct the jury to answer special interrogatories concerning the percentage of the total fault allocated to each claimant, defendant, third party defendant, and persons released from liability under Section 668.7

2. Burden of Proof.

Iowa Code Chapter 668 does not specify who has the burden of proving the fault of released parties. Ordinarily the burden of proof on an issue is upon the party who would suffer loss if the issue were not established. Iowa R App. P 14(f)(5).

3. Beyer v. Todd.

If one Defendant has settled, the burden of proof regarding the fault of that Defendant falls on the remaining Defendant Beyer v. Todd, 601 N.W.2d 35 (Iowa 1999); Iowa Civil Jury Instruction 400 10 If that burden is not met, there will be no apportionment of fault as to settling party.

XIV Issues of Vicarious Liability.

1 Current Trend.

It has been stated that "one of the hottest issues" in medical malpractice litigation is whether a hospital, HMO, or insurance company can be held vicariously liable for the negligence of its independent contractor physicians See Medical Malpractice Reports, February 2000, Volume 14, No 2 (Matthew Bender & Company, Inc.)

2. Agency

The Iowa Supreme Court has not specifically held that agency principles may be used to hold a hospital, HMO, or insurance company vicariously liable for the negligence of its independent contractor physicians even though the Court came close to doing so in Biddle v. Sortori Memorial Hospital, 518 N.W.2d 795 (Iowa 1994). However, a number of states have addressed this issue under various factual settings

a. Apparent Agency.

In Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788 (1993), the Illinois court held that a genuine issue of material fact prevented summary judgment for hospital in an action by a heart attack patient who alleged that the hospital's emergency room physicians had failed to diagnose the patient's heart condition. Although the hospital claimed that the emergency room physician was an independent contractor, the court held that the patient was entitled to try and prove to a jury that the physician was acting as the hospital's agent. The court held that unless the patient knows or should have known that the physician providing treatment is an independent contractor, vicarious liability can attach to a hospital for the medical malpractice of its physicians under the doctrine of apparent authority. The court listed the following elements of the apparent authority claim: (1) that the HMO held itself out as the provider of health care, without informing the patient that the care was given by independent contractors; and (2) that the patient justifiably relied on the conduct of the HMO by looking to the HMO to provide health care services, rather than to a specific position. Apparent agency was a question of fact.

b. Implied Agency.

In Petrovich v. SHARE Health Plan of Illinois, Inc., 696 N.E.2d 356 (Ill. 1998), the court allowed the plaintiff to proceed under the theory of implied authority or implied agency. Implied authority, the court said, is actual authority, circumstantially proved. For example, implied authority arises where the facts and circumstances show that the defendant exerted sufficient control over the alleged agent so as to negate that person's status as an independent contractor, at least with respect to third parties. The cardinal consideration is whether the alleged agent retains the right to control the manner of doing the work.

Implied agency and apparent agency claims seem more prevalent in those states that have damage caps and are commonplace where the physician has low limits. Areas ripe for this type of claim are emergency room, radiology, anesthesia, and pathology. The Wisconsin court in Kushishian v. Port, 481 N.W.2d 277 (Wis. 1992), held that the agency can be a basis for malpractice claims beyond the emergency room setting.

c. Ostensible Agency

Many courts have begun to evoke the ostensible agency doctrine. Although various labels are used by the courts, ostensible agency is usually applied as one of two theories:

(a) Agency by estoppel; or
(b) Apparent agency in situations where the hospital causes a patient

to believe that a physician is an agent or employee of the hospital. (See apparent agency above.)

Agency by estoppel is the theory that a hospital may be estopped from denying that physicians are its agents when the plaintiff patient can show the following:

1. Patient consent was based on reasonable belief that the physician was the employee of the hospital; and

2. The hospital intentionally or by lack of ordinary care caused such a belief or knew of such belief and failed to notify the patient that the belief was mistaken; and

3. The patient reasonably relied upon such a representation or admission Lopez v. Central Plains Regional Hospital, 859 S.W.2d 600 (Tex. 1993)

XV Duty to "Pass Along" Safety Alerts.

1. FDA Notices.

From time to time, the Food and Drug Administration, as well as various manufacturers of medical devices, will "pass along" to health care providers safety alerts. Does the practitioner have the obligation to pass along safety alerts to current and former patients? The Indiana court in Harris v. Raymond, 715 N.E.2d 388 (Ind. 1999), held that a dentist, who inserted the TMJ implants in question into the plaintiff's jaw in 1988, had a duty to make reasonable efforts to contact both current and former patients to pass along the safety alerts issued by the FDA and the manufacturer. See Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999), where Iowa adopted a post-sale duty to warn as well as Re-statement (Third) of Torts: Products Liability §10 (1977)

XVI Informed Consent.

1. Elements.

To demonstrate a lack of informed consent a plaintiff must establish: 1) the existence of a material risk unknown to the plaintiff; 2) a failure to disclose that risk on the part of the physician; 3) that disclosure of the risk would of lead a reasonable patient in plaintiff's position to reject the particular medical procedure utilized or to choose a different course of treatment; and 4) injury Kennis v. Mercy Hosp. Med. Center, 491 N.W.2d 161 (Iowa 1992)

2. Patient Rule.

Iowa has adopted the patient rule, which means that a patient's right to make an informed decision about submitting to a particular medical procedure places a duty on a doctor to disclose all material risks involved in the procedure. That duty is shaped not by what the medical community would deem material, but by the patient's need for information sufficient to make a truly informed and intelligent decision. Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991).

3. Iowa Code Section 147.137

Iowa Code Section 147.137 provides, in part, as follows:

"A consent in writing to any medical or surgical procedure or course of

procedure in patient care, which meets the requirements of this section shall create a presumption that informed consent was given. A consent in writing meets the requirements of this section if:

(a) Sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegic, paraplegic, the loss of function of any organ or limb, or disfiguring scars associated with such procedures, with the probability of each such risk if reasonably determinable

(b) Acknowledges that the disclosure of that information has been made and all questions asked about the procedure or procedures have been answered in satisfactory manner.

(c) Signed by the patient for whom the procedure is to be performed, or if the patient for any reason lacks leave of capacity to consent, is signed by a person who has legal authority to consent on behalf of that patient in those circumstances.

XVII Expert Witness Standards.

1 Section 147 139.

Iowa Code Section 147 139, in part, states:

> "If the standard of care given by a physician and surgeon licensed pursuant to Chapter 148, or osteopathic physician and surgeon licensed pursuant to Chapter 150A ,or a dentist licensed pursuant to Chapter 153, is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical or dental qualifications relate directly to the medical problem or problems at issue, and the type of treatment administered in the case."

2. Discretion of the Court.

The Supreme Court is committed to a liberal rule on admissibility of expert testimony, and admission of such testimony rests within the sound discretion of the District Court Carolan v. Hill, 553 N W.2d 882 (Iowa 1996).

3. Nurses v. Physician.

A nurse was not qualified to give expert opinions as to her observations regarding practice of surgeons and physicians with reference to pre-operative conferences in a malpractice action against a surgeon who failed to hold such a conference. The nurse's testimony was insufficient to establish the standard of care the doctor had to meet Bray v. Hill, 517 N W 2d 223 (Iowa 1994). However, in Carolan v. Hill, the Court held that even though a nurse anesthetist was not a physician, the nurse anesthetist was qualified to testify as an expert in a medical malpractice action alleging the patient's ulnar nerve injury resulted from improper positioning and padding of the patient's arms during defendant physician's administration of anesthesia during surgery. In Carolan, the nurse anesthetist's qualifications related directly to the precise issues in the case and the nurse had twenty-seven (27) years of practice and had delivered anesthesia to approximately 17,000 patients

4. Unnecessary to Have an Expert.

In a case involving a patient who suffered a chemical burn to his arm caused by sodium pentothal that the anesthesiologist injected into his vein, which then infiltrated or escaped from the vein into the surrounding tissues, it was not required or necessary to present expert testimony in order to establish an anesthesiologist's negligence because it was within the common experience of lay persons that such occurrence in the ordinary course of things would not have happened if reasonable care had been used. Welte v. Bello, 482 N.W.2d 437 (Iowa 1992). (A res ipsa case.)

XVIII. Causation.

1. Causation as an Element of the Prima Facia Case.

To establish a prima facia case of malpractice, the plaintiff must offer admissible evidence that establishes: 1) the applicable standard of care; 2) this standard has been violated; and 3) a causal relationship between the violation and the alleged harm. Kennis v. Mercy Hospital Medical Center, 491 N.W.2d 161, 165 (Iowa 1991); Iowa Civil Jury Instruction 1600.6.

2. Substantial Factor.

The plaintiff must show that the negligence of the practitioner was a substantial factor in bringing about the injury or causing the injury. Speed v. State, 240 N.W.2d 901, 905 (Iowa 1976).

3. Reasonable Degree of Probability.

The casual relationship between the alleged negligence and the subsequent injury must be established within a reasonable degree of probability. Bradshaw v. Iowa Methodist Hospital, 101 N.W.2d 167, 172 (Iowa 1960).

XIX. Emergency Medical Treatment and Active Labor Act ("EMTALA") Claims.

1. EMTALA.

The EMTALA states in relevant part:

> "In the case of a hospital that has a hospital emergency department if any individual comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department to determine whether or not an emergency medical condition exists."
> 42 U.S.C. §1395(d)(d)

2. History and Purpose of EMTALA.

President Reagan signed the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA) into law on April 7, 1986. EMTALA was part of COBRA. EMTALA requires that hospitals having emergency departments, and which participate in the Medicare program, provide a medical examination within the capability of the hospital's emergency department to any person requesting one. The examination's purpose is to

determine whether the person is suffering from an "emergency medical condition" as the term is defined under EMTALA. An individual found to be in an emergency medical condition must either be provided with medical treatment or transferred in accordance with EMTALA. A person in an emergency medical condition must be transferred without restriction once stabilized. If the patient has not been stabilized, however, the hospital is not permitted to transfer that patient except for medical reasons. See 42 U.S.C. § 1395(d)(d)(c)(1)(A)(ii); Brodersen v. Sioux Valley Memorial Hospital, et al., 902 F.Supp 931; 1995 U.S. Dist. Lexis, 13836; 43 Fed. R. Evid. Serv (Callghan) 567.

3. Patient Dumping.

The EMTALA, commonly known as the "patient anti-dumping act", was enacted in response to a growing concern about the provision of adequate emergency room medical services to individuals who seek care, particularly the indigent and uninsured.

4 Possible EMTALA Claims.

Potential claims that may be pursued under EMTALA are:

(a) Disparate treatment claims.

Whether the Defendant provided an appropriate medical screening to determine whether an emergency medical condition exists for any individual who comes to the emergency medical department requesting treatment In other words, did the hospital provide the same level of treatment, which the hospital would normally provide to patients in similar medical conditions, and to stabilize any emergency condition discovered?

(b) Failure to stabilize claim.

Whether the hospital has determined that a patient has an emergency medical condition, and if so, has the hospital stabilized the patient before the transfer

(c) Failure to provide emergency care due to improper motive.

XX. Closing Comments

"Legal Malpractice: Dissolution of Marriage – Inadequate Settlement"

George A. LaMarca*

PART I

This is the first in a two part series on the duties of a lawyer in dissolution cases and the defenses to claims of legal malpractice arising out of an inadequate settlement. Part one deals with the duty issues and part two will deal with the defense issues.

I. Introduction

The multi-million dollar jury verdicts against attorneys reported below and several substantial confidential settlements in Iowa expose the diligence required of lawyers in dissolution of marriage cases. Where substantial assets are involved, the attorney's obligations in settlement or trial is directly dependent upon effective, multifarious investigations to determine all assets, their actual value, income tax consequences of settlement terms, and even long-term estate planning advice.

- *Client files a legal malpractice action in a marriage dissolution proceeding for negligence in advising settlement based on inadequate financial information regarding the husband's estate. The Supreme Court of Connecticut found the jury verdict of 1.5 million dollars was not excessive.* Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, *646 A.2d 195 (Conn. 1994).*

- *Client brought an action against her attorney for failing to properly represent her during a marriage dissolution proceeding. The trial court entered*

judgment on a jury verdict for the plaintiff in the amount of $6,834,926.00. Baldridge v. Lacks, 883 S.W.2d 947 (Mo. Ct. App. 1994).

- *After the jury returned a verdict finding a lawyer's negligence was responsible for $960,000.00 in damages, the trial court granted a motion for judgment notwithstanding the verdict, only to have the appellate court reinstate the jury verdict and remove the jury's finding that the client was 25% comparatively negligent for relying on the law firm's advice. Tarleton v. Arnstein & Lehr, 719 So.2d 325 (Fla. Dist. Ct App. 1998)*

Both a private study and an ABA study have shown that a substantial amount of all legal malpractice claims involve the activity of negotiation and settlement of dissolution of marriage cases. See, Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 Vand. L. Rev. 1657, 1739 (1994).

II. Typical Fact Pattern in a Legal Professional Malpractice Action Regarding a Settlement Without Full Knowledge of All Assets

The plaintiff will allege he/she agreed to the settlement on the advice of the defendant attorney who failed to discover important information about the other spouse's assets. For example, the attorney hired an accountant who valued the marital estate, but the accountant's tally was deficient because of several oversights by the attorney, including the attorney's failure to:

- locate a safety deposit box;
- locate tax-free municipal bonds (which are not be reported on tax returns);
- verify the value of the adverse spouse's profit-sharing plan;

- search for assets the adverse spouse concealed;
- contact the United States Patent Office to verify the existence of certain patents the adverse spouse held (and then sold post-settlement);
- discover a million-dollar life insurance policy naming the adverse spouse's secretary as beneficiary; and
- properly value private company stock.

As a result of the attorney's negligence, the plaintiff agreed to a settlement that "was not reflective of the plaintiff's legal entitlement," and thereby sustained actual economic losses.

The plaintiff's expert held the following opinions:

1) the defendant attorney had not conducted an adequate investigation and evaluation of the adverse spouse's business interests and assets;

2) the defendant attorney had not properly prepared for trial;

3) as a result of the defendant attorney's negligence, the plaintiff agreed to a distribution of the marital estate and an alimony award that was not fair and equitable under the law; and

4) the plaintiff would have received a greater distribution of the marital estate and additional alimony had the plaintiff been competently represented.

III. The Standard of Care

In a lawyer malpractice case the plaintiff must demonstrate:

1) the existence of an attorney-client relationship giving rise to a duty;

2) that the attorney, either by an act or a failure to act, violated or breached that duty;

3) that the attorney's breach of duty proximately caused injury to the client; and

4) that the client sustained actual injury, loss, or damage. Dessel v. Dessel, 431 N.W.2d 359, 361 (Iowa 1988); Burke v. Roberson, 417 N.W.2d 209, 211 (Iowa 1987).

Iowa lawyers are bound to fully to perform the work they agreed to undertake. Devine v. Wilson, 373 N.W.2d 155, 157 (Iowa Ct. App. 1985). In determining the scope of this duty, courts embrace the fiduciary role of the attorney and the heavy responsibility this imposes to fully and competently protect the client's interests. Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977); Healy v. Gray, supra; Jamison v. Weaver, 46 N.W. 996 (Iowa 1890). From the framework of these obligations, it is clear that Iowa lawyers must act diligently to discover and properly value all marital assets and to give advice with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks. In cases involving substantial assets, it is clearly the standard of care to hire investigators, CPAs, stockbrokers, and asset valuation experts. The attorney's duty, however, is not discharged by the employment of experts. The attorney must direct and supervise the expert's work, and thus remains ultimately responsible to the client for the scope and reasonableness of the expert's work.

In a sense, the post-settlement malpractice claims are similar to the lack of informed consent malpractice claims against the medical profession. For example, Rule 1.4 of the Model Rules of Professional Conduct, provides both that:

a) a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and

b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(See In re the matter of the Proposed Adoption of the American Bar Association Rules of Professional Conduct, Supreme Court of Iowa, filed March 8, 2000.)

The attorney's responsibility to discover all marital assets, an accurate income and expense history are inherent in a dissolution case and are fundamental to satisfactorily resolving the issues of asset division, child support, and alimony. The lawyer has a duty to fully explain all of the terms of a settlement and to render competent legal advice on the merits of the settlement versus trial adjudication. See McWhirt v. Heavey, 550 N.W.2d 327, 332 (Neb. 1996).

The attorney's duty also includes the effective determination as to whether or not the client has other claims arising out of the other spouse's conduct. When it is discovered that marital assets have been concealed, transferred, or squandered, the attorney must consider bringing other causes of action. A punitive damage claim, while not an issue in a dissolution action, is a remedy for fraud and other intentional torts committed upon a spouse during the marriage. Moreover, the discovery of evidence giving rise to these additional causes of action can provide substantial leverage on behalf of the damaged spouse even when such causes of action are not formally filed. Thus, the investigation and prosecution of fraud claims against spouses who hide or dissipate assets, or battery claims has been extolled as within the due diligence ambit of a lawyer practicing family law. See, *See You In Divorce Tort*, 30 ABA Journal, January, 1999; Domestic Torts, Family Violence, Conflict and Sexual Abuse; and Karp & Karp (West Group 1989).

The attorney's duty to represent and protect his client does not extend beyond reasonable bounds. Steinbach v. Meyer, 412 N.W.2d 917, 918 (Iowa Ct. App. 1987). It follows, also, that attorneys cannot be held liable simply because they are unsuccessful in persuading an opposing party to accept certain terms. Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992); see also, Baldridge v. Lacks, 883 S.W.2d 947 (Mo. Ct. App. 1994). Typically a dissolution client entrusts the discovery and valuation of assets to his/her lawyer. However, clients will often assume certain tasks in the process. When a question arises about the extent of a lawyer's duty to investigate a client's transaction, the Iowa Supreme Court has stated that the following principles are applicable:

> "Under certain circumstances it may be the duty of the lawyer to investigate the facts applicable to a transaction and report the results to the client. If the attorney should have inquired concerning the facts and did not, the client cannot be said to have been negligent in failing to disclose said facts. However, an attorney need not inquire into matters that do not pertain to the discharge of duties that he has undertaken. Likewise, an attorney need not make inquiry where the responsibility of the matter is assumed by the client," citing Hansen v. Wightman, 538 P.2d 1238, 1245 (Wash. 1975).

What is the scope of duty of the lawyer who is employed merely to review a settlement agreement that was amicably reached by the parties without prior representation? The analysis of the Iowa case law would indicate that the lawyer's obligation to the client would go no further than the limited scope of the engagement. Several principles of law are pertinent: (1) an attorney need not inquire into matters that do not pertain to the discharge of duties that he has undertaken, and (2) an attorney need not make inquiry where the responsibility of the matter is assumed by the client. Steinbach v. Meyer, 412 N.W.2d 917, 919 (Iowa Ct. App. 1987). In Steinbach, the

plaintiffs handled their own affairs with the bank in negotiating financing for a farmstead. The attorney's role was limited to redrafting a cattle feeding agreement presented to the bank as proposed security for the financing. When the client failed to obtain further credit, however, fault and damages were sought as flowing from an alleged breach of duty by the attorney. The Iowa Supreme Court stated "that which doesn't exist can bear no fruit," referring to the limited engagement of the attorney. Id. at 919. Steinbach seemingly provides a comforting analogy for the case where the lawyer was merely asked to review an already negotiated settlement. But hindsight can make even the simplest of tasks more complex. Thus, at the very least, the attorney hired merely to review an already agreed upon settlement should advise the client in writing of the limited scope of the engagement and the pitfalls of relying on their own resources to determine the extent and value of the marital assets. Inquiry should also be made as to whether the adverse spouse was in a position to conceal or dissipate marital assets or have hidden sources of income or benefits.

While the Iowa Supreme Court has left open the possibility that some shortcomings of a lawyer could be so plain that they may be recognized or inferred from the common knowledge or experience of laymen, expert testimony to prove negligence is the rule. Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975). Where the claim is that the attorney did not follow a specific request to discover or value assets or advise on the tax consequences of settlement terms, expert testimony would not be necessary. "It has generally been recognized that an attorney may be liable for all losses caused by his failure to follow with reasonable promptness and care the explicit instructions of his

client. Moreover, an attorney's honest belief that the instructions were not in the best interests of his client provides no defense to a suit for malpractice." Olfe v. Gordon, 286 N.W.2d 573, 577 (Wis. 1980). The attorney-client relationship in such contexts is one of agent to principal, and as an agent, the attorney "must act in conformity with his authority and instructions and is responsible to his principal if he violates this duty." Id., citing Ford v. Wisconsin Real Estate Examining Bd., 179 N.W.2d 786, 792 (Wis. 1970). While actions for disregard of instructions can be based upon fiduciary and contractual principles, the principal's cause of action for an agent's breach of duty may also lie in tort. "(I)f a paid agent does something wrongful, either knowing it to be wrong, or acting negligently, the principal may have either an action of tort or an action of contract." Restatement (Second) of Agency, sec. 401, Comment a, 238 (1958); see also, In re Pratt's Estate, 266 N.W. 230, 233 (Wis. 1936) ("It is elementary that a principal has a cause of action sounding in tort against his agent when the latter violates a duty that he owes to the former.").

"In accordance with rules governing the liability of agents toward their principals for violations of instructions . . ., an attorney's duty, where he is specially instructed, is to follow the instructions of his client, except as to matters of detail connected with the conduct of the suit, and he is liable for all losses resulting from his failure to follow such instructions with reasonable promptness and care." 7 C.J.S. Attorney and Client, s 148 (1937); see, Lally v. Kuster, 171 P. 961, 962 (Cal. 1918) ("We have here, then, a direct loss due to disobedience of the client's instructions, for which respondent (the attorney) is liable."); Trustees of Schools of Tp. 42 North v. Schroeder, 278 N.E.2d 431, 433 (Ill.

1971) ("Whenever an attorney disobeys the lawful instructions of his client he is liable for any loss which ensues from such act."); Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978) ("The relationship is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal."); see, Restatement (Second) of Agency, sec. 400, 235-36 (1958); Note, Attorney Malpractice, 63 Colum.L.Rev. 1292, 1302 n. 81 (1963). This rule has been applied in a professional liability action to allow recovery for negligence under ordinary tort principles, notwithstanding the agent's assertion that liability could be imposed solely under contract theory. See, McAlvain v. General Ins. Co. of America, 554 P.2d 955, 958-59, 959 n.1 (Idaho 1976). The Iowa Supreme Court has stated that the crux of a legal malpractice action lies in tort and that without negligence there can be no recovery. Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987). Arguably, this case is limited to its own facts, and given the broad responsibilities of an attorney and the lack of a definitive Iowa case setting forth the precise nature of an action for legal malpractice, the plaintiff attorney should plead negligence, breach of contract (oral or written per facts) and breach of fiduciary duty alternatively.

"Legal Malpractice: Dissolution of Marriage – Inadequate Settlement"

George A. LaMarca*

PART II

This is the second in a two part series on the duties of a lawyer in dissolution cases and the defenses to claims of legal malpractice arising out of an inadequate settlement. Part one dealt with the duty issues and part two deals with the defense issues.

V. Defenses to Legal Malpractice Claim for Failure to Discover Assets.

A. Curable Defect/Failure to Take Remedial Measures

If timely to do so, any neglect of the attorney that can be cured must be cured. Depending on when hidden assets are discovered after a settlement or judgment, certain remedial measures can (should) be taken. I.R.C.P. 252 provides certain limited grounds for vacating or modifying a judgment. "Irregularity or fraud practiced in obtaining it," I.R.C.P. 252(b), "and material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial, and was not discovered within the time for moving for a new trial under R.C.P. 244," are the two grounds that need to be scrutinized. I.R.C.P. 252(f) & 253. This procedure is not available if the attorney failed to act "with reasonable diligence." If there was fraud or deliberate concealment despite due diligence, then an exhaustion of the grounds for vacating or modifying the judgment should be instituted before prosecuting a legal malpractice action. While an action for fraud will lie against a spouse who deliberately

concealed assets, the burden of proof in fraud actions is substantial and the client is left with a precarious remedy. In cases where there was no sworn statement as to the adverse spouse's financial condition or insufficient discovery was propounded, fraud will not be provable. While an affidavit of financial status is required by Iowa Code § 598.13, an attorney cannot merely rely on the adverse spouse's representations as to their income and expense and extent and value of marital assets. The process of dissolution is adversarial, and, given the attorney's broad discovery powers, there can be no solace in the excuse that the errant spouse was not cooperative. Moreover, it is prudent to recognize the potential for fraud, and thus deception is not a defense if it could have been uncovered by reasonable measures.

B. Consent and Flood Gate Rationale

Many defendants have urged the courts to adopt an old common law rule whereby an attorney may not be held liable for negligently advising a client to enter into a settlement agreement because the client consented to the settlement. They argue that, as a matter of public policy, an attorney should not be held accountable for improperly advising a client to settle a case unless the advice is the product of fraudulent or egregious misconduct. They argue that such a rule is particularly appropriate when the court has reviewed and approved the settlement agreement. These arguments have been rejected by all modern day courts except Pennsylvania (and then in a narrow fashion).

The fact that a judge approved the settlement agreement is not controlling, nor should it be. The court's scrutiny does not serve as a substitute for the diligent investigation and preparation for which counsel is responsible. In every state except

Pennsylvania, a client is permitted to proceed with the theory that the attorney negligently presented or negotiated an agreement despite the fact that the client consented to settlement. In Muhammad v. Strassberger, McKenna, Messer, Shilobod and Gutnick, 587 A.2d 1346 (Pa. 1991), the Pennsylvania Supreme Court determined that an attorney is immune from malpractice based on negligence when the client consented to settlement. All other state court decisions after Muhammad, however, have uniformly rejected immunity for the attorney, permitting post-settlement malpractice actions to proceed in the same manner as the prototypical malpractice case. Thomas v. Bethea, 718 A.2d 1187 (Md. 1998) (where the court found the Muhammad decision was "not only inconsistent with most of the cases decided prior to its rendition, none of which are even mentioned in the opinion, but has been expressly rejected by all of the courts that have had the benefit of considering it."); Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, 646 A.2d 195 (Conn. 1994) (the court specifically rejected the defendant's argument for the adoption of the Muhammad common law rule whereby an attorney should not be held accountable for improperly advising a client to settle a case unless that advice is the product of fraudulent or egregious misconduct on the part of the attorney. The court opined that such a rule promotes the finality of settlements and judgments at the expense of a client who, in reasonable reliance on the advice of his or her attorney, agrees to a settlement only to discover that the attorney failed to exercise the degree of skill and learning required of attorneys under the circumstances, and would thus be fundamentally unfair); Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992) (finding a client who agrees to settlement may still maintain a malpractice action even without a showing of fraud, and

the fact that the settlement is fair does not preclude a finding that the attorney was incompetent in not obtaining a better settlement); Prande v. Bell, 660 A.2d 1055 (Md. Ct. Spec. App. 1995) (specifically holding that settlements entered into in earlier actions did not bar malpractice action as client had not had full and fair opportunity to litigate the issue of negligence of the attorneys); McCarthy v. Pedersen & Houpt, 621 N.E.2d 97 (Ill. App. Ct. 1993) (held that client was not precluded as a matter of law from bringing a legal malpractice claim on the fact that he had settled the underlying action after a proposed settlement agreement had been reviewed by independent counsel); Malfalbon v. Garcia, 898 P.2d 107 (Nev. 1995) (the Supreme Court of Nevada held that a fact issue as to whether the attorney was negligent in advising client to accept settlement precluded the dismissal, and reversed and remanded the district court's dismissal); Meyer v. Wagner, 709 N.E.2d 784 (Mass. 1999) (the court found the client may maintain a malpractice claim against the attorney concerning the advice on settlement in a divorce action and the client was entitled to recover even if the settlement had received judicial approval); McWhirt v. Heavey, 550 N.W.2d 327 (Neb. 1996) (specifically objecting the defendant's argument that an acceptance of the settlement proposal is an absolute bar to a subsequent professional negligence action against his or her attorney following Grayson v. Wofsey); see also, Rigelhaupt, J., Attorney's Liability for Negligence in Cases Involving Domestic Relations, 78 A.L.R.3d 255 (1977).

An adjunct to "the client consented to the settlement" rationale is the seemingly noble cry that there should be finality to litigation. However, courts have not embraced

this so called "flood gate" argument. First, the courts counter that they have created no new claim or theory of recovery. Second, as one court reminds us:

> Plaintiffs must allege particular facts in support of their claims of attorney incompetence and may not litigate complaints containing mere generalized assertions of malpractice. We are mindful that attorneys cannot be held liable simply because they are not successful in persuading an opposing party to accept certain terms. Similarly, we acknowledge that attorneys who pursue reasonable strategies in handling their cases cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice.

Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992); see also, Baldridge v. Lacks, 883 S.W.2d 947 (Mo. Ct. App. 1994) (court agreed that public policy strongly favors the peaceful settlement of disputes, and the settled cases should not be readily revisited, particularly in marriage dissolution cases; however, balanced against the consideration was the common law right of a client to maintain an action seeking civil liability for negligence, and the court accordingly refused to adopt a bright line rule that protects attorneys from liability where plaintiff has made an admissible case of negligence).

C. Statute of Limitations

The true nature of the action rather than the theory of recovery determines the proper statute of limitations. Thus, the nature of the right sued upon and not the elements of relief sought is pivotal. Venard v. Winter, 524 N.W.2d 163, 165 (Iowa 1994), citing Barrett v. Burt, 250 F.Supp. 904, 905 (S.D. Iowa 1966) (interpreting Iowa Code § 614.1). The attorney-client relationship in Venard v. Winter was created pursuant to an oral contract and the injury was the loss of Venard's property. Contrary to Winter's contention, the court held Venard did not incur personal injury within the meaning of the

two-year statute of limitations. The court specifically distinguished "damages to property" for which a five-year statute is applicable, and "injuries to relative rights" for which a two-year statute of limitations would be applicable. Iowa Code § 614.1(2). While it is difficult to imagine a lawyer's malpractice causing a personal injury to the client, the "real nature of the action" test would apply the two-year statute of limitations, if in fact there was a resulting personal injury within the meaning of Iowa Code § 614.1(2). Consistent with this analysis, the court's conclusion states "In sum, we hold that Iowa Code § 614.1(4) – the five-year statute – governs *this* legal malpractice case." (Emphasis supplied) Id. at p. 168.

There is no Iowa case which discusses the tension between the ten-year statute of limitations on written contracts and a five-year statute of limitations for "those brought for injuries to property." However, because of the Iowa Supreme Court's adherence to the doctrine that the appropriate statute of limitations must be premised upon the real nature of the action rather than the theory of recovery, (i.e., breach of written contract), it most likely would find the five-year statute of limitations applicable even when there is a written contract between the attorney and client.

D. Error in Judgment

In 1975, the Iowa Supreme Court in Baker v. Beal, 225 N.W.2d 106 (Iowa 1975), held that "[i]t is the generally accepted rule that mere errors in judgement by a lawyer are not grounds for negligence, at least where the lawyer acts in good faith and exercises a reasonable degree of care, skill and diligence." Id. at 112, citing cases and secondary authorities. The "error in judgement" rule has been criticized as so vague and indefinite

as to be highly confusing to a jury. It is also inconsistent with more recent holdings of the Iowa Supreme Court. For example, "The code of professional responsibility sets the standard for an attorney's conduct in any transaction in which his professional judgment may be exercised," Dessel, at 361, citing Cornell v. Wunschel, 408 N.W.2d 369, 377 (Iowa 1987). Given the more recent decision that an "error in judgment" defense is no longer available to physicians, it is both logical and consistent to expect that this defense should also be abolished for lawyers. See, Vachon v. Broadlawns Medical Foundation, 490 N.W.2d 820 (Iowa 1992). (See, Olfe v. Gordon, 286 N.W.2d 573 (Wis. 1980), where "the similarity between medical and legal malpractice actions" was recognized.) In Grefe & Sidney v. Watters, 525 N.W.2d 821, 825 (Iowa 1994), this issue was raised on appeal, but not properly preserved at trial, and thus the court declined consideration. The "error in judgment" concept creates a subjective watering down of the "reasonable and prudent attorney under circumstances" standard. Any contrary "judgment" is in reality not only "error" but negligence. A better rule would be one that instructs that "a mere difference in the utilization of strategy or tactics commonly employed by other attorneys but upon which reasonable and prudent attorneys may fairly disagree is not negligence." To hold otherwise would mean that every losing litigant would be able to sue his attorney if he could find another attorney willing to second-guess the decisions of the first attorney with the advantage of hindsight. In this regard, see, Woodruff v. Tomlin, 616 F.2d 924, 930 (C.A. 6 1980).

E. Comparative Negligence Defense

With no Iowa case, other courts are in discord over when, or if at all, comparative negligence is a defense in legal malpractice action. See, Restatement (Second) of Torts §§ 463-496; Restatement (Second) Agency § 415 (Doctrine applicable to the same extent and subject to the same rules as in other negligence actions). In appraising comparative fault, regard must be had to the special circumstances of the lawyer-client relationship. Under fiduciary principles, clients are entitled to rely on their lawyers to act with competence, diligence, honesty, and loyalty. The difficulty many clients face in monitoring a lawyer's performance is one of the main grounds for imposing a fiduciary duty on lawyers. Except in unusual circumstances, clients have not been held negligent for failing to investigate, detect, or cure a lawyer's malpractice until the client is aware, or should reasonably be aware, of facts clearly indicating the basis for the claim of lawyer malpractice. Typically, any detailed "comparative" analysis would find the attorney as the party with both superior knowledge and an actual duty to protect the client's interest. As a practical matter, it is a rare dissolution case where it can be proven that the client was at fault. Lay people are not educated in the law. Typically, they have no experience in investigation or discovery methods. Significantly, they are also emotionally overwrought, such that their judgment cannot be said to be objective and dispassionate as that required of their attorney. Citing a commentator with approval, the Wisconsin Supreme Court has held:

> "(C)ontributory negligence should have no place as a defense against an obedient client who originally hired the attorney to help him avoid the very acts which are now labelled negligent. . . . The layman should be penalized

> for ignorance of legal matters only when he refuses proper help, and not when the attorney he hires fails in his duties," citing Leavitt, The Attorney as Defendant, 13 Hast.L.J. 1, 32 (1961).

Olfe v. Gordon, 93 Wis. 2d 173, 286 N.W. 2d 573, 580 (1980). In London v. Weitzman, 884 S.W.2d 674 (Mo. Ct. App. 1994), the court found that by the clients own admission, she agreed to the terms of the separation agreement without knowing about the marital assets or her husband's actual income, and she was under no compulsion to accept the separation agreement until the former spouse furnished her with the information she now claims was her attorney's duty to have obtained. The jury verdict, which found the plaintiff was 40 percent at fault, was supported by the law and the evidence. In Tarleton v. Arnstein & Lehr, 719 So.2d 325 (Fla. Dist. Ct. App. 1998), the court specifically found that a client cannot be comparatively negligent for relying on an attorney's erroneous legal advice or her failing to correct errors of the attorney which involved the exercise of professional expertise. Id. at 331 (citing, Becker v. Port Dock Four, Inc., 752 P.2d 1235, 1239 (Or. Ct. App. 1988)); Theobald v. Byers, Cal. App. 2d 147, 13 Cal. Rptr. 864, 866-67 (1961)). In Tarleton, the former wife relied on the firm's representations that she could still bring claims on promissory notes even if she signed settlement agreements. The fact the client was sophisticated in business matters did not impose upon her the burden to second-guess her attorney's advice or require her to hire a second attorney to see if such advice was proper. Id. Reasoning that the very purpose a client hires an attorney is for expertise and superior knowledge of the legal implications of signing a marital settlement agreement, the court remanded the matter to instruct the trial court to strike the portion of the jury's verdict finding the plaintiff 25% comparatively negligent.

Id.; see also, Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis. 1985) (finding the client was not contributorily negligent as a matter of law in a legal malpractice action against her attorney for failure to discover all of the former spouse's assets).

On comparative and contributory negligence of clients, there are a number of instructive cases that can be examined. In the context of the facts of your case, one should compare the contrasting holdings of e.g., American Intern. Adjustment Co. v. Galvin, 86 F.3d 1455 (7th Cir. 1996) (client's failure to settle underlying case not contributory negligence); Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir. 1992) (proper to instruct jury that client may assume lawyer is competent and may rely on lawyer's advice); Conklin v. Hannoch Weisman, 678 A.2d 1060 (N.J. 1996) (client's failure to understand subordination clause that lawyer negligently failed to explain not contributory negligence); Cicorelli v. Capobianco, 453 N.Y.S.2d 21 (N.Y.A.D. 1982), aff'd, 449 N.E.2d 1273 (N.Y. 1983) (real estate dealer client could not be expected to understand legal issues in real estate under contract); Bjorgen v. Kinsey, 466 N.W.2d 553 (N.D. 1991) (failure to dismiss lawyer not negligent); Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 457 S.E.2d 28 (Va. 1995) (contributory negligence is defense, but fact issue present when lawyer in charge of matter allegedly responsible for malpractice was also client's president); Jackson State Bank v. King, 844 P.2d 1093 (Wyo. 1993) (comparative negligence statute inapplicable to malpractice, at least where claims based on contract and fiduciary theories), with the holdings of, Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991) (repeated indications of inadequate performance for several years, causing client to consult another lawyer, should have caused client to

act); F.D.I.C. v. Ferguson, 982 F.2d 404 (10th Cir. 1991) (negligence of bank); Carmel v. Clapp & Eisenberg, P.C., 960 F.2d 698 (7th Cir. 1992) (client concealed from lawyer knowledge of fraudulent activity of client's associate); and Nika v. Danz, 556 N.E.2d 873 (Ill. Ct. App. 1990) (client failed to provide essential information). See, generally, Annot., 10 A.L.R. 5th 828 (1993).

VI. Proximate Cause

To establish proximate cause in legal malpractice suits, two things must be shown: (1) the harm would not have occurred had the attorney not been negligent, and (2) the negligence was a substantial factor in bringing about plaintiff's harm. Blackhawk Bldg. Sys. v. Law Firm, 428 N.W.2d 288, 290 (Iowa 1988), citing, Pedersen v. Kuhr, 201 N.W.2d 711, 713 (Iowa 1972).

VII. Damages

The general measure of damages in legal malpractice actions is the amount of loss actually sustained as a proximate result of the attorney's act or omission. Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988); Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 525 (Iowa 1983). By far the most difficult element to prove in any legal malpractice action involving a settlement is that the client would have been more successful in the underlying action "but for" the attorney's negligence. When the alleged legal malpractice consists of a mishandled settlement or lawsuit, proof of damages necessarily involves proof of the value of what was lost in the underlying cause of action. See, Baker v. Beal, 225 N.W.2d 106, 110-11 (Iowa 1975). The measure of injury to the client's cause of action is the difference between what the client would have recovered

but for the negligence, and what the client actually recovered. Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986), citing R. Mallen & V. Levit, Legal Malpractice § 303, at 354-55 (2d ed. 1981), (now in its 4th edition). This "case within a case" element requires the former client to prove both the legal malpractice claim and the value of the underlying claim to the same jury. What the client would have recovered, however, is not difficult to prove when an inadequate settlement resulted from a failure to discover assets. If such assets had been timely discovered, they would no doubt have been equitably divided and received at the time of settlement or trial. Since the Iowa Supreme Court has held that "it is a rare case when an issue of collectability in a malpractice case is so clear that it can be decided as a matter of law," it is imperative to also prove what portion of the belatedly discovered assets would have been not only awarded bit also received. Burke v. Roberson, 417 N.W.2d 209, 212 (Iowa 1987); see also, Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 160 (Iowa 1984); and Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 526 (Iowa 1983).

Loss of use of the money which the client would have received had the attorney performed competently has been recognized as an item of damage in legal malpractice cases. See, generally, Mallen and Smith, Legal Malpractice (3d ed. 1989), § 16.5, p. 897; see also, Sample v. Freeman, 873 S.W.2d 470, 476 (Texas Ct. App. 1994) ("Prejudgment interest is appropriate in a legal malpractice case."). There is no Iowa legal malpractice case on point. The concept of prejudgment interest is, however, both sound and fair, and it is the law in those jurisdictions where it has been adjudicated.

VIII. Conclusion

It is clear that lawyers engaged in dissolution cases have to be many things to their clients. The trust and competence expected by the client is great. It is important to involve the client in a timely fashion at each step of the investigation and discovery process. In large asset cases, due diligence can require multifarious investigations and valuations. In reality, there are no defenses for a lawyer who fails to fully and competently handle the responsibilities to the client.

2001 LEGISLATIVE REPORT

BY

ROBERT M. KREAMER

Strange as it may seem, after the November 2000 general election results were certified, the Republican party controlled the Iowa Senate and Iowa House of Representatives by the identical margins they had enjoyed the prior two years. This same 30-20 margin in the Senate and the 56-44 margin in the Iowa House of Representatives virtually guaranteed another highly partisan legislation session with Democrat Tom Vilsack serving as governor.

The dominant issues in the 2001 legislative session were legislative and congressional reapportionment and balancing the state budget. Reapportionment is always a difficult partisan issue and required consideration of a second plan before there was final legislative approval. Because actual state revenues were substantially lower than projections, decisions on what budgets were to be cut and by how much became extremely political and protracted in efforts to reach a balanced budget.

With reapportionment and budgeting dominating the legislative agenda, the 2001 legislative agenda of the Iowa Defense Counsel Association received little consideration. This IDCA agenda, as adopted by the Board at their December 2000 meeting, included the following legislative positions:

1. Oppose any efforts to require mandatory mediation in civil cases in Iowa.

2. Repeal the 5% cap on the reduction of a plaintiff's damages for failure to use a seatbelt or safety harness as provided in Iowa Code Chapter 321.445(4)(b).

3. Repeal Iowa Code Chapter 228.9 so that psychological records and test data would be discoverable, as are other medical records, as provided in the Iowa Rules of Civil Procedure and Iowa Code Section 622.10.

4. Amend Iowa Code Chapter 677 to stop the running of all pre-judgment interest from the date that a successful Offer to Confess Judgment is served.

Additionally, it was determined that legislative monitoring of any legislation introduced of an adverse nature to IDCA should continue throughout the session.

Legislation of interest that was introduced during the 2001 legislative session included the following:

1. House Study Bill 100 (HSB 100) - this proposed Committee on Judiciary bill would eliminate the 5% limitation on the reduction in damages awarded to plaintiffs who fail to wear a seatbelt or safety harness. HSB 100 was assigned to a subcommittee and a meeting with that chairperson was held. Representatives from the Iowa State Bar Association and the Iowa Trial Lawyers Association were also present and expressed opposition to HSB 100. No further action was taken during the session. Senate Study Bill 1116 was the companion legislation introduced in the Iowa Senate.

2. Senate File 222 (SF 22) - this legislation by the Senate Committee on Judiciary would amend Iowa Code Section 614.1 relating to the statute of limitations in certain civil actions. This bill would reduce the time in which civil actions arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty may be brought from 15 to 10 years. After amending this legislation to provide an 8-year statute of limitations, the Iowa Senate then approved this legislation on a vote of 35-25. The Iowa House of Representatives, in its deliberations, amended the statute of limitations back to 10 years and approved Senate File 222 by a vote of 52-46. The Iowa Senate concurred in this House amendment and then sent this legislation to Governor Tom Vilsack for his consideration. On May 3rd Governor Vilsack vetoed this legislation. The position of the Iowa Defense Counsel Association was to monitor this legislation throughout the legislative process.

3. Senate Study Bill 1110 (SSB 1110) - this proposed Committee on Judiciary bill provides that one of the purposes of the Iowa Insurance Trade Practices Act is to regulate the insurance trade practices by providing for public and private enforcement of Iowa Code Sections 507B.4 or 507B.5. This legislation also adds an expressed private cause of action for damages. The Iowa Defense Counsel Association opposed this legislation and no legislation action was taken on SSB 1110 during the session.

4. House File 387 (HF 387) - this legislation was sponsored by 48 members of the Iowa House of Representatives and limited the damages available to non-economic losses arising out of the personal injury or death of a resident of a health-care facility. This legislation would cap non-economic losses, such as pain and suffering and punitive damages, at $250,000.00. The Iowa Defense Counsel Association opposed this legislation because of the interference with the free will of a properly instructed jury to decide the facts and circumstances of a claim. This position is consistent with the IDCA's position on Iowa's "seatbelt cap" because it, too, usurps jury authority.

5. House Study Bill 140 (HSB 140) - this proposed Committee on Judiciary bill would limit the recovery of prejudgment interest in any pending action where an Offer to Confess Judgment is made, but not accepted, and a subsequent trial results in a judgment that is less than the amount in the Offer to Confess Judgment. In such a case, no prejudgment interest is to be calculated or recovered after the date of the Offer to Confess Judgment. This legislation was assigned to a subcommittee and a meeting with that chairperson was held. In attendance at that meeting were also representatives from the Iowa State Bar Association and the Iowa Trial Lawyers Association who expressed opposition to HSB 140. No further action was taken during the session on this legislation.

6. Senate File 484 (SF 484) - this legislation would remove the present immunity currently granted to wholesalers, retailers, distributors or other sellers of products when the assemblers, designers, or manufacturers of the product are not domiciled in the United States or are not subject to the jurisdiction of the Iowa courts. This legislation was approved by the Senate Judiciary Committee on a vote of 10-0. Subsequently, the Iowa Defense Counsel Association and other business-interest groups lobbied the Iowa Senate leadership and expressed our strong opposition to this legislation. No further action was taken on Senate File 484.

7. House File 326 (HF 326) - this legislation amends the mediation language in the Iowa Civil Rights Act to provide that formal mediation is not a mandatory step for every complaint filed with the Iowa Civil Rights Commission. This legislation passed the Iowa House 89-0 and the Iowa Senate 49-0. Governor Tom Vilsack signed this legislation into law on April 24th. The Iowa Defense Counsel Association's position on this legislation was to monitor.

The issue of mandatory mediation in civil litigation that is promoted by Iowa Attorney General Tom Miller never advanced far enough in the process to receive a bill number. This issue is still very much alive and remains an issue that must be monitored on an ongoing basis in future legislative sessions.

In addition to the above legislative activity, there were numerous other pieces of legislation that required monitoring and conversation with legislators to ensure that such legislation did not take shape in such a way as to work against the interests of IDCA and its members. My daily presence at the Capitol representing IDCA gives me numerous opportunities to provide legislators with the IDCA position on a given legal issue. It is important that IDCA has this daily presence to provide answers to legislators' questions, materials and directions to authorities in helping them become better informed on various issues of concern to them and their constituents.

Finally, I want to thank the Iowa Defense Counsel Association for allowing me to represent it this past year and to Mike Weston for his continued fine leadership, interest and support as chair of the IDCA Legislative Committee. He does an excellent job. I am very proud to be able to represent such a distinguished organization as the Iowa Defense Counsel Association. Thank you!

Bob Kramer

RMK:cc

CONTEMPT
An Overview
(Revised 2001)

Judge John D. Ackerman
Third Judicial District

Iowa Defense Counsel Seminar
Embassy Suites Hotel, Des Moines, Iowa
September 26-28, 2001

CONTEMPT - An Overview

I

WHAT IS CONTEMPT?

a) general principles

The power to punish for contempt is inherent in the nature and constitution of a court. It is not derived from statute, but is implied as it is necessary to the exercise of the other powers of the courts. In its absence, the administration of the law would be in constant danger of being thwarted by the lawless. It is indispensable to the protection of due and orderly administration of justice and in maintaining the authority and dignity of the court. Knox v. Municipal Court of the City of Des Moines, 185 N.W.2d 705, 707 (Iowa 1971).

Although an Iowa court's contempt power is inherent, the power to punish a contempt may be validly limited by statute. Chapter 665 comprehensively regulates a court's contempt power and constructively repeals all common law on the subject. Christensen v. Iowa District Court for Polk County, 578 N.W.2d 675, 679 (Iowa 1998). Hutcheson v. Iowa District Court, 480 N.W.2d 260, 263 (Iowa 1992). Palmer College of Chiropractic v. Iowa District Court for Scott County, 412 N.W.2d 617, 621-22 (Iowa 1987). Skinner v. Ruigh, 351 N.W.2d 524, 528 (Iowa 1984); Wilson v. Fenton, 312 N.W.2d 182, 184 (Iowa 1981). All contempt proceedings in Iowa are treated as quasi-criminal in nature even if they arise in civil cases.[1] French v. Iowa District Court for Jones County, 546 N.W.2d 911, 915 (Iowa 1996); Ervin v. Iowa District Court for Webster County, 495 N.W.2d 742, 744 (Iowa 1993); McNabb v. Osmundson, 315 N.W.2d 9, 11 (Iowa 1981); Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). The provisions of chapter 665 have been substantially the same since 1851. Knox, 185 N.W.2d at 709.

b) civil vs. criminal contempt

Contempt is traditionally classified in two ways:

A) Criminal or civil

[1] While an action for contempt is treated as criminal in nature, the Rules of Criminal Procedure do not apply. Contempt proceedings are governed by Ch. 665. I.R.Cr.P. 1 says the rules apply to "indictable offenses." Contempt is not an "indictable offense." No speedy trial rules. State v. Delap, 466 N.W.2d 264, 268 (Iowa App. 1990).

and

B) Direct or indirect

Knox v. Municipal Court of City of Des Moines, 185 N.W.2d 705, 707 (Iowa 1971). The "blurred and often nebulous" distinction between criminal or civil is no longer of significance under Iowa law since Chapter 665 makes no such distinction, and treats all contempts as quasi-criminal. Phillips, 380 N.W.2d at 708; McNabb, 315 N.W.2d at 11; Knox, 185 N.W.2d at 707. The Iowa Supreme Court has stated that by treating all contempts as criminal it has alleviated the need for a court to first make the determination of whether a contempt proceeding is civil or criminal in nature, and then determine what constitutional safeguards are necessary given the outcome of the determination. Phillips, 380 N.W.2d at 708. This is because a contemner can be jailed under §665.4 whether the contempt is considered civil or criminal. "The jail doors clang with the same finality behind an indigent who is held in contempt and incarcerated for nonpayment of child support under section 598.23 as they do behind an indigent who is incarcerated for violation of a criminal statute." McNabb, 315 N.W.2d at 11. In addition, any fines imposed are paid to the state and are not used to compensate the aggrieved party for the damages suffered as a result of the contumacious conduct of the noncomplying party. Palmer, 412 N.W.2d at 622. Phillips, 380 N.W.2d at 709. Wilson,[2] 312 N.W.2d at 528. Even though the distinction does not have significance for Iowa courts, the severity of the punishment will determine the constitutionally required procedures to be used by the court. See International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552 (1994) (Criminal contempt is a crime in the ordinary sense and criminal penalties may not be imposed on someone who has not been afforded the protections that the

[2] The fines and jail sentences allowed in §665.4 are punitive in nature. The fines are payable for the benefit of the state. See §666.3 of Iowa Code (1999). §665.4 limits the court to the levying fines retrospectively in the amount of $500.00 for each separate act of contempt. Because the fines under §665.4 are punitive in nature, they need not be geared to the actual damages of the complaining party. Rather they are intended to punish the contemner for past acts and act as a deterrent against future violations. The statute doesn't authorize a prospective daily fine as a coercive remedial sanction such as are entered in the federal courts and other states. Because §665.4 doesn't authorize such a sanction the court cannot enter such a fine since the legislature has validly limited the courts inherent power to punish contempts. Palmer, 412 N.W.2d at 622; Wilson v. Fenton, 312 N.W.2d 524, 529-30 (Iowa 1981). If the court wishes to use imprisonment to coerce an act which the contemner still has the power to perform, the court is limited to the remedy provided by §665.5. Amro, 429 N.W.2d at 139; Wilson, 312 N.W.2d at 530.

constitution requires in such criminal proceedings Civil contempt sanctions in federal courts are considered to be coercive and avoidable through obedience, and thus may be imposed in ordinary civil proceedings upon notice and opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required for civil contempts in federal proceedings) Even in states or the federal courts where there is a distinction as between civil and criminal contempts, the distinction applies only in cases of indirect contempt. The distinction of criminal versus civil contempt is not pertinent to direct contempts that are adjudged and punished summarily except where a court intends to impose serious contempt sanctions for a direct contempt, in which case summary adjudication is not constitutionally permissible Bagwell, 114 S.Ct. at 2557

c) direct contempt

A direct contempt consists of words spoken or acts committed in the presence of the court which tend to degrade the court or obstruct, interrupt, prevent or embarrass the administration of justice McNabb, 315 N.W.2d at 11; Knox, 185 N.W.2d at 707. In "the presence of the court" extends beyond those places within the sight and hearing of the presiding judge." "A court, 'at least when in session, is present in every part of the place set apart for its own use, and for the use its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court.'" Knox, 185 N.W.2d at 707. Direct contempts (criminal or civil) which occur in open court, in the presence of the judge, which disturbs the court's business, and where all the essential elements of the misconduct are actually observed by the court can be adjudged and sanctioned summarily because immediate punishment is essential to prevent demoralization of the court's authority before the public McNabb, 315 N.W.2d at 12. Nonserious direct criminal contempt may be punished summarily[3] without notice and a hearing. There is no need to

[3] "Summarily" doesn't necessarily mean "immediately" U.S. v. Perry, 116 F.3d 952 (1st Cir. 1997) citing Sacher v. U.S., 343 U.S. 1, 72 S.Ct. 451 (1952) In Perry, criminal defendant, through counsel, informed the court that he needed to use the rest room. The Court noted that the government's closing was only going to go another five to ten minutes and told the defendant to wait until then. The defendant then stood up (after government counsel had resumed his argument) turned his back to the jury and urinated on the floor The defendant was immediately removed, the jury was excused and defendant was returned to the courtroom and informed by the Court that his actions was contemptuous. Defendant's counsel was allowed to address the Court as to the circumstances Seven days later when the verdict was returned the defendant was brought

file an affidavit pursuant to §665.6 or serve the contemner with a rule to show cause pursuant to §665 7 However, the contemner must be given a reasonable opportunity to explain his or her conduct (i e allocute). Knox, 185 N.W.2d at 710 Bisignano v. Municipal Court of Des Moines, 23 N W 2d 523, 527-28 (Iowa 1946). An apology and/or denial of intent to embarrass or offend the judge or to impede the operation of the Court does not in itself purge the contemner of the contempt Brown v. District Court of Webster County, 158 N.W.2d 744, 748 (Iowa 1968). The contemner may be held to waive this right by indicating to the court that he/she is ready for punishment if the judge is disposed to imposed to inflict it (i e continue engaging in the contumacious conduct). Knox v. Harrison, 185 N.W.2d 718, 719 (Iowa 1971) In a summary proceeding for direct criminal contempt the court takes on the functions of identifying, prosecuting, adjudicating and sanctioning contumacious conduct. Bagwell, 114 S Ct at 2559

---

before the court for a hearing. The defendant's counsel was permitted to address the court and argue on behalf of his client The defendant was afforded the right of allocution. The Court sentenced the defendant to 90 days of confinement. The Court held that this procedure for a direct contempt was all that due process required and the defendant was not entitled to a trial with notice and time for preparation of a defense. In this case the Court summarily found the person in contempt but delayed the imposition of sentence.

- a court has traditionally had the power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing a petty contemptuous act committed in his or her presence and observed by the judge. The usual justification for such summary proceedings is necessity. The necessity justification is at its pinnacle where contumacious conduct threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify or a party disrupts the court. The limited power is to sanction those who interfere with the orderly conduct of court business or disobey orders necessary to the conduct of that business. Summary adjudication is allowed to maintain order in the courtroom and the integrity of the trial process in the face of an actual obstruction of justice. Summary proceedings have been tolerated because of a court's significant interest in rapidly coercing compliance and restoring order, and because the contempt's occurrence before the court reduces the need for extensive fact finding and the likelihood of an erroneous deprivation. International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 2557, 2563 (1994); Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 2703 (1974). Even though allowed, summary contempt proceedings are disfavored since our system of jurisprudence is based on the idea of notice and opportunity to be heard before punishment is imposed. Even where summary punishment for contempt is imposed during a judicial proceeding, the contemner is normally to be given an opportunity to speak in his or her own behalf in the nature of a right of allocation. Taylor, 94 S.Ct. at 2703. Except for serious criminal contempts (i.e. contempts which carry a punishment of jail over six months in which a jury trial is required), the traditional distinction between civil and criminal contempt proceedings does not pertain to direct contempts that are immediately adjudged and sanctioned summarily. Bagwell, 114 S.Ct. at 2557 and 2560. If final adjudication and sentence for a direct contempt is postponed to a later time, (i.e. after conclusion of proceedings) the alleged contemner is entitled to the due process rights of reasonable notice of the specific charges and opportunity to be heard on his or her own behalf. However, a full scale trial is not required.[4] This procedure is particularly appropriate where the

[4] In Knox the Iowa Supreme Court stated the determination of whether a contempt is direct or indirect is determined at the time the offensive act occurs. A direct contempt is not converted to an indirect contempt because the court in whose presence the contumacious conduct occurred chooses procedurally to have the matter heard by another judge. Since the new judge must rely on evidence to prove the contempt, the alleged contemner is entitled to be advised of the charges, have a reasonable opportunity to present evidence by way of defense of explanation, have the right to be represented by counsel and the opportunity to testify or call witnesses on his behalf. The alleged contemner is entitled to be served with a rule to show cause as required by 665.7 or brought before the county by way of warrant. However, an affidavit need not be filed since the language "or comes officially to its knowledge" of 665.6 is broad enough to cover the situation where a direct contempt occurred in front of one judge but the case was tried by another judge. Knox, 185 N.W.2d at 707-10.

offender is a lawyer representing a client at the judicial proceeding. Taylor, 94 S.Ct. at 2703. When the contempt proceedings in a direct contempt are postponed until a later time, due process requires that the alleged contemner be tried by a judge other than judge that witnessed the actions giving rise to the contempt proceeding.[5] Taylor, 94 S.Ct. at 2704. The Court in Taylor recognized that in direct contempts the contemner's acts may involve a direct personal attack on the judge, such that it would be unlikely that the judge would be able to maintain the calm detachment necessary for a fair adjudication. Even where the contemptuous conduct did not constitute a personal attack on the judge, the judge must decide not only whether he/she has actual bias toward the contemner but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the alleged contemner. Taylor, 94 S.Ct. At 2704. In Bagwell the Court made it very clear that it was aware that the contempt power "uniquely is liable to abuse". "Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament and its fusion of legislative, executive and judicial powers summons forth the prospect of the most tyrannical licentiousness." Bagwell, 114 S.Ct. at 2559.

d) indirect contempts

An indirect or constructive contempt is an act committed, not in the presence of the court, but at a distance from it, which tends to degrade the court or obstruct, interrupt, prevent or embarrass administration of justice. Knox, 185 N.W.2d at 707. In other words, indirect contempts involve acts occurring outside the presence of the court where the judge

[5]The Iowa Supreme Court recognized this principle in Knox where the Court commended the first trial judge (in front of whom direct contempt occurred, i.e. defendant spit on a judge) who decided not to adjudicate the contempt summarily and substituted another judge. Knox, 185 N.W.2d at 708. In Knox the contemner who was before another judge that evening called that judge a "fascist". The second trial judge summarily held the contemner in contempt and sentenced the man to six months in jail. The Iowa Supreme Court upheld the Court's action. Knox v. Harrison, 185 N.W.2d 718 (Iowa 1971). In Brown v. Iowa District Court for Webster County, 158 N.W.2d 744, 749 (Iowa 1968), the petitioner appeared as ordered and testified under oath that he had no intention either to embarrass, offend, or cause any grief to the judge. He apologized and offered to do anything necessary to make the matter right. Apology or mere denial of intent to embarrass or impede the operation of the Court does not in itself purge the petitioner of contempt. In addition, the Court stated that in an indirect contempt where the contemptuous act was directed to a particular judge, that judge should not hear and determine the matter but should call in another judge. The Court noted that such a judge is not required to do so but that it "strongly advised against" the judge handling the matter "as a matter of sound policy". In Brown the contemner who had earlier lost a real estate case, deeded his interest in the subject property to the trial judge and sent a disrespectful letter to the judge.

has no personal knowledge of one or more of the material facts necessary to establish the contemptuous conduct. McNabb, 315 N.W.2d at 11-12. Knox, 185 N.W.2d at 708. Due process of law requires that one charged with indirect criminal contempt of court be advised of the charges against him or her, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call witnesses in his or her behalf, either by way of defense or explanation. McNabb, 315 N.W.2d at 12. Indirect contempt may never be punished summarily. In an indirect criminal contempt scenario, due process does not allow the judge to initiate, prosecute and adjudicate the contempt charges. U.S. v. Neal, 101 F.3d 993, 998 (4th Cir. 1996) citing In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 625-27 (1955)

> - Indirect contempt are classified as either criminal contempt or civil contempt for due process purposes. The traditional distinction between indirect civil and indirect criminal contempt has been criticized as being conceptually unclear and difficult to apply. The two used to be distinguished on the basis of the purpose and character of the sanction involved. Thus, a contempt was considered civil if it was remedial and for the benefit of the contemnee and was considered criminal if the sanction was punitive and for the purpose of vindicating the authority of the court. Bagwell, 114 S.Ct. at 2557. The Supreme Court has ruled that the appropriate test for determining whether a contempt is civil or criminal is from an examination of the character of the sanction since many punitive sanctions can be both remedial and punitive.
>
> > As Gompers recognized, however, the stated purposes of a contempt sanction alone cannot be determinative. Id., at 443, 31 S.Ct., at 498-499. "[W]hen a court imposes fines and punishments on a contemner, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemner's behavior to conform to the terms required in the order." Hicks, 485 U.S., at 635, 108 S.Ct., at 1431. Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's

> future obedience. The Hicks Court accordingly held that conclusions about the civil or criminal nature of a contempt sanction are property drawn, not from "the subjective intent of a State's laws and its courts," ibid., but "from an examination of the character of the relief itself," id , at 636, 108 S Ct , at 1432.

Bagwell, 114 S.Ct. at 2557.

If an indirect contempt is determined to be criminal in nature, sanctions may not be imposed without affording the contemner the protections required in criminal proceedings such as double jeopardy protection; rights to notice of charges, assistance of counsel, right to call witnesses, the right to an unbiased judge, and right to present a defense; privilege against self-incrimination, right to proof beyond a reasonable doubt; and a right to a jury trial where contempt is serious. Bagwell, 114 S.Ct. at 2557; Crowe v. Smith, 151 F.3d 217, 227 (5th Cir. 1998)

The constitution allows civil contempt sanctions to be imposed in an ordinary civil proceeding upon notice and opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is constitutionally required. Bagwell, 114 S Ct. at 2557. Federal courts only require a finding of civil contempt by clear and convincing evidence. U.S. v. Ayres, 166 F.3d 991, 994 (9th Cir. 1999).

The Court in Bagwell classified the following sanctions as follows:

Civil Contempt

A) indefinite imprisonment of contemner until he or she complies with an affirmative command such as an order to testify, pay alimony, surrender property ordered to be turned over, etc. The Court stated that this sanction was the paradigmatic coercive civil contempt since the contemner is able to end the confinement by performing an affirmative act and thus "carried the keys of his prison in his own pocket"

B) fixed period of imprisonment when the contemner is given the option of reducing or avoiding the confinement by performing an affirmative act or prospectively complying with the court order. Because the contemner is able to purge the contempt and avoid the imprisonment, he still "carries the keys of his prison in his pocket".

C) a compensatory fine A compensatory fine is one that compensates the contemnee for losses sustained as a result of the contemner's acts. (A fine payable to the court is not a compensatory fine.)

D) a noncompensatory fine is treated as a civil contempt if the contemner is afforded an opportunity to purge the contempt by

prospectively complying with the order.

E) per diem fine imposed for each day in the future that the contemner fails to comply with an affirmative court order. Such fine exerts a constant coercive pressure and once the order is obeyed, the future daily fines are never imposed (i.e. purged)

However, a noncompensatory fine, even if coercive in nature which is found to constitute a serious criminal sanction, can be entered only through procedures necessary for the imposition of criminal contempt sanctions where the court order in question is a complex injunction setting forth a detailed code of conduct both prohibiting certain acts and mandating affirmative acts. In Bagwell, the Court held that a contemner was entitled to the procedures necessary to impose a criminal contempt sanction where the court fined the contemner for past acts (later vacated because they were found to be criminal nature) and ordered that it would fine the contemner $100,000 for any future violent breach of the injunction and $20,000 for any future nonviolent violation. However, once the contemner was found to be in violation, the fine was not able to be purged. There were widespread violations and the court subsequently fined the contemner $52 million based on the above schedule. The Court in Bagwell did not resolve when is a fine no longer petty and becomes a serious contempt fine. The Court seemed to indicate a fine of over $5,000 for an individual and over $10,000 for nonindividuals may be considered serious contempt fines. See also Crowe v. Smith, 151 F.3d 217, 228 (5th Cir. 1999). In U.S. v. Ayres, 166 F.3d 999, 995 (9th Cir.) the Court held that a finding of contempt and a per diem fine of $500 for each day the contemner failed to comply with the order was a civil contempt proceeding. However, a contemner's ability to purge the civil contempt (i.e. comply with the order so no per diem fine is imposed) cannot be contingent upon the acquiescence of an opposing party because such an arrangement effectively renders the contempt punitive, rather than civil. In Crowe v. Smith, 151 F.3d 217, 228 (5th Cir. 1998), noncompensatory and nonpurgeable fines of $5 million on an insurance company and $75,000 on an attorney were deemed criminal fines. But see Labor Relations v. Salem Teachers Union, 706 N.E.2d 1146 (Mass. App. Ct. 1999) where court held that a $20,000 per diem fine for future violations of an unequivocal and simple order not to encourage or condone a strike was not held to be a serious fine and the imposition of a $60,000 fine for three days of violations did not require a criminal jury trial even though union had

funds of only $36,000. The Court in Crowe also ruled that disbarment, suspension or reprimand of an attorney admitted to practice in the federal district court is civil in nature and the attorney is not entitled to full criminal procedure protections. The Court stated that an attorney who is held in contempt for matters occurring outside the presence of the court, is only entitled to notice of the charges and opportunity to appear and provide explanation and defense.

Criminal

A) a fixed sentence of imprisonment imposed retrospectively for a completed act of disobedience with no ability to purge the contempt or alleviate the sanction by prospective compliance with the order. Such sanction has no coercive effect and the contemner cannot shorten the term by promising not to repeat the offense

B) a noncompensatory fine as little as $50 if contemner has no subsequent opportunity to reduce or avoid the fine through compliance. Although entitled to the other procedures accorded criminal contempts, a contemner is not entitled to a jury trial unless the criminal fine constitutes a serious criminal sanction.

e) Iowa law on contempt

Sections 665.2 and 665.3 of the Iowa Code (1999) set out the acts or omissions that constitute contempt for most purposes.

Section 665.2 provides:

THE FOLLOWING ACTS OR OMISSIONS ARE CONTEMPTS, AND PUNISHABLE AS SUCH BY ANY OF THE COURTS OF THIS STATE, OR BY ANY JUDICIAL OFFICER, INCLUDING JUDICIAL MAGISTRATES, ACTING IN THE DISCHARGE OF AN OFFICIAL DUTY, AS HEREINAFTER PROVIDED:

1 CONTEMPTUOUS OR INSOLENT BEHAVIOR TOWARD SUCH COURT WHILE ENGAGED IN THE DISCHARGE OF A JUDICIAL[6] DUTY WHICH MAY TEND TO

[6]In Newby v. Iowa District Court for Woodbury County, 147 N.W.2d 886 (Iowa 1967) the Supreme Court held that a judge, after identifying himself as a judge, and ordering the contemners to stop their conduct was assaulted in his front yard at 11:30 p.m. by persons committing a public disturbance was engaged in the discharge of a judicial duty. The Court based its decision on the language of Article III, Section 7, of the Iowa Constitution which states "The Judges of the Supreme and District Courts shall be conservators of the peace throughout the State." Therefore, a judge who is attempting to stop a breach of the peace is properly engaging

IMPAIR THE RESPECT DUE TO ITS AUTHORITY.

- Examples

- Defendant spits on judge when judge announced finding of guilty of misdemeanor charge. Knox, 185 N.W.2d at 706.

- Defendant's reply "Go ahead, who cares, Fascist" to a judge's warning to him during a hearing that his conduct if continued will result in a contempt. Knox v. Harrison, 185 N.W.2d at 719.

- Courtroom observer frequently calling the court, while in session, a "fascist court," "pig court" and referring to police officers as "pigs" and when the defendant (a friend of the contemner) spit on the judge, the contemner jumped up and shouted "mother f----- pacifist" and apparently charged towards the bench. De Patten v. Harrison, 185 N.W.2d 721 (Iowa 1971).

- Courtroom observers making of comments loud enough to be heard over the courtroom when cases were being tried about the "fascist court," "pig court" and "pigs" in the courtroom. Each time someone was found guilty contemner would say "found guilty again by the fascist court". Court attendant told contemner to be quiet two or three times. When friend spit on judge, the contemner stood up and took one step toward the bench and was forced back into his chair by bailiff. Green v. Harrison, 185 N.W.2d at 723.

- Assaulting a judge when they know the person is a judge and the judge is engaged in the discharge of his/her judicial duties. Newby v. Iowa District Court for Woodbury County, 147 N.W.2d 886, 889 (Iowa 1967); Bisignano v. Municipal Court of Des Moines, 23 N.W.2d 523, 530 (Iowa 1946).

- Threats of physical violence against a judge, juror, attorney, witness or court officer because of the performance of their duty in connection with court proceedings so as to deter them from such performance in the future is contumacious conduct. Bisignano, 23 N.W.2d at 530.

- Assaulting and using profane language to a judge outside of a courtroom (in fact in a place away from the courthouse) because of his or her official

---

in their duty as conservators of the peace and therefore engaging in the discharge of a judicial duty. See also Harding v. McCullough, 19 N.W.2d 613, 617 (Iowa 1954) (The term "judicial duty" is defined as vested in the judicial department. Whatever emanates from a judge as such, or proceeds from a court of justice, is judicial in nature.)

conduct in regard to a case is punishable as a contempt. Such acts are considered to be in the discharge of their duty since a judge is, under such circumstances, in recess of his or her courtroom duties. Bisignano, 23 N.W.2d at 530.

- Attorney's statement to a judge in an angry tone while shaking [illegible] the judge's face in response to the judge's refusal to approve [illegible] and that the judge "had some ulterior motive for not wanting to approve" the bond was held to be [illegible] insulting and discourteous and [illegible] attorney to contempt [illegible] insinuation that the [illegible] nature of a rebuke to the [illegible] The Court noted that [illegible] properly due the authority [illegible] concerned with the respect [illegible] The Court stated that it is [illegible] courts and that duty is not [illegible] judge may be erroneous. [illegible] court rules upon questions before it, it is the duty of counsel to [illegible] acquiesce in such rulings. He owes no duty to his client which will justify him in indulging in *** contemptuous comment upon such rulings. This practice on the part of attorneys is most reprehensible and brings disrepute upon the institution which it is their sworn duty to respect." See Harding v. McCullough, 19 N.W.2d 613, 616 (Iowa 1945).

- Letters or other written communications sent through the mail to a judge is considered an indirect contempt. Letters of criticism directed to a judge do not subject the author to contempt sanctions. However, if the author of a critical letter also takes overt action which tends to impair respect due the court and interferes with the orderly administration of the court, the person is subject to contempt sanctions. Brown v. District Court of Webster county, 158 N.W.2d 744, 748 (Iowa 1968). In Brown the Court quoted other cases dealing with criticism of judges:

> If petitioner had contented himself with a letter of criticism, we would have no real difficulty with this case. As this court said in the early case of State of Iowa v. Dunham, (1858), 6 Iowa 245, 256: "No court can or should hope that their opinions and actions can escape discussion or criticism. When a case is disposed of, and the decision announced, such decision becomes public property, so to speak. The construction given to a statute — the reasoning and conclusion of the court upon the facts — all go to the public and become

> subject to public scrutiny and investigation. In such cases, it is perfectly competent and lawful for anyone to comment upon the decision, and expose its errors and inconsistencies. If such comments do not correct errors, they will, at least, lead to renewed caution and circumspection upon the part of those whose duty it is to declare the law.
>
> * * *
>
> "As indicated heretofore, our courts have not been drawn into the vortex of constructive contempts as defined by the earlier common law, and we have construed many of such acts to have no tendency to obstruct the administration of justice, but simply to wound the feelings or offend the personal dignity of the judge. The latitude of contempt which finds expression in the earlier decisions is not in harmony with the genius of our life or the spirit of our institutions. The primary purpose of a contempt proceeding is to vindicate the integrity and independence of the court. The judge is the judicial administrator, but it is not he who is aggrieved. His own personal feelings are not in the case. It is the court, not the individual."

Braun, 158 N.W.2d at 746

2. ANY WILLFUL DISTURBANCE CALCULATED TO INTERRUPT THE DUE COURSE OF ITS OFFICIAL PROCEEDINGS

- In order for the court to summarily adjudicate a contempt that is committed in his or her presence, there must be an actual obstruction of or interruption of the court's business as a result of the contemner's actions. Hudson v. Jenkins, 288 N.W.2d 566, 571-72 (Iowa 1980).

- False statements made to the Court during a court proceeding by a party who was not under oath, are not punishable as a contempt. The time consumed by the court in ferreting out the truth does not constitute an obstruction of a judicial function. Hicks v. Stigler, 323 N.W.3d 262, 263 (Iowa App. 1982). The court, in dicta, stated that even if the statements were made under oath in the presence of the Court, it still would not be punishable as a contempt because there still would not be an obstruction of a judicial function. See Jones v. Lincoln Electric, 188 F.3d 709 (7th Cir. 1999) (Court stated that witness cannot be held in contempt for false testimony since there is no order for a witness to testify truthfully. An oath is not tantamount to a court order. In addition, court noted that since essential

function of a trial is "truth-finding" the giving of false testimony does not obstruct the function of court. Finally, the court noted that proper recourse against a witness who testifies falsely is criminal prosecution for perjury). However, the giving of false, misleading or evasive answers in a discovery proceeding with the design to obstruct the judicial process after being ordered to provide information on a particular topic can be sanctioned as contempt under FRCP 37(b)(2) (IRCP 134(b)(2)(D). See Jones v. Clinton, 36 F.Supp.2d 1118, 1126-31 (E.D. Ark. 1999).

- The courts of the various jurisdictions disagree over whether the absence or tardiness of an attorney is to be treated as a direct or indirect contempt Courts hold that the absence of counsel at a scheduled matter is an obstruction of the judicial process

> When an attorney fails to appear in court with his client, particularly in a criminal matter, the wheels of justice must temporarily grind to a halt. The client cannot be penalized, nor can the court proceed in the absence of counsel. Having allocated time for this case, the court is seldom able to substitute other matters Thus, the entire administration of justice falters.

Arthur v. Superior Court, 398 P.2d 777 (Cal. 1965) The majority of courts (state and federal) treat such conduct as an indirect contempt since such matters will generally require proof of facts occurring outside the presence of the court Some courts use a hybrid procedure in these circumstances. Under this approach, the characterization of the contempt as direct or indirect is deferred until after the attorney has an opportunity to explain his/her absence or tardiness. If there is an adequate explanation, the matter proceeds no further. If the attorney refuses to explain or if the attorney offers an insulting, frivolous, or clearly inadequate explanation, the court treats the matter as a direct contempt The attorney is given a hearing before the offended judge. The hearing is limited to proof of facts, legal argument and the right to allocution. If there is some evidence of the adequacy of the explanation, the matter is characterized as an indirect contempt requiring an order to show cause and a hearing before another judge See State v. Jenkins, 950 P.2d 1338 (Kan. 1997); In Re Yengo, 417 A.2d 533, 540-43 (NJ 1980).

3. ILLEGAL RESISTANCE TO ANY ORDER OR PROCESS MADE OR ISSUED BY IT.

- Illegal resistance to any court order is a contemptuous act District court has authority to punish for violations of a court order entered pursuant to the

court's inherent equity power to decide issues concerning custody and support between unmarried persons The relevant penalty provisions are §598.23 and .23A Harris, 584 N.W.2d at 563-64 Skinner, 351 N.W 2d at 185.

- Absent a filing of a supersedeas bond, a court may invoke its judicial contempt power to enforce a decree while the legal correctness of the underlying decree/order is on appeal. Shedlock v. Iowa District Court for Polk County, 534 N.W.2d 656, 658 (Iowa 1995). See Lutz, 297 N.W.2d at 352 and Iowa Rule of App. Pro. 7.

- The court in a contempt proceeding does not have to determine whether all of the alleged default/disobedience to a court order was willful. Contempt finding is appropriate only if some of the default/disobedience relied on was willful. Jacobo, 526 N.W.2d at 866; Skinner, 351 N.W.2d 182, 185; Amro, 429 N.W.2d at 140.

- Separate contempts involving a decree or order may be punished in a single contempt proceeding and each violation may be punished as a separate contempt. However, separate acts of contempt must be alleged in the contempt application before the court is able to separately sanction the multiple violations. An alleged contemner must be given reasonable notice and that requires that the separate charges of contempt must be set out like separate criminal charges, as in a trial information. Bruns, 535 N.W.2d at 164; Kula, 462 N.W.2d at 722 An application that merely states that the contemner was ordered to pay monthly alimony of $1500; was in arrears of $22,000; and merely requests that the contemner "be held in contempt" does not give the contemner "clear notice of multiple accusations" and prevents the court from giving multiple contempt sanctions. Bruns, 535 N.W.2d at 164

- A person may be found in contempt for violating a court order or injunction even though the person is not a party to the injunction or order. Hutcheson, 480 N.W.2d 264 (lawyer found in contempt for aiding and abetting the woman who had had a §236.14 domestic abuse no-contact order entered against her and proscribed contact with the attorney. It was found that the man continued to initiate contact with the woman preventing her from properly obeying the no-contact order issued in favor of the man against the woman) See also Henley v. Iowa District Court for Emmet County, 533 N.W.2d 199, 202 (Iowa 1995). If the nonparty (victim) had notice or knowledge of the court order and either acts in concert or be in privity with a person to whom the court order is directed, such person can be held in contempt for aiding and abetting, conspiring with or encouraging or inciting

the named party in violating the injunction or order. The Court in Hutcheson quoted from Carey v. District Court, 285 N.W. 236 (Iowa 1939) in stating that §665.2(2) and (3) in combination authorizes a court to punish a nonparty (victim) for contempt for aiding and abetting in the violation of an injunction or order by the named party. §236.8 [contempt provisions Domestic Abuse Act] do not prevent the protected party/victim from being held in contempt for assisting the abuser in violating the no-contact provisions of the protective order. "The integrity of the court's ruling, as well as the safety and prevention concerns underlying chapter 236, demand swift action. The statute makes no exception for victims who, regrettably, chose to ignore their own best interest. The desires of those individuals must be subordinated to the interest of victims in general, and to the court's ability to demand accountability in this emotionally charged arena *** "[Victim] argues nonetheless that such a finding violates the spirit of the domestic abuse statute." *** "Although we are sympathetic to Henley's plight as a victim, her willful disregard for her own safety cannot deter us from upholding an enforceable order for her protection". Henley, 533 N.W.2d at 202 and 203.

- advice of counsel is not a defense to a contempt finding although it may be considered in mitigating the penalty to be imposed. Palmer College of Chiropractic v. Iowa District Court for Scott County, 412 N.W.2d 617, 621 (Iowa 1987). A client who, in good faith, acts on erroneous legal advice, may establish a defense to a contempt citation since the act would not have been willful. Heishman v. Jenkins, 372 N.W.2d 506, 509-10 (Iowa 1985). Huyser, 499 N.W.2d at 3.

- An attorney can be held in contempt if he or she counsels the client to disobey a court order. In Committee on Professional Ethics & Conduct v. Crary, 245 N.W.2d 298 (Iowa 1976), the Iowa Supreme Court stated:

> An attorney may of course challenge a decree of a court by motion, appeal, or other legal means, but as long as the decree stands he must abide by it. In like manner, he must not counsel others to disobey decrees or be a party with them in disobedience.
>
> Hughes, 557 N.W.2d at 893. An attorney's full knowledge of and cooperation with a client's willful violation of a court order subjects the attorney to being held in contempt along with the client. Bevers v. Kilburg, 326 N.W.2d 902, 905 (Iowa 1982). See also Iowa Supreme Court v. Hughes, 557 N.W.2d 890, 893-94 (Iowa 1996)

- Contempt is a viable option for punishing disobedience to a court's general equity decree. Disobedience of decree where a court exercised its equitable jurisdiction to divide the property and debts of the parties who lived together but never married is punishable as a contempt under §665.2(3) and (4).

Harris v. Iowa District Court for Cherokee County, 584 N W 2d 562, 564 (Iowa 1998). The Court rejected the argument that §626 1 [stating that judgments or orders requiring payment of money or delivery of property are to be enforced by execution, not contempt] prohibited enforcement of the decree by contempt. Criminal contempt sanctions for failure to pay child support, alimony or property settlement payments pursuant to a dissolution decree are not in violation of Article I, Section 19 of the Iowa Constitution which provides "No person shall be imprisoned for debt in any civil action ***." The Court held that child support, alimony and property settlement obligations pursuant to a court order are not "debts" within the meaning of the constitutional prohibition of imprisonment for debt. In Re Marriage of Lenger, 336 N.W.2d 191, 192 (Iowa 1983). Payment of medical bills are in the nature of support and contempts for failure to pay are not violative of the constitutional provision. Anderson, 451 N.W.2d at 190.

- Construction of a decree necessary to resolve a contempt application is appropriate and comports with due process. In In Re Marriage of Anderson, 451 N.W.2d 187, 190 (Iowa App. 1989) the Court held that a trial court's construction of the decree which provided that the noncustodial parent would pay half of the "uncovered medical expenses" would require the parent to pay half of the uncovered orthodontia expenses was appropriate and did not violate due process. However, a contempt proceeding cannot be converted into a proceeding to modify the underlying order. Gilliam v. Gilliam, 258 N.W.2d 156, 156 (Iowa 1977). A notice to show cause for a contempt proceeding does not confer personal jurisdiction over the alleged contemner for purposes of modifying the underlying order. To convert a contempt proceeding into a modification proceeding without notice violates substantive and procedural due process requirements. In Re Marriage of Springer, 538 N.W.2d 897, 901-02 (Iowa App. 1995). However, §598.23 does allow for modification of the decree in certain respects as an alternative to a contempt sanction.

- Finding of contempt against the parent awarded physical care upheld where physical care custodian refused to turn children over to other parent for visitation on five consecutive occasions when other parent refused to submit to sobriety tests. The other parent had appeared for visitation in an intoxicated condition several months prior thereto. The Court stated that visitation was not conditioned on the other parent's submission to sobriety tests by the physical care custodian. The Court further noted that there was no evidence that the other parent had engaged in drinking and driving when she attempted to pick up the children on the five occasions. Sulma v. Iowa District Court for Washington County, 574 N.W.2d 320, 321 (Iowa 1998).

- The doctrine of issue preclusion, res judicata and double jeopardy may prevent a second finding of contempt for the same conduct. However, a court was not barred for holding a party in contempt for failure to turn over a child to the parent awarded physical care pursuant to a final decree of dissolution even though the court had previously found the party in contempt for failing to turn over the child pursuant to a temporary custody order in the dissolution proceeding Amro, 429 N.W.2d at 140. The Court Amro noted that the two contempts dealt with two different court orders and there were new facts since the first contempt proceeding, and therefore, the law concerning issue preclusion, res judicata and double jeopardy did not prevent the enforcement of the final dissolution decree. See also Clark v. Glanton, 370 N.W.2d 606 (Iowa App. 1985) wherein court held successive actions for contempt based on same decree and same facts of noncompliance barred the second contempt proceeding. The Amro case also held when a finding of contempt is based on disobedience of a court's order, the cases recognize that a court may impose punitive sanctions under section 665.4 for past disobedience, impose coercive remedial sanctions under section 665.5 to encourage performance of affirmative acts required by the order, or impose both punitive and coercive remedial sanctions. Amro v. Iowa Dist. Court, 429 N.W.2d 135, 139 (Iowa 1988); Wilson v. Fenton, 312 N.W.2d 524, 528-29 (Iowa 1981)

- The provisions of chapter 665 provide the procedural framework for contempt proceedings based on an Iowa modification order of a dissolution decree from another state and sections 598.23 and 598.23A defined the applicable penalty Skinner v. Ruigh, 351 N.W.2d at 185. In Skinner 351 N.W.2d at 184, we held that, in contempts arising under dissolution of marriage decrees, punitive sanctions recognized by section 665.4 are available, provided, however, that the maximum punishment for such contempts is now fixed by section 598.23(1) rather than section 665.4. Amro, 429 N.W.2d at 139, recognized that, notwithstanding the provisions of section 598.23(1), the Court is also empowered with respect to certain violations of dissolution of marriage decrees to impose coercive remedial relief under section 665.5.

- A person who disobeys a child custody determination of another state can be held in contempt by an Iowa court. §598B.102(3) defines "child custody determination" as

> "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or

other monetary obligation of an individual.

The child custody determination entered in another state must first be registered with the district court in this state before it can be enforced by an Iowa court §598B 306 provides:

1. A court of this state may grant any relief normally available under the law of this state to enforce a registered child-custody determination made by a court of another state

2. A court of this state shall recognize and enforce, but shall not modify, except in accordance with article II, a registered child-custody determination of a court of another state.

§598B 313 further provides

A court of this state shall accord full faith and credit to an order issued by another state and consistent with this chapter which enforces a child-custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under article II.

The procedure for registering a "child-custody determination" from another state is set out in §598B 305. See Ballanger v. Iowa District Court for Appanoose County, 491 N.W.2d 179, 181 (Iowa App. 1992) which held that an that an Iowa court could enforce a custody decree of another state pursuant to repealed section 598A.15 (providing similar procedures as §598B.305). The Court noted that §598.23 of the Iowa Code provides the basis for citing and punishing a person for violating the foreign custody decree registered in this state.

- A person who disobeys a child support order of another state can be held in contempt by an Iowa court. §252K.101(21) defines "support order" as

"Support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, or reimbursement, and may include related costs and fees, interest, income withholding, attorney's fees, and other relief.

The support order entered in another state must first be registered with the district court in this state before it can be enforced by an Iowa court §252K.603 provides

1. A support order or income withholding order issued in another state is registered when the order is filed in the registering tribunal of this state.

2. A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.

> 3. Except as otherwise provided in this article, a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

The procedure for registering a foreign "support order" from another state is set out in §252K.602. A person may be cited and punished for contempt for failure to obey a support order from another state pursuant to either §598.23 or §598.23A.

- The Court also has the power to hear and determine applications for contempt of a non-Iowa dissolution decree if the registration requirements of chapter 626A (Uniform Enforcement of Foreign Judgments Act) are met. A properly authenticated foreign judgment, filed in an Iowa district court which would have venue if the original action was being commenced in this state. The specific statutory authority for this power is set out in §598.23(1). It should be noted that §598.23A(1) deals only with foreign "support orders". However, in Burke v. Iowa District Court for Boone County, 546 N.W.2d 582 (Iowa 1996) the Court makes the broad statement that §626A.2 provides that a properly authenticated foreign judgment has the same effect and is subject to the same procedures as an Iowa judgment and may be enforced or satisfied in a like manner. The Court of Appeals in Ballanger held that the provisions of 598A.15 [now §598B.305] controlled rather than §626A.

- The district court in one Iowa county does not have the authority to hear a contempt action pursuant to §598A.23 in regards to the violations of a dissolution decree which was entered by an Iowa district court for another county. See In Re Marriage of Rathe, 521 N.W.2d 748, 750 (Iowa 1994).

- Court orders must be obeyed unless modified by subsequent court action or changed on direct appeal from the entry of the order. If a court has jurisdiction of the parties and the legal authority to make an order, the order must be obeyed however erroneous or improvident. An erroneous, irregular or improvident order furnishes no grounds for a person to disobey its terms. A failure to obey a court order may be punished as contempt despite the any legal error or irregularity which infers in the order giving rise to the contempt proceeding. Allen v. Iowa District Court for Polk County, 582 N.W.2d 506, 508-09 (Iowa 1998). Iowa Supreme Court v. Hughes, 557 N.W.2d 890, 892-93 (Iowa 1996).

> "We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal. Persons who make private determinations of the law and

> refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. . .' [Nor should the attorney] advise a client not to comply." Hughes, 557 N.W.2d at 894 quoting Maness v. Mevers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed. 2d 574 (1975)

Even a good faith effort to pursue further legal procedures does not give the aggrieved party the right to flout a court order. Bevers v. Kilberg, 326 N.W.2d 902, 905 (Iowa 1982). A party must challenge an order they claim to be erroneous by direct appeal. An alleged contemner, in the contempt action, cannot attack the legal correctness of the order giving use to the contempt proceeding. A contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed. However, the alleged contemner may assert that the order giving use to the contempt proceeding is void (i.e., court lacked subject matter personal jurisdiction or is void for vagueness). Allen, 582 N.W.2d at 509; Hughes, 557 N.W.2d at 893 (Orders entered without subject matter jurisdiction are void. One cannot be cited for contempt of a void order). Courts will refuse to apply the collateral bar rule in a contempt proceeding when there was not an adequate and effective remedy to review the challenged ruling giving rise to the contempt proceeding, or where compliance could cause irreparable injury which may not be repaired by appellate vindication. Allen, 582 N.W.2d at 509. In Allen, the contemner refused to testify after being granted use immunity. The contemner argued that he was entitled to both use and transactional immunity. The trial court refused grant transactional immunity. The witness' application for discretionary review was denied. After the defendant again refused to testify and asserted his Fifth Amendment right against self-incrimination, the Court found him in contempt and sentenced him to six months in jail. On appeal, the Supreme Court, on a writ of certiorari, did not apply the collateral bar rule and vacated the ruling granting only use immunity and set aside the judgment and sentence of contempt entered against the witness.

4. DISOBEDIENCE TO ANY SUBPOENA ISSUED BY IT AND DULY SERVED, OR REFUSING TO BE SWORN OR TO ANSWER A WITNESS

- The use of the coercive contempt power to force compliance with court orders and to compel testimony of witnesses is included among a court's inherent powers. Medina v. Iowa District Court for Woodbury County, 552 N.W.2d 140, 142 (Iowa 1996).

[It] is essential that courts be able to compel the appearance and testimony of witnesses . . Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance The conditional nature of the imprisonment -- based entirely upon the contemner's continued defiance -- justifies holding civil contempt proceedings absent the safeguards of indictment and jury, provided that the usual due process requirements are met. Medina, 552 N.W.2d at 142 quoting Shillitani v. United States, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535 (1966) In Medina, the defendant had been subpoenaed to give deposition testimony by the State in the case against his half-brother on the same charges the defendant had already been tried and sentenced on. The defendant refused to testify after being advised that he no longer faced criminal jeopardy for the crimes and was given immunity on any related crimes The Supreme Court upheld the trial court's order confirming Medina to the county jail until such time as he complied with the court's order to give deposition testimony.[7]

See also U.S. v. Marquardo, 149 F.3d 36, 40-41 (1st Cir. 1998) wherein witness found in civil contempt for failure to testify before grand jury after being subpoenaed and granted immunity was ordered to prison until he agreed to testify or until grand jury disbanded. The witness spent 15 months in jail until the grand jury expired. He was subsequently charged with criminal contempt and sentenced to 15 months. The Court held that there were no double jeopardy problems since the civil and criminal contempt sentences served distinct purposes, one being coercive, the other punitive and deterrent, the same act may give rise to the different sanctions without violating

[7]-A court has the right and authority to continue a criminal trial until the contemner complies with the order once a criminal defendant is found in contempt of court and placed in jail. State v. Longstreet, 407 N.W.2d 591, 593 (Iowa 1987) In Longstreet, the defendants refused to provide handwriting exemplars. The Court ordered the defendants to remain in jail until they complied and continued the trial until such compliance. The Court found that speedy trial rule was not violated since "good cause" existed for the delay and that the delay was attributable to the defendants. The Court in Longstreet noted that due process may at some future point require that the criminal trial go forward without the exemplars once the confinement loses its coercive force.

double jeopardy provision of the U S Constitution "By the time of his civil detention, appellant had already independently committed the crime for which he is presently charged and convicted, namely criminal contempt At that point he could no more turn back the clock on his actions than, for example, a robber could avoid being convicted of the bank robbery by returning the loot to a bank he had robbed" See also People v. Warren, 671 N E 2d 700, 711 (Ill 1996) (Court in Warren also ruled that statute that made interference with visitation rights a crime and provided that a person who had been convicted under that section could not also be held in civil contempt for the same act if it violated the visitation provisions of a dissolution decree was unconstitutional as an undue infringement of the court's inherent powers by the legislature)

5 UNLAWFULLY DETAINING A WITNESS OR PARTY TO AN ACTION OR PROCEEDING PENDING BEFORE SUCH COURT, WHILE GOING TO OR REMAINING AT THE PLACE WHERE THE ACTION OR PROCEEDING IS THUS PENDING, AFTER BEING SUMMONED, OR KNOWINGLY ASSISTING, AIDING OR ABETTING ANY PERSON IN EVADING SERVICE OF THE PROCESS OF SUCH COURT

6 ANY OTHER ACT OR OMISSION SPECIALLY DECLARED A CONTEMPT BY LAW

Section 665 3 provides:

In addition to the above, any court of record may punish the following acts or omissions as contempts:

1 Failure to testify before a grand jury, when lawfully required to do so

2 Assuming to be an officer, attorney, or counselor of the court, and acting as such without authority

3 Misbehavior as a juror, by improperly conversing with a party or with any other person in relation to the merits of an action in which the juror is acting or is to act as a juror, or receiving a communication from any person in respect to it without immediately disclosing the same to the court

4 Bribing, attempting to bribe, or in any other manner improperly

influencing or attempting to influence a juror to render a verdict, or suborning or attempting to suborn witness.

5. Disobedience by an inferior tribunal, magistrate, or officer to any lawful judgment, order or process of a superior court, or proceeding in any matter in a manner contrary to law, after it has....

See also I.R.Civ.Pro. 134 (b)(2)(D).

II

WHAT IS THE PUNISHMENT FOR CONTEMPT?

In French, 546 N.W.2d at 914 the Court stated that the primary purpose of a contempt proceeding is to vindicate the integrity and independence of the court.

A court may impose punitive sanctions for past disobedience to an order or decree (completed contempts) pursuant to the provisions of §665.4 or impose coercive remedial sanctions under §665.5 to encourage or coerce performance of affirmative acts required by the order or decree, or impose both punitive and coercive remedial sanctions. Harris, 584 N.W.2d at 564; French, 546 N.W.2d at 914; Amro, 429 N.W.2d at 139; Wilson, 312 N.W.2d at 528-29. The different punishments prescribed by the statutes governing contempts (such as Sections 665.4, 665.5, 598.23 and 598.23A) are the only punishments a court can impose. Sanctions not authorized in the governing statutes are beyond a court's power to impose. Christensen, 578 N.W.2d at 679-80.

Section 665.4 of the Iowa Code (1999) set out the punishment courts may impose after finding that the person is in contempt.

§665.4 states:

> The punishment for contempt, where not otherwise specifically provided, shall be:
>
> 1. In the supreme court or the court of appeals, by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.
>
> 2. Before district judges, district associate judges, and associate juvenile judges by a fine not exceeding five hundred dollars or imprisonment in a county jail not exceeding six months or by both such fine and imprisonment.

> 3. Before judicial magistrates, by a fine not exceeding one hundred dollars or imprisonment in a county jail not exceeding thirty days.

§665.5 deals with the situation where the court imprisons a person who has been found to be in contempt for the failure to perform a particular act with the intent that they can be released upon performing a particular act. That section provides:

> If the contempt consists in an omission to perform an act which is yet in the power of the person to perform, the person may be imprisoned until the person performs it. In that case the act to be performed must be specified in the warrant of the commitment.

§655.5 authorizes incarceration to forcefully coerce compliance with a court order as opposed incarceration for punishment for past acts as provided for in §665.4 and 598.23(1). §655.5 is applicable to contempt actions in dissolution cases so long as the incarceration is for the purpose of requiring the contemner to comply with a court order and the person will be released on compliance with the order and the contemner has an opportunity to comply through reasonable efforts, i.e. the contemner carries "the keys of their prison in their own pockets". If the contemner is without any opportunity to take reasonable actions to obtain his or her release, then indefinite incarceration until compliance is made, is inappropriate. Amro, 429 N.W.2d at 141. A court may not, as a contempt sanction for the nonpayment of support, require that the contemner remain in jail indefinitely pursuant to §665.5 until he/she posts cash or a cash bond pursuant to §598.23A(2) unless there is a finding that the conditions which will secure his/her release are within the contemner's power to perform. Gizmo v. Iowa District Court for Hardin County, 561 N.W.2d 833, 835 (Iowa App. 1997). §665.5 does not have a counterpart in chapter 598 as does §665.4 (i.e., §598.23 and 23A). Therefore, indefinite imprisonment pursuant §665.5 until the contemner performs the act is not limited to the 30-day period set forth in §598.23. Amro, 429 N.W.2d at 139.

The incarceration of a person for an indefinite period of time to coerce compliance with a court order when the contempt consists in an omission to perform an act which is yet in the power of the person to perform is essentially a civil remedy designed for the benefit

of other parties. Medina, 552 N.W.2d at 142. The court is not required to make an individualized decision on the likelihood that the confinement will have a coercive effect at the time of the commencement of the incarceration.

> The judge need not, of course, accept as conclusive a contemner's avowed intention never to [perform the necessary act] Even if the judge concludes that it is the contemner's present intention never to [perform the necessary act], that conclusion does not preclude the possibility that continued confinement will cause the witness to change his mind

Medina, 552 N.W.2d at 142 quoting Simkin v. U.S., 715 F.2d 34, 37 (2nd Cir. 1983). As long as the court is satisfied that the coercive sanction of confinement might yet produce compliance with the order, the confinement may continue in the discretion of the court The Court in Medina recognized that the duration of coercive confinement may be limited to a term commensurate with the rationale for the contempt finding.

Section 598.23 of the Iowa Code (1999) is one example within the "where not otherwise specifically provided" provision of §665.4. Section 598.23 provides for a different punishment for contempt than that authorized in §665.4 for disobedience of orders entered in dissolution cases Skinner, 351 N.W.2d at 184 The provisions of §598.23 are intended to be primarily punitive[8] in nature and are only indirectly coercive. Amro, 429 N.W.2d at 139.

Section 598.23(1) provides:

> 1. If a person against whom a temporary order or final decree has been entered willfully disobeys the order or decree, the person may be cited and punished by the court for contempt and be committed to the county jail for a period of time not to exceed thirty days for each offense.

Section 598.23 does not limit a court to contempt as a means of punishing a willful

[8] §598.22 provides, in part, that a court may proceed with a contempt proceeding even if the amounts in default are paid in full prior to the contempt hearing. Amro, 429 N.W.2d at 139; Ogden v. Iowa District Court for Polk County, 309 N.W.2d 401 (Iowa 1981). A contemner can be held in contempt for past violations of an order and sentenced to jail even if the contemner pays all arrearages (or otherwise rectifies all defaults) prior to the contempt hearing or even if the contemner is currently unable to comply with the order but was so able to comply at the times of the prior defaults McNabb, 315 N.W.2d at 15

disobedience of a order or decree issued in a dissolution matter The remainder of §598 23(2) provides:

> 2 The court may, as an alternative[9] to punishment for contempt, make an order which, according to the subject matter of the order or decree involved, does the following:
>
> a Withholds income under the terms and conditions of chapter 252D
>
> b Modifies visitation to compensate for lost visitation time or establishes joint custody for the child or transfers custody
>
> c Directs the parties to provide contact with the child through a neutral party or neutral site or center
>
> d Imposes sanctions or specific requirements or orders the parties to participate in mediation to enforce the joint custody provisions of the decree.[10]

---

[9]A trial court does not have the authority to sanction a contemner with a fine and/or jail time and also order one of the sanctions listed in §598 23(2)(a)(b)(c) or (d) The court may either punish a contemner under §598 23 by a fine and/or jail or impose one of the alternate sanctions set forth in §598 23(2), but may not do both Kirk v. Iowa District Court for Jefferson County, 508 N W 2d 105, 109 (Iowa App 1993) Phillips, 380 N W 2d at 709-10 However, if the court also has pending a petition to modify the decree, it may through that procedural device, modify the decree as to custody and fine and/or jail the contemner pursuant to the contempt proceeding. Phillips, 380 N W 2d at 710. The court is required to consider the long-range best interests of the children before entering any order modifying the legal custody or physical care of the children, whether the modification occurred in a contempt proceeding pursuant to §598 23(2)(b) or in a modification proceeding Kirk, 508 N W 2d at 109; Phillips, 380 N W 2d at 710 Furthermore, after a court has sanctioned a contemner under §598 23 or 598 23(1) or 598 23(2) for one contempt, subsequent sanctions may be imposed for additional contumacious conduct Kirk, 508 N W 2d at 109

[10]In addition, §598 23A of the Iowa Code (1999) provides that, in relation to a failure to make support payments or provide medical support pursuant to an order or decree entered pursuant to Chapter 598, 234, 252A, 252C, 252F, 600B or any other support chapter, or comparable chapter of another state may, a person may be cited and punished by the court for contempt pursuant to §598 23 or under the provisions of §598 23A. The punishment for such a contempt are set forth in §598 23A 2 which provides:

> 2. If a person is cited for contempt, the court may do any of the following:
>
> a. Require the posting of a cash bond, within seven calendar days, in an amount equivalent to the current arrearages and an additional amount which is equivalent to at least twelve months of future support obligations. If the arrearages are not paid within three months of the hearing, the bond shall be automatically forfeited to cover payment of the full portion of the arrearages and the portion of the bond representing future support obligations shall be automatically forfeited to cover future support payments as payments become due.
>
> b (1) Require the performance of community service work of up to twenty hours per week for six weeks for each finding of contempt. The contemner may, at any time during the six-week period, apply to the court to be released from the community service work requirement under any of the following conditions:
>
> (a) The contemner provides proof to the court that the contemner is gainfully employed and submits to an order for income withholding pursuant to chapter 252D or to a court-ordered wage assignment
>
> (b) The contemner provides proof of payment of an amount equal to at least six months' child support The payment does not relieve the contemner's obligation for arrearages or future payments

(c) The contemner provides proof to the court that, subsequent to entry of the order, the contemner's circumstances have so changed that the contemner is no longer able to fulfill the terms of the community service order.

(2) The contemner shall keep a record of and provide the following information to the court at the court's request, or to the child support recovery unit established pursuant to chapter 252B, at the unit's request, when the unit is providing enforcement services pursuant to chapter 252B:

(a) The duties performed as community service during each week that the contemner is subject to the community service requirements.

(b) The number of hours of community service performed during each week that the contemner is subject to the community service requirements.

(c) The name, address, and telephone number of the person supervising or arranging for the performance of the community service.

(3) The performance of community service does not relieve the contemner of any unpaid accrued or accruing support obligation

c. Enjoin the contemner from engaging in the exercise of any activity governed by a license.

(1) If the court determines that an extreme hardship will result from the injunction, the court order may allow the contemner to engage in the exercise of the activity governed by the license, subject to terms established by the court, which shall include, at a minimum, that the contemner enter into an agreement to satisfy all obligations owing over a period of time satisfactory to the court.

(2) If the court order allows for the exercise of the activity governed by a license pending satisfaction of an obligation over time, and the contemner fails to comply with the agreement, the contemner shall be provided an opportunity for hearing, within ten days, to demonstrate why an order enjoining the contemner from engaging in the exercise of any activity governed by a license should not be issued.

(3) The court order under this paragraph shall be vacated only after verification is provided to the court that the contemner has satisfied all accrued obligations owing and that the contemner has satisfied all terms established by the court and when the person entitled to receive support payments, or the child support recovery unit when the unit is providing enforcement services pursuant to chapter 252B, has been provided ten days' notice and an opportunity to object.

(4) As used in this paragraph, "license" means any license or renewal of a license, certification, or registration issued by an agency to a person to conduct a trade or business, including but not limited to a license to practice a profession or occupation or to operate a commercial motor vehicle.

- In a criminal or civil contempt proceeding, where an alleged contemner faces actual imprisonment (not just the possibility of imprisonment), the alleged contemner is not only entitled to be represented by counsel, but if indigent, is entitled to court-appointed counsel at the state's expense McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982); Bruns, 535 N.W.2d at 164. This applies to the original contempt proceeding as well as any subsequent hearing if it will result in the loss of the contemner's physical liberty. McNabb, 315 N.W.2d at 14. "This holding necessarily will require the trial judge and counsel prosecuting a contempt proceeding to engage in what the Argensinger Court termed a 'predictive evaluation' of each case to determine whether there is significant likelihood that if the indigent is found in contempt the judge will sentence him or her to a jail term". "If so, counsel must be appointed" If not, the Court is not constitutionally required to appoint counsel. McNabb, 315 N.W.2d at 14. Denial of required counsel requires the vacating of the finding of contempt and the sentence since the denial of counsel is a denial of due process that deprives the court of jurisdiction to make the adjudication. Van Meter v. Hellwege, 356 N.W.2d 541, 543 (Iowa 1984). A court must, prior to the start of a contempt proceeding advise the alleged contemner of his or her right to counsel as well as the right to court-appointed counsel if he or she is indigent. A finding of indigency or non-indigency must also be made prior to the start of the contempt proceeding. A post-hearing determination that the alleged contemner was not indigent does not comply with due process. Kula v. Iowa District Court for Linn County, 462 N.W.2d 721, 722 (Iowa App. 1990). The alleged indigent contemner can waive his or her right to court-appointed counsel and represent themselves at the contempt proceeding assuming the appropriate record is made. Kula, 462 N.W.2d at 722 citing State v. Hindman, 441 N.W.2d 770 (Iowa 1989). Counsel appointed to represent an alleged contemner is entitled to be paid at the same rate (and not higher) allowed for court-appointed counsel in criminal matters or in juvenile court. State Public Defender v. Iowa District Court for Muscatine County, 594 N.W.2d 38, 39 (Iowa 1999). A person found in contempt and sentenced to jail may file a postconviction relief action alleging ineffective-assistance-of-counsel. State v. Arne, 579 N.W.2d 326, 330 (Iowa 1998).

- The Supreme Court held that a court-appointed attorney may only be compensated for contempt actions at the level allowed by statute in compensating attorneys for representation in criminal matters. In

State Public Defender v. Iowa District Court for Muscatine County, 594 N.W.2d 38, a court-appointed attorney, John Winder, relied on McNabb v. Osmundson, 315 N.W.2d 9 (1982) which held an attorney could be compensated based on a district court's assessment of reasonable compensation following Iowa Code Section 815.7, The Code (1981). The district court of Muscatine County relied on the authority of McNabb and awarded attorney Winder a claim of fees based on an hourly rate of $55.00. The State Public Defender argued, however, that the district court overstepped its authority and should be required to follow the requirements of Iowa Code Section 815.7 (1997) and Iowa Administrative Code 493 – 10.9(2)(c)(13B) limiting fees to $45.00 per hour because there is no other source of authority for the State to compensate lawyers appointed by the Court. After considering the McNabb case, the Supreme Court distinguished it because at the time of its review attorney fee claims were approved under Iowa Code Section 815.7, and were payable by the county in which the action was pending. The source of that funding was a court expense fund established by the board of supervisors pursuant go 1981 Iowa Acts, chapter 117, section 425. Section 421 of chapter 117 of the same 1981 session laws established a permissive special tax levy to maintain the county court expense fund. Therefore, the Supreme Court held in seeking a source of funding for claims not expressly referred to in any statute (i.e., contempt proceedings), it preferred to resort to an existing funding source that the legislature had established for similar, if not identical, situations rather than selecting a less analogous funding source. In addition, the Court concluded the contempt case was significantly similar to each of the other charges involved in Attorney Winder's fee application for $45.00 per hour. State Public Defender v. Iowa District Court for Muscatine County, 594 N.W.2d 38 (Iowa 1999).

- §665.4(2) and §598.23(1) provides for potential jail terms in the "county jail" as punishment for contempt. In a dissolution matter where a contemner is jailed as a means of punishment for past acts (i.e. punitive in nature because no action on the part of the contemner is available which can effect the release) §598.23(1) controls over §665.4. Amro, 429 N.W.2d at 139. In Christensen, the district court sentenced a contemner to 30 days in the county jail with all but one-half hour suspended. The half hour was ordered to be served in the courtroom at the conclusion of the contempt proceeding. The Supreme Court held such a sentence was illegal as not being provided for in the above statutes. In addition, such a sentence was not appropriate under §665.5 because the sentence was not coercive

but rather punitive in nature because it was for past acts and would not be obviated by satisfying his default of the decree provisions. However, the Court seemed to state that if the half hour confinement had been a condition of the court's withholding commitment it would have been appropriate. Christensen, 579 N.W.2d at 680.

- A court which has found that incarceration is a proper sanction for past acts of contempt may withhold commitment conditioned on compliance with prescribed conditions. Ickowitz v. Iowa District Court, 452 N.W.2d 446, 449-50 (Iowa 1990); Christensen, 578 N.W.2d at 680. Whenever a court withhold mittimus (commitment) upon a finding of contempt subject to certain conditions allowing a person to purge themself of contempt, the contemner is entitled to notice and opportunity to be heard before commitment can be ordered for the failure to comply with the conditions. Madyun v Iowa District Court for Linn County, (Iowa 1996); Greene v. District Court of Polk County, (Iowa 1993) The Greene Court held that where commitment is withheld in contempt proceedings under section 598 23, due process requires that the contemner must be allowed to show that the conditions have been fulfilled or that he or she made a bona fide effort to comply with the conditions but was unable to do so through no fault of their own. A subsequent order for commitment is not proper absent a finding that the contemner is responsible for the failure to comply and that alternative procedures or dispositions are inadequate to meet the court's interest in punishment and deterrence. Madyun, 544 N W 2d at 443; Greene, 342 N W.2d at 821. The reference to "alternative procedures or dispositions" in Greene was not made in the context of imposing imprisonment but rather spoke to alternative conditions for avoiding imprisonment. In the absence of changed circumstances not within the Court's contemplation at the time of the original punishment order, a court which found that imprisonment is a proper sanction for past acts of contempt may withhold commitment conditioned on total and unwavering compliance with prescribed conditions. A commitment so withheld may later be imposed for failure to meet those conditions. Where, as in the present case, the time period for performing the conditions is so short as to negate any suggestion that the contemner's ability to perform has changed from the time of the original order, a re-examination of ability to perform is not a condition for imprisonment. Conditions of imprisonment in prior punishment orders may only be altered in a manner which is favorable to the imprisoned party. It is, of course, necessary in order to avoid a Greene-type reexamination of ability to pay, that the original order fixing punishment clearly specify that,

absent an unanticipated change of circumstances, confinement cannot be avoided unless the conditions fixed by the Court are met completely. Diercks v. Iowa District Court for Marion County, 526 N.W.2d 350, 352 (Iowa App. 1994). Although it is wiser for a court to put in its contempt order that the contemnee may request a hearing if he or she believes the conditions have not been met, it is not a requirement. Sulma v. Iowa District Court for Washington County, 574 N.W.2d 320, 322 (Iowa 1998). In addition, the contemner is not entitled to be personally served with a rule to show cause when the court is asked to impose the penalty which was withheld when the court initially found the person in contempt. Mailed notice to the contemner giving reasonable notice and opportunity to be heard is all that is required. Sharkey v. Iowa District Court for Dubuque County, 461 N.W.2d 320, 323 (Iowa 1990).

- One of the purposes of contempt is to compel obedience to a court order. It is proper for a court to provide for purgation of the contempt by imposing conditions designed to procure compliance with the court order. However, a court may not attach a condition not connected with the subject matter of the contempt action. Callenius v. Blair, 309 N.W.2d 415, 419 (Iowa 1981) (court held invalid one of the conditions required of the contemner (i.e., pay interest on the property settlement payment) when only claim of contempt related to child support, alimony, and visitation.)

- A party found in contempt for violating a provision of a dissolution decree can be assessed the costs of the proceeding including reasonable attorney's fees. §598.24 of the Iowa Code (1999) provides:

> When an action for a modification, order to show cause, or contempt of a dissolution, annulment, or separate maintenance decree is brought on the grounds that a party to the decree is in default or contempt of the decree, and the court determines that the party is in default or contempt of the decree, the costs of the proceeding, including reasonable attorney's fees, may be taxed against the party.

See In Re Marriage of Anderson, 451 N.W.2d 187, 189 (Iowa App. 1989).

- §665.4 and §665.5 do not allow the court to award to the contemnee their attorney's fees and costs of gathering evidence incurred in obtaining the contempt order. There is no right for the prevailing party to recover attorney fees from the contemner absent statutory or contractual authority. Wilson, 312 N.W.2d at 529. See §236.8, §598.24, §625.22, and I.R.C.P. 134(b)(2)(D) and (E).

- In a contempt proceeding based on disobedience of a court decree or order, the court has no authority to award compensatory damages to the contemner for injuries or losses which resulted from the violation of the decree or order. A monetary judgment is neither a fine nor imprisonment, which are the sole forms of punishment available to a court under sections 665.4 and 665.5 French, 546 N.W.2d at 915.

III

WHAT IS THE PROCEDURE FOR FINDING SOMEONE IN CONTEMPT AND THE BURDEN OF PROOF NECESSARY TO ESTABLISH A CONTEMPT?

The provisions of chapter 665 provide the procedural framework for contempt proceedings. Skinner, 351 N.W.2d at 185. The procedure differs depending on whether the contumacious conduct was committed in the presence of the court or outside the presence of the court. If the contempt was not committed in the presence of the court, sections 665.6 and 665.7 are applicable. Section 665.6 provides:

> Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge,[11] an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises.[12] [13]

---

[11]The language "or comes officially to its knowledge", being unique to the Iowa statute, is broad enough to allow a contempt proceeding to proceed when a subpoena with a return of service is presented to the court and the witness fails to appear. Therefore, an affidavit is not needed. Knox, 185 N.W.2d at 709.

[12]When the alleged contemner appears at the hearing and does not challenge the sufficiency of the

Section 665.7 provides:

---

acts required to secure jurisdiction at the commencement of the proceeding (i.e. fails to object to a lack of an affidavit being on file), any deficiencies are waived and the lack of such an affidavit does not deprive the court of subject matter jurisdiction. Huyser v. Iowa District Court for Marion County, 499 N.W.2d 1, 2 (Iowa 1993).

[13]A verified application for contempt by the complaining party detailing the events giving rise to alleged contempt constitutes an affidavit for purposes of §665.6. Callenius v. Blair, 309 N.W.2d 415, 417-18 (Iowa 1981)

Before punishing for contempt, unless the offender is already in the presence of the court, the offender must be served personally[14] [15] [16] [17] with a rule to show cause against the punishment[18], and a reasonable time given the offender therefor; or the offender may be brought before the court forthwith, or on a given day, by warrant, if necessary.[19] [20] [21] In either case

---

[14]- An alleged contemner can be served with the rule to show cause by sending the notice to the alleged contemner's trial counsel when the alleged contemner has been shown to have evaded personal service. M.A. v. Iowa District Court for Polk County, 517 N.W.2d 205, 208 (Iowa 1994); Beauchamp v. Iowa District Court for Cass County, 328 N.W.2d 527 (Iowa 1983). IRCP 56.1 (n) provides:

> (n) If service cannot be made by any of the methods provided by this rule, any defendant may be served as provided by court order, consistent with due process or law

Once the complaining party establishes the predicate condition, a court may order service by mail on the alleged contemner's attorney. Generally, the best way to establish the predicate for using Rule 56.1(n) is to first attempt service under the relevant alternative in Rule 56.1(a) - (m) although this is not the only way to establish the predicate. Beauchamp, 328 N.W.2d at 528.

[15]- A rule to show cause must state the time and place for the contempt hearing, state the essential facts constituting the contempt charged and describe the proceeding as a proceeding for the purpose of holding the person in contempt. Arthur, 533 N.W.2d 325 (Iowa 1996) (wherein the Court held that the procedural requirements of §665.7 had not been complied with when the Court found the defendant in contempt for failing to appear at trial because of illness when the order setting the hearing stated: "The Court hereby sets a hearing for 9 a.m. 28 September 1995 for evidence that the defendant was too ill to attend the scheduled trial today, and for a conference to reschedule and prepare for the trial." The Court held that the order didn't advise the defendant that he was subject to a finding of contempt nor did it advise him of the means available to present a defense to the contempt charge).

[16]In the case of an indirect contempt, a court has no authority to render a judgment for contempt on evidence that was not of record at the time of the entry. Lutz, 297 N.W.2d at 354. (Wherein held that court is without power to enter a finding of indirect contempt when no evidence was introduced at the hearing on the contempt and only nonreported arguments of counsel were made. Court's summary of arguments in its ruling is insufficient to cure the noncompliance with §665.8.)

[17]The summary jailing/contempt procedures by police officers of those who are believed to have violated a domestic violence protective order pursuant to the provisions of §236.11 and 236.14 control over the procedural requirements of §665.7. Henley, 533 N.W.2d at 201.

[18]In Bruns, the Court noted that failure to carry out the service of process of the rule to show cause in the prescribed manner may deprive the court of jurisdiction. However, an alleged contemner's answer to the application for contempt waives any defects in the service of process. Bruns, 535 N.W.2d at 163. The failure to bring an alleged contemner before the court in regards to a charge of indirect contempt by personally serving on him/her a rule to show cause or by a warrant precludes the court from holding a person in contempt of court (absent appearance by the alleged contemner at the contempt hearing and waiver of such service by the contemner). Counsel for the alleged contemner cannot on his/her own waive personal service of the rule to show cause on his/her client. Mailing of copy of Application for Contempt and Rule to Show Cause to alleged contemner's counsel is insufficient. Lutz, 297 N.W.2d at 351. See also Arthur v. Iowa District Court for Jasper County, 553 N.W.2d 325, 327 (Iowa 1996). See also Criswell v. Hendricksen, 344 N.W.2d 255, 257 (Iowa App. 1983) (contemner's appearance at hearing with counsel and presenting evidence waives any defect in failing to serve the rule to show cause personally.)

[19]In Re Marriage of Bruns, 535 N.W.2d 157, 163 (Iowa App. 1995) wherein Court held that when a

the offender may, at the offender's option, make a written explanation of the offender's conduct under oath, which must be filed and preserved.

Where the contempt is founded upon evidence given by the persons other than the court, a record must be made. See §665.8. Where a judge finds a person in contempt based upon her or his personal knowledge, the facts must be made of record or be filed when no record is made. See §665.9.[22]

---

contempt proceeding has been initiated by a personal service of a rule to show cause, it is unnecessary to personally serve the alleged contemner with a new show cause order in the event the initial hearing is continued or rescheduled. Once the court acquires jurisdiction over the person at the time of the original service, it is only required thereafter to give the alleged contemner reasonable notice and opportunity to be heard of any hearings. The Court noted that notice mailed to an attorney for hearing on one matter is not notice to the alleged contemner representing himself in the contempt proceeding. However, actual notice of the hearing suffices.

[20]- An Iowa court which had jurisdiction over the parties when it entered the initial order has continuing personal jurisdiction over one of the parties to enforce the order/decree even though the violating party moves from the state of Iowa so long as he or she is properly served with a rule to show cause as provided in §665.7. Opperman v. Sullivan, 330 N.W.2d 796, 797 (Iowa 1983).

[21]- A court may impose contempt sanctions on a contemner who voluntarily absents himself/herself from the contempt proceedings with full awareness of the consequences after being appropriately served with a rule to show cause pursuant to §665.7. Opperman, 330 N.W.2d at 797-98. Kirk, 508 N.W.2d at 109.

[22]This section applies to summary contempt proceedings when the contempt finding is made by the

judge before whom the contemptuous acts actually occurred The purpose of such requirement is not to give notice to the alleged contemner, or to frame is issues to be tried, but solely to permit an appellate court to review the judge's action in the event the contemner seeks review by certiorari. Hudson v. Jenkins, 288 N.W 2d 566, 570 (Iowa 1980); Knox v. Municipal Court of City of Des Moines, 185 N W.2d 705, 710 (Iowa 1971).

A court must find that the alleged contemner is guilty of contempt beyond a reasonable doubt Christensen, 578 N W 2d at 678 Phillips, 380 N W 2d at 709 There must be substantial evidence that could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt Jacobo, 526 N W 2d at 866 Ervin, 495 N W 2d at 744-45 Rater v. Iowa District Court for Polk County, 548 N W 2d 588 (Iowa App 1996) The party requesting the contempt finding has the burden of proving that the contemner:

(1) had a duty to obey a court order;

and

(2) willfully[23] failed to perform that duty

Once a violation of a court order has been shown, the burden of production shifts to the alleged contemner to produce evidence suggesting that the violation was not willful, i e , a good faith effort was made to comply Matlock v. Weets, 531 N W 2d 118, 124 (Iowa 1995) Ervin, 495 N W 2d at 745 (Evidence of inability to obey is generally under the control of the alleged contemner and a failure or refusal to bring such evidence forward should not inure to the benefit of the person who has not complied with a court order) There are two ways in which the contemner may show that a failure to comply with a court order was not willful:

(1) the order was indefinite, ambiguous or uncertain;[24]

---

[23]Even though §236 8 does not mention willfulness, a finding of contempt for a violation of a domestic abuse protection order must be willful State v. Lipcamon, 483 N W 2d 605, 607 (Iowa 1992) The person subject to a domestic abuse protective order may not urge as a defense to a contempt citation that the protected party acquiesced and participated in the prohibited contacts However, such circumstances may considered in determining whether the contemner acted willfully Lipcamon, 483 N W 2d at 608 Henley, 533 N W 2d at 202

[24]In an injunction, the acts or things enjoined should be definitely specified and set forth with certainty and clearness so that persons bound by the decree may readily know what they must refrain from doing without speculation or conjecture. The test to determine if the order is vague or ambiguous is whether a person of common intelligence would be required to surmise or engage in conjecture to determine what conduct is or is not proscribed by the injunction Matlock, 531 N W 2d at 123 Before a person may be held in contempt (civil or criminal) for violating a court order, the order should inform the person in clear, specific, definite, unequivocal and certain terms what is commanded of the person. The command must be express and not implied. Rolek v. Iowa District Court for Polk County, 544 N W 2d 554, 547 (Iowa 1996) Zimmerman v. Iowa District Court for Benton County, 480 N W 2d 70, 74 (Iowa 1992); Hudson v. Jenkins, 288 N W 2d 566, 572 (Iowa 1980) (a court in determining whether an order was violated cannot, by interpretation, supply constraints which are not

expressed in the order, especially when the result is to apply powers of the court as formidable as contempt); Lynch v. Uhlenhopp, 78 N W 2d 491, 494 (Iowa 1956): Whether the language of an order is ambiguous, uncertain or indefinite is a question of law, not of fact. Zimmerman, 480 N.W 2d at 74. Interestingly, the Court in Matlock, stated "In examining a contempt citation for violating an injunctive order 'we take into consideration the spirit as well as the letter of the injunction to determine if its intent has been honestly and fairly obeyed.'" Matlock, 531 N.W.2d at 124; Bear v. Iowa District court for Tama County, 540 N W 2d 439, 441 (Iowa 1995). See also Palmer College, 412 N W 2d at 621

(2) the contemner was unable to perform the act ordered

The contemner retains the burden of persuasion to prove willfulness beyond a reasonable doubt. Since the burden of persuasion remains on the contemner, even if the contemnee makes a prima facie case and the contemner does not produce any evidence, the court must still analyze the contemnee's evidence to determine whether it establishes a willful violation beyond a reasonable doubt. Jacobo, 526 N.W.2d at 866. Gizmo, 561 N.W.2d at 835. Willful disobedience supporting a contempt finding requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not. Christensen, 578 N.W.2d at 678. Jacobo, 526 N.W.2d at 866.

> - A contemner is not excused from complying with a court order that is physically and financially capable of being done. A contemner must at least make good faith efforts to try to comply with the order, insofar as is possible. Personal disagreement with the practicality of an order does not excuse failure to comply, or attempting to comply insofar as possible. Ervin, 495 N.W.2d at 745. A contemner must make good faith/reasonable efforts to comply with a court order to avoid being found in contempt. Amro, 429 N.W.2d at 141. In Re Interest of B.C.A.K, 508 N.W.2d 738, 740 (Iowa App. 1993). It may be a defense to a contempt finding that a person, in order to comply with a court order, must necessarily have to deal with third parties who do not respond or cooperate within the time limits set by the court. Interest of B.C.A.K., 508 N.W.2d at 740
>
> -contempt finding against child support obligor upheld where obligor had lost full-time job, maintained that he was unable to find suitable employment due to physical problems, had two civil judgments against him and also had child support obligations from another marriage. The Court stated that the test for determining an ability to pay "is not merely whether [the contemner] is presently working or has current funds or cash on hand, but whether he has any property out of which payment can be made." The Court found very significant the fact that the contemner had failed to show why he hadn't obtained funds from his retirement account to pay his court-ordered obligations. The Court stated that a parent is "not free to prioritize [the parent's] financial obligations so as to prefer [the parent's] own creditors over [the parent's] court-ordered obligations. Christensen, 578 N.W.2d 675, 679 (Iowa 1998); McKinley v. Iowa District Court, 542 N.W.2d 822 (Iowa 1996)

- In In Re Marriage of Schradle, 462 N.W.2d 708 (Iowa App 1990) the ex-wife filed a contempt proceeding in regards to the alleged contemner's failure to make alimony payments as per the decree. The alleged contemner filed a modification proceeding. At an apparent hearing on the contempt proceeding the alleged contemner promised that he would make all payments due under the decree pending a combined trial on the matters and no contempt order was issued. At the later combined trial, it was shown that the alleged contemner had not made the payments as promised. The Court in Schradle in affirming the contempt finding stated: "The trial court found [contemner] in contempt for failing to keep his promise to a district judge." *** "Not only did the original stipulation and decree outline [contemner's] obligations, but [contemner] later promised a district judge he would remain current on his alimony and maintain the various insurance policies. The record demonstrates he failed to do so. His actions were 'contrary to a known duty.'"

- when a decree provides that a party to pay certain expenses upon presentation of certain documentation, the failure to provide appropriate documentation is a defense to a contempt proceeding for the failure to pay Jacobo, 526 N.W.2d at 868. However, the obligor remains liable for the total amount ordered to be paid upon presentation of proper documentation

- Under §598.23 and 598.23A, a trial court is not required to hold a person in contempt even though the requesting party had met their burden of proof. Both sections provide that a person "may be cited and punished" for contempt and, therefore, the trial court has discretion in deciding whether to impose punishment for contempt in a particular case after considering all of the circumstances. The trial court has broad discretion in deciding whether to punish a person for contempt and such a decision will not be reversed unless the discretion is grossly abused. In Re Marriage of Swan, 526 N.W.2d 320, 327 (Iowa 1995). Ballanger v. Iowa District Court for Appanoose County, 491 N.W.2d 179, 181 (Iowa App 1992).

- Under §236.8 a court "may hold a person in contempt" of a protective order but is not required to do so upon the showing of a violation of the order. The trial court has broad discretion in deciding whether to hold a person in contempt for the violation of a protective order. The decision to hold or not hold a person in contempt will not be reversed absent a showing of gross abuse of discretion. State v. Lipcamon, 483 N.W.2d 605, 607 (Iowa 1992)

- a good faith belief that the parties to an order had modified the terms of the order by way of a private agreement is a defense to a contempt proceeding.

Jacobo, 526 N.W 2d at 867 This is so notwithstanding the law that a modification of a support order is void unless the court approves the modification after notice and opportunity for a hearing. See §598.21(8) However, the obligor is still responsible for the total amounts owed under the court order until the court enters an order of modification. See also Huyser, 499 N.W.2d at 3 wherein the Court stated that in such circumstances a trial court must find whether the agreement was as the alleged contemner contended it was, whether the delinquency on which the contempt is based occurred after the alleged agreement and in reliance thereon, and whether under all the circumstanced presented, including the alleged agreement, the default was willful

- Physical care custodian held not to be in contempt when 17- and 15-year-old boys refused to exercise visitation with their father when the evidence failed to show that the mother deliberately prevented the boys from participating in visitation In Re Marriage of Ruden, 509 N W 2d 494, 496 (Iowa App. 1993). The Court noted that there was evidence that the mother could have done more to assure that the father got the ordered visitation. The court also noted its displeasure with the mother's attitude which implied that the children's rejection of visitation was acceptable. The Court stated "The present situation points to the limitations of the court system in solving a family's problems."

- failure of a parent exercising visitation with the children to return them to the physical care custodian upon the conclusion of the court-ordered visitation period resulted in a contempt finding when the only reason given for said refusal was that children did not want to go back to the physical care custodian. Wells v. Wells, 168 N W 2d 54, 64 (Iowa 1969)

- a physical care custodian can be held in contempt for disobeying a court order allowing the other parent visitation with the child even though custodian believed child was at great risk if visitation was allowed because the noncustodial parent was suspected of sexually abusing the child. An attorney who counseled the client to disobey the order was also subject to discipline. Hughes, 557 N.W 2d at 894 citing In Re Robinson, 639A.2d 1384 (Vt 1994) and In Re Rosenfeld, 601 A 2d 975 (Vt. 1991).

- a party to a contempt proceeding or a witness in a contempt proceeding may invoke their Fifth Amendment right against self-incrimination. State v. Rhode, 503 N.W 2d 27, 37 (Iowa App. 1993). A valid assertion of the Fifth Amendment right against self-incrimination would be a valid defense to an order to testify. Gibb v. Hansen, 286 N.W 2d 180, 184 (Iowa 1979). In Re the Interest of E.H. III, 579 N.W.2d 243, 249 (Iowa 1998) the Iowa Supreme

Court stated:

> The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. This privilege applies not just to criminal trials, but also allows a person "'not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 274, 281 (1973)). When the State "compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment." Lefkowitz v. Cunningham, 431 U.S. 801, 805, 97 S.Ct. 2132, 2135, 53 L.Ed 2d 1, 7 (1977).

As for a witness in a civil or criminal proceeding who asserts his or her Fifth Amendment right against self-incrimination, the witness is not exonerated from answering a particular question merely because he or she declares that doing so would incriminate them It is up to the Court, in its sound discretion, to determine if the assertion of the right is genuine or if the hazard of self-incrimination is illusory or speculative. A court may not give a blanket ruling excusing a witness from testifying The court must address the assertion of the right on a question-by-question basis.[25] State v. McDowell, 247 N.W 2d 499, 501 (Iowa 1976); State v. Parkam, 220 N.W.2d 623, 626, 628 (Iowa 1974).

A party to a civil proceeding may invoke their Fifth Amendment right against self-incrimination, but the refusal to testify may be used against the party in that action Bauer v. Stein Finance, 169 N W.2d 850,0852 (Iowa 1969). An adverse inference from the failure of a party to testify in a civil case may be made by the fact-finder and there is no infringement of the party's rights

---

[25] An appropriate procedure to be used by a court when a witness refuses to answer a question during trial testimony is to (1) order the witness to answer the question in front of the jury; (2) If the witness continues to refuse to answer, send the jury out and hold a contempt hearing. The Court should advise the alleged contemner of the consequences of refusing to answer the question (i.e. explain that an illegal resistance to a court order constitutes contempt and that the sanctions are a fine up to $500 and/or imprisonment up to six months; allow the person to explain his/her reasons for failing to respond to the question, then decide whether to hold the person in contempt and announce the sanctions imposed) (3) resume trial. See Gibb v. Hansen, 286 N.W.2d 180, 183 (Iowa 1979)

under the Fifth Amendment Giltner v. Stark, 219 N.W.2d 700, 714-715 (Iowa 1974).

In a criminal contempt proceeding, if the alleged contemner asserts his or her Fifth Amendment rights, no adverse inference can be made by the fact-finder from the contemner's silence. Giltner, 219 N.W.2d at 713-14. However, in a civil or criminal contempt proceeding, the contemner has the burden of production of evidence to show that the disobedience to the order was not willful. The court may consider the fact that no evidence was introduced by the contemner on this issue as a result of the assertion of the right against self-incrimination. Rater, 548 N.W.2d at 590-91. The reason for such absence of evidence is incidental. It is the fact of the absence of such evidence that can be used by the court in making its decision. Bauer, 169 N.W.2d at 854; Rater, 548 N.W.2d at 591; U.S. v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 1552-54 (1983). Some states have held that an alleged contemner in a criminal contempt proceeding has the same scope of protection under the Fifth Amendment afforded a criminal defendant and includes the right not to be called as a witness. In Re Marriage of Alverson, 981 P.2d 1123, 1125 (Colo. App. 1999); Ex Parte Werblud, 536 S.W.2d 542, 547-48 (Tex. 1976) and Ex Parte Bowers, 886 S.W.2d 346 351 (Tex. App. 1994); See McCarthy v. Iowa District Court for Jefferson County, 386 N.W.2d 122, 127 (Iowa App. 1986) (an alleged contemner who fails to raise the issue of the right against self-incrimination when called as a witness by the complaining party waives that issue).

- if the actual sentence to be imposed (as opposed to the potential length of sentence) for a contempt or contemptuous acts exceeds six months' incarceration, the defendant is entitled to a jury trial. M.A. v. Iowa District Court for Polk County, 517 N.W.2d 205, 206-07 (Iowa 1994). A state may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. Or, the state may, after conviction choose to reduce the total sentence to six months or less rather than retry the contempt with a jury. See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697 (1974); Lewis v. U.S., _____ U.S. _____, 116 S.Ct. 2163, 2167-67 (1996). If there is a potential for a period of incarceration greater than six months and the defendant requests a jury trial, the court may either make an express pretrial announcement indicating the limits of the penalty it will impose (i.e. penalty will be six months or less no matter the number of acts found to constitute contempt) or the court may simply deny the jury request which effectively indicates pretrial that it will not impose a sentence greater than six months. U.S. v. Linney, 134 F.3d 274, 281 (4th Cir. 1998).
- attorney for mother not held in contempt for obtaining a psychological exam for the child after juvenile court had previously ruled on the mother's

application for an exam stating "At this time the court denies the request of counsel of the mother that the child be evaluated by Dr. Douglas Brewer." The Supreme Court held there were two possible interpretations: (1) the order absolutely forbid the evaluation; and (2) the order simply denied his request that the court order the evaluation. The Court ruled that the order, in order to justify a contempt finding, requires the reader to infer that the denial of the request for the evaluation was prohibited without prior court approval. In contempt actions, the Court stated that it would not supply by interpretation constraints that are not expressed. In light of the lack of an express order prohibiting the evaluation, the resulting ambiguity prevented a finding that the attorney had willfully violated the order. However, in Polek v. Iowa District Court for Polk County, 554 N.W.2d 544, 547-48 (Iowa 1996) the Court relied on the unexpressed implicit directives of an order to justify the alleged contemner's actions and refused to hold the person in contempt.

There is a split of authority[26] in the federal courts whether a trial court can order a noncompensatory (i.e. not reimbursement of fees and costs incurred as a result of the contempt) fine against party as a sanction under FRCP 37 without a finding of contempt. Regardless of whether a fine is premised on a finding of contempt or is deemed justified under FRCP 37, a noncompensatory nonpurgeable fine of $10,000 against an attorney (who apparently assisted client in disobeying a discovery order) is a criminal sanction and the attorney must be provided the procedural protections associated with a criminal proceeding. Satcorp International Group v. China National Silk, 101 F.3d 3, 6 (2nd Cir. 1996). Mackler Productions, Inc., v. Cohen, 146 F.3d 126, 130 (2nd Cir. 1998) (holding that attorney who

[26]There are significant differences between the imposition of sanctions and the punishment of contempt. The court's power to impose appropriate sanctions on attorneys practicing before it springs from a different source than the power to punish for contempt. The power to impose sanctions on attorneys is either rooted in the court's inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal or statutes and rules designated to implement the power (such as FRCP 11 and 37 or IRCP 80 and 134(b). Mackler Productions Inc. v. Cohen, 146 F.3d 126, 129 (2nd Cir. 1998). IRCP 80 provides in part that "if a motion, pleading or other paper is signed in violation of this rule, the court *** 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." Rule 134 (b)(2)(D) and (E) provide: (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; (E) In lieu of any of the foregoing orders or in addition thereto, the court shall require the disobedient party or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. No matter the source of the power to sanction attorneys or parties, and no matter whether the court chooses to characterize the sanctions as something other than contempt, due process requires that the person be provided with notice of the possibility that sanctions may be imposed and an opportunity to present evidence or argument against their imposition. Satcorp International China National Silk Import, 101 F.3d 3, 5-6 (2nd Cir. 1996).

allowed client to testify falsely was entitled to criminal procedural protections before imposition of a sanction of $10,000 which was noncompensatory and nonpurgeable). The Supreme Court has ruled that civil coercive fines as well as sanctions for failure to comply with discovery requests are not criminal in nature.

> Contempts such as failure to comply with document discovery, for example, while occurring outside the court's presence, impede the court's ability to adjudicate the proceedings before it and thus touch upon the core justification for the contempt power. Courts traditionally have broad authority through means other than contempt - such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment - to penalize a party's failure to comply with the rules of conduct governing the litigation process. See, e.g., Fed.Rules Civ. Proc. 11, 37. Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority.

Bagwell, 114 S.Ct. at 2560.

- The filing of a chapter 7 or 13 bankruptcy by the contemner may or may not automatically stay the contempt proceedings. 11 USC §362(h) provides that a bankruptcy petition does not stay a commencement or continuation of a criminal action or proceeding against the debtor. The filing of a bankruptcy petition does not preclude the commencement or continuation of a criminal contempt proceeding against the debtor for a pre-petition violation of a court-ordered obligation to pay a pre-petition debt. If the sanctions for the contempt are criminal (i.e. a definite period of incarceration without the ability to purge by the payment of certain pre-petition debts) the contempt proceedings are exempt from the automatic stay. If the sanctions are coercive in nature (i.e. sanction is purgeable by payment of certain pre-petition debts - sentenced to a period of incarceration but mittimus withheld if certain pre-petition debts paid by a date certain or indefinite confinement until debts paid), then the contempt proceedings would be stayed by the automatic stay. The reason is that the coercive sanctions in effect seek to effect a coerced dilution of the bankruptcy estate and favor one creditor over the debtor's other creditors. Scully v. Iowa District Court for Polk County, 489 N.W.2d 389, 391 (Iowa 1992). In Re Maloney, 204 B.R. 671 (E.D.N.Y. 1996); In Re Wrobel, 197 B.R. 289 (N.D. Ill. 1996); In Re Allison, 182 B.R. 881 (N.D. Ala. 1995). Furthermore, postpetition contempt proceedings not involving a debtor's failure to discharge a pre-petition debt pursuant to a pre-petition court order may include coercive sanctions as a means of forcing compliance with the court order so long as the conditions do not involve the property of the bankruptcy estate (i.e. postpetition wages or exempt property). Scully, 489 N.W.2d at 391. (An example cited by the Court are

contempt proceedings for a violation of discovery orders.) In addition, 11 USC §362(b)(2) excepts from the automatic stay the collection of nondischargeable support obligations (alimony or child support) A chapter 7 debtor's postpetition earnings, exempt property and property acquired after the petition for bankruptcy are available to pay nondischargeable support obligations. Generally, the support obligee needs to seek a determination from the bankruptcy court that the support obligations were truly in the nature of support and therefore nondischargeable. Once done, the obligee is free to collect support obligations (and to bring contempt proceedings to effect collection) from property that is not property of the estate In Re Kearns, 168 B R. 423 (D.Kan. 1994). (The Court noted that prudence suggests that any uncertainty as to whether the automatic stay applies should be submitted to the bankruptcy court before action is taken to avoid the risk of being held in contempt by the bankruptcy court pursuant to 11 USC §362(h).

IV

ABUSE OF CONTEMPT POWER

A judge who abuses the contempt power is subject to sanctions See Annotation - Abuse or Misuse of Contempt Power as Ground for Removal or Discipline of Judge, 76 ALR 4th.

The bad faith refusal to follow clearly defined rules of procedure for contempt citations will result in removal or reprimand of a judge

However, the mere reversal of a finding of contempt by an appellate court will not subject the judge to sanctions.

> Judges are supposed to be [persons] of fortitude, able to thrive in a hardy climate Although we have indicated our displeasure with the injudicious use of contempt authority, we have not officially reprimanded or censured a judge whose contempt order has been reversed. The authority of a judge or hold one in contempt, depriving as it does a person of liberty, is an authority that should be used rarely, and with extreme caution. Nevertheless, judges overly sensitive, or judges acting in pressure-laden situations, should not be required to fear automatic discipline because a contempt ruling might later be reversed on appeal. Judges have and will make mistakes. They are human beings and not robots woven of steel mesh
>
> In Re Johnson, 395 A 2d 1319 (Pa 1978)

In In Re Inquiry Concerning Judge Perry, 641 So.2d 366 (Fla. 1994) the court in reprimanding a judge who had repeatedly failed to follow proper procedures in citing persons for contempt stated:

> Further, we fully understand that one of the most important and essential powers of a court is the authority to protect itself against those who disregard its dignity and authority or disobey its orders. This authority is appropriately administered through a court's power to punish by contempt South Dade Farms, Inc. v. Peters, 88 So.2d 891 (Fla. 1956). Nevertheless, although the power of contempt is an extremely important power for the judiciary, it is also a very awesome power and is one that should never be abused Further, because trial judges exercise their power of criminal contempt to punish, it is extremely important that they protect an offender's due process rights, particularly when the punishment results in the imprisonment of the offender. As such, it is critical that the exercise of this contempt power never be used by a judge in a fit of anger, in an arbitrary manner, or for the judge's own sense of justice As we have previously explained:
>
> > Judges must necessarily have a great deal of independence in executing [their] powers, but such authority should never be autocratic or abusive. We judges must always be mindful that it is our responsibility to serve the public interest by promoting justice and to avoid, in official conduct, any impropriety or appearance of impropriety. We must administer our offices with due regard to the system of law itself, remembering that we are not depositories of arbitrary power, but judges under the sanction of law. Judges are expected to be temperate, attentive, patient and impartial, diligent in ascertaining facts, and prompt in the performance of a judge's duties. Common courtesy and considerate treatment of [others] are traits properly expected of judges. Court proceedings and all other judicial acts must be conducted with fitting dignity and decorum, reflecting the importance and seriousness of the inquiry to ascertain the truth.\
>
> In Re Turner, 421 So 2d 1077, 1081 (Fla. 1982) It is also extremely important to recognize that this discretionary power of criminal contempt is not broad or unregulated. Our rules directly speak to how it should be exercised. Justice Cardozo's comments concerning the discretionary power of trial judges seem appropriate in this instance:
>
> > The judge, even when he is free, is still not wholly free He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is

> to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.
>
> American Judicature Society, *Handbook for Judges*, 82 (1961) (emphasis added) (footnote omitted) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921))

Perry, 461 So 2d at 368-369.

V

CHECKLIST AND REMINDERS

1) Is the act a direct or indirect contempt?

2) If the act is an indirect contempt, proceed by way of §665.6 and §665.7

- affidavit must be filed
- serve rule to show cause giving notice and opportunity of the hearing
- appoint counsel if alleged contemner is indigent and jail is a probable sanction
- if sanctions will constitute serious criminal contempt, advise alleged contemner of right to trial by jury.

3) If the act is a direct contempt, the Court must first determine if the act constitutes an actual disruption of the judicial proceedings

A) If yes, the Court may proceed to adjudicate and sanction the contemner immediately after allowing the contemner an opportunity allocute unless the act constituted a personal attack on the judge. If the Court chooses not to proceed to adjudicate the contempt immediately or if the actions constitute a personal attack on the judge, the contempt matter should be assigned to a different judge and notice and opportunity of the hearing should be given.

B) If no, the Court should assign the contempt matter to a different judge and give notice and opportunity of the hearing to determine if the act constituted contemptuous conduct.

The ABA Standards for Criminal Justice suggest that the alleged contemner be given an admonition or warning before be found in contempt for his/her actions. Standard 6-4.2 provides:

> No sanction other than censure should be imposed by the trial judge unless:
>
> (a) it is clear from the identity of the offender and the character of his or her acts that the disruptive conduct was willfully contemptuous (flagrant contempts do not require a warning) or
>
> (B) the conduct warranting the sanction was preceded by a

clear warning that such conduct was impermissible and that specified sanctions might be imposed for its repetition.

Where a judge instructs a person to cease certain activities that are improper or contemptuous, the instruction must be clear and exact.

Where the contemner is the trial attorney, a judge is wise to avoid instant action against the attorney in the presence of the client, if at all possible To find the attorney guilty of contempt in the middle of the trial would likely bring a claim of prejudice by the client, who would claim that his or her right to effective assistance of counsel and a fair trial was severely impaired by the action of the trial judge

The wisdom of deferring action against a lawyer has nothing to do with the requisites of due process when the trial judge does not act the instant the contempt is committed, but the possible prejudice to the lawyer's client may counterbalance the need to preserve order in the court through immediate action.

Where the judge decides to find a person in contempt of court, the judge must act skillfully to perfect a record that will sustain the judgment of contempt on appeal.

The judge should remember that contemptuous conduct often is not spoken but comes in the form of unruly actions. Those actions should be described in detail for the record so that the reviewing court may appreciate the situation faced by the trial court. Thus, the judge must unmistakably and vividly describe the conduct that he or she witnessed, and deemed contemptuous.

INTERVIEWING THE TREATING PHYSICIAN, GETTING THE RECORDS AND RELATED TOPICS

Information submitted by:
Mike Ellwanger
Sioux City, IA

DIVISION XVIII. SUBPOENAS

RULES 363 TO 364. [ABOLISHED]

[Abolished July 1, 1973.]

RULE 365. SPECIFIC PROVISIONS

(a) **Form; Issuance.** Every subpoena shall

(1) state the name of the court from which it is issued and the title of the action, including its docket number;

(2) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. A command to produce evidence or to permit inspection may be joined with a command to appear at trial, hearing or deposition, or may be issued separately;

(3) be issued by the clerk of court as provided by these Rules of Civil Procedure or by statute;

(4) set forth the text of subdivisions (b), (c) and (d) of this rule.

(b) **Protection of Persons Subject to Subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorney's fees.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (c)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance, if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect

and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place outside of the county in which that person resides, is employed or regularly transacts business in person, except that, such a person may be ordered to attend trial anywhere within the state in which the person is served with a subpoena;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information; or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(c) **Duties in Responding to Subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When the information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(d) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (b)(3)(A).

(e) **Service.** Subpoenas shall be served as prescribed in these rules or by statute.

(f) **Notice.** Prior notice of any commanded production of documents and things or inspection of premises shall be served on each party in the manner prescribed by R.C.P. 106(b) and in a manner reasonably calculated to give all parties an opportunity to object before the commanded production or inspection is to occur.

(g) **Limits.** An attorney may cause a subpoena to be issued only in a pending proceeding governed by these Rules of Civil Procedure and in which the attorney has appeared.

[Adopted effective Jan. 24, 1998.]

PERPETUATING TESTIMONY

DOCUMENTS FILED WITH STATE OR DIVISIONS

GENERAL PRINCIPLES

622.1 Certification under penalty of perjury.

1. When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by a sworn statement written by the person attesting the matter, the person may attest the matter by an unsworn written statement if that statement recites that the person certifies the matter to be true under penalty of perjury under the laws of this state, states the date of the statement's execution and is subscribed by that person. This section does not apply to acknowledgments where execution is required by law, to a document which is to be recorded under chapter 558 or to a self-proved will under section 633.279, subsection 2.

2. The certification described in subsection 1 may be in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct.

....
Date Signature

84 Acts, ch 1048, §1

622.2 Credibility.

Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility.

[C51, §2389; R60, §3979; C73, §3637; C97, §4602; C24, 27, 31, 35, 39, §**11255**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.2]

622.3 Interest.

No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of the person's interests in the event of the action or proceeding, or because the person is a party thereto, except as provided in this chapter.

[R60, §3980; C73, §3638; C97, §4603; C24, 27, 31, 35, 39, §**11256**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.3]

622.4 Transaction with person since deceased or mentally ill. Repealed by 83 Acts, ch 37, § 7.

622.5 Exceptions. Repealed by 83 Acts, ch 37, § 7.

622.6 Depositions taken conditionally. Repealed by 83 Acts, ch 37, § 7.

622.7 Husband or wife as witness. Repealed by 83 Acts, ch 37, § 7.

622.8 Witness for each other.

In all civil and criminal cases the husband and wife may be witnesses for each other.

[C51, §2391; R60, §3983; C73, §3641; C97, §4606; S13, §4606; C24, 27, 31, 35, 39, §**11261**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.8]

622.9 Communications between husband and wife.

Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

[C51, §2392; R60, §3984; C73, §3642; C97, §4607; C24, 27, 31, 35, 39, §**11262**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.9]

622.10 Communications in professional confidence — exceptions — required consent to release of medical records after commencement of legal action — application to court.

1. A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the

person to discharge the functions of the person's office according to the usual course of practice or discipline.

2. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to physicians or surgeons, physician assistants, advanced registered nurse practitioners, mental health professionals, or to the stenographer or confidential clerk of any physicians or surgeons, physician assistants, advanced registered nurse practitioners, or mental health professionals, in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.

3. *a.* In a civil action in which the condition of the plaintiff in whose favor the prohibition is made is an element or factor of the claim or defense of the adverse party or of any party claiming through or under the adverse party, the adverse party shall make a written request for records relating to the condition alleged upon the plaintiff's counsel for a legally sufficient patient's waiver under federal and state law. Upon receipt of a written request, the plaintiff shall execute the patient's waiver and release it to the adverse party making the request within sixty days of receipt of the written request. The patient's waiver may require a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional to do all of the following:

(1) Provide a complete copy of the patient's records including, but not limited to, any reports or diagnostic imaging relating to the condition alleged.

(2) Consult with the attorney for the adverse party prior to providing testimony regarding the plaintiff's medical history and the condition alleged and opinions regarding health etiology and prognosis for the condition alleged subject to the limitations in paragraph *"c"*.

b. If a plaintiff fails to sign a waiver within the prescribed time period, the court may order disclosure or compliance. The failure of a party to comply with the court's order may be grounds for dismissal of the action or any other relief authorized under the rules of civil procedure.

c. Any physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional who provides records, provides information during consultation, or otherwise responds in good faith to a request pursuant to paragraph *"a"* shall be immune with respect to all civil or criminal penalties, claims, or actions of any kind with respect to this section.

d. Any physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional who provides records or consults with the counsel for the adverse party shall be entitled to charge a reasonable fee for production of the records, diagnostic imaging, and consultation. Any party seeking consultation shall be responsible for payment of all charges. The fee for copies of any records shall be based upon actual cost of production.

e. Defendant's counsel shall provide a written notice to plaintiff's counsel in a manner consistent with the Iowa rules of civil procedure providing for notice of deposition at least ten days prior to any meeting with plaintiff's physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional. Plaintiff's counsel has the right to be present at all such meetings, or participate in telephonic communication with the physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional and counsel for the defendant. Plaintiff's counsel may seek a protective order structuring all communication by making application to the court at any time.

f. The provisions of this subsection do not apply to actions or claims brought pursuant to chapter 85, 85A, or 85B.

4. If an adverse party desires the oral deposition, either discovery or evidentiary, of a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional to which the prohibition would otherwise apply or the stenographer or confidential clerk of a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional or desires to call a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional to which the prohibition would otherwise apply or the stenographer or confidential clerk of a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional as a witness at the trial of the action, the adverse party shall file an application with the court for permission to do so. The court upon hearing, which shall not be ex parte, shall grant permission unless the court finds that the evidence sought does not relate to the condition alleged and shall fix a reasonable fee to be paid to the physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional by the party taking the deposition or calling the witness.

5. For the purposes of this section, *"mental health professional"* means a psychologist licensed under chapter 154B, a registered nurse licensed under chapter 152, a social worker licensed under chapter 154C, a marital and family therapist licensed under chapter 154D, a mental health counselor licensed under chapter 154D, or an individual holding at least a master's degree in a related field as deemed appropriate by the board of behavioral science examiners.

6. A qualified school guidance counselor, who

has met the certification and accreditation standards of the department of education as provided in section 256.11, subsection 10, who obtains information by reason of the counselor's employment as a qualified school guidance counselor shall not be allowed, in giving testimony, to disclose any confidential communications properly entrusted to the counselor by a pupil or the pupil's parent or guardian in the counselor's capacity as a qualified school guidance counselor and necessary and proper to enable the counselor to perform the counselor's duties as a qualified school guidance counselor.

[C51, §2393, 2394; R60, §3985, 3986; C73, §3643; C97, §4608; S13, §4608; C24, 27, 31, 35, 39, §**11263**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.10; 82 Acts, ch 1242, §1]

88 Acts, ch 1134, §107; 88 Acts, ch 1262, §10; 91 Acts, ch 229, §11; 97 Acts, ch 197, §8, 16

1997 amendment applies to actions filed after July 1, 1997; 97 Acts, ch 197, §16

622.10A Tax advice — confidential communications.

1. With respect to communications involving tax advice between a taxpayer and a federally authorized tax practitioner, the same protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to that communication to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

2. The confidentiality privilege under this section applies to either of the following:

a. A noncriminal tax matter before the Iowa department of revenue and finance.

b. A noncriminal tax proceeding in federal or state court brought by or against the state of Iowa.

3. As used in this section:

a. "Federally authorized tax practitioner" means an individual who is authorized under federal law to practice before the Internal Revenue Service if such practice is subject to federal regulation under 31 U.S.C. § 330.

b. "Tax advice" means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in paragraph *"a"*.

4. The confidentiality privilege under this section shall not apply to a written communication between a federally authorized tax practitioner and a director, shareholder, officer, employee, agent, or representative of a corporation in connection with the promotion of the direct or indirect participation of that corporation in a tax shelter as defined in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

99 Acts, ch 25, §1

622.11 Public officers.

A public officer cannot be examined as to communications made to the public officer in official confidence, when the public interests would suffer by the disclosure.

[C51, §2395; R60, §3987; C73, §3644; C97, §4609; C24, 27, 31, 35, 39, §**11264**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.11]

622.12 Judge as witness. Repealed by 83 Acts, ch 37, § 7.

622.13 Civil liability.

No witness is excused from answering a question upon the mere ground that the witness would be thereby subjected to a civil liability.

[C51, §2396; R60, §3988; C73, §3646; C97, §4611; C24, 27, 31, 35, 39, §**11266**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.13]

622.14 to 622.16 Repealed by 74 Acts, ch 1272, § 4.

622.17 Previous conviction. Repealed by 83 Acts, ch 37, § 7.

622.18 Moral character. Repealed by 83 Acts, ch 37, § 7.

622.19 Whole of a writing or conversation. Repealed by 83 Acts, ch 37, § 7.

622.20 Detached acts, declarations, or conversations. Repealed by 83 Acts, ch 37, § 7.

622.21 Writing and printing.

When an instrument consists partly of written and partly of printed form, the former controls the latter, if the two are inconsistent.

[C51, §2400; R60, §3993; C73, §3651; C97, §4616; C24, 27, 31, 35, 39, §**11274**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.21]

622.22 Understanding of parties to agreement.

When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which a party had reason to suppose the other understood it.

[C51, §2401; R60, §3994; C73, §3652; C97, §4617; C24, 27, 31, 35, 39, §**11275**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §622.22]

622.23 Historical and scientific works.

Historical works, books of science or art, and published maps or charts, when made by persons

THE NEW FEDERAL AND LOCAL RULES
OUTLINE
by
James D. Hodges, Jr.
Clerk
U.S. District Court Northern District of Iowa

I. The 2000 Amendments to the Federal Rules of Civil Procedure:

A. The following amendments to Rules 5(d), 26(a)(1), 26(b)(1)-(2), 26(d), 26(f), 30(d) and 37(c) of the Federal Rules of Civil Procedure became effective December 1, 2000.

1. Rule 5(d):

a. The amendment makes filing of discovery requests the exception rather than the rule. Specifically, the rule now provides:

...and the following discovery requests and responses must not be filed until these are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admissions.

b. Does this change reflect a change in the courts public access philosophy?

2. Rule 26:

a. Rule 26(a)(1) Mandatory Disclosure. This is the biggest change in the rules and makes the mandatory disclosures universally mandatory. In other words, courts like the Northern and Southern Districts of Iowa can no longer opt out of the mandatory disclosures by Local Rule. However, parties may still object and there are classes of cases which may be excluded.

(1) The disclosures are due 14 days after the Rule 26(f) conference or approximately 83 days after Defendant has appeared and 113 days after the complaint has been served.

(2) Disclosure of the identities of witnesses and documents "that the disclosing party may use to support its claims or defenses, unless solely for impeachment" are generally required at this time.

(3) There is a duty to supplement disclosures if it later appears that is was incomplete or incorrect.

(4) No disclosures are required in the following category of cases: administrative appeals, habeas cases, pro se prisoner proceedings, attempts to quash administrative summons or subpoenas, actions by the United States to recover benefit payments or collect on government-guaranteed student loans, proceedings ancillary to proceedings in other courts, and actions to enforce arbitration awards.

(5) The parties may stipulate away the obligation to make these disclosures or either party may object. If the objection is stated in the Rule 26(f) discovery plan, there is no duty to make the disclosure until the judge rules.

b. Rule 26(b)(1): Scope of Discovery:

(1) The amendments narrow the scope of discovery to matters which are "relevant to the claim or defense of any party" rather than the current "relevant to the subject involved in the pending action".

(2) The intent of the rule is now to allow greater court involvement when broader discovery is sought.

(3) How will this impact notice pleading?

c. Rule 26 (d) Moratorium on Discovery:

(1) The amendment now precludes the courts from opting out of the moratorium on Discovery and now, absent agreement, starts discovery at the parties' Rule 26f discovery conference.

d. Rule 26(f) Discovery Conference:

(1) Again the amendments preclude local opt outs.

(2) It now provides that the mandatory conference must occur at least 21 days before the Rule 16(b) scheduling conference is held or a scheduling order is due.

(3) The amendments clarify further that an actual meeting is not required but that the parties must confer.

e. Rule 30 (d) Limits on Depositions:

(1) The amendment set a presumptive one day or 7 hour limit.

f. Rule 37(c)(1) Expansion of Sanctions:

(1) The amendment expands the sanction of automatic preclusion of evidence

II. The 2000 Amendments (Revision) to the Local Rules for the Northern and Southern Districts of Iowa.

A. Introduction:

(1) With the above amendments to the Federal Rules, all the District Courts for the Northern and Southern Districts of Iowa took the opportunity to undertake a complete review and revision to their Local Rules.

(2) The rules are intended to fill in the gaps left by the Federal Rules and to serve as a road map for practice in the Northern and Southern Districts.

B. Source:

(1) The authority and scope of appropriate Local Rules is found in FRCP 83 and FRCrP 57.

(2) Local Rules directed to form may be enforced to cause a loss of rights only for willful violations.

C. Numbering:

(1) By statute the Local Rules are numbered in a manner to conform to the most closely applicable Federal Rule. For example, if you want a rule dealing with Summary Judgement, you would look at LR 56.1, etc.

D. Motion Practice: (LR 5.1, LR 7.1, 10.1, 11.1, 37.1 and 56.1)

(1) Generally:

Motions shall be filed in accordance with (LR 7.1, 10.1 and 56.1). These rules require the motions to be in writing and to cite to appropriate authority. All substantive motions must be accompanied by a brief which:

(a) Must be a separate document and filed with the motion. LR 7.1d
(b) Contain page numbers at the bottom of the brief and all attachments. LR 7.1d
(c) There is a 20 page limit for all briefs except for Summary Judgement. LR 7.1h
(d) Margins and other technical requirement are set out in LR 10.1
(e) Resistance filed within 14 days. LR 7.1e
(f) Reply briefs filed within 5 court days. LR 7.1g

(2) Unresisted Motions:

If the motion is uncontested, tell the court and attach a signature line. LR 7.1f.

(3) Motions to Continue, Extend Deadlines, Amend Pleadings, and Add Parties:

LR 7.1k sets out the requirements for these motions which include a statement as to whether the motion will be resisted and the deadlines that might be affected. If the request is for an extension of the Scheduling Order, see LR 16.1f.

(4) Expedited Relief:

LR 7.1j provides the procedure and requires the request to be noted in the caption and a copy delivered to the Judicial Officer.

(5) Summary Judgement:

LR 56.1 governs the procedure for Summary Judgement motions. It sets out specific requirements for filing the motion, brief, statement of material facts and appendix.

(6) Discovery Motions:

LR 37.1 sets out the requirements for motions to compel, including a requirement to file a declaration that the matter is at issue.

E. Filing Requirements:

(1) Complaints:
LR 3.1 sets out the requirements for filing, including where and how much.
(2) Documents Under Seal:
LR 5.1e sets out the requirements for filing documents under seal. A motion is required and the documents should be clearly identified.
(3) By Fax:
LR 5.1d sets out what you need to do to file by fax. It's really simple, you call the Clerk and then follow-up with the original document.
(4) Statement of Interest:
LR 3.2 requires all parties to file a list of interested parties to help the court determine if recusal is appropriate.

F. Miscellaneous Rules:

(1) To deposit money at interest see LR67.1
(2) LR 47.1 generally prohibits contact with jurors without prior court approval.
(3) LR 83.2 sets the standards for admission Pro Hac Vice.
(4) LR 81.1 gives guidance on actions removed from State Court.
(5) LR 83.7 deals with the marking and handling of exhibits.

III. I would welcome you to visit our web page at www.iand.uscourts.gov. Not only can you down load copies of the Local Rules but also many of the forms used in the courts. In addition, you can read the Judges' preferences for handling many matters as well as their opinions and instructions.

Civil Liability of Employers and Insurers Handling Workers' Compensation Claims

CHARLES E. CUTLER
PATTERSON, LORENTZEN, DUFFIELD,
TIMMONS, IRISH, BECKER & ORDWAY, L.L.P.
505 Fifth Avenue, Suite 729
Des Moines, Iowa 50309
Phone: 515-283-2147
Facsimile: 515-283-2147

I. Exclusive Remedy Doctrine

A. Statutory Authority

Iowa Code section 85.20 codifies the exclusive remedy doctrine. Section 85.20 states:

> The rights and remedies provided in this chapter, chapter 85A or chapter 85B for an employee, . . . on account of injury, occupational disease or occupational hearing loss for which benefits under this chapter, chapter 85A or chapter 85B are recoverable, shall be the exclusive and only rights and remedies of the employee . . . on account of such injury, occupational disease, or occupational hearing loss against any of the following:
>
> 1. Against the employee's employer.
>
> . . .

The 2001 version of 85.20 is modified from its earlier versions but the exclusivity language maintains its tone of absoluteness. Modern courts have begun to recognize exceptions to the exclusive remedy doctrine that can lead to civil lawsuits against the employer and insurer based upon their handling of workers' compensation claims.

B. Policy Behind the Exclusive Remedy Doctrine

Generally, an employee is entitled to workers' compensation when injured in the scope of employment and the employer is immune from civil liability for the injury. James R. Lawyer & Judith Ann Graves Higgs, IOWA WORKERS' COMPENSATION LAW AND PRACTICE § 8-1 (Harrison Company, 3d ed. 1999). Historically, civil employer immunity for industrial injuries was nearly absolute. *See* Glenn v. Farmland Foods, Inc., 344 N.W.2d 240, 242-44 (Iowa 1984); Harned v. Farmland Foods, Inc., 331 N.W.2d 98, 99-100 (Iowa 1983); Steffens v. Proehl, 171 N.W.2d 297, 300 (Iowa 1969). The basic premise behind the exclusive remedy doctrine is that there is a quid pro quo relationship between the employer and the employee. LARSON'S WORKMEN'S COMPENSATION DESK ADDITION, § 65.10, Arthur Larson (Matthew Bender 1986); Taylor v. Peck, 382 N.W.2d 123, 126 (Iowa 1986); Steffens v. Proehl, 171 N.W.2d 297, 300 (Iowa 1969) (quoting LARSON § 65.10). The employee gives up the right to pursue the employer for civil damages in exchange for quick and assured workers' compensation benefits from the employer.

Likewise the employer promises to administer quick and assured benefits for industrial injuries to the employee in exchange for the immunity from civil damage actions which can be substantially more than compensation benefits.

C. Exclusive Remedy Doctrine as a Bar to Claims against Employers and Insurers Based on Handling of Claims

1. The Exclusive Remedy Doctrine was Originally Used as a Bar to Bringing Claims against Employers and Insurers Based on Handling of Claims.

Since the early 1900's Iowa's Workers' Compensation Act has provided that an employee's exclusive remedy for injuries while in the course of employment are the remedies contained in the Workers' Compensation Act. Taylor v. Peck, 382 N.W.2d 123, 126 (Iowa 1986). The courts generally have held that the act was the exclusive remedy against employers and insurers for more than 70 years. Even claims against employers and insurers, based on their handling of workers' compensation claims, were said to be barred by the Exclusive Remedy Doctrine.

The Exclusive Remedy Doctrine in § 85.20 has been found to be constitutional. Suckow v. Neowa F.S. Inc., 445 N.W.2d 776 (Iowa 1989).

For years, it appeared the legislature intended for the act to be the exclusive remedy and the courts routinely respected that intent. McGraw v. Seigel, 263 N.W. 553, 555 (Iowa 1935). It has only been recently that the courts have begun to make significant exceptions to the exclusive remedy provisions of the act. Boylan v. American Motorists Insurance Co., 489 N.W.2d 742, 744 (Iowa 1992).

2. The Modern Interpretation of the Exclusive Remedy Doctrine Allows Claims Against Employers and Insurers Based on Handling of Claims.

In 1992 the Iowa Supreme Court first allowed a bad faith action against a workers' compensation insurer in Boylan v. American Motorists Insurance Co., 489 N.W.2d 742 (Iowa 1992). The Boylan court found that workers' compensation insurance carriers are liable to claimants for bad-faith handling of workers'

compensation claims in civil actions. In 1996, in Wilson v. IPB, Inc., 558 N.W.2d 132 (Iowa 1996) the court held that employers are liable to employees in civil actions for the intentional torts of breach of fiduciary duty and defamation. Continuing the trend, the U.S. District Court in Phillips v. Swift & Co., 137 F. Supp. 2d 1126 (S.D. Iowa 2001) held that employers can be held liable for a breach of fiduciary duty to the employee civilly, outside the statutory scheme of workers' compensation. Finally, the Iowa Supreme Court in Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388 (Iowa 2001), held that an employee has civil causes of action against carriers of workers' compensation insurance for bad faith and abuse of process and awarded punitive damages for willful and wanton conduct by the carrier as to both. In all of these cases, the court determined that the Exclusive Remedy Doctrine did not bar the injured worker's claim against the employer.

a. Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)

Wilson is an action by a former employee alleging breach of fiduciary duty and defamation against IBP's company nurse and IBP for statements made to the treating physician by the company nurse. The nurse alleged that Wilson was faking his injuries and that the employer had possession of a video tape showing Wilson violating his work restriction of bed rest when there was no such videotape. Wilson, 558 N.W.2d at 132. The doctor believed the employer and eventually stopped treating Wilson. Id. Wilson settled his workers compensation claim with the employer and then filed suit in district court against the company nurse and vicariously against IBP for slander and for violating fiduciary duties as an occupational health nurse treating him. Id. at 137. The court found that the causes of action for breach of fiduciary duty and defamation were not barred by § 85.20 and lie outside of the workers' compensation act. Id. at 137-38. The court affirmed an award for punitive damages after adjustment for remittitur ($15 million award reduced to $2 million). Id. at 135.

The court rejected the defendants claim that this was an action based merely on the dissatisfaction with treatment and affirmed that intentional torts had been committed. Id. at 138. Therefore, § 85.20 of the Iowa Code was inapplicable since the claims were based on tort.

b. Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 338 (Iowa 2001)

In Gibson, the court addressed the issue of whether the denial of medical care and termination of benefits without a reasonable basis can give rise to a civil action and eventually approved awards based upon bad upon bad faith theories and abuse of process. The court found that the denial of a claim without a reasonable basis when the claim is fairly debatable as a matter of fact or law is tantamount to an intentional tort, the remedy for which may lie outside of the workers' compensation act. Id. at 396. Gibson affirmatively establishes a civil cause of action by an employee against an insurance carrier for bad-faith handling of a claim and sets the burden of proof as an absence of a reasonable basis for denying benefits in the presence of a fairly debatable claim. Id. Punitive damages are also available if the carrier acts in "willful and wanton disregard for the rights and safety" of the claimant. Id. at 397-98.

c. Phillips v. Swift & Co., 137 F. Supp. 2d 1126 (S.D. Iowa 2001)

In Phillips, the U.S. District Court goes into a lengthy discussion of historical and modern cases explaining the purpose, intent, and statutory scheme of Iowa's workers' compensation act. The Phillips court found that a claim for an employers breach of fiduciary duty to its employee in the handling of a workers' compensation claim is outside the workers' compensation scheme and is an appropriate district court action. Id. The court also found that punitive damages are available in civil breach of fiduciary duty claims resulting from workplace injuries. Id.

In Phillips the company nurse violated the work restriction that Phillip's doctor placed on him. Phillips had been injured on the job when he was lacerated by a fan. The company nurse for the most part respected the doctor's restriction prohibiting the use of Phillips' right arm but placed Phillips in areas that were contaminated with infectious organisms which caused infections in Phillips's wounds. Swift & Co. admitted owing Phillips a fiduciary duty in providing medical care and a safe working environment. The court found that Swift's nurse breached this fiduciary duty and that such a cause of action falls outside the

workers' compensation scheme. Id. Breaches of fiduciary duties such as in the Phillips case are tantamount to intentional torts. Id.

II. Causes of Action

A. Bad-Faith Claims

Bad faith claims against workers' compensation insurers and employers are based on the duty to provide benefits and treated like "first party" bad faith claims. Boylan v. American Motorists Insurance Co., 489 N.W.2d 742, 743-44 (Iowa 1992). To establish a bad-faith claim "a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." Further, "[a] reasonable basis exists for denying insurance benefits if the claim is 'fairly debatable' as to either matters of fact or law." Id. There is no reasonable basis for denying a claim when the decision to deny the claim is not based upon an honest and informed judgment. Reedy v. White Consolidated Industries, Inc., 890 F. Supp. 1417, 1436 (N.D. Iowa 1995).

Many employers and insurers feel, and have argued that, Iowa Code section 86.13 provides a "statutory remedy for unreasonably delayed or withheld workers' compensation benefits thereby providing an exclusive remedy and precluding a common-law bad-faith claim." However, the Gibson court cited Boylan v. American Motorists Insurance Co. and held that "'it is unlikely that the legislature intended the penalty provision in section 86.13 to be the sole remedy for all types of wrongful conduct by carriers with respect to the administration of worker' compensation benefits.'"

There is no question, at this time, that a bad faith cause of action exists based upon decisions made during the handling of a workers' compensation claim. The worker will have to prove:

1. The lack of a reasonable basis for denying the claim; and
2. Defendants knowledge of or reckless disregard for the lack of a reasonable basis for denying the claim.

Below, are some examples of the kinds of decisions which have lead to claims for bad faith against employers and insurers.

1. **Failure to Pay Benefits**

   Boylan v. American Motorists Insurance Company, 489 N.W.2d 742, 743-44 (Iowa 1992) (holding that workers' compensation insurance carriers are liable for bad faith acts such as "failure to furnish medical and hospital supplies to an injured employee" and "failure to pay medical benefits" in district court. Id.)

   Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388, 396-97 (Iowa 2001) (citing Boylan).

2. **Failure to Provide Medical Care**

   Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388, 392, 399 (Iowa 2001) ("ITT's failure to follow the doctor's recommendations constituted a failure to provide reasonable treatment." Id. at 392. Failure to "furnish reasonable and necessary medical care to an injured employee" exposed ITT to punitive damages. Id. at 399.).

3. **Improper Processing and Evaluation of a Claim**

   Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388, 398 (Iowa 2001) (insurance carrier refused payment of weeks of benefits it knew it owed and used the legal process to prevent treatment that had an adverse affect on the claimants mental state).

4. **Providing Incorrect or Misleading Information to Doctors**

   Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996) (affirming occupational health nurse and employer liable for breach of fiduciary duty and defamation for the nurse's misrepresentations to the

claimant's treating physician, and damages award including punitive damages).

B. Breach of Fiduciary Duty

Phillips v. Swift & Co., 2001 WL 301134, 137 F. Supp. 2d 1126 (S.D. Iowa 2001) (holding that employers owe fiduciary duties to employees in providing medical care and that a breach exposes employers to liability in district court and to punitive damages if the conduct constitutes "willful and wanton disregard for the rights of others." Id. at *11 (citing Iowa Code section 668A.1).

Wilson v. IBP Inc., 558 N.W.2d 132, 137-38 (Iowa 1996) (recognizing claims for an intentional tort of breach of fiduciary duty is "cognizable, if at all, outside the scope of the workers' compensation act." Id. at 138.).

C. Retaliatory Discharge for a Worker Pursuing a Workers' Compensation Claim

Springer v. Weeks, 475 N.W.2d 630, 632-33 (Iowa 1991) (The court clarified that retaliatory or wrongful discharge for pursuing a workers' compensation claim is a recognized claim in Iowa.).

Clarey v. K-Products, Inc., 514 N.W.2d 900 (Iowa 1994) (employee terminated during healing period awarded $364,146.00 in damages for wrongful termination for pursuing a workers' compensation claim).

D. Intentional Torts of the Employer or Insurance Carrier

Tallman v. Hanssen, 427 N.W.2d 868, 870 (Iowa 1988) (citing In *Matter of Certification of Question of Law*, 399 N.W.2d 320 (S.D. 1987) held that "the exclusivity provision of the Workers' Compensation Act does not bar an action by the employee against the insurance carrier for the commission of an intentional tort."). Phillips v. Swift & Co., 2001 WL 301134, 137 F. Supp. 2d 1126, *8 (2001) (citing Tallman and analogizing intentional tort analysis alongside bad-faith claims).

E. Abuse of Process

Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388, 398 (Iowa 2001) (upholding Gibson's claim of abuse-of-process and affirming that ITT Hartford "intentionally used an answer to Gibson's petition before the Iowa Industrial Commissioner . . . "primarily to prevent Gibson from obtaining psychiatric care at ITT's expense and to prevent Gibson from obtaining a hearing before the Industrial Commissioner.")

F. Intentional Interference With a Contract

Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388, 398 (Iowa 2001)(recognizing the claim for intentional interference with Gibson's contract with his doctor by refusing to pay for a myelogram, but not deciding the issue due to insufficiency of evidence).

Springer v. Weeks & Leo Company, Inc., 475 N.W.2d 630, 632-33 (Iowa 1991) (analogizing the wrongful or retaliatory discharge with intentional interference with a contract for hire. Id. referencing *Springer v. Weeks & Leo Company, Inc.*, 429 N.W.2d 558, 560 (Iowa 1988)).

G. Misrepresentation

Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388, 398 (Iowa 2001) (affirming the district courts' grant of judgment not withstanding the verdict for ITT Hartford because of insufficiency of the evidence to establish the elements of fraudulent misrepresentation in the absence of evidence that the doctor relied on the misrepresentation).

III. Damages

The damages recoverable in these cases are generally the same types of damages that would flow from the various causes of action on which plaintiffs claims are based. An issue which has been discussed and clarified in some of these recent cases relates to the submissibility and award of punitive damages. Most of these actions can give rise to punitive damage claims. Iowa Code § 668A.1 allows for an award of punitive damages when the plaintiff establishes, by a preponderance of the clear,

convincing and satisfactory evidence, that the conduct of the defendant constituted a willful and wanton disregard for the rights and/or safety of another. Wilful and wanton in these types of cases means that the employer or insurer intentionally has made an unreasonable decision with disregard for the fact that it is highly probable that harm will follow. McClure v. Walgreen Company, 613 N.W.2d 225, 230 (Iowa 2000).

To establish willful and wanton disregard in these types of cases, the worker will have to show that the employer's or insurer's conduct constituted actual or legal malice. Gibson at 396. According to Gibson, actual malice "is characterized by such factors as personal spite, hatred or ill will." Id. Legal malice can be shown by establishing that the "wrongful conduct committed or continued with a wilful or reckless disregard for another's rights." Id.

It is important to note that in a case where plaintiff proves bad faith, there will almost always be a submission for punitive damages. Our court has stated that when a workers' compensation insurer or employer ". . . has no reasonable cause or excuse for 'a delay in commencement or termination of benefits' such a failure establishes the first prong of a bad faith claim." Gibson at 397. The court went onto state that a willful or wanton disregard for the rights of another can be shown by an intentional violation of a statutory right. Id. at 398. Therefore, whenever there has been an intentional act or decision, which gives rise to a bad faith claim, punitive damages are a very real possibility.

IV. Miscellaneous

A. Stay of Bad-Faith Case

Reedy v. White is a case involving a self-insured employer sued for bad-faith in handling a workers' compensation claim prior to the claim being heard by the Workers' Compensation Commissioner. The court held that a district court case should not be dismissed on ripeness grounds, nor heard before the Industrial Commissioner has the opportunity to decide material issues of benefit entitlement. Id. at 603-04. The court stated that it believed the decisions made in the administrative process are important and relevant to a bad-faith cause of action and that many times

those decisions will create a preclusive effect to the bad-faith cause of action. Id. at 603. The court directed that these circumstances "should encourage courts, whenever it is feasible to do so, to permit the case to remain on the docket while awaiting the administrative determination." Id. at 604.

B. Employer Liability for Handling Claims

The Reedy court cited Boylan and found that a self-insured employer is equally liable for bad-faith activities as an insurance carrier would be. Id. Reedy is a warning to self-insured employers regarding the importance of the proper and professional handling of workers' compensation claims.

C. Timing

In Morgan v. American Family, 534 N.W.2d 92 (Iowa 1995), the court stated that the analysis is to contain a look at the information before the decision maker, at the time the claim was denied, to determine whether there was an objectively reasonable basis for the denial. Id. at 97.

It is also important to remember that a claim may be fairly debatable at the an initial denial is made, but later may become one that is not fairly debatable so that a continued denial is in bad faith. Dirks v. Farm Bureau Mutual, 465 N.W.2d 857, 862 (Iowa 1991).

PRODUCT LIABILITY LAW IN IOWA: A BASIC PRIMER

Prepared by:

RICHARD J. KIRSCHMAN

WHITFIELD & EDDY, P.L.C.
317 Sixth Avenue, Suite 1200
Des Moines, IA 50309-4195
Tel: (515) 288-6041
FAX: (515) 246-1474
kirschman@whitfieldlaw com

PRODUCT LIABILITY LAW IN IOWA

I. THEORIES OF RECOVERY.

A. Strict Liability.

1. Iowa adopted strict liability in tort as set out in the Restatement (Second) of Torts § 402A, in Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 684 (Iowa 1970).[1] Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 528 (Iowa 1999).

2. Strict liability was implemented as a theory of recovery for two primary reasons: (a) it was too difficult for plaintiffs to recover under negligence; and (b) the privity rules which attended liability based on warranty were too restrictive.

3. Retailer immunity statute: Iowa Code section 613.18 provides immunity for wholesalers, retailers, distributors and sellers of a product from a suit based

---

[1]Section 402A of the Restatement (Second) of Torts provides:

(1) One who sells any product in a defective condition and unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although:

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

on strict liability in tort or breach of implied warranty of merchantability that arises solely from an alleged defect in design or manufacture of a product. Hillrichs v. Avco Corp., 478 N.W.2d 70, 72 (Iowa 1991).[2]

4. Elements of strict liability:

a. Defendant [designed, manufactured, assembled or sold] the product.

b. Defendant was engaged in the business of [designing, manufacturing, assembling or selling] the product.

c. The product was in a defective condition at the time it left defendant's control.

---

[2]Iowa Code § 613.18 states as follows:

613.18 Limitation on products liability of nonmanufacturers.

1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:

a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.

b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent

2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arise from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

3. An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer

d. The defective condition was unreasonably dangerous to the plaintiff.

e. Plaintiff used the product in the intended manner or in a manner reasonably foreseeable by the defendant.

f. The product was expected to and did reach the plaintiff without substantial change in its condition.

g. The defect was a proximate cause of plaintiff's damage.

h. The amount of damage.

See Burke v. Deere & Co., 6 F.3d 497, 503 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994); Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 916 (Iowa 1990); Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980); Iowa Uniform Civil Jury Instruction No. 1000.1.

5. Defective Condition. A product is defective if it is "unreasonably dangerous in a reasonably foreseeable use." Henkel v. R & S Bottling Co., 323 N.W.2d 185, 191 (Iowa 1982); see also Mercer v. Pittway Corp., 616 N.W.2d 602, 620 (Iowa 2000).

a. Defective condition is defined by the Restatement (Second) of Torts § 402A comment g as follows:

> Defective Condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.

b. Iowa has a "hybrid" test that uses both the consumer expectations test and risk-utility test in defining a "defect." Mercer, 616 N.W.2d at 620. Iowa Civil Jury Instruction 1000.4, Defective Condition and Reasonably Foreseeable Use - Definition, states as follows:

> A product is defective if it does not perform reasonably, adequately and safely:

1. In the normal or specified use intended by the defendant.

2. When it is used in a manner reasonably foreseeable by the defendant. A reasonably foreseeable use may include misuse by [plaintiff] [other user] if such misuse is reasonably foreseeable by the defendant. In determining a reasonably foreseeable use you should consider the following matters as shown by the evidence:

   a. The reasonable use or uses of the product.

   b. The ordinary user's awareness that the use of the product in a certain way is dangerous.

   c. The likelihood of, and probable use of, the product by persons of limited knowledge.

   d. The normal environment for the use of the product and the foreseeable risks in such a place.

   e. Any other evidence bearing on this question.

6. Unreasonably Dangerous. Comment i to section 402A of the Restatement (Second) of Torts states as follows:

> Unreasonably Dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold 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.

Fell, 457 N.W 2d at 916-17.

a. A product is unreasonably dangerous if (1) the product is dangerous and (2) it was unreasonable for such a danger to exist. Fell, 457 N.W.2d at 918.

b. Proof of unreasonableness involves balancing the utility of the product versus the risk of its use. Id. The plaintiff must show the design of the finished product was dangerous, and that it was unreasonable to subject the user to this danger because the user would not contemplate the danger in the normal, innocent use of the product. Id. (citing Aller v. Rogers Machinery Mfg. Co., 268 N.W.2d 830, 835 (Iowa 1978)).

c. Proof that a product is unreasonably dangerous may be established by circumstantial evidence. Fell, 457 N.W.2d at 918.

7. Without Substantial Change. "Under a strict liability theory, a plaintiff must establish that the product was expected to and did reach the plaintiff without a substantial change in condition from the time it was sold." Fell, 457 N.W.2d at 918. A manufacturer or seller is not liable if the product is delivered in a safe condition and subsequent mishandling, alteration, or other cause beyond the seller's or manufacturer's control, renders the product defective. Id.; Restatement (Second) of Torts § 402A comment g. For a defendant to be liable, the substantial change in condition after sale must be the result of active alteration, such as removing a guard or shield, and not the result of action independent of the plaintiff. Fell, 457 N.W.2d at 918.

8. Reasonably Foreseeable Use. For a strict liability claim, the plaintiff must show, among other elements, that the product was used in the intended manner or in a manner reasonably foreseeable by defendant. Hughes v. Massey-Ferguson, Inc., 490 N.W.2d 75, 78 (Iowa App. 1992). The Hughes court held the strict liability claim should not have been submitted to the jury because the plaintiff did not present substantial evidence

suggesting the manufacturer intended or could reasonably have foreseen that a combine operator would raise the cornhead, leave the cornhead mechanism engaged, step over the stair platform guardrailing and try to walk across a three-inch ledge above the open-turning auger in an attempt to take a short cut from the cab of the combine to the engine compartment. Id.

B. Negligence.

1. A plaintiff may raise claims of negligence related to the defendant's manufacturing, design, inspection, instructions, labeling, warning and testing. See Mercer v. Pittway Corp., 616 N.W.2d 602, 623-27 (Iowa 2000); Hawkeye Bank v. State, 515 N.W.2d 348, 351-52 (Iowa 1994); Spaur v. Owens-Corning Fiberglass Corp., 510 N.W.2d 854, 863-64 (Iowa 1994); Beeman v. Manville Corp. Asbestos Fund, 496 N.W.2d 247, 251-52 (Iowa 1993).

2. The manufacturer of a product has a duty to warn premised on a negligence standard as set forth in Restatement (Second) of Torts § 388. Mercer, 616 N.W.2d at 623; Hillrichs, 478 N.W.2d at 73 (citing Anderson v. Glynn Constr. Co., 421 N.W.2d 141, 143-44 (Iowa 1988)).

3. Failure to Warn is Negligence Only. A failure-to-warn claim should be submitted only under a negligence theory, and not as a theory of strict liability. Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994).

4. Standard of Care. In testing a defendant's liability for negligence in failing to warn, the defendant is held to the standard of care of an expert in its

field. Olson, 522 N.W.2d at 289. The relevant inquiry is whether the manufacturer knew or should have known of the danger, in light of generally recognized and prevailing best scientific knowledge, yet failed to provide adequate warning to users or consumers. Id.; Beeman v. Manville Corp. Asbestos Fund, 496 N.W.2d 247, 252 (Iowa 1993).

5. Reasonably Foreseeable. A duty to warn "depends upon superior knowledge, and such a duty exists when one may reasonably foresee a danger of injury or damage to one less knowledgeable unless an adequate warning is given." Beeman, 496 N.W.2d at 252. Reasonable foreseeability triggers the obligation to warn. Id.

6. Known and Obvious Risks. No duty to warn exists where risks are known and obvious to plaintiff. Lovick v. Wil-Rich, 588 N.W.2d 688, 700 (Iowa 1999); Olson, 522 N.W.2d at 291.

7. Equipment Dealers are not insulated from claims of negligence by virtue of § 613.18 of the Iowa Code (the "retailer immunity" statute). Negligence of an equipment dealer can be predicated on failure to notify equipment purchasers about a manufacturer's recall program. Hillrichs v. Avco Corp., 478 N.W.2d 70, 73 (Iowa 1991) (Hillrichs I), appeal after remand, 514 N.W.2d 94 (Iowa 1994) (Hillrichs II).

   a. An equipment dealer, however, cannot be liable for failure to warn concerning hazards of equipment that dealer never sold but merely connected to component part that it sold to plaintiff. Hillrichs, 478 N.W.2d at 73.

   b. A mere furnisher of services is not liable for a dangerous condition that it did not create or aggravate, unless it acts to mask the danger.

Hillrichs, 478 N.W.2d at 73.

c. Normally, an implement dealer is not the agent of the manufacturer for product liability purposes. See Todd Farm Corp. v. Navistar Int'l Corp., 835 F.2d 1253 (8th Cir. 1987).

C. **Warranty.**

1. Product liability warranty actions can be based on breach of express warranty or breach of implied warranty. Implied warranty actions include breach of the implied warranty of "merchantability" and breach of the implied warranty of "fitness for a particular purpose." A seller's breach of an implied warranty of merchantability for goods under Iowa Code § 554.2314 may form the basis for a product liability action. Wernimont v. International Harvester Corp., 309 N.W.2d 137, 140 (Iowa App. 1981). To be merchantable, goods must be "fit for the ordinary purposes for which such goods are used." Id. at 140; Iowa Code § 554.2314(2)(c). If the seller sells unmerchantable goods, "he is liable for breach of the implied warranty of merchantability, regardless of whether he knew or should have known of the deficiency in the goods." Wernimont, 309 N.W.2d at 140.

2. Iowa Code § 554.2315 governs the implied warranty of fitness for a particular purpose. Fell, 457 N.W.2d at 919. This warranty is defined as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [section 554.2316] an implied warranty that the goods shall be fit for such purpose.

Iowa Code at § 554.2315.

3. To establish a claim for implied warranty of fitness for a particular purpose, Plaintiff must demonstrate the following:

1) the buyer had a "particular" purpose, distinct from the ordinary purpose for which the goods are typically used; 2) the manufacturer had knowledge of or reason to know of that "particular" purpose; 3) the manufacturer knew or had reason to know that the buyer was "relying" on the manufacturer's expertise to furnish a product that was suitable for the particular purpose; **and** 4) the buyer specifically relied on the manufacturer's expertise to furnish an appropriate product. See, e.g., Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 637 (Iowa 1988).

4. The U.C.C. limitations as codified in § 554.2725 apply to implied-warranty claims under § 554.2315. Fell, 457 N.W.2d at 919. Section 554.2725 provides as follows:

Statute of Limitations in contracts for sale . . . .

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made.

5. A five-year statute of limitations governs breach of implied warranty claims. Fell, 457 N.W.2d at 919 (citing City of Carlisle v. Fetzer, 381 N.W.2d 627, 628-29 (Iowa 1986)). The time period begins to run at the time the good is sold. Accordingly, in some cases, a plaintiff's right to sue based on implied warranty may expire before the accident has occurred.

6. When the loss is economic, including loss of profit, loss of bargain and loss of business, the right of recovery is governed by a warranty theory rather than strict liability in tort. Hawkeye-Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (Iowa 1972).

7. Submission to Jury. The theory of recovery under strict liability in tort and the theory of warranty may be submitted to a jury in the same case. Mercer v. Pittway Corp., 616 N.W.2d 602 (Iowa 2000); Hawkeye-Security, 199 N.W.2d at 382.

8. Warranty rules that generally require "reasonable notice of breach" of warranty, see, e.g., Iowa Code § 554.2607, do not apply to product liability actions for personal injury by persons other than the original purchaser. McKnelly v. Sperry Corp., 642 F.2d 1101, 1107 (8th Cir. 1981).

II. PRODUCT DEFECT THEORIES.

A. Manufacturing Defect.

1. A manufacturing defect is one where the product as manufactured does not correspond with the intended plans or design of the manufacturer. This kind of defect makes the most sense with respect to liability based on strict liability. It is based upon the same proof required for action based on design defect, except the manufacturing defect must be a proximate cause of plaintiff's injuries.

2. To be successful on a manufacturing defect claim pursuant to Iowa law, a plaintiff must establish, among other things, that: 1) the product was

defectively manufactured; 2) the manufacturing defect existed at the time the product left the manufacturer's control; 3) the manufacturing defect rendered the product unreasonably dangerous; and 4) the manufacturing defect was a proximate cause of the plaintiff's injuries and resulting damages. See Burke v. Deere & Co., 6 F.3d 497, 503 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994).

3. In Stoffel v. Thermogas Co., 998 F. Supp. 1021 (N.D. Iowa 1997), the court expressly recognized the distinction between manufacturing and design defect claims under Iowa law, as follows:

> [A] manufacturing defect . . . results when a mistake in manufacturing renders a product that is ordinarily safe dangerous so that it caused harm[.]
>
> [A] design defect . . . results when the product as designed is unreasonably dangerous for its intended use[.]

Id. at 1032-33 (citations omitted)

B. Design Defect.

1. A plaintiff alleging a design defect must show that the product is unreasonably dangerous because the defendant failed to use reasonable care in its design. Wernimont, 309 N.W.2d at 140. "Unreasonably dangerous" refers to a consumer's reasonable expectations concerning the product's characteristics. Id.; Aller v. Rogers Mach. Mfg. Co., 268 N.W.2d 830, 835 (Iowa 1978) (the risk-utility balancing test is also a measure of defectiveness).

2. While strict liability design defect claims are treated as separate and distinct

from negligent design claims, Olson v. Prosoco, Inc., 522 N.W.2d 284, 288 (Iowa 1994) (citing Aller, 268 N.W.2d at 835), most commentators believe there is no practical distinction between design liability based on strict liability and negligence. Both theories are based on a standard of reasonable conduct by the manufacturer. The Iowa Supreme Court recognized this in Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994).

C. Warning or "Marketing" Defects.

1. Until Olson v. Prosoco, an inadequate warning could be the basis of a strict liability claim. Burke, 6 F.3d at 503. This is no longer true in the wake of Olson.

2. Distinction between Negligence and Strict Liability Theory Based on Inadequate Warning. A claim of inadequate warning based on strict liability "relates to conditions existing at the time the product leaves the seller's control." Burke, 6 F.3d at 503 (emphasis in original). In a negligent failure-to-warn case, however, "there may be a continuing duty to warn of dangers which become known after the product has entered the stream of commerce." Id.; but see Olson, 522 N.W.2d at 289 (stating in context of failure-to-warn claims, "we believe any posited distinction between strict liability and negligence principles is illusory;" from this point forward only a claim for failure to warn based on negligence survives).

3. Unreasonable Danger. In determining unreasonable danger, a jury considers all the warnings given to the plaintiff as well as his general

knowledge and experience. Burke, 6 F.3d at 504.

4 The warning issue in a product defect claim is relevant to the existence of a dangerous defect, to causation, to the defendant's affirmative defense of assumption of risk and to the assessment of comparative fault. Burke, 6 F.3d at 505.

5 The duty to warn about hazards that were present in the product at the time of sale, but were only discovered later, is distinguished from a duty to recall or retrofit. Lovick v. Wil-Rich, 588 N.W.2d 688, 692-95 (Iowa 1999); Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991), rev'd on other grounds, 6 F.3d 497 (8th Cir. 1993). There is no duty to recall or retrofit under Iowa law. Burke v. Deere & Co., 6 F.3d 497, 509-10 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994); Lovick, 588 N.W.2d at 696 (citing Burke).

6. A manufacturer sometimes has a duty to warn the ultimate users of a product and not merely the manufacturer's immediate vendee. West v. Broderick & Bascom Co., 197 N.W.2d 202, 211 (Iowa 1972).

a. "How far down the distributive chain a manufacturer must warn is determined by the general requirement of reasonable care." Id. at 211; see Restatement (Second) of Torts § 388 cmt. n.[3]

---

[3] Restatement (Second) of Torts § 388 comment n states as follows:

Giving to the third person through whom the chattel was supplied all of the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it.

b. Whether reasonable care requires a manufacturer to give warning beyond its immediate vendee depends upon various factors including the following: The likelihood or unlikelihood that harm will occur if the vendee does not warn the ultimate user, the nature of the probable harm, the probability that the vendee will pass on the warning, and the manufacturer's burden in giving the warning to the ultimate user. West, 197 N.W.2d at 211 (finding that danger from use of iron rope sling beyond its rated capacity was great and that manufacturer made little effort to get information on rated capacities to ironworkers).

c. If a warning should be given to the ultimate users, the requirement is not that the users in fact receive the warning but that the manufacturer use methods "reasonably calculated" to reach the users with the warning. Id. at 212.

7. A manufacturer's duty to warn the ultimate user may exist even where the ultimate user is an expert. Id. at 211 (declining to hold, as a matter of law, that manufacturer of sling owed ironworkers no duty to warn merely because ironworkers had expertise in use of slings).

D. Enhanced Injury or Crashworthiness Defect.

1. The enhanced injury or crashworthiness doctrine is a design-defect theory which holds a product manufacturer liable for injuries which were aggravated or exacerbated by faulty product design. Hillrichs, 478 N.W.2d at 74.

a. The theory was first developed in automobile "second collision" or "crashworthiness" cases. Id. (citing Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968)). Because automobile accidents are readily foreseeable, automobile manufacturers must use reasonable care in designing cars to protect occupants from foreseeable second collisions of the occupants with the inside of the car. Hillrichs, 478 N.W.2d at 74. Even though a design defect did not cause the original accident, the manufacturer should be liable

---

West, 197 N.W.2d at 211 (quoting Restatement (Second) of Torts § 388 comment n) (emphasis in original).

assistance, expert testimony as to a defect in the design is an indispensable element of a plaintiff's case Wernimont, 309 N.W.2d at 141.

b. When, however, understanding the issue requires only common knowledge and experience, expert testimony may not be required. Id.

7. A jury question is presented on the second element (what injuries would have resulted had the alternative safer design been used) where the plaintiff makes a "but for" causation showing. Reed, 494 N.W.2d at 228 (holding Reed's showing that but for fiberglass top, his arm would not have been injured was sufficient for this element).

8. To satisfy element number two, a plaintiff is not generally required to establish the precise injuries which would have been sustained. Id.

9. Applying the second and third elements, recovery should be denied when it is uncertain or speculative that any enhanced injuries or damages actually occurred. Reed, 494 N.W.2d at 227.

10. See also Kevin M. Reynolds and Richard J. Kirschman, "Preventing a 'Second Bite at the Apple:' Defending Against Enhanced Injury Claims," For the Defense, Defense Research Institute, Oct. 1994, at 12-20.

III. PRODUCT LIABILITY DEFENSES.

A. Assumption of Risk

1. Iowa courts initially recognized two distinct meanings of the term "assumption of risk." The "primary meaning" of the term is an alternate expression for the simple proposition that the defendant was not negligent, i.e., owed no duty, or did not breach any duty owed. The "secondary

meaning" arises when the injured person acted unreasonably in assuming a particular risk; this definition of assumption of risk is the same as the defense of contributory negligence. Nichols v. Westfield Indus., Ltd., 380 N.W.2d 392, 399 (Iowa 1985) (citing Rosenau v. City of Estherville, 199 N.W.2d 125, 131 (Iowa 1972)). The Rosenau court abolished the "secondary meaning" of assumption of risk. It was no longer available as a separate defense in cases where contributory negligence was an available defense. 199 N.W.2d at 133.

2. "Primary" assumption of risk was retained as an affirmative defense. Chapman v. Craig, 431 N.W.2d 770, 771 (Iowa 1988). After the enactment of Iowa Code § 668.1, assumption of risk in its primary meaning is properly classified as a type of fault to be compared with the fault of other parties, and thus is not a complete defense in all cases. Arnold v. City of Cedar Rapids, 443 N.W.2d 332, 333 (Iowa 1989); see also Iowa Uniform Civil Jury Instruction No. 1000.9. The defense of assumption of risk in its primary meaning is still a viable concept. The Iowa Supreme Court has suggested, for purposes of accuracy and clarity, however, that the issue be framed "in terms of whether a duty is owed." Arnold, 443 N.W.2d at 333.

3. Assumption of risk is a separate and distinct defense, and defendant is entitled to a jury instruction on it, in a case where liability is premised on strict liability in tort. Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992); Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), cert. denied, 510

U.S. 1115 (1994).

B. Comparative Fault/Contributory Fault

1. Strict Liability. Comparative fault is a defense to an action premised on strict liability in tort. Iowa Code § 668.1. A plaintiff's comparative fault should be alleged as an affirmative defense. Iowa Code § 619.17. "[F]ault means 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(1). Specifically included within this statutory definition of the term "fault" are the following items: (1) breach of warranty; (2) unreasonable assumption of risk not constituting an enforceable express consent; (3) misuse of a product for which the defendant otherwise would be liable; and (4) unreasonable failure to avoid an injury or to mitigate damages.

2. Negligence. Comparative fault is also a defense to a negligence action. Iowa Code § 668.1. A plaintiff's comparative fault should be alleged as an affirmative defense. Iowa Code § 619.17. If the plaintiff's negligence exceeds that of all the defendants combined, the plaintiff is barred from recovery. Iowa Code § 668.3(1).

C. Seat Belts - Failure to Use

1. In actions arising before July 1, 1986, evidence of nonuse of a seat belt was inadmissible in a civil action. Iowa Code § 321.445(4)(a). In causes of action arising on or after July 1, 1986, evidence of failure to wear a seat belt is not considered evidence of comparative fault. Iowa Code §

321.445(4)(b). If a defendant first introduces substantial evidence that failure to wear a seat belt contributed to plaintiff's injuries, the trier of fact may find that the plaintiff's failure to wear the seat belt "contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault." Iowa Code § 321.445(4)(b)(1) and (2).

2. It may be argued that evidence of failure to wear seat belt should be considered as comparative fault in an enhanced injury case.

3. See Richard J. Kirschman, "The Seat Belt Defense: Are Rumors of Its Demise Greatly Exaggerated?" For The Defense, Oct. 1998.

D. Misuse of Product/Unanticipated or Unintended Use

1. In Iowa, product misuse is no longer considered to be an affirmative defense. Instead, evidence of product misuse is "treated in connection with the plaintiff's burden of proving an unreasonably dangerous condition and legal cause." Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 546 (Iowa 1980). Irrespective of whether a defendant has pleaded product misuse, the plaintiff must prove by a preponderance of the evidence that the use of the product was reasonably foreseeable.

2. If defendant's evidence of product misuse prevents the plaintiff from proving that the product was used in a reasonably foreseeable fashion, defendant is entitled to a directed verdict. Hughes, 288 N.W.2d at 548; but see Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 916 (Iowa

1990) (where the court noted in *dicta* that "one might argue that the legislature has made 'misuse' an affirmative defense.").

E. Unforeseeable Use

This is not an affirmative defense. Rather, plaintiff must prove, as an element of its case, that the product was used in a reasonably foreseeable manner. If the product was misused, plaintiff must prove that such misuse was reasonably foreseeable. See Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980).

F. Alteration of Product

1. If a product is altered, a defendant can still be held liable, but only if the plaintiff is able to show that it was foreseeable that the alteration would be made and the change does not unforeseeably render the product unsafe. Hardy v. Britt-Tech Corp., 378 N.W.2d 307, 309 (Iowa App. 1985); see also Alberg v. Hardin Marine Corp., 387 N.W.2d 779, 781 (Iowa App. 1987) (citing Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 838 (Iowa 1978). "The determinative question is whether the intervening alteration can be characterized as a substantial change such that it would be the superseding cause of the injuries." Alberg, 387 N.W.2d at 781.

2. The Iowa Supreme Court recognizes that strict liability is inappropriate where a product undergoes a "substantial change in condition" before it is received by a consumer. "The rule is that 'strict liability in tort should not extend to injuries which cannot be traced to the product as it reached the market.'" Duggan v. Hallmark Pool Mfg. Co., 398 N.W.2d 175, 178 (Iowa 1986).

3. "Passive alteration," which does not constitute a substantial change in the condition of the product, does not provide the manufacturer with a defense. Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911 (Iowa 1990).

G. Unavoidably Unsafe Products

The Iowa Supreme Court has recognized, in the context of a products liability action against a pharmaceutical manufacturer, that "certain prescription drugs, such as birth control pills, may cause side effects despite the fact they have been properly manufactured, [and] these drugs are deemed 'unavoidably unsafe products.'" Moore v. Vanderloo, 386 N.W.2d 108, 117 (Iowa 1986). Such products are not held to be defective or unreasonably dangerous "so long as they are accompanied by proper directions for use and adequate warnings as to potential side effects." Id.; Restatement (Second) of Torts § 402A cmt. k.

H. Open and Obviously Unsafe Conditions — Duty to Warn

1. Where risks are known and obvious, there is no duty to warn. Sandry v. John Deere Co., 452 N.W.2d 616, 619 (Iowa App. 1989) (citing Nichols v. Westfield Indus., Ltd., 380 N.W.2d 392, 401 (Iowa 1985)).

2. In Iowa, a supplier's duty is to warn of dangers which are not obvious with respect to use of the product in its condition as supplied to the user. A supplier need not give information as to means to ameliorate obvious dangers, even if the supplier is aware of these means and the party to whom the chattel is supplied is not. Nichols, 380 N.W.2d at 401.

3. Where a danger resulting from product use is "sufficiently known to consumers at large" and forms the basis of a claim for failure to warn, the

claim may be dismissed for failure to state a claim for which relief may be granted. Maguire v. Pabst Brewing Co., 387 N.W.2d 565, 570 (Iowa 1986).

4. The duty to warn requires an adequate warning, and the adequacy of the warning depends both upon its content and upon whether the manufacturer or distributor took reasonable care to inform the user of the possible danger of the product. Rowson v. Kawasaki Heavy Indus., Ltd., 866 F.Supp. 1221 (N.D. Iowa 1994). To prevail on a failure to warn claim in Iowa, plaintiff must prove that the manufacturer was negligent. Nassif v. National Presto Indus., Inc., 731 F. Supp. 1422 (S.D. Iowa 1990); see also Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994) (holding that failure to warn should only be submitted on a negligence theory).

I. Informed Intermediary

1. There are no Iowa state court decisions on this defense. The Eighth Circuit Court of Appeals has recognized the existence of the defense, but refused to apply it to the facts of a strict liability action against a propane manufacturer who had argued that its retailer was a "learned intermediary," discharging the manufacturer from liability. See Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 n.9 (8th Cir. 1989). The informed intermediary defense may be limited to cases where a product is obtainable "only through a qualified professional who presumably will explain the dangers of the product" to the ultimate user. Id.

2. Under Iowa law a bulk supplier of a product may satisfy its duty to take

reasonable steps to ensure that the end user is properly warned by warning the intermediary. Stoffel v. Thermogas Co., 998 F. Supp. 1021 (N.D. Iowa 1997).

J. Sealed Containers

There is no Iowa law on the subject of the sealed container defense. But see Iowa Code § 613.18 (retailer immunity statute). A mere "pass through" seller is entitled to legal immunity from claims based on strict liability in tort or breach of implied warranty of merchantability. Id.

K. Fault of Others

1. No third-party action for contribution is permitted between a defendant in a products liability case and a plaintiff's employer, as there is no common liability between the manufacturer and employer by reason of the exclusive remedy bar of the worker's compensation law. Speck v. Unit Handling Div. of Litton Systems, Inc., 366 N.W.2d 543 (Iowa 1985). To permit a jury to assess a percentage of fault against an entity, that entity must be a party to the case. See Iowa Code § 668.3(2).

2. The "empty chair" argument—that a third party, not a party to the action, was the sole cause of the plaintiff's injuries—is permissible notwithstanding the fact that the third person is not a party. See, e.g., Chumbley v. Dreis & Krump Mfg. Co., 521 N.W.2d 192 (Iowa App. 1993); Sorensen v. Morbark Indus., Inc., 153 F.R.D. 144 (N.D. Iowa 1993), rev'd on other grounds, In re Sorensen, 43 F.3d 674 (8th Cir. 1994). The defense of "sole proximate cause" does not have to be pleaded to entitle a defendant to an

instruction on this theory; rather, a general denial that a defendant's acts were a proximate cause of plaintiff's injury will suffice.

3. The court may not allocate fault to a person, formerly a party to the action, who has been voluntarily dismissed from the action (without prejudice) and was not released from liability. Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911 (Iowa 1990).

L. Preemption

There are no Iowa decisions interpreting preemption in the products liability context. Strict liability and negligence claims, based on inadequate labeling or warning, were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Reutzel v. Spartan Chem. Co., 903 F. Supp. 1272 (N.D. Iowa 1995).

M. Compliance with Standards

1. Strict Liability. No state court decisions. For federal law, see Reutzel v. Spartan Chem. Co., 903 F. Supp. 1272 (N.D. Iowa 1995).

2. Negligence. A trial court may adopt a regulation or statute as a standard of conduct in determining negligence "when the injured party is a member of the class of persons likely to be exposed to the kind of harm the regulation was intended to prevent." Brichacek v. Hiskey, 401 N.W.2d 44, 47 (Iowa 1987); see Wilson v. Nepstad, 282 N.W.2d 664, 667 (Iowa 1979); Koll v. Manatt's Transp. Co., 253 N.W.2d 265, 270 (Iowa 1977). Evidence of compliance with a standard would constitute evidence of the exercise of reasonable care. Evidence of a violation of such a regulation

would likewise be construed as evidence of negligence in cases where the plaintiff is a member of the class to be protected by the statute. Koll, 253 N.W.2d at 270; see also Reutzel v. Spartan Chem. Co., 903 F. Supp. 1272 (N.D. Iowa 1995).

3. See also Kevin M. Reynolds and Richard J. Kirschman, "Damned If You Do, Damned If You Don't: The Standards Dilemma in Products Litigation," For The Defense, Oct. 1996.

N. State-of-the-Art

1. In strict liability actions, if properly pleaded and demonstrated, state-of-the-art precludes the jury from assigning a percentage of fault to the defendant. Iowa Code § 668.12. This statutory provision does not, however, diminish the duty "to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to so warn" after the product leaves the defendant's control. Id. "Feasibility" in the context of the state-of-the-art defense connotes a product design that is practically, as well as technologically, sound at the time of manufacture. Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294 (Iowa 1994).

2. In negligence actions, state-of-the-art is a complete defense if proven. See Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911 (Iowa 1990) (holding state-of-the-art is a complete defense against liability for design defects). State-of-the-art should be submitted by way of special verdict. Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).

3. State-of-the-art is not a defense to a failure to warn claim. See Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994).

O. Disclaimers of Liability

In Iowa, it is possible for a disclaimer to limit liability for negligence. It is not against public policy for parties to contract to exempt liability. Manning v. International Harvester Co., 381 N.W.2d 376, 379 (Iowa App. 1985) (citing Weik v. Ace Rents, Inc., 87 N.W.2d 314, 317 (Iowa 1958)). Where limitation language in disclaimer is ambiguous, the language will be strictly construed against the party claiming protection against liability. Manning, 381 N.W.2d at 380.

P. Failure to Mitigate Damages

Unreasonable failure to mitigate damages constitutes fault within the context of Iowa's Comparative Fault Act. Iowa Code § 668.1. Pursuant to Iowa Code §§ 619.7-8, failure to mitigate is an affirmative defense which ordinarily must be pleaded. See Tanberg v. Ackerman Investment Co., 473 N.W.2d 193 (Iowa 1991). A plaintiff's unreasonable failure to mitigate damages is therefore properly considered by the fact-finder in determining the percentages of fault to be assessed against the parties. Iowa Code § 668.3; Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988).

Q. Damage to Property/Product Itself without Bodily or Consequential Injury

Iowa follows the economic loss doctrine, which states that property damage may be recoverable under strict liability so long as there is damage by reason of a sudden, calamitous event which could have resulted in personal injury. See American Fire & Cas. Co. v. Ford Motor Co., 588 N.W.2d 437 (Iowa 1999).

R. Statutes of Limitation

1. The statute of limitations for products actions is found at Iowa Code § 614.1. A plaintiff must institute an action founded on injuries to the person, whether based on contract or tort, within two years. Personal injury actions premised on breach of warranty are also subject to a two-year statute of limitations under § 614.1. Franzen v. Deere & Co., 334 N.W.2d 730, 733 (Iowa 1983); see also Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 351-53 (Iowa 1987).

2. The limitation period begins, i.e., a cause of action "accrues," when all of the elements of the cause of action are known, or in the exercise of reasonable care should have been known, to the plaintiff. Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985). Once a plaintiff has knowledge of facts supporting an actionable claim, he or she has no more than the applicable period of limitations to discover all the theories of action they may wish to pursue in support of that claim, except in cases of a defendant's fraudulent concealment of facts supporting a cause of action. Sparks, 408 N.W.2d at 352-53.

3. Under the Iowa Comparative Fault Act, the filing of a petition tolls the statute of limitations for the commencement of an action against all parties who may be assessed any percentage of fault. See Iowa Code § 668.8; but see Betsworth v. Morey's & Raymond's, 423 N.W.2d 196 (Iowa 1988).

4. For a personal injury product liability claim based on breach of warranty, the statute begins to run when the product is sold. A warranty claim may

be barred by the statute of limitations set forth in U.C.C. § 2-725 and the limitation period may expire before the plaintiff was injured. Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911 (Iowa 1990).

S. Statutes of Repose

1. A 15-year statute of repose applies to product liability cases. See Iowa Code § 614.1(2)(A). This statute applies to cases where the accident occurred on or after July 1, 1997. Cases involving an accident occurring before that date were "grandfathered" in and the statute of repose does not apply to those cases, which are merely subject to a two-year statute of limitations.

2. Section 614.1(11) of the Iowa Code provides a 14-year limitation period applicable to "improvements to real property." This statute has been applied in the product liability context in a case involving an allegedly defective furnace valve. Krull v. Thermogas Co., 522 N.W.2d 607 (Iowa 1994).

T. Retailer Immunity

1. Iowa Code § 613.18 limits the liability, for certain products liability claims, for defendants who are not manufacturers. Non-manufacturers are immune from suit for strict liability or breach of implied warranty of merchantability in cases which arise "solely from an alleged defect in the original design or manufacture of the product." Iowa Code § 613.18(1)(a).

2. Non-manufacturers are not liable for damages assessed in strict liability cases or in cases involving an alleged breach of the implied warranty of

merchantability upon proof that the manufacturer is subject to jurisdiction of the Iowa state courts and has not been judicially declared insolvent. Iowa Code § 613.18(1)(b); Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82 (Iowa 1992); Bingham v. Marshall & Huschart Mach. Co., 485 N.W.2d 78 (Iowa 1992); Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991)

3. A party who is both a retailer and an assembler of a product is not liable for damages based on strict liability in tort or breach of implied warranty of merchantability arising from a design or manufacturing defect if: (1) the assembly of the product is not causally related to the alleged injury; (2) the manufacturer is subject to the jurisdiction of the Iowa courts; and (3) the manufacturer has not been judicially declared insolvent. Iowa Code § 613.18(2).

IV. DAMAGE ISSUES

A. Punitive Damages

1. Punitive or exemplary damages are recoverable pursuant to statute. Iowa Code § 668A.1.

2. When punitive damages are submitted, the jury must answer special interrogatories to determine: (1) whether the plaintiff established by a preponderance of clear, convincing and satisfactory evidence that defendant's conduct which gave rise to the claim constituted "willful and wanton disregard for the rights or safety of another;" and if so, (2) whether defendant's conduct was "directed specifically at the claimant, or at the

person from which the claimant's claim is derived." Iowa Code § 668A.1(1); Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994); Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994).

3 Punitive damages are assessed only if the answer to the first special interrogatory above is in the affirmative. Iowa Code § 668A.1(2). If the first condition is met, distribution of the punitive damage award depends on whether the defendant's conduct was aimed directly at the plaintiff, as revealed by the second special interrogatory. If so, the full award is disbursed to the plaintiff. Iowa Code § 668A.1(2)(a). If not, after payment of costs and fees, an amount not to exceed twenty-five percent of the entire award is disbursed to the plaintiff and the remainder is paid into a civil reparations trust fund administered by the state. Iowa Code § 668A.1(2)(b); see Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 176-78 (Iowa 1990).

B. Contribution

1. The right of contribution is equitable in nature and preserved under Iowa's Comparative Fault Act. Iowa Code § 668.5. Pursuant to this provision, "a right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them." Iowa Code § 668.5(1); see also American Trust & Sav. Bank v. United States Fidelity & Guar. Co., 439 N.W.2d 188, 189 (Iowa 1989).

Common liability must be established as a condition of contribution Id. The basis for contribution is each party's equitable share of the obligation, i.e., amounts are premised on the percentage of fault of each party, including the share of the fault of the plaintiff. Iowa Code § 668.5(1).

2. If percentages of fault for each of the parties to a claim for contribution have been established previously by the court, a party paying more than its percentage share of damages may recover judgment for contribution either upon motion to the court in the original case, or in a separate action. Iowa Code § 668.6(1). If percentages of fault were not previously assessed, contribution may be enforced in a separate action, whether or not judgment had previously been rendered against either the person seeking contribution or the person from whom contribution is sought. Iowa Code § 668.6(2).

3. Contribution is available to a settling party only if the liability of the person against whom contribution is sought has been extinguished, and then only to the extent that the amount paid in settlement was reasonable. Iowa Code § 668.5(2).

4. If judgment has been rendered in the original action giving rise to contribution claims, the action for contribution must be commenced within one year after the judgment becomes final. Iowa Code § 668.3. If no judgment was rendered, a party seeking contribution must establish one of two conditions: (1) he must have discharged the liability of the person from whom contribution is sought by payment to the claimant within the period of the statute of limitations applicable to the claimant's right of action and

must have commenced the action for contribution within one year after the date of that payment; **or** (2) he must have agreed while the original action was pending to discharge the liability of the person from whom contribution is sought and within one year after the date of the agreement must have discharged that liability and commenced an action for contribution. Iowa Code § 668.6(3).

4 If the parties seeking contribution have not paid more than their percentage share of the damages, the contribution action must fail. American Trust & Savings Bank, 439 N.W.2d at 189.

C. Indemnification

The Iowa Supreme Court has recognized four grounds for an indemnity claim: (1) express contract; (2) vicarious liability; (3) breach of an independent duty of the indemnitor to the indemnitee; and (4) secondary as opposed to primary liability, also referred to as active-passive negligence. American Trust & Savings Bank v. United States Fidelity & Guaranty Co., 439 N.W.2d 188, 190 (Iowa 1989). An action for indemnity premised on an active-passive negligence theory is no longer viable because it does not fit within Iowa's comparative fault. Id. Indemnity actions premised upon the remaining three grounds are apparently still viable.

D. Joint and/or Several Liability

By statute, joint and several liability is inapplicable to defendants who are assessed less than fifty percent of the total fault assigned to all parties. Iowa Code § 668.4. Where a jury finds by special verdict that no defendant bears fifty percent of the combined fault of all parties, joint and several liability is precluded. Under those

circumstances, each defendant is only responsible for paying its own percentage share of the damages. Kopsas v. Iowa Great Lakes Sanitary Dist., 407 N W 2d 339, 341 (Iowa 1987).

E. Successor Liability

In Iowa, the general rule is that where one company sells or otherwise transfers all of its assets to another company, the purchasing company is not liable for the debts and liabilities of the transferor. There are, however, four exceptions to this rule. Successor liability may be incurred if any of the following four circumstances exist: (1) there is an agreement to assume such debts or liabilities; (2) there is a consolidation of the two corporations; (3) the purchasing corporation is a mere continuation of the selling corporation; or (4) the transaction was fraudulent in fact. DeLapp v. Xtraman, Inc., 417 N.W 2d 219, 220 (Iowa 1987). The Iowa Supreme Court has expressly rejected the product line theory of successor liability. DeLapp, 417 N.W 2d at 222-23.

V. THE RESTATEMENT (THIRD) AND POST-SALE DUTIES

A. The Iowa Supreme Court adopted § 10 of the Restatement (Third) of Torts: Products Liability in Lovick v. Wil-Rich, 588 N.W 2d 688 (Iowa 1999). Lovick involved the post-sale duty to warn. The Iowa Court has not yet adopted (or cited with approval) any other provisions of the Restatement (Third). In the past, however, the court has often cited to the ALI Restatement with approval. In the future, if Iowa does not have a prior case on point concerning a matter of substantive product liability law, it is expected that the court will look to the Restatement (Third) as persuasive authority regarding the rule of decision.

B. To establish a post-sale duty to warn, plaintiff must prove:

(1) the supplier knows or should reasonably know that the product poses a substantial risk of harm to persons or property; and

(2) the supplier can identify those to whom a warning should be provided and it may reasonably be assumed those persons are unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing the warning.

RECENT IOWA DISCIPLINARY DECISIONS

David J. Grace, Assistant Ethics Counsel
Iowa Supreme Court Board of Professional Ethics and Conduct
521 E. Locust Street, Floor 3rd
Des Moines, Iowa 50309-1939
(515) 243-0027

I. ATTORNEY MISCONDUCT:

Canon 1 A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a disciplinary rule.

(2) Circumvent a disciplinary rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on the fitness to practice law.

(7) Engage in sexual harassment or other unlawful discrimination on the basis of sex, race, national origin, or ethnicity in the practice of law or knowingly permit staff and agents subject to the lawyer's direction and control to do so.

A. Criminal conduct involving moral turpitude (DR 1-102(A)(3)).

Board v. Lyzenga, revocation, 619 N.W.2d 327 (Iowa 2000).

Lyzenga violated various provisions of DR 1-102(A) by her convictions of one felony charge of forgery and numerous misdemeanors, including seven theft, one trespass, one deceptive practices, and four prostitution charges. The Iowa Supreme Court found that the theft, forgery, deceptive practices, and prostitution convictions constituted illegal conduct involving moral turpitude. These convictions and the trespass conviction were prejudicial to the administration of justice and reflected adversely on Lyzenga's fitness to practice law. The convictions for theft, forgery, and deceptive practices involved dishonesty, fraud, deceit, and misrepresentation.

The Court rejected the excuse that the conduct occurred after Lyzenga had ceased practicing law. The Court sympathized with various personal problems

Lyzenga had undergone but found that these problems did not excuse the misconduct. And the Court rejected Lyzenga's plea that she be allowed "to retain her license so that she might have a way to begin her life anew," finding that "[w]hile permitting Lyzenga to retain her license might be good for her, allowing her to do so could no doubt be damaging to the public." The Court ordered her license revoked.

Board v. Morris, 6-month suspension, 604 N.W.2d 653 (Iowa 2000)

Attorney Morris pled guilty to state charges of fraudulent practice in the fourth degree, based on his willful failures to pay withholding taxes on his law office employee's wages and to file the required withholding forms. At a subsequent disciplinary hearing, Morris testified he did not pay the withholding taxes because of his limited income. He also testified concerning his serious health problems.

Although many lawyers have been disciplined for failure to file personal income tax returns, this is the first case in which the Iowa Supreme Court has considered the failure of a lawyer to pay employee withholding taxes in the operation of a law office.

The Court concluded that Morris's conduct violated DR 1-102(A)(3), (4), (5), and (6). The Court further concluded that the failure to pay employee withholding taxes is equally serious to failure to file income tax returns, and suspended Morris's license for not less than six months.

James A. Sinclair, public reprimand, Supreme Court Order, February 12, 2001.

Sinclair was charged by the Polk County Attorney with Burglary in the second degree, a class C felony for breaking and/or entering the residence of another. He subsequently entered a plea of guilty to the reduced charge of attempted burglary in the third degree, an aggravated misdemeanor on August 10, 2000. On Sinclair's petition to plead guilty to the aggravated misdemeanor he acknowledged that: "On January 11, 2000, I entered the one-half of my duplex that I don't live in. The premises were occupied by others and entered the same with the intent to be offensive and assaulting to the persons inside without permission."

Sinclair was publicly reprimanded that his conduct leading to the criminal charges to which he entered a guilty plea established that he engaged in illegal conduct involving moral turpitude, contrary to DR 1-102(A)(3); conduct prejudicial to the admimistration of justice, contrary to DR 1-102(A)(5) and conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Doughty, 18-month suspension, 588 N.W.2d 119 (Iowa 1999).

Doughty knowingly failed to file timely federal and Iowa state income tax returns for eleven consecutive years, 1985-95. He pleaded guilty to federal charges involving four of those years and was sentenced to a term of imprisonment. His conduct violated DR 1-102(A)(3) and (4) (lawyer shall not engage in illegal conduct involving moral turpitude and conduct involving dishonesty, fraud, deceit, or misrepresentation).

Although the record showed Doughty was a respected member of the bar and that he was open, frank, and cooperative in the investigation and hearing of the case, the Iowa Supreme Court noted that discipline was necessary to deter others from similar conduct and to maintain the reputation of the bar as a whole. The Court suspended Doughty's license indefinitely with no possibility of reinstatement for eighteen months from September 12, 1997, the date his license was suspended under Court Rule 118.14 (providing for interim suspension upon conviction of crime that would be ground for suspension or revocation of license). The Court's order of suspension provided that any reinstatement would be conditioned on Doughty's showing he was in compliance with all restitution plans concerning his income taxes.

Board v. Engelhardt, 6-month suspension, ____ N.W.2d ____ (Iowa 2001).

Records of the Iowa Department of Revenue show that Engelhardt failed to file state income tax returns for 1989, 1990, and 1991, and that he filed untimely returns for 1992, 1993, 1994, 1995, and 1997. He also failed to file timely state withholding tax returns for several quarters. In 1999 some of these income and withholding tax failures were made the basis of criminal charges against Engelhardt and his wife. Pursuant to a plea agreement, Engelhardt entered an *Alford* plea to one misdemeanor count of willful failure to file withholding tax returns.

In proceedings before the grievance commission, Engelhardt sought to defend his handling of the tax matters by arguing he had relied on his wife, who was also his secretary, to make the filings. She assured him she was taking care of their tax responsibilities and concealed her failure to do so. The grievance commission concluded that Engelhardt "unreasonably and recklessly over an extended period of time wholly delegated his personal, legal responsibilities as a taxpayer and his duties as a lawyer." Engelhardt even delegated to his wife the filing of the 1997 return after learning from state revenue authorities that returns for several previous years had not been filed. In addition to the tax violations, the commission concluded Engelhardt had failed to timely respond to notices from the ethics board.

The Iowa Supreme Court expressed general agreement with the commission's findings, and suspended Engelhardt's law license indefinitely, with no possibility of reinstatement for six months.

Board v. Neuwoehner, 3-month suspension, 595 N.W.2d 797 (Iowa 1999)

Neuwoehner failed to file Iowa income tax returns and pay his state income tax obligation for 1993, 1994, and 1995. These failures resulted in state criminal charges. He pleaded guilty pursuant to a plea bargain to one count of fraudulent practice in the third degree and received a fine and suspended prison sentence.

In a subsequent grievance commission hearing Neuwoehner admitted the relevant facts but argued his conduct was neither immoral, dishonest, unethical, nor prejudicial to the administration of justice. The Iowa Supreme Court disagreed. The court explained that criminal conduct by a lawyer reflects adversely on all members of the profession and the judicial system.

The court suspended Neuwoehner's license indefinitely with no possibility of reinstatement for three months. The court said that but for Neuwoehner's previously unblemished record the sanction would have been more severe.

Board v. Blazek, two-year suspension, 590 N.W.2d 501 (Iowa 1999).

Blazek sexually assaulted his 11-year-old nephew-by-marriage by touching the boy's bare buttocks and genitals. The conduct occurred during a family reunion aboard a cruise ship. In December 1997 Blazek pleaded guilty to a federal felony charge of knowingly engaging in sexual conduct with a child under 12. He was sentenced to a prison term of 12 months to be followed by three years of supervised release, and ordered to pay restitution of over $27,000 for his nephew's counseling.

In March 1997 the Iowa Supreme Court temporarily suspended Blazek's law license pursuant to Court Rule 118.14. After Blazek's release from prison, hearing was held before the grievance commission. The commission found that Blazek's conduct violated DR 1-102(A)(3) and (6), and recommended that his license be suspended for three years.

The Iowa Supreme Court imposed an indefinite suspension with no possibility of reinstatement for a period of two years from the date of the temporary suspension order. The court said revocation was unnecessary because the conduct was an isolated incident and Blazek admitted the violations, sought treatment immediately following the offense, and "no longer presented a significant risk to potential clients or the public." The court reasoned that a longer suspension would discourage other lawyers from obtaining treatment and accepting responsibility for similar misconduct. The court placed conditions on Blazek's reinstatement, including proof he has continued counseling and has complied with all conditions of his federal parole.

Board v. Wagener, 6-month suspension, 620 N.W.2d 484 (Iowa 2000).

Wagener failed to file his state income tax return for 1993. He was convicted of the aggravated misdemeanor of fraudulent practice in the third degree. The Grievance Commission found that his conduct violated DR 1-102(A)(3), (4), (5) and (6). Considering comparable tax cases and Wagener's

previous suspension for failure to file his 1973 state income tax return, the court suspended his license to practice law indefinitely, with no possibility of reinstatement for six months.

Board v. Schatz, revocation, 595 N.W.2d 794 (Iowa 1999).

Schatz was a long-time partner in a large Sioux City law firm. The firm detected an irregularity involving a legal fee paid to the firm. The fee was paid by check and deposited into Schatz' personal bank account. Schatz admitted the conversion, but told the firm that it was an isolated incident. The subsequent investigation by the firm, however, revealed that he had converted over $140,000 in fees over a period of many years.

Schatz was terminated from the firm and charged with felony counts of theft and income tax invasion. He pled guilty to theft in the 2nd Degree in violation of Iowa Code §§ 714.1(1) and 714.2(2) and income tax evasion in violation of Iowa Code § 422.25(8). He was incarcerated when the Grievance Commission met to consider his ethical violations. The Commission recommended disbarment, and the Supreme Court agreed, stating, "these convictions constituted conclusive evidence of his unfitness to practice law."

Board v. Wickey, 6-month suspension, 619 N.W.2d 319 (Iowa 2000).

Wickey failed to file state income tax returns and pay the taxes due for four years. He was charged with four felony tax evasion counts and, in a plea agreement, was convicted of one aggravated misdemeanor count. Finding that his conduct violated DR 1-102(A)(3), (4), (5) and (6), the Grievance Commission recommended a ninety-day suspension. Considering comparable tax cases and Wickey's previous public reprimand, however, the court suspended his license to practice law indefinitely, with no possibility of reinstatement for six months.

B. Conduct involving dishonesty, fraud, deceit, or misrepresentation (DR 1-102(A)(4).

Board v. Jones, two-month suspension, 606 N.W.2d 5 (Iowa 2000).

In 1995 Jones was employed by Leon Currie, whom he had not previously represented or known, to assist in recovering $25,300,000 that the Nigerian National Petroleum Company purportedly owed Currie for building an oil pipeline. According to information provided by Currie, the Nigerian entity would deliver the $25,300,000 upon receipt of a $25,300 insurance premium. Currie said he was $5000 short in raising money for the premium and asked Jones to find a lender for this amount. In return for securing a lender and obtaining the money from Nigeria, Jones was to receive a two million dollar annuity.

Making no effort to independently verify Currie's story, Jones contacted several banks and individuals. None of them was interested in making the loan. In May 1997 Jones approached a 74-year-old former client and long-time acquaintance, Delbert Jones (no relation).

Jones told Delbert that Currie was due money on the pipeline contract and that if Delbert would make the $5000 loan within two days, Delbert would receive $15,000 within thirty days. Jones described the transaction as an opportunity for Delbert "to make some fast money . . . some good money." Delbert said he did not know Currie, but Jones assured him: "Well, he's my client. He's good. He's good."

Based on Jones' representations, Delbert obtained a thirty-day loan of $5000 from his credit union and delivered to Jones a cashier's check in that amount. Jones endorsed the check and forwarded it to Currie. Jones also signed on Currie's behalf a handwritten promissory note, payable to Delbert in thirty days.

Delbert has never received the promised money. After obtaining two thirty-day extensions from his credit union, he paid the $5000 loan with nine percent interest.

The Iowa Supreme Court found that while Delbert may not have looked to Jones for legal advice, he was relying on him to protect his interests. When Jones solicited the loan he knew—but did not tell Delbert—that several banks had refused to lend the money because of concerns about the stability of the Nigerian government and fraudulent transactions originating in that country and that several other individuals had declined to make the loan. Jones also failed to tell Delbert he had been promised a $2 million annuity if he could secure a lender and obtain the $25,300,000 payment. The Court noted that Jones had hurried Delbert to make a decision over a two-day weekend, effectively depriving him of the opportunity to obtain independent advice.

The Court concluded that Jones did not commit a fraud but that his misstatements and omissions violated Iowa Code of Professional Responsibility for Lawyers DR 1-102(A)(4) (misrepresentation) and (6) (conduct reflecting adversely on fitness to practice). When a lawyer engages in a business transaction with an unrepresented person, the lawyer has a duty to recognize and correct potentially misleading situations.

Because Jones previously had received a public reprimand for other misconduct and because his actions caused harm to Delbert, the Court suspended his license indefinitely with no possibility of reinstatement for two months. As a condition of reinstatement, the Court directed Jones to make restitution of $5000 plus interest to Delbert.

Board v. Stein, two-year suspension, 603 N.W.2d 574 (Iowa, 1999)

Stein's license to practice law was suspended in November 1998 for neglect and misrepresentations to the court and opposing counsel. The present disciplinary action involves further neglect and misrepresentations.

In 1997 and 1998 Stein represented the purchaser in a real estate transaction. There was a prior contract of sale involving the same real estate. Although the prior contract had not legally been forfeited, Stein represented in a preliminary title opinion that the forfeiture had been accomplished. In later communications with the purchaser's bank, Stein represented that he personally had performed the forfeiture requirements. Instead of taking appropriate action to complete the forfeiture, Stein continued to stonewall and mislead the bank. Eventually he sent the bank a bogus affidavit of publication of notice purporting to show that he had caused notice of forfeiture to be published in a local newspaper.

When the misrepresentations were discovered, a complaint was filed with the Board of Professional Ethics and Conduct. Stein failed to answer the first two letters sent him by the board.

The Grievance Commission and the Iowa Supreme Court found that Stein violated DR 1-102(A)(5) and (6) (failure to cooperate with the board), DR 6-101(A)(3) and DR 7-101(A) (neglect of the real estate matter), and DR 1-102(A)(4)(5), and (6) (dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice, and conduct reflecting adversely on fitness to practice law).

The Grievance Commission recommended that Stein's license be suspended for five years. The Iowa Supreme Court, noting that Stein has sought psychiatric counseling and expressed remorse for his actions, imposed a two-year suspension.

John R. Martin, public reprimand, Supreme Court Order, May 31, 2000.

Martin's father had remarried and at his death was survived by his spouse, Martin's step-mother. Prior to his father's death Martin drafted and secured his father's signature on a power of attorney naming Martin as his attorney in fact in which Martin attempted to secure authority to act on behalf of his father even after his father's death by adding to the language of the printed form which would have provided that the power of attorney would be "effective until my death," the words: "or until my assets are distributed by probate or otherwise, whichever occurs later."

Following his father's death Martin secured the proceeds of an annuity contract which proceeds were payable to his father's widow by enclosing a copy of that power of attorney without revealing the fact of his father's death to the insurance company. He then deposited the proceeds of that annuity contract, which by its terms was payable to his father's widow, to his personal account.

Martin then wrote to his father's widow proposing a division of his father's assets, including a distribution to himself and his siblings of, among other assets, the balance in the joint checking account his father had with his widow, their home which his father and his widow owned in joint tenancy, and an automobile which was titled only in the name of his father's widow and her daughter, thus making a proposal to an adverse party not represented by counsel

which, if he had secured her consent, would have required that she share with Martin and his siblings assets which passed to her automatically by operation of law and in which Martin and his siblings had no entitlement.

Martin was publicly reprimanded that in drafting a power of attorney granting unto himself the authority to act as an attorney in fact intended to survive the death of the grantor thereof he engaged in conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers. That in securing the proceeds of an annuity contract which by its terms made his father's widow the primary beneficiary thereof, pursuant to that power of attorney, without disclosing to the insurance carrier the fact of his father's death, he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, contrary to DR 1-102(A)(4), of the Iowa Code of Professional Responsibility for Lawyers. That in proposing to his father's widow, who at the time was not represented by counsel, a division of property to himself and his siblings, which included items of property which his father and his widow held in joint tenancy and which were thus hers automatically by operation of law, he not only engaged in conduct involving misrepresentation, contrary to DR 1-102(A)(4), but gave advice to a person not represented by counsel, other than the advice to secure counsel, his father's widow's interests being in conflict with the interest of Martin and his siblings, contrary to DR 7-104(A)(2) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Gallner, 6-month suspension, 621 N.W.2d 183 (Iowa 2000).

Gallner is an experienced lawyer with recognized expertise in the area of workers' compensation. Evidence produced at a Grievance Commission hearing showed that from 1985 to 1995 he wrote at least six letters in which he informed the Social Security Administration that his attorney fees for representing clients in workers' compensation cases were greater than the actual amounts he charged the clients. The information was used by the Social Security Administration to determine whether to reduce benefits to clients who received both social security disability benefits and workers' compensation. Federal law limits the total of social security disability benefits and workers' compensation benefits (less attorney's fees) to eighty percent of a worker's preinjury earnings. Gallner's purpose in misstating the facts was to help his clients obtain more social security benefits than they were entitled to receive.

The Iowa Supreme Court found that Gallner engaged in a pattern of factual misstatements over an extended period of time. The court concluded he violated Iowa Code of Professional Responsibility for Lawyers DR 1-102(A)(4), (5), and (6) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice, and conduct reflecting adversely on fitness to practice law) and DR 7-102(A)(5) (knowingly making false statements on behalf of a client).

Gallner asserted various excuses and mitigating factors. He claimed he acted out of confusion about the applicable federal regulations. The court,

however, found his misstatements resulted from design and purpose rather than confusion or mistake. The court also found it unimportant that those initiating the complaint may have been motivated by personal animosity. It was neither an excuse nor mitigating that the conduct was meant to benefit clients. Similarly, it was unimportant that some of the letters may not have resulted in the clients' receiving excessive benefits, since a wrongful attempt is unethical even if the conduct does not achieve its ultimate purpose. Nor was it significant that some of the conduct occurred as long ago as 1985.

The court noted that a pattern of misconduct calls for an enhanced sanction. Gallner's experience and his discipline in a prior matter also were held to be aggravating factors. The court suspended his license indefinitely, with no possibility of reinstatement for six months.

Board v. Ackerman, one-month suspension, 611 N.W.2d 473 (Iowa 2000).

Representing a defendant on a criminal charge, Ackerman moved to dismiss the prosecution, alleging that no indictment had been found within forty-five days of arrest. The motion was erroneous, however, because Ackerman used the date of the alleged crime as the arrest date. He presented an order dismissing the case *ex parte* to the judge, who signed it. When the true facts were learned the dismissal was set aside and Ackerman was found in contempt of court. His defense of mistake was countered by evidence of two previous similar incidents. In refusing to write off the conduct as a mere mistake, the court stated, "At its most basic level a court must rely, not alone on the honesty of lawyers, but also on the reliability of factual representations submitted to the court. A misrepresentation cannot be explained away, and certainly not justified, on the basis of disorganization and confusion." The court also found that Ackerman had violated DR 7-110(B) by presenting the dismissal order *ex parte* without advising the county attorney.

Although the Grievance Commission recommended a public reprimand, the Supreme Court considered the fact that Ackerman had previously been publicly reprimanded and suspended his license for a minimum of one month.

Board v. Carr, revocation, 588 N.W.2d 27 (Iowa 1999).

In 1993 Carr undertook to represent Sandi W. and Sandi's daughter, Heather (then a minor), in pursuing Heather's sexual discrimination and harassment claim against the Mason City School District. He also represented Heather and Sandi in negotiating a contract with NBC for a television movie depicting Heather's story. Because NBC was paying Carr and one of his partners a consulting fee with respect to the TV movie, Carr and the partner agreed not to charge the Wrights a fee for negotiating the NBC contract.

In September 1995, before the harassment case was tried, NBC sent Carr royalty checks payable to Heather and Sandi. Carr telephoned Sandi to say the money had arrived and to arrange for her to meet him at a restaurant in Story City

to deliver the checks. Contrary to his agreement, Carr told Sandi he was entitled to a fee of ten percent of the total royalties from NBC. He told her to bring him $4,700 when they met in Story City. This amount, together with consulting fees already paid by NBC, equaled ten percent of the royalties. At their meeting in Story City, Carr delivered the royalty checks to Sandi and she gave him the requested $4,700. Carr did not inform his firm of his receipt of this money.

Soon after the sexual harassment case was tried in June 1996, Carr's law firm acquired information he may have received fees that were not deposited to the firm's account. Upon inquiry, Sandi confirmed her payment of $4,700 to Carr the preceding September. When confronted by the firm, Carr denied he had obtained the money as a fee. He claimed he was holding the $4,700 for Heather in a safe box at his residence out of concern Heather would squander the money. Shortly thereafter, he drove to Mason City and gave Heather forty-seven one hundred dollar bills.

At hearing before the Grievance Commission, Carr denied any intent to steal his clients' money and maintained he merely had violated trust account rules by holding the client funds at his home. The Commission and the Iowa Supreme Court, however, rejected this defense. Carr's story, in the words of the Court, "was a desperate attempt to minimize the seriousness of his conduct." Carr violated DR 1-102(A)(3) and (4) by falsely representing to Sandi a fee was due, accepting the money from her, and failing to account for the receipt of the money to his firm. He also engaged in a dishonest cover-up when the misconduct began to surface.

Although Carr had no prior disciplinary record and committed only a single conversion of funds, the Court held the theft and deceitful conduct warranted revocation of his license.

Robert A. Wright, Jr., public reprimand, Supreme Court Order, May 23, 2001.

Wright received a public reprimand with respect to two complaints filed with the Board of Professional Ethics and Conduct. With respect to the first complaint Wright had been approached by a criminal defendant and the defendant's brother seeking Wright's representation of the criminal defendant with respect to serious criminal charges. The criminal defendant indicated he owned a home in Des Moines and would be willing to use the home as collateral to secure the payment of Wright's fee. Wright secured and examined the abstract of title to the property and confirmed that the criminal defendant held the title to the property, the defendant's brother having quitclaimed the property to his brother by a deed recorded July 5, 1994. Wright then entered into an attorney fee contract with the criminal defendant pursuant to which the criminal defendant executed a quitclaim deed to Wright dated November 29, 1996, which Wright recorded January 8, 1997. Wright then entered into a contract with the defendant's brother, agreeing to sell the property to the brother for $13,000, which the defendant's brother was to pay in monthly installments of $350. The contract did not require the payment of any interest.

The defendant's brother, who was then the contract purchaser of the property, contacted Wright in the Fall of 1998 advising he wished to obtain a loan so he could do some remodeling of the property. The property was then mortgaged to obtain additional funds for the remodeling and Wright renegotiated the contract with the defendant's brother to provide for a total contract obligation of $18,000 with would thereafter incur interest.

The mortgage lender then required a corrected quit claim deed from the criminal defendant to Wright to reflect that he was a single individual at the time he signed the original quit claim deed to Wright. The criminal defendant was not available for a signature at that time. Wright then relied on the brother's assurance that he had the authority to sign his brother's name. The brother then signed the criminal defendant's name to the corrected quit claim deed conveying the property to Wright. Wright had a secretary in his office complete the acknowledgment that the signature was the criminal defendant's. It was not indicated on the deed that the brother was signing in a representative capacity nor was there a duly executed power of attorney giving the brother authority to sign his brother's name.

Wright was publicly reprimanded that in participating in the execution of a deed to himself in which the grantor's brother signed the grantor's name, and in permitting his secretary to acknowledge that signature as if it was the signature of the grantor himself, he engaged in conduct involving deceit or misrepresentation, contrary to DR 1-102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers.

As to another complaint Wright was employed to pursue a client's wrongful termination of employment claim. Wright neglected to pursue that action and later, when his client's claim became an asset in her bankruptcy, though he agreed he would file an objection to the bankruptcy trustee's proposed compromise settlement of that claim, he failed to do so. Wright's public reprimand included the determination that in neglecting a client's cause of action for alleged wrongful termination of employment, he violated DR 6-101(A)(3) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Vanden Berg, public reprimand, Supreme Court Order, November 12, 1999.

Vanden Berg drew a will naming his wife as executor. Following the testator's death Vanden Berg caused that will to be offered for probate and secured the appointment of his wife as executor of the decedent's estate. As attorney for the estate Vanden Berg prepared documents for the signature of the executor. However, Vanden Berg then signed his wife's name to those documents and, as a notary public, acknowledged that the signatures were his wife's and that she had signed the same in his presence.

Vanden Berg was publicly reprimanded that in so doing he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, contrary to DR 1-102(A)(4); conduct prejudicial to the administration of justice, contrary to DR

1-102(A)(5); and conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers.

Randall A. Roos, public reprimand, Supreme Court Order, February 15, 2000.

Roos represented a plaintiff in a copyright infringement action filed in Federal District Court. While a preliminary injunction and partial summary judgment were on appeal, he negotiated a settlement on behalf of his client pursuant to which his client was to receive $200,000.00 subject to certain terms and conditions which he had negotiated with defendants' counsel. Upon his receipt of a settlement draft for $200,000.00 made payable to himself and his client, together with settlement documents prepared by defendants' counsel, he negotiated the draft though he and his client disputed and disagreed with the terms of two of the settlement documents, refused to sign the stipulation for dismissal as prepared by defendants' counsel, and drafted his own stipulation and dismissal order reciting different terms.

Roos was publicly reprimanded that in his negotiation of the settlement draft, while refusing to accept the settlement documents as prepared by opposing counsel, he engaged in conduct involving dishonesty or misrepresentation, contrary to DR 1-102(A)(4); conduct prejudicial to the administration of justice, contrary to DR 1-102(A)(5); and conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers.

Vernon A. McKinley, public reprimand, Supreme Court Order, April 21, 2000.

McKinley was called as a witness and testified at a hearing held October 8, 1999, in the Iowa District Court in and for Johnson County on a motion in arrest of judgment filed on behalf of his former client in a criminal matter. McKinley acknowledged that he had signed his client's name on a written guilty plea and, as a notary public, completed his notary's acknowledgment falsely stating the criminal defendant had signed the document in his presence. He then caused the document to be filed. McKinley testified that he had done so because his client was not present but was in Illinois and he had done so to prevent a warrant being issued for his arrest. The Johnson County District Court found that the written guilty plea was fatally flawed and would not accept the guilty plea on that basis.

McKinley was publicly reprimanded that in signing his client's name to a written plea of guilty and then, as a notary public, completing the notary's acknowledgment that the signature was that of his client, he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, contrary to DR 1-102(A)(4); conduct prejudicial to the administration of justice, contrary to DR 1-102(A)(5); and conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers.

C. Conduct Prejudicial to the Administration of Justice or Adversely Reflecting on Fitness to Practice Law (DR 1-102(A)(5) and (6)).

Joe Harris, public reprimand, Supreme Court Order, May 31, 2000.

Harris represented an individual who lived near the proposed site of a new landfill. He sent anonymous fax communications to approximately 325 local Cedar Rapids businesses critical of the Cedar Rapids Mayor and Commissioners for selecting that particular site for the proposed landfill, advocating a change in city government and urging: "our city needs new leadership – vote for change in city government."

Harris's anonymous faxes were determined to be political materials that did not contain a "paid for by" attribution disclaimer and he was thus in violation of section 56.4 of the Code of Iowa. Harris was publicly reprimanded that in distributing political material anonymously, in violation of Iowa statute, and further, with respect to a matter in which he represented a client with a personal interest, he violated DR 1-102(A)(5) of the Iowa Code of Professional Responsibility for Lawyers by engaging in conduct prejudicial to the administration of justice, and DR 1-102(A)(6) by engaging in other conduct adversely reflecting on his fitness to practice law.

Board v. Thompson, two month suspension, 595 N.W.2d 132 (Iowa 1999).

Thompson's daughter had an abusive boyfriend. One evening after Respondent had been drinking, he entered uninvited the home of the boyfriend and his mother and conducted himself in a vulgar and threatening manner, refusing to leave when requested. Thereafter he drove the boyfriend to his residence and pointed a shotgun at him. He was charged with criminal trespass and an aggravated misdemeanor of assault. He finally reached an agreement with the state pursuant to which he was found guilty of simple assault in violation of Iowa Code §§ 708.1(2) and 708.2(4) and criminal trespass, a simple misdemeanor, in violation of Iowa Code §§ 716.7(2)(6) and 716.8(1). Thompson's sentence was suspended and he was placed on probation.

On another matter, Thompson had been appointed to represent a convict on an appeal of a postconviction relief decision. His neglect of the matter resulted in dismissal of the appeal for want of prosecution.

In view of Thompson's two previous public reprimands for neglect matters, the Supreme Court decided that a thirty-day suspension was warranted for the criminal convictions and another thirty-day suspension necessary for the neglect violation, stating that in imposing the two-month suspension, it was taking into consideration the depression and emotional pressures under which Thompson was laboring at the time.

Angela Boeke, public reprimand, Supreme Court Order, November 10, 2000.

While engaged as a prosecutor in the Office of the Johnson County Attorney and being principally assigned to prosecute serious and aggravated misdemeanors, including prosecutions of Operating While Intoxicated, Boeke engaged in a romantic affair with a judge before whom such matters were prosecuted. She maintained that relationship in secret without notice to the Johnson County Attorney, by whom she was employed, or to counsel for those defendants she prosecuted before that judge. It was the determination of the Supreme Court's Board of Professional Ethics and Conduct, that in so doing she compromised the integrity of both her work and the Court itself as it is an absolute necessity that the prosecutor and a judge before whom the prosecutor practiced be independent and impartial. Such independence and impartiality could not be achieved when she and the judge maintained an undisclosed, romantic, intimate relationship.

Boeke was publicly reprimanded that by engaging in an undisclosed, romantic relationship with a judge before whom she prosecuted criminal matters, she engaged in conduct prejudicial to the administration of justice, contrary to DR 1-102(A)(5), conduct adversely reflecting on her fitness to practice law, contrary to DR 1-102(A)(6), conduct which might impair her independent professional judgment, contrary to DR 5-101, and conduct, which like a gift or a loan to a judge could be construed as unduly influencing the judge, contrary to DR 7-110(A) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Runge, six month suspension, 588 N.W.2d 116 (Iowa 1999).

Runge failed to file state income tax returns and pay the taxes due for four years. He was charged with four felony tax evasion counts and, in a plea agreement, was convicted of one aggravated misdemeanor count. Finding that his conduct violated DR 1-102(A)(3), (4), (5) and (6), the Grievance Commission recommended a ninety day suspension. Considering comparable tax cases and Runge's previous public reprimand, however, the court suspended his license to practice law indefinitely, with no possibility of reinstatement for six months.

Brian L. Early, public reprimand, Supreme Court Order, November 10, 2000.

Early was charged by trial information in Jasper County, Iowa, with the crime of Operating While Intoxicated, Third Offense, in violation of Section 321J.2(1)(a) and (b) and 321J.2(c) of the Iowa Criminal Code with respect to his operation of a motor vehicle in Jasper County, Iowa, on March 31, 2000. Having previously been convicted of Operating While Intoxicated in Mahaska County on September 3, 1997, and having received a deferred judgment for Operating While Intoxicated in Poweshiek County on April 25, 1998. Early pleaded guilty to a charge of Second Offense OWI and agreed to a 30-day jail sentence and a $2,500 fine.

Early was publicly reprimanded that his conduct resulting in his criminal conviction to a charge of OWI Second Offense was conduct prejudicial to the administration of justice, contrary to DR 1-102(A)(5) and conduct adversely reflecting on his fitness to practice law, contrary to DR 102(A)(6) of the Iowa Code of Professional Responsibility.

Board v. Apland, two year suspension, 599 N.W 2d 453 (Iowa 1999).

Apland was upset with the relationship between his former client, George Ensley, and his ex-wife, Kathryn Apland. As the Supreme Court found, "his anger resulted in his embarking on a course of harassment, threats, misrepresentations, and outright lies." There was evidence that Apland threatened to kill his ex-wife, slammed on his brakes directly in front of Ensley's car, made numerous phone calls to Ensley, and accused Ensley of arson in calls to Ensley's insurance agent and attorney. At the time of his transgressions, Apland's license was under suspension for not complying with continuing legal education and client security requirements, and he had previously been publicly reprimanded for another offense. Although the Grievance Commission recommended a suspension of his license to practice law for not less than six months, the Supreme Court ordered a suspension for a minimum of two years.

Board v. Pracht, two-year suspension, 627 N.W 2d 567 (Iowa 2001).

To "remedy" a perceived problem in the filing system of the Scott County Clerk of Court, Pracht removed, without authorization, the check-out cards used by the clerk's office to keep track of files borrowed by lawyers. Local procedure required a lawyer who wished to check out a file to fill out a card and leave it in place of the removed file. The file was to be returned within twenty-four hours. Over time, many lawyers failed to fill out the cards or were not punctual in returning files. The chief judge decided to install a sensormatic electronic system to prevent unauthorized removal of files. Before the system was installed, the chief judge asked lawyers to return all files to the clerk's office by July 2, 1999. After this deadline, the clerk's office planned to pull all remaining check-out cards and track down the files to which they belonged.

Pracht believed there were many missing files for which no one had prepared check-out cards and that the clerk did not realize the extent of the problem. He did not voice these concerns to the clerk's office or the court. Hoping to force a full inventory of every file for which the clerk was responsible, on July 2, 1999, he removed all remaining check-out cards from the clerk's office.

When the removal of the cards was discovered, a DCI investigation promptly commenced. Pracht did not disclose he had taken the cards until confronted by the county attorney over two weeks later. Meantime, the investigation cost thousands of dollars and several innocent persons were interrogated or asked to take polygraph tests.

Several months later Pracht compounded the misconduct by making unfounded allegations of a "misappropriation" or "misallocation" of $100,000 to $250,000 of court funds and a conspiracy involving the clerk, the clerk's staff, and the chief judge. He claimed that by taking the check-out cards he hoped to prompt an investigation of these matters as well. Pracht's allegations triggered a second DCI investigation. A review of twenty-five years of records disclosed no misappropriation, misallocation, or conspiracy.

The Iowa Supreme Court concluded that Pracht's conduct was deceitful, prejudicial to the administration of justice, and reflected adversely on his fitness to practice law, in violation of DR 1-102(A)(4), (5), and (6). Citing Pracht's disdain for basic considerations of candor and honesty, his attempt to shift blame, and previous disciplinary history, the court suspended his license indefinitely with no possibility of reinstatement for two years.

Chad L. Belville, public reprimand, Supreme Court Order, February 15, 2000.

Belville, the Worth County Attorney, was sentenced pursuant to his guilty plea to the crime of operating a motor vehicle while intoxicated, second offense. He was publicly reprimanded that his conviction for a second offense OWI indicated conduct on his part prejudicial to the administration of justice, contrary to DR 1-102(A)(5) and conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Naylor, one-year suspension, 623 N.W.2d 814 (Iowa 2001).

When a client filed an ethics complaint against Naylor, despite several notices, he did not respond to the Board's inquiries. Moreover, despite the fact that Naylor had been suspended from the practice of law for failing to comply with continuing legal education requirements, he continued to hold himself out as a practicing attorney in the yellow pages. After being served with a disciplinary complaint before the Grievance Commission, Naylor ignored the entire proceeding, including failing to show up at his hearing. The Grievance Commission recommended that his license to practice law be revoked, and the Supreme Court agreed that he had violated DR 1-102(A)(5) and (6) (conduct prejudicial to the administration of justice and adversely reflecting on fitness to practice law). However, the Supreme Court decided that a one-year suspension was the appropriate sanction.

Failure to Respond to Board Notices of Complaint:

David J. Erbes, public reprimand, Supreme Court Order, May 31, 2000

Erbes signed a postal receipt for the Supreme Court Board of Professional Ethics and Conduct's initial notice of complaint on June 23, 1999, and on July 13, 1999, acknowledged receipt of that notice and requested a 10 day extension of time to file his response, which the Board granted. He failed thereafter to file a response notwithstanding another letter to him by ordinary mail on August 11, 1999, reminding him that he had been granted an extension to July 24 to file a response and which letter advised Erbes that his failure to provide a response was itself an ethical violation which would warrant a filing against him with the Grievance Commission. Erbes nevertheless failed to file a response until March 1, 2000.

Erbes was publicly reprimanded that his failure to provide a timely response to the Board's notice of complaint, notwithstanding the Board's reminder to him of the consequence of such failure, was conduct prejudicial to the administration of justice, contrary to DR 1-102(A)(5) of the Iowa Code of Professional Responsibility for Lawyers.

Douglas D. Daggett, public reprimand, Supreme Court Order, February 11, 1999.

Daggett did not respond to Notices of Complaint from the Iowa Supreme Court Board of Professional Ethics and Conduct. Daggett was publicly reprimanded that his failure to respond to the Board's notices was conduct prejudicial to the administration of justice, contrary to DR 1-102(A)(5) and conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers.

D. Conduct involving sexual harassment (DR 1-102(A)(7)).

Board v. Steffes, 2-year suspension, 588 N.W. 2d 121 (Iowa 1999).

This case involves the first reported violation by an Iowa lawyer of DR 1-102(A)(7), which was adopted a few years ago to prohibit sexual harassment or discrimination in the practice of law.

Steffes represented a female client charged with possession of marijuana with intent to deliver. The client admitted the possession but denied an intent to deliver. She maintained she was suffering from back problems and was using the marijuana to relieve pain. During a conference with the client at Steffes' office, he took two Polaroid pictures of her, purportedly to illustrate the site of her pain. The first photograph was of the client's bare back. Before taking the second picture, Steffes pulled down the client's shorts and underwear. The second photograph depicted the client's nude breasts and pubic area. Steffes told her the pictures might impress male members of the jury in her favor.

The client was distressed by this incident, and, when meeting with Steffes at the courthouse for her arraignment, demanded he give the photos to her. Steffes reluctantly did so. He suggested she destroy the pictures, and even obtained a pair of scissors for her to use. She did not destroy the pictures,

however. Instead, after receiving them, she obtained new counsel and reported the incident to the Board of Professional Ethics and Conduct.

The Grievance Commission and the Supreme Court found that Steffes' conduct violated DR 1-102(A)(5) and (6) (lawyer shall not engage in conduct prejudicial to administration of justice and conduct reflecting adversely on fitness to practice law). The Court further found the conduct constituted sexual harassment in the practice of law, in violation of DR 1-102(A)(7). As to the latter violation, the Court rejected Steffes' argument that the rule applies only to workplace discrimination.

The Grievance Commission had recommended a six-month suspension. The Court, however, concluded the conduct was so egregious as to warrant an indefinite suspension, with no possibility of reinstatement for two years. The Court noted that Steffes had exploited a vulnerable client to satisfy his own prurient interests, that he had tried to get her to destroy the evidence of his misconduct, and that at the hearing before the Commission he had tried to shift the focus to the client and her failure to actively resist his photographic improprieties. The Court ordered that, prior to any reinstatement of license, Steffes demonstrate his completion of formal training in sensitivity to sexual harassment issues.

II. ADVERTISING (CANON 2)

David L. Baker and John L. Riccolo, public reprimands, Supreme Court Orders, February 15, 2000.

Riccolo and Baker, partners in a Cedar Rapids law firm, caused to be published a full page advertisement in the Yellow Pages of the US West Telephone Directory for Dubuque, Iowa, indicating their firm's practice in "Personal Injury, Medical Malpractice, and Product Liability." Neither had previously filed a certification of eligibility to indicate areas of practice with the Commission on Continuing Education. Both were publicly reprimanded that their indication of areas of practice without a prior filing of certifications of eligibility to indicate such areas of practice with the Commission on Continuing Education was in violation of DR 2-105(A)(2) of the Iowa Code of Professional Responsibility for Lawyers.

Vernon A. McKinley, Constance P. Stannard, and James H. Carter, public reprimands, Supreme Court Orders, May 23, 2001.

McKinley, Stannard, and Carter caused their firm name, containing each of their names, to appear in a half page advertisement in the University of Iowa's 2000 football yearbook which prominently displayed a photograph of each of them indicating the firm practiced "personal injury, family law, criminal law, & other related legal matters." None of them had previously filed a certification of eligibility to indicate those areas of practice with the Commission on Continuing

Education, as required by DR 2-105(A)(4) of the Iowa Code of Professional Responsibility for Lawyers and the advertisement did not contain either of the required DR 2-101(A) or DR 2-105 disclaimers.

Mckinley, Stannard, and Carter were each publicly reprimanded for their violations of DR 2-105(A)(4), DR 2-101(A), and DR 2-105(A)(3)(c) of the Iowa Code of Professional Responsibility for Lawyers.

III. UNAUTHORIZED PRACTICE (Canon 3)

John R. Leed, public reprimand, Supreme Court Order, May 23, 2001

Though not admitted to the practice of law in Nebraska Leed filed an Appearance and Answer on behalf of Nebraska defendants in a lawsuit filed in the County Court of Lancaster County, Nebraska, on March 10, 2000. It was a regular practice in that Nebraska Court to enter the attorney's Nebraska bar number in the Court's computer so each lawyer was to include his Nebraska bar number on pleadings filed there. Because Leed had failed to include a Nebraska bar number the Lancaster County Clerk of Court called Leed on numerous occasions but Leed failed to return any of those calls It was then determined that Leed was not admitted to the practice of law in Nebraska.

The State of Nebraska then filed criminal charges against Leed and on February 6, 2001, Leed entered a guilty plea to a misdemeanor charge and was subject to a fine.

Leed was publicly reprimanded that in appearing in a Nebraska Court on behalf of Nebraska defendants though not admitted to the practice of law in Nebraska he was in violation of DR 3-101(B) of the Iowa Code of Professional Responsibility for Lawyers in that he practiced law in a jurisdiction where doing so was in violation of the regulations of the profession in that jurisdiction.

IV. CONFLICTS OF INTEREST (Canon 5)

A. Business Relationship with a client.

Board v. Fay, one month suspension, 619 N.W.2d 321 (Iowa 2000).

Fay and his daughter owned a residential property in Cedar Rapids. During a conference with a client, he learned that the client, Jeanice Havlik, d/b/a/ Red Door Interiors (an interior decorating company), needed a new place of business. Fay brought up his property, and Ms. Havlik eventually leased it for her business. Although it was zoned residential, Fay told Havlik that it could qualify under the home occupation exception to the residential zoning ordinance, since Havlik intended to live at the location. The City of Cedar Rapids, however, promptly took steps to enforce its ordinances, and Havlik was faced with the possibility of a business shutdown. Fay assured her that she would be able to keep operating; however, he took no action and Havlik eventually moved her business

again and sued him for her losses. After trial, the court found that "it would have been extremely difficult, if not impossible, for this dwelling to ever have been brought into compliance with the Cedar Rapids City Code given the business that Ms. Havlik intended to operate." The court found that Fay had made negligent misrepresentations and, after an offset for delinquent rent, awarded judgment for the plaintiff in the amount of $4,993.

After hearing the same evidence, the Grievance Commission found that Fay had violated DR 5-104(A) by engaging in a business transaction with a client without fully disclosing his conflict of interest. The Supreme Court agreed and suspended Fay's license to practice for a minimum of one month.

Board v. Wagner, three month suspension, 599 N.W.2d 721 (Iowa 1999).

Wagner engaged in conflicts of interest in the 1995 sale of a restaurant in South Amana. He initially undertook to represent the seller, who agreed to pay a ten percent commission if Wagner found a purchaser. In April 1995 David Childers, who had limited financial resources and no experience in owning a business, met with Wagner at Wagner's office in Amana to inquire about the restaurant. Childers knew the restaurant had been closed for about fifteen months but was unsure whether it was for sale. He went to Wagner because Wagner previously had represented him and was the only attorney he knew.

Wagner told Childers he represented the seller but did not disclose his own commission interest in the sale. Although he told Childers it may be in Childers' interest to have independent counsel, he did not explain why. Wagner charged Childers for the meeting and proceeded to represent both him and the seller in the real estate transaction. In May 1995 Childers bought the restaurant on contract for $400,000 with a down payment of $150,000. By December 1995 when the first contract payment was due Childers was unable to make the payment in full. His interest in the contract eventually was forfeited, leaving him with a bank debt of nearly $150,000 as well as other debts related to his purchase or operation of the restaurant.

The Iowa Supreme Court held Wagner engaged in two categories of conflict of interest. First, the court found conflict in the representation of both buyer and seller. Even though the court stopped short of finding Wagner participated in negotiation of the purchase price, the court observed there are many other areas in which the interests of buyer and seller differ.

Second, the court found Wagner's own interests conflicted with those of the buyer because of Wagner's ten percent commission interest in the sale. In particular, the court noted purchase of the restaurant was a risky proposition and it was in Childers' interest to receive disinterested advice whether to proceed. It was in Wagner's interest, however, to make sure the sale went through so he could earn the commission. Childers and Wagner also had differing interests in the purchase price and size of the down payment.

Given the conflicts, Wagner had a duty of full disclosure. The court held it was inadequate merely to inform the clients that he was representing both sides,

that there was a possibility of conflict, and that it may be in their interest to consult independent counsel. Wagner also had a duty to explain what conflicts might arise and the advantages of obtaining independent counsel. Moreover, he had a duty to tell Childers of his ten percent commission interest in the sale and how that interest could affect his professional judgment. The court concluded Wagner should have insisted Childers secure independent counsel.

The grievance commission recommended Wagner's license be suspended for three months. Wagner asked the Iowa Supreme Court to impose a reprimand. The court agreed his conduct may have resulted from poor judgment rather than moral turpitude but noted suspension has been imposed in other conflicts cases even in the absence of moral turpitude. The court found several aggravating circumstances, including harm to the client, Wagner's experience ("[s]ixteen years in the practice with a heavy emphasis in real estate transactions tells us that Wagner should have known better"), and his prior reprimand for an advertising violation. The court suspended his license indefinitely with no possibility of reinstatement for three months.

Board v. Walters, three month suspension, 603 N.W 2d 772 (Iowa 1999).

Walters committed multiple ethical violations. The first involved loans he solicited in 1991 and 1992 from his former clients, Lester and Venola Diegel. He had represented the Diegels from 1976 until 1989. In 1989 Walters left the practice of law and for a time pursued a real estate career in Minnesota. When this proved unsuccessful, he returned to Mason City, hoping to resume the practice of law. Having little income and continuing expenses, he contacted the Diegels for a loan in December 1991. He did not advise them that his own interest in the matter might affect his judgment on their behalf. He received two loans form the Diegels, totaling $15,000, which he used to pay college tuition and expenses for his daughter. Although he signed promissory notes to the Diegels, the loans remained unpaid. Eventually the Diegels obtained a judgment against him for the loan amounts plus interest, attorney fees, and costs.

The Iowa Supreme Court found that by soliciting money from former clients, Walters committed violations of Canons 4 (confidentiality) and 5 (conflict of interest) of the Iowa Code of Professional Responsibility for Lawyers. The court said that a violation of DR 4-101(B)(3) occurs when Walters gained knowledge of the clients' financial resources through the attorney-client relationship and later used the knowledge to solicit funds from them. He violated DR 5-104(A) (business transaction with client) when he failed to explain to the Diegels why they should consult independent counsel before deciding whether to enter into a transaction with him. The latter rule applies to transactions with a former client as long as the attorney has influence over the client arising from the previous professional relationship and the client is looking to the lawyer to protect the client's interests.

Walters committed further misconduct by writing a bad check to the Diegels. Although he denied intentionally writing an insufficient funds check, he

admitted he did nothing to try to make the check good after it was returned by the bank. The court found that this conduct involved dishonesty in violation of DR 1-102(A)(4).

In a completely separate matter, Walters violated confidentiality and conflict of interest rules by switching sides in representing Rodney Helps and Keri Helps. He represented Keri when she and Rodney divorced. Shortly after the dissolution decree was entered he represented Rodney in an involuntary hospitalization proceeding. A few months later he represented Keri against Rodney in a proceeding to hold Rodney in contempt and enjoin him from contact with Keri and their minor child. The Iowa Supreme Court found that matters raised in the hospitalization action were substantially related to the subsequent contempt proceeding. Accordingly, the representation of Keri in the contempt action violated duties of confidentiality and loyalty to Rodney. When an attorney represents a client in a matter adverse to a former client and when the current and former representations are substantially related, the court will assume that the attorney obtained confidential information in the former representation that is relevant to the subsequent litigation. It is unnecessary to show that confidences actually were divulged.

Walters compounded the foregoing violations by failing to respond to inquiries from the Board of Professional Ethics and Conduct.

The court suspended Walters' license indefinitely with no possibility of reinstatement for three months. As a condition of reinstatement, Walters must pay in full the judgment entered as a result of the loan transaction with the Diegels.

Board v. Stamp, one year suspension, 590 N.W.2d 496 (Iowa 1999).

Stamp was attorney for an estate which contained eighteen shares of stock in the Bellevue State Bank. There was a market for such stock at $869 per share with the Bank's ESOP, which Stamp, as a bank director, should have known. Nevertheless, Stamp purchased the shares from the estate at $300 per share, concealing the nature of the transaction and without giving notice to the distributees or obtaining court approval. When the attorney for one of the distributees discovered the particulars of the sale, he filed an objection to the final report. This prompted Stamp to transfer the stock back to the estate, when then sold it to the bank for $869 per share.

At the hearing, Stamp claimed he did not know the value of the stock when he bought it from the estate. He attempted to excuse his conduct by claiming that he was trying to expedite the closing of the estate because the distributees were hounding him for their money. Both the Commission and the Court found that he was "being less than candid." Stamp was found to have violated DR 5-104(A), which prohibits a lawyer from entering into a business transaction with a client when they have differing interests. Although the

Commission recommended that Stamp be suspended for 90 days, the Supreme Court suspended his license to practice law indefinitely, with no possibility of reinstatement for one year.

Board v. **Bisbee**, three year suspension, 601 N.W.2d 88 (Iowa 1999)

An elderly widow in Grinnell was having problems with delinquent taxes on a house she owned in Las Vegas, Nevada, where she had previously lived. The house was worth about $100,000. She consulted Bisbee, who then practiced law in Grinnell, regarding her problem. Rather than advising her to sell the house and pay the taxes from the proceeds, Bisbee offered to clear up the problem with the taxes in return for half of the equity in the house. The house was then sold, with the widow receiving $43,000 of the proceeds and Bisbee receiving $43,000. Bisbee kept all of the money for himself rather than turning it in to his law firm. Shortly thereafter, the law partnership dissolved and Bisbee's partner reported this matter to the Board of Professional Ethics. Bisbee left town and resides in Tennessee, where he does not practice law. He refused to participate in the disciplinary proceedings.

The Grievance Commission found that Bisbee violated DR 5-104(A) (conflict of interest), 1-102(A) (conduct involving dishonesty, prejudicial to the administration of justice and adversely reflecting on fitness to practice law), and 2-106(A) (excessive fee). It recommended that his license to practice law be revoked. On review, the Supreme Court agreed that Bisbee had a conflict of interest which he had failed adequately to explain. However, the court was not convinced that the money Bisbee received was a legal fee. It viewed the matter as a business deal which might not have involved dishonesty toward his law partner. Stating that Bisbee's disregard for his client's interests, as well as those of the profession, demanded a lengthy suspension, the court suspended his license to practice law indefinitely, with no possibility of reinstatement for three years.

B. Conflict with lawyer's personal interest

Board v. Furlong, 18-month suspension, 625 N.W 2d 711 (Iowa 2001).

While representing a divorce client, Furlong initiated a sexual relationship with her which continued for approximately twenty months. During this time he continued to represent her on a myriad of other legal problems she was experiencing. The Court held that he violated DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice law) with respect to conduct prior to the adoption of the specific rules regarding attorney-client sex in January 1995. With respect to conduct after January 1995, the relationship was held to violate DR 5-101(B), which generally prohibits a lawyer from engaging in sexual relations with a client. Both the Commission and the Court also found that Furlong had attempted to dissuade his client from following through on her complaint with the disciplinary

authorities. The duty imposed by DR 1-103(A) to report disciplinary violations also embraces a responsibility not to frustrate such reporting by others.

A second client also filed a complaint against Furlong, alleging that he sexually harassed her in the course of her personal injury claim. The Grievance Commission and the Court held that this conduct was proven and violated DR 1-102(A)(7) (lawyer shall not engage in sexual harassment).

A third woman client also testified that when she was represented by Furlong, he gave her an uninvited kiss and inserted his tongue in her mouth. Furlong settled her sexual harassment claim for $5,000.

There was evidence that in connection with a previous complaint by a fourth female client, Furlong had inserted language in the release obligating the client not to disclose the facts to the disciplinary authorities, as a result of which Furlong had received a public reprimand in 1997.

The Grievance Commission recommended an eighteen-month suspension, and the Supreme Court agreed this was an appropriate sanction.

C. Conflict between clients

Peter W. Berger and Michael J. Culp, public reprimand, Supreme Court Order January 20, 2000

Berger and Culp were employed to pursue a wrongful death action by the heirs of a decedent who was killed while a passenger in an automobile involved in an accident with another vehicle. Notwithstanding that the driver of the vehicle in which the decedent was a passenger was represented by counsel, Berger and Culp wrote that driver advising: "We would be happy to represent your family." Both Berger and Culp were publicly reprimanded that such letter was an impermissible solicitation, contrary to DR 2-101(B)(4)(b) of the Iowa Code of Professional Responsibility for Lawyers. They were each also publicly reprimanded that since the interests of the driver and the estate of the driver's passenger, which estate they were initially employed to represent, were potentially adverse, that their attempt to represent both without an adequate and complete disclosure was contrary to DR 5-105(D) of the Iowa Code of Professional Responsibility for Lawyers.

Thomas J. Wilkinson, Jr., public reprimand, Supreme Court Order, September 3, 1999.

Wilkinson's services were retained by Landex Research, Inc., which had agreements with the heirs of the Peter Castagna Estate granting it a one-third interest in the heirs' inheritance in exchange for its having revealed that money may be due the heirs from the estate and in consideration of its investigation and endeavoring to procure proof of the heirs' interest in the estate. Wilkinson's agreement with Landex provided that he was to receive a three percent contingent fee on all funds distributed to the heirs whom he represented. Landex solicited

from the heirs authorizations for him to act as their attorney. He then filed a notice of representation, appearing in the estate as attorney for numerous heirs. Respondent was reprimanded for violating DR 2-103(D), which prohibits a lawyer from knowingly assisting an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services. He was also reprimanded for violating DR 2-103(E), which prohibits a lawyer from accepting employment when the lawyer knows or it is obvious that the person seeking legal services does so as a result of conduct prohibited under that rule.

Prior to appearing for the heirs, Wilkinson did not make full disclosure to them of his fee arrangement and of possible conflicts he had in the simultaneous representation of Landex and the heirs. It was in Landex' financial interest to preserve and enforce its one-third interest in the heirs' inheritance, and in Respondent's financial interest to receive the three percent contingent fee from Landex; but it was in the heirs' best interest to have the Landex fee declared unenforceable. Respondent's arrangement thus violated DR 5-107(A), which provides that without the consent of a client after full disclosure, a lawyer may not accept compensation for legal services from one other than the client. Furthermore, the arrangement was in violation of DR 5-105(C), which provides that a lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client is likely to be adversely affected by the representation of another client.

During his representation in the Castagna Estate, Respondent took various positions to promote the receipt by Landex of its fee and to ensure his own fee but which were not in the best interest of the heirs he purportedly represented. This type of arrangement is not allowed by DR 5-107(B), which provides that a person who pays the lawyer to render legal services for another person may not direct or regulate the lawyer's professional judgment in rendering such services.

Respondent was also reprimanded for making false statements in letters to the heirs and in pleadings filed with the court.

Board v. Winkel, two month suspension, 599 N.W.2d 456 (Iowa 1999)

Winkel was representing Michael Reimers in a bankruptcy. While the bankruptcy was pending, Reimers was involved in an automobile accident with Jake Sweers. Over Reimers' objections, Winkel withdrew from the bankruptcy and undertook the representation of Sweers in connection with the accident, including resulting litigation. Despite Winkel's assertion that the two legal matters were unrelated, the court found that while representing both parties, he was representing clients with conflicting interests, contrary to DR 5-105. In unilaterally withdrawing from representing Reimers, Winkel also violated DR 2-110. Finally, Winkel deposited the entire flat fee for the bankruptcy, including the filing fees paid by his client, into his operating account at the beginning of the representation, rather than into his trust account. This violated DR 9-102.

Despite Winkel's two previous public reprimands, the Grievance Commission recommended only another public reprimand. The Supreme Court,

however, recognized "a disturbing pattern of putting a personal agenda ahead of a client's needs," and suspended his license to practice law indefinitely, with no possibility of reinstatement for two months.

Thomas M. Magee, public reprimand, Supreme Court Order, February 15, 2000.

Magee undertook representation of a contractor who had defaulted on his contract to construct a hog facility in an effort to resolve the contractor's obligations to the owner of the hog facility. He continued in that representation notwithstanding that his partner, representing the ready-mix concrete company that had supplied concrete for the project, filed a mechanic's lien against the hog facility alleging there were unpaid sums due for the concrete. Magee was publicly reprimanded that such concurrent representation, both on behalf of and adverse to the interests of the contractor, was a conflict of interest, contrary to DR 5-105(C) of the Iowa Code of Professional Responsibility for Lawyers.

Kenneth P. Nelson, public reprimand, Supreme Court Order, February 15, 2000.

Though he had never met nor previously represented an elderly, single, Decorah, Iowa, woman residing in a nursing home, Nelson prepared a Last Will and Testament for her based on instructions given him by a Wisconsin attorney who had accompanied the testator's niece, also of Wisconsin, to Decorah. The will he prepared on instructions provided him by the Wisconsin attorney representing the testator's niece altered her prior will so as to provide for the testator's niece and her siblings, although only token bequests had been provided them in her prior will. At the time Nelson secured the testator's execution of that will, the testator's own attorney, who had prepared the prior will, had declined to draft a will incorporating the changes desired by the testator's niece because of his concerns for her competency as expressed in a doctor's report dated October 15, 1996.

The day following his receipt of instructions from the Wisconsin attorney representing the testator's niece, Nelson met with the testator's niece, her Wisconsin attorney, and the testator at the Eastern Star Home in Decorah, which was his first meeting with the testator. Nelson had also been instructed to draft a restated and substituted trust agreement naming the testator's niece as a co-trustee with a Decorah bank. The two instruments that Nelson prepared greatly increased the bequests to the testator's niece and her brothers.

On November 26, 1996, without consulting the testator, and apparently at the request of the testator's niece, Nelson filed an appearance in Winneshiek County in the matter of the testator's revocable trust at which time the testator's long time personal attorney was her attorney of record. He did so without consulting the testator's guardian ad litem nor the attorney reflected as the designated attorney in that matter, and who had refused to draft a new will.

The testator's prior attorney received a copy of Nelson's appearance in the matter of the testator's revocable trust. Based on the testator's statements to him in October of 1996 that she did not wish to change her affairs and the opinion of the Doctor that she was incompetent, he visited the testator at the Eastern Star Home on November 27, 1996, accompanied by the administrator of the Home. At that meeting the testator indicated that she did not know Nelson nor did she recall ever having met him. Neither did she recall having signed any documents on November 19th.

Nelson was publicly reprimanded that he in fact represented the interests of others, that is the testator's niece and her siblings, rather than the testator herself in drafting and securing the execution of a Last Will and Testament and Restated and Amended Declaration of Trust, a conflict of interest contrary to DR 5-105 of the Iowa Code of Professional Responsibility for Lawyers.

Randy S. DeGeest, public reprimand, Supreme Court Order, November 10, 2000.

While serving as City Attorney for the City of Oskaloosa and knowledgeable that conveyances by Gerald Estal of parcels of unplatted real estate within two miles of the city limits of Oskaloosa were contrary to an Oskaloosa subdivision ordinance, DeGeest nevertheless represented Estal in the preparation of a contract for the sale of a parcel of real estate which was then not processed by the Mahaska County Auditor because it was contrary to the Oskaloosa subdivision ordinance. On September 1, 1998, subsequent to is preparation of the April 11, 1998 real estate contract from Estal to Kelderman, and as Oskaloosa City Attorney, DeGeest caused to be recorded in the Office of the Mahaska County Recorder a "Legal Notice," as follows:

> To all property owners and all buyers and sellers of real estate located within the city limits of Oskaloosa and WITHIN TWO MILES of the Oskaloosa city limits you are hereby notified that the City of Oskaloosa subdivision ordinance and the requirements set forth therein apply to all real estate within the city limits of Oskaloosa and within two miles of the city limits area. You are notified that if the real estate you are buying or selling has not been properly subdivided or platted as required by the ordinances or is not within a statutory legal exception to the platting requirements, that the Mahaska County Recorder and Auditor cannot by law place your deed of record.
>
> To insure that your deed will be accepted by the Mahaska County Auditor you should obtain approval by the Mahaska County Auditor and the City of Oskaloosa through the Oskaloosa City Engineer's Office.
>
> Take notice and govern yourself accordingly.
>
> /s/ Randy S. DeGeest.

DeGeest caused that notice to be recorded on behalf of the City of Oskaloosa notwithstanding that five months previously he had drafted a deed on behalf of Gerald Estal contrary to such requirement.

DeGeest was publicly reprimanded that his representation of Gerald Estal in the drafting of a real estate contract contrary to the subdivision ordinance of the City he concurrently represented was an impermissible conflict of interest contrary to DR 5-105 of the Iowa Code of Professional Responsibility.

Gary McClintock, public reprimand, Supreme Court Order, February 12, 2001.

McClintock represented the wife of a ward when in 1997 a conservatorship was opened naming the ward's wife as his guardian and conservator. He continued in that representation filing annual reports with appropriate accountings for 1998 and 1999. The ward's sister was appointed as a successor guardian and conservator in January of 2000. McClintock continued to represent the successor guardian and conservator.

Notwithstanding his representation of the guardian and conservator for the ward McClintock nevertheless filed a dissolution petition against the ward and on behalf of the ward's wife in 1998 while he represented the ward's wife as guardian and conservator. The dissolution was not resolved, however, because of the pending appeal of a judgment in favor of the ward.

McClintock's representation, initially of the ward's wife, and subsequently of the ward's sister, as successor guardian and conservator for the ward, carried with it a fiduciary obligation to the ward. Despite that fiduciary obligation McClintock undertook representation on behalf of the ward's wife seeking a dissolution of her marriage to the ward, which proceeding was adverse to the ward. As the dissolution attorney for the ward's wife his interest was in securing as much of the ward's assets as possible for her, while as attorney for the guardian and conservator his interest was in preserving the ward's assets. McClintock thus engaged in an impermissible conflict of interest.

McClintock was publicly reprimanded that undertaking representation adverse to a ward whose guardian and conservator he concurrently represented was an impermissible conflict of interest contrary to DR 5-105 of the Iowa Code of Professional Responsibility for Lawyers.

Randy DeGeest, Public Reprimand, Supreme Court Order, May 23, 2001

DeGeest initially represented the wife in dissolution proceedings. A decree was entered February 2, 1996, placing custody of the parties' minor children with the wife and ordering her husband to pay child support. On February 6, 1997, following the entry of that decree, the husband employed DeGeest to prepare a joint application for temporary custody and an enrolled order. In 1999 DeGeest was again employed by the husband to prepare a joint application and enrolled order to make the February 1997 order permanent. Though initially representing the wife in dissolution proceedings DeGeest

subsequently represented the husband in additional proceedings involving the same dissolution.

DeGeest was publicly reprimanded that having initially represented the wife in dissolution proceedings his subsequent representation of the husband, adverse to the wife, was in violation of DR 5-105(A) of the Iowa Code of Professional Responsibility for Lawyers which provides: "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."

V. NEGLECT AND INCOMPETENCE (CANON 6)

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1)Handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a client's legal matter.

Board v. Erbes, public reprimand, 604 N.W.2d 656 (Iowa 2000).

Erbes failed to file required annual or final reports in one estate, one trust and three guardianships in which he served as attorney for the fiduciaries. Delinquency notices had been issued by the clerk of court, to which Erbes failed to respond. After these delinquencies were referred to the Board of Professional Ethics, Erbes failed to respond to the Board's investigation.

At the hearing before the Grievance Commission, Erbes conceded the foregoing violations, but offered proof that the probate matters were now current. He explained that he suffered from depression but currently had his professional life under control after a successful course of counseling and drug therapy with a clinical psychologist.

Erbes had two previous public reprimands. However, stating that "the record also reveals a refreshingly proactive response by attorney David Erbes as he strives to overcome the debilitative effects of depression," the court reprimanded him for neglecting the probate deadlines and failing to cooperate with the ethics investigation.

Board v. Sullins, one year suspension, 613 N.W.2d 656 (Iowa 2000).

Sullins failed to discharge his duties as a lawyer with respect to four clients. His mistakes included procrastinating in answering interrogatories,

resulting in a $750 sanction; sloppy record keeping and loss of files; failure to render an accounting of services performed; failure to file suit even though the petition was prepared and the client had paid the filing fee; failure to respond to requests for return of client materials after being discharged; failure to refund unearned fees after being discharged; and failing to cooperate with state and local ethics investigations. The court wrote that Sullins "seems to have raised procrastination to a fine art. He plays no favorites. He has consistently spurned the inquiries of our board of ethics and conduct in exactly the same manner demonstrated with his clients." Citing the three previous disciplinary sanctions against Sullins, the court stated, "this is enough," and suspended his license for a minimum of one year.

Board v. Fleming, six month suspension, 602 N.W.2d 340 (Iowa 1999).

Fleming was attorney for the executor in two related estates. He neglected to move them along and was eventually removed by the Nebraska bank executor. The estates had to pay interest and penalties regarding the inheritance tax due to Fleming's neglect. Furthermore, the executor, not being familiar with Iowa court rules, made two payments of attorney fees to Fleming without court orders approving the fees. Finally, when contacted by the Board regarding the complaints, Fleming failed to make a full explanation, and his answers to interrogatories and document production in the disciplinary proceeding were received only after an order sustaining a motion to compel.

Upon hearing, the Grievance Commission recommended a suspension of Fleming's license to practice for thirty days. However, citing Fleming's two previous public reprimands, the Supreme Court suspended his license indefinitely, with no possibility of reinstatement for six months. As a condition of reinstatement, the court also is requiring Fleming to reimburse the beneficiary of the two estates for the interest and penalties paid as a result of his failure to file inheritance tax returns when due.

Board v. Freeman, three month suspension, 603 N.W.2d 600 (Iowa 1999).

Freeman neglected three legal matters entrusted to him. The first of these involved federal employment discrimination claims. Freeman accepted the case shortly before the statute of limitations on the client's claims was about to expire. Freeman, however, was not admitted to practice in the federal court in which the lawsuit was to be filed. Despite taking the case, Freeman failed to make the necessary arrangements to be promptly admitted, and the statute ran on the client's claims before Freeman could file suit.

The second matter involved the estate of the mother of James Gibbs. Freeman failed to timely perform the necessary work even after receiving at least two delinquency notices from the clerk of court. Gibbs' telephone calls to Freeman regarding the delinquencies were not returned. When Gibbs wrote

Freeman to request he withdraw from the matter and forward the estate file to him, Freeman again failed to respond.

A third matter neglected by Freeman was the guardianship and conservatorship of Gibbs' younger brother. Freeman failed to do the necessary work despite receiving two delinquency notices.

The Board of Professional Ethics and Conduct notified Freeman of complaints regarding the foregoing matters and asked him to respond, but Freeman failed to provide the requested response.

The Grievance Commission recommended Freeman be publicly reprimanded. The Iowa Supreme Court, however, suspended Freeman's license for not less than three months. The court explained that a reprimand would be inadequate given the harm Freeman caused to a client by allowing the statute of limitations to expire without filing suit. The court further ordered that upon application for reinstatement, Freeman prove he has withdrawn from the two Gibbs matters and returned the files to the client. Finally, the court ordered that if Freeman intends to engage in the private practice of law, he must prove he will put in place, use, and maintain office practices to assist him in performing future work in a timely manner.

Barry S. Kaplan, public reprimand, Supreme Court Order, November 12, 1999.

Kaplan drafted a last will and testament in which the testator nominated Kaplan to serve as executor of his estate. Upon the testator's death, Kaplan employed the decedent's daughter, a recent law school graduate, as the attorney for the estate though she had no experience in probate matters in an effort to provide something for her from her father's estate despite the fact that her father had intentionally made no provision for her.

Among the matters requiring resolution in the decedent's estate was a personal injury claim against the decedent as the result of an automobile accident. Although Kaplan negotiated a settlement of the claim, he delayed implementation of the settlement, which delay ultimately cost the estate an additional $10,000.00. When the decedent's daughter, who had been employed as the attorney for the estate, moved to Colorado, Kaplan replaced her with an attorney from his own firm and submitted an application for fees for himself and his partner without setting out which services were performed respectively by himself, as executor, and by his partner, as attorney for the estate.

Findings as to those matters were made by the District Court pursuant to a Petition for Declaratory Judgment, Objection to Final Report, and an application for removal of Kaplan as executor, filed by beneficiaries of the estate. The Court hearing those matters removed Kaplan as executor and, in addition, entered a judgment against him for the $10,000.00 loss he caused the estate by the delay in implementing the settlement of the personal injury claim offset, however, by the $1,100.00 fee for his services as executor awarded by the Court. The Court further found that Kaplan had acted as attorney for the decedent's brother who had

served as the decedent's guardian prior to the decedent's death and who had a substantial claim against the decedent's estate.

Kaplan was publicly reprimanded that in acting as attorney for the decedent's brother who had a claim against the decedent's estate, he engaged in an impermissible conflict of interest, contrary to DR 5-105 of the Iowa Code of Professional Responsibility for Lawyers. That in unduly protracting the settlement of the personal injury claim against the estate, hiring an inexperienced lawyer in a complex estate, and in undertaking duties as executor without being competent to handle the same, he failed to act competently, contrary to DR 6-101 of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Plumb, 2-month suspension, 589 N.W.2d 746 (Iowa 1999).

Plumb failed to act competently and neglected the legal matters of two clients. He allowed one client's dissolution of marriage action to be dismissed for failure to prosecute pursuant to Iowa R. Civ. P. 215.1 (and failed to inform her of the dismissal). He also failed to file termination of parental rights and bankruptcy petitions for the same client. The client eventually retained new counsel and requested that Plumb return her file. He never did so.

A second client retained Plumb to prepare articles of incorporation for a small business. Plumb failed to prepare the incorporation papers and the client hired another lawyer to do the work.

By failing to act competently and by neglecting his clients' legal work, Plumb violated DR 6-101(A)(1) and (3). By not returning one client's file, Plumb violated DR 2-110(A)(2) (requiring lawyer, upon withdrawal from representation, to return all papers and property to which client is entitled).

Noting that Plumb had received two prior public reprimands, the court suspended his license for at least two months.

Board v. Sprole, two month suspension, 596 N.W.2d 64 (Iowa 1999).

Sprole accepted a $200 retainer and agreed to represent a woman in a child support proceeding. After filing the petition, he repeatedly failed to return telephone calls from his client, file a financial statement, provide financial information requested by opposing counsel, or otherwise move the matter along. The frustrated client finally discharged him and obtained another lawyer to conclude the proceeding. However, Sprole failed to withdraw from the case and did not provide an accounting requested by the client.

On another matter, Sprole agreed to represent a couple who had discovered numerous defects in a home they had recently purchased. Again, he accepted a $200 retainer. Sprole failed to write a demand letter as promised and did not return phone calls from his clients. After several months of inaction, the clients discharged him and retained a new attorney who successfully represented them.

The Grievance Commission recommended that Sprole be suspended for thirty days. However, citing Sprole's two previous public reprimands and two previous admonitions, the Supreme Count concluded that "a suspension of not less than two months properly reflects the seriousness of the misconduct and will better protect the public and the profession."

Board v. **Scieszinski,** public reprimand, 599 N.W.2d 472 (Iowa 1999).

Scieszinski neglected numerous probate matters, resulting in multiple notices of delinquency from the clerk of court. When the Board sent him notices of complaint concerning these delinquencies, his usual "response" was to drop the notices into a desk drawer and ignore them.

Respondent explained the neglect and failures to respond as the result of major depression, for which he now has sought psychiatric treatment.

The Iowa Supreme Court adopted the grievance commission's recommendation that Scieszinski be publicly reprimanded and that he be required to seek the counsel of the director of the Iowa Lawyers Assistance Program and refrain from all probate practice until further order of the court.

Board v. Gonnerman, 1-month suspension, 601 N.W.2d 34 (Iowa 1999).

Gonnerman was charged with neglect of a decedent's estate and failure to respond to the board. At the time of the hearing before the grievance commission the estate had been open nine years and Gonnerman had received twelve delinquency notices from the clerk of court. He previously had been publicly reprimanded for neglect of the same estate. Gonnerman failed to respond to seven letters of inquiry from the board.

The Iowa Supreme Court suspended Gonnerman's license indefinitely with no possibility of reinstatement for at least one month. As a condition of reinstatement, the court directed that Gonnerman show he has secured substitute counsel within twenty days to complete the estate proceedings.

Michael D. Maxwell, public reprimand, Supreme Court Order, February 15, 2000.

Maxwell filed a petition on behalf of a personal injury claimant on November 3, 1997, the last day such petition could be filed before the expiration of the statute of limitations, the plaintiff having sustained personal injuries as the result of an automobile accident on November 3, 1995. Maxwell was dilatory in responding to numerous discovery requests by the defendants subjecting the plaintiff to numerous motions to compel. A trial date was set for August 23, 1999. On July 1, 1999, another attorney entered an appearance on behalf of the plaintiff together with a motion for a continuance of the August 23 trial date advising the Court the plaintiff had discharged Maxwell, who although he had delivered the client's file to the successor attorney, had not filed a motion to withdraw. The plaintiff's new counsel advised the Court that Maxwell had

conducted no discovery, there were still outstanding discovery requests by the defendants, and the needed discovery could not be concluded by the scheduled trial date.

Maxwell was publicly reprimanded that his neglect of the plaintiff's cause of action was the neglect of a legal matter, contrary to DR 6-101(A)(3) of the Iowa code of Professional Responsibility for Lawyers.

Michael P. Brice, public reprimand, Supreme Court Order, February 12, 2001.

In his representation of a workers' compensation client Brice neglected to adequately prepare for her mediation hearing and did not take any measures to attempt to have the mediation set for a convenient location after it had been scheduled to be held in Burlington, Iowa, some distance from his office and the complainant's residence in Oskaloosa. When his workers' compensation client expressed her concern as to the mediation hearing Brice responded in an extremely intemperate, offensive manner by reason of his profane and obscene language.

Brice was publicly reprimanded that his failure to make adequate preparation for a mediation hearing in a workers' compensation matter was the neglect of a client's legal matter, contrary to DR 6-101(A)(3) and his intemperate and profane outburst was conduct adversely reflecting on his fitness to practice law, contrary to DR 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers.

Keith D. Koch, public reprimand, Supreme Court Order, February 15, 2000.

Koch opened the estate of a decedent January 17, 1986. He served as both executor and attorney for the estate. He had not closed the estate by September 3, 1999, when the Court entered a memorandum order that another attorney would represent the estate although Koch would continue to serve as executor. While serving as both executor and as attorney for the estate Koch caused a distribution to be made without a provision for certain heirs who should have enjoyed a share in the estate pursuant to the anti lapse statute. Koch agreed to personally reimburse the estate the amount necessary to cover the amount which should have been distributed the issue of a pretermitted heir.

Koch was publicly reprimanded that his neglect to conclude an estate which had been open for thirteen years was the neglect of a legal matter, contrary to DR 6-101(A)(3) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Jay, one year suspension, 619 N.W.2d 321 (Iowa 2000).

Jay's uncle died in July 1993 and his will named Jay as executor of his estate. Jay also had himself designated as attorney for the estate. Jay neglected to move the estate along. Although he filed a final report in July 1995, there was no accounting attached and the report contained several misrepresentations. These

included a representation that an accounting had been made to the distributees, a statement that the certificate of aquittance for Iowa income tax was on file when it was not, and a representation that each distributee had receipted for his distribution, which was not true. The estate was far from being ready to close at that point. Nevertheless, Jay had prematurely taken his entire fees as executor and attorney. After objections to his final report were filed, the court ordered Jay to show cause why he should not be removed as executor and attorney for the estate. Based on his failure to file proper accountings, he was subsequently removed and ordered to make a full accounting to a successor executor and to deliver all financial records to that party. Jay did not comply with that order. He was also ordered to refund fees to which the court determined he was not entitled. When he failed to do this, his inheritance was offset against the fees ordered to be refunded, but he still owed the estate $5,678. A judgment was entered against him for that amount, and the estate was finally closed, five years after it was opened, with the judgment against Jay unsatisfied. Attorney's fees for objectors to Jay's final report amounted to $1,331 and were charged against the general assets of the estate.

The Grievance Commission and the Supreme Court found that Jay had neglected the estate, made misrepresentations to the court, and collected his fees prematurely. There were aggravating factors of failure to satisfy the judgment against him in the estate and previous ethical violations involving a suspension and public reprimand. Both the Commission and the Court found that a suspension was appropriate, with no possibility of reinstatement for one year. To be reinstated, Jay must also satisfy the judgment against him in the estate and reimburse the estate for amount of attorney's fees paid to the objector's attorney concerning challenges to Jay's final report.

Board v. Lemanski, one month suspension, 606 N.W.2d 11 (Iowa 2000).

Lemanski represented a client in a workers' compensation claim filed in January 1991. At the hearing in March 1992, the Deputy Industrial Commissioner excluded his witnesses and exhibits because Lemanski had not complied with the order requiring exhibit and witness lists to be served 15 days prior to the hearing. After judicial review and many delays, Lemanski finally received a settlement check for $1,894 in May 1997. He deposited it into his trust account, but despite requests by his client, failed to disperse any of it for a year and failed to render an accounting of those funds to his client. When his client filed a complaint against him with the Ethics Committee of the Dubuque County Bar Association, Lemanski did not reply to it. His client then filed a complaint with the Supreme Court Board of Ethics, which sent two notices to him, to which he also did not respond. It was not until May 1998, after Lemanski received notice that the matter would be referred to the Grievance Commission, that he made a substantive reply to the complaint and sent his client a check for the $1,894.

The Grievance Commission and the Supreme Court found that Lemanski had neglected his client's legal matter, contrary to DR 6-101(A)(3), failed to promptly disperse settlement proceeds and render an accounting, contrary to DR

9-102(B), and failed to respond to disciplinary inquiries, contrary to DR 1-102(A)(5) and (6).

In considering the sanction to be imposed, the Court reviewed the fact that Lemanski had previously been privately admonished by the Board for neglect of a lawsuit which resulted in a default judgment against his client. The Court held that suspension was the appropriate sanction, with no possibility of reinstatement for one month.

David Graeser, public reprimand, Supreme Court Order, April 21, 2000.

Graeser had been subject to notices of delinquency in 13 probate matters, and had been subject to notices of delinquency and notices of complaint from the Board of Professional Ethics and Conduct on four occasions since January of 1997. Graeser was publicly reprimanded that his failure to resolve delinquencies in multiple probate matters despite repeated notices thereof was the neglect of clients' legal matters, contrary to DR 6-101(A)(3) of the Iowa Code of Professional Responsibility for Lawyers.

Ted Breckenfelder, public reprimand, Supreme Court Order, April 21, 2000.

Breckenfelder represented a client whose action was subject to a motion for summary judgment. Breckenfelder failed to file a complete resistance to the motion for summary judgment and then concealed his failure to do so from his client. Breckenfelder was publicly reprimanded that in failing to complete that resistance and in then concealing that omission from his client he both neglected a client's legal matter contrary to DR 6-101(A)(3) and engaged in conduct involving misrepresentation, contrary to DR 1-102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers.

William J. Giles, IV, public reprimand, Supreme Court Order, October 10, 2000.

Giles represented a defendant in a criminal matter who was found guilty following a jury trial. Giles failed to appear for the sentencing which the Court then rescheduled for the following day. Giles again failed to appear whereupon the Court appointed another attorney to represent Giles' client at sentencing. The attorney so appointed subsequently filed a motion for new trial which the Court granted upon its determination that Giles had provided ineffective assistance of counsel. The Court's order granting the motion for new trial recited there had been no meaningful discussion between Giles and his criminal defendant as to what the State had to prove to obtain a conviction and the decision by the defendant to not take the witness stand was made with no appreciation by Giles of relevant case law and that there was thus no understanding on the part of the criminal defendant as to the effect of his failure to take the stand.

Giles' client had paid $15,500 for Giles' fee for his defense which included $2500 paid on the second day of trial, allegedly to handle post-

sentencing matters, if any, and to pursue an appeal. Giles not only failed to appear for sentencing, requiring the appointment of other counsel, he was determined to have collected an excessive fee by requiring an additional $2500 for post-trial matters which he did not pursue.

Giles was publicly reprimanded that in handling a legal matter for which he was not competent, he violated DR 6-101(A); that his failure to appear for his client's sentencing was the neglect of a client's legal matter, contrary to DR 6-101(A)(3); and that in collecting a fee of $2500 allegedly to pursue post-trial matters which he failed to pursue, he collected an excessive fee, contrary to DR 2-1006(A) of the Iowa Code of Professional Responsibility for Lawyers.

David Stuart, public reprimand, Supreme Court Order, November 10, 2000.

Though Stuart's dissolution client's husband had been properly served with notice of the dissolution petition September 21, 1999, he filed no pleading in response thereto, and the dissolution decree could have been entered by default any time after December 21, 1999. Stuart did not proceed to the entry of the dissolution decree until July 7, 2000; however, he falsely advised his client in March of 2000 that her dissolution was final.

Stuart was publicly reprimanded that his failure to secure the dissolution decree in a timely manner was the neglect of a client's legal matter contrary to DR 6-101(A)(3), and that falsely advising his client in March of 2000 that her dissolution was final was conduct involving dishonesty, fraud, deceit, and misrepresentation, contrary to DR 1-102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Sherman, public reprimand, 619 N.W.2d 407 (Iowa 2000).

In August 1997 Sherman was employed by a client who wished to obtain a divorce. Matters were complicated by uncertainty whether the client and her "husband" were legally married. Frustrated by Sherman's inaction, in June 1998 the client hired other counsel to represent her. The Iowa Supreme Court found that Sherman violated ethical standards by neglecting her case and failing to carry out a contract of employment. The Court concluded the complaint stemmed from a breakdown in communication between Sherman and his client. Each blamed the other for canceling appointments.

In addition to the neglect, Sherman failed to respond to notices and inquiries from the ethics board.

The Court adopted the Grievance Commission's recommendation of a public reprimand.

Board v. Hovda, public reprimand, 620 N.W.2d 485 (Iowa 2000).

Hovda was the attorney for an estate which owned a real estate contract. When the contract was paid off, he failed to convey title by court officer deed,

causing damages to the buyer. After being sued by the buyer for damages resulting from the delay, he settled by paying $6,500. The buyer also filed a complaint with the Supreme Court Board of Ethics. Hovda's attorney requested of the buyer's attorney that he dismiss the complaint as part of the settlement.

Hovda failed to respond to three notices from the Board regarding these complaints.

At the Grievance Commission hearing, Hovda acknowledged that he had a problem with procrastination, but presented evidence that his conduct had improved since his suspension for such problems in 1998. Because Hovda's conduct was the same type of neglect of probate matters which led to his suspension, the Commission recommended only a public reprimand. The Court agreed that under the circumstances, a public reprimand was appropriate for the neglect, ignoring of Board notices and seeking withdrawal of the ethics complaint.

VI. REPRESENTING A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW (Canon 7)

James L. Pillers, public reprimand, Supreme Court Order, February 12, 2001.

Pillers represented a dissolution client who, following the filing of his affidavit of financial status including a 401(K) plan having a value of $21,350.38, which was unencumbered and which it was anticipated would be divided equally between the parties, cashed in the 401(K) taking a $5,000 loss as a result of the early redemption.

When Pillers discovered that his client had cashed in that account, but after the dissolution hearing, though he wrote a letter to the Court advising the Court of that fact, he did not insure that opposing counsel received a copy. Opposing counsel did not learn that the marital asset had been cashed by Piller's client until approximately one year after the dissolution hearing. When Pillers learned that his client had cashed in his 401(K) he took an assignment of the funds as security for his attorney's fees. It was over Pillers' resistance that the Court entered an order nunc pro tunc that its findings of fact and conclusions of law entered previously clearly contemplated that the 401((K) plan was to be equally divided.

When Pillers learned that his client had cashed in his 401(K) plan, which asset had been listed in the affidavit of financial status as unencumbered, and which was to be considered as a marital asset, he had an affirmative obligation to bring that to the attention of the Court, in an appropriate manner, other than by letter, and also had the affirmative duty to bring that matter to the attention of opposing counsel.

Pillers was publicly reprimanded that his conduct, as aforesaid, was in violation of DR 7-102(A)(3) that "in the representation of a client, a lawyer shall not conceal of knowingly fail to disclose that which the lawyer is required by law to reveal." In diverting funds in which the opposing party had a marital interest

for his attorney's fees, which funds were represented as unencumbered at trial, and without an order of the Court allowing him to do so, Pillers engaged in conduct prejudicial to the administration of justice, contrary to DR 1-102(A)(5) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Wanek, 2-month suspension, 589 N.W.2d 265 (Iowa 1999).

Wanek was charged with misrepresenting facts to a federal bankruptcy court and asserting unwarranted legal positions in a chapter 13 proceeding. The grievance commission found him guilty only of conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(5), and recommended a private admonition. On appeal, the Iowa Supreme Court determined Wanek violated not only DR 1-102(A)(5), but DR 1-102(A)(4) and (6) (misrepresentation and conduct reflecting adversely on fitness to practice), DR 7-102(A)(5) (knowingly making false statement of fact in representation of client), and DR 7-102(A)(1) and (2) (taking action on behalf of client when it is obvious such action would serve merely to harass or injure another and knowingly advancing unwarranted claim). The court concluded he "crossed the line dividing zealous advocacy from sharp—and unethical—practice."

Wanek's clients, Tim and Shirley Gerk, had operated a newspaper distribution business. In 1994 they were involved in a tax dispute with the Internal Revenue Service for the years 1987 through 1991. The IRS claimed Gerks owed taxes in the amount of $1,151,036.68. One factor in the dispute was the IRS's disallowance of deductions claimed for cost of goods sold. In June 1994 Gerks faced an imminent tax sale of their residence.

Wanek filed a chapter 13 reorganization petition to stay the tax sale and to seek discovery from various newspaper corporations concerning the amount of payments Gerks had made to buy newspapers during the tax years in question. Wanek initiated the discovery by sending letters by ordinary mail to the New York Times, the Chicago Tribune, and Investor's Business Daily of Los Angeles (IBD). None of these letters was directed to a named person or to the corporation's legal department. Moreover, the addresses to which the letters were sent were either incomplete or totally inaccurate. The letter to IBD and a letter to The Times at an Illinois address were returned to Wanek as undeliverable.

When the newspapers failed to respond to the informal discovery requests, Wanek obtained orders to compel discovery, and, eventually, a judgment for sanctions of $1,151,036.68 against each of the corporations. Because the sanctions motions were mailed to the same incomplete or inaccurate addresses as the discovery letters, The Times did not receive the motion until after the order for sanctions had been entered. The motion against IBD was returned to Wanek as undeliverable. IBD was unaware judgment had been entered against it until its bank account was frozen several months later upon service of writ of execution.

The three corporations moved to set aside the judgments. Wanek resisted. He pursued execution against IBD in disregard of the undeliverable letters and notices that had been returned to him, and did so even after learning that the information sought from IBD could net Gerks a tax savings of no more than

$1,200 to $1,500, a mere a fraction of the $1,151,036.68 judgment. Several months later—after the IRS and Gerks had settled their tax dispute for $112,265, the corporations had incurred litigation expenses totaling almost $100,000, and Wanek had withdrawn from the case—the Gerks through new counsel agreed to vacate the judgments. Meantime, Wanek had made a number of written and oral misrepresentations to the bankruptcy court. Though he eventually acknowledged that some mail to IBD had been returned to him undelivered, a search of his file after it was in the hands of Gerks' new counsel revealed more returned letters to the newspapers than he had admitted.

The court noted a number of "troubling themes" in this case: "A certain cynicism about any representation made by 'big city' lawyers who claim not to have received documents sent weeks earlier. A certain attitude that a million dollar judgment—whether justifiable or not—makes for good leverage when it comes to catching the attention of big corporations. And when it is 'the little guy' versus a 'big guy' like the IRS or the New York Times, and it all turns out 'okay' in the end, a little prevarication here and there doesn't matter." The court noted that "obvious mistakes over misaddressed mail" ended up involving lawyers from New York, Chicago, and Los Angeles "in six months of litigation in Iowa at a cost of nearly $100,000."

Expressing dismay as to the loss of "idealism about how professionals might handle things with less nonsense and more civility," the court suspended Wanek's license indefinitely with no possibility of reinstatement for two months.

Board v. Herrera, three-month suspension, 626 N.W.2d 107 (Iowa 2001).

Herrera represented Carlos Penuelas-Santos for the sentencing and appeal of a federal drug conviction. After Herrera filed the notice of appeal, he received a check for $5,000, which he deposited into his personal account. Herrera failed to handle various aspects of the appeal in a timely matter. He was eventually suspended from practicing before the Eighth Circuit for failing to file a brief in another case. Nevertheless, Herrera had his paralegal and another lawyer write the brief for Penuelas-Santos. The paralegal signed Herrera's name to the brief, which was filed but subsequently stricken because Herrera was unauthorized to practice before the Eighth Circuit. Penuelas-Santos was given the option of filing another brief or retaining new counsel. The Commission and the Court found that Herrera had neglected a client's legal matter and failed to supervise his paralegal, in violation of DR 6-101(A) and 3-104(D).

After Herrera's brief was stricken, Penuelas-Santos wrote to Herrera and requested a refund of the $5,000 fee. Herrera responded to this request by sending his client a check from his office account in the amount of $4,300; however, the check was returned for insufficient funds. Herrera then issued a second check for $4,400 from the personal account into which he had deposited the $5,000 payment, but this check was also returned for insufficient funds. Given the numerous checks which Herrera was bouncing at the time, the issuance of these

insufficient funds checks was not inadvertent or excusable neglect. Instead, the Court held it was dishonest conduct which was prejudicial to the administration of justice and reflected adversely on his fitness to practice law, in violation of DR 1-102(A)(4), (5) and (6).

On another matter, Herrera was considering representing Fernando Lopez on a federal charge of conspiracy to distribute methamphetamine. A co-defendant, Francisco Santos, was represented by the Federal Defender's Office. Upon hearing that Santos was also interested in hiring him, Herrera met with both of these co-defendants jointly in the Polk County Jail. The Supreme Court concluded that Herrera was in the course of representing Lopez at the time he met with Santos. However, the Court stated that the communications between Herrera and Santos did not extend to matters covered within the subject of the representation between Santos and his existing lawyer, but only dealt with the subject of possible new representation by Herrera. Although stating that the "safe course of conduct for a lawyer would be to abstain from any communications under these circumstances," the Court held that the evidence failed to show any communications prohibited by DR 7-104(A)(1).

Citing Herrera's three prior public reprimands and his suspension before the Eighth Circuit, the Court concluded that Herrera "approaches the practice of law fast and loose" and had "failed to use his prior reprimands as a wake-up call." Thus, it suspended his license to practice law indefinitely, with no possibility of reinstatement for three months.

Board v. Visser, admonition, 629 N.W.2d 376 (Iowa 2001).

Visser's client, an insurance agency, was contemplating a business venture with a Waterloo company managed by Steve Mulder. Mulder was to become a shareholder in the agency. One of the agency's employees, Charles Heins, objected to the proposal and brought two suits against the agency. The first suit challenged a disbursement by the agency and was the subject of an injunction decision in which the district court noted that Heins was unlikely to succeed on the merits of his claim. The second suit pled various theories of recovery subsequent to Heins' allegedly wrongful termination by the agency. After the second suit was filed, Visser wrote a letter to the *Waterloo Courier* disparaging the suit. The letter included the following statements:

> The agency is saddened that a confused and angry young man has chosen to embarrass himself further by filing a lawsuit which is unlikely to succeed. One judge has already determined that he is unlikely to succeed on the merits of his far-fetched claims.

In the subsequent *Courier* article, Visser's letter was quoted at length. Heins then filed a complaint with the Board. He alleged a violation of DR 7-107(G), which restricts attorneys associated with civil actions in making extrajudicial statements. The Grievance Commission found that the rule was violated and that Visser's statement that "one judge has already determined that

he is unlikely to succeed on the merits of his far-fetched claims" was misleading. The Commission recommended a public reprimand, and Visser appealed.

Although he had not pled the defense of First Amendment unconstitutionality before the Grievance Commission, on appeal Visser argued that DR 7-107(G) was unconstitutional on its face and as applied to him. The Court held that to pass constitutional muster, the rule should be applied only to statements which were reasonably likely to affect the fairness of the proceedings. Thus, even though Visser's comments had been held by the Grievance Commission to violate DR 7-107(G)(1), (2) and (4), the Court held that because the statements had not been reasonably likely to affect the fairness of the proceeding, there was no violation of DR 7-107(G).

The Court did, however, find a violation of DR 1-102(A)(4), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. Visser's statement that "one judge has already determined that [Heins] is unlikely to succeed on the merits of his far-fetched claims" was only partially true, because the judge had not dealt with the merits of the claims involved in the second suit. The Court stated: "Although we realize the statement was made under the pressure of the situation, the fact is it was only partially true and was therefore a misrepresentation under DR 1-102(A)(4). We admonish the respondent, and the bar generally, that we do not condone such conduct."

VII TRUST ACCOUNT VIOLATIONS

Canon 9 Avoiding Even the Appearance of Impropriety. DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, except retainer fees paid on a regular and continuing basis, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in DR 9-102(C). All such funds received from clients for matters arising out of the practice of law in Iowa, as the term "practice of law" is employed in court rule 121, shall be deposited only in trust accounts located in Iowa. No funds belonging to the lawyer or law firm shall be deposited in trust accounts except as follows:

(1) Funds reasonably sufficient to pay service charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Trinidad J. Leon, revocation, 602 N.W.2d 336 (Iowa 1999).

At the time of the misconduct, Leon was a partner in a three-person law firm. His ethical violations began with the mishandling of the cases of four

separate clients. Instead of doing the work he had been hired to do, Leon wrote checks on his firm's trust account to or on behalf of the clients, falsely leading them to believe he had favorably resolved their legal matters. Even worse, by writing these checks he misappropriated other clients' funds. The clients whose cases he had neglected either had no funds on deposit in the trust account or (in one case) did not have enough money in the account to cover the check. The total misappropriation was about $9,000.

Leon compounded the misconduct by lying not only to his clients but, when questions were raised, to his partners and a district court judge. He also failed to respond to inquiries from the Iowa Supreme Court Board of Professional Ethics and Conduct.

The Grievance Commission found violations of Iowa Code of Professional Responsibility for Lawyers DR 1-102(A)(3), (4), (5) and (6), DR 6-101(A)(3), and DR 9-102(A). The Commission recommended a one-year suspension.

The Iowa Supreme Court found the recommended sanction inadequate. The Court noted misappropriation of clients' funds routinely warrants revocation. Although occasionally the Court imposes a less severe sanction in misappropriation cases, there were no mitigating factors warranting leniency in this case. Leon's conduct was not an isolated instance. He misappropriated funds on five separate occasions involving four separate clients. He lied to cover up his conduct. He failed to reimburse the trust account fully after his conduct came to light. He ignored the Board's inquiries.

The pattern of misconduct in this case led the Court "to conclude that future misconduct is likely." The Court ordered Leon's law license revoked.

Board v. Sunleaf, public reprimand, 588 N.W.2d 126 (Iowa 1999).

Sunleaf was found to have committed two kinds of misconduct: (1) commingling his own funds with those of clients by using his client trust account for the deposit of earned fees and payment of personal and business expenses (so as to hide the funds from the IRS which had levied on his business account), in violation of DR 9-102(A); and, (2) denying the commingling to the Board and the Client Security and Attorney Disciplinary Commission, in violation of DR 1-102(A)(4).

The court said Sunleaf's misconduct "lies at the precise boundary between suspension and public reprimand." No client's funds were misappropriated. Because the record showed the conduct was an aberration and inconsistent with Sunleaf's otherwise excellent reputation for honesty and many years of honorable practice, the court accepted the Grievance Commission's recommendation of a public reprimand.

Jeffrey L. Stein, public reprimand, Supreme Court Order, April 21, 2000

A mother who had divorced and remarried and her new husband employed Stein for the purpose of the new husband's adoption of the minor children of that

prior union. The matter was not concluded when Stein closed his office and left the practice of law in August of 1998. Although Stein referred the file to another lawyer, that lawyer returned the file to Stein when he determined he would not be able to accept that representation. Later Stein learned the mother and her new husband had become involved in dissolution proceedings and no longer wished to pursue the adoption. Although Stein promised the mother he would return her retainer, he did not do so and failed to respond to any of her further requests for a refund although he continued to hold the retainer in a trust account. Stein finally refunded the retainer upon his receipt of notice of her complaint to the Board of Professional Ethics and Conduct.

Stein was publicly reprimanded that his neglect in responding to the mother's requests was the neglect of a client's legal matter, contrary to DR 6-101(A)(3); and his failure to promptly refund the unearned retainer was in violation of DR 9-102(B)(4) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Adams, 3-Month Suspension, 623 N.W.2d 815 (Iowa 2001).

Adams was employed by two couples who wished to file bankruptcy petitions. Each couple paid him a $600 retainer. Adams deposited the retainers into his general checking account, not into a client trust account. He never filed the clients' bankruptcy petitions but told them he had. He made several other misrepresentations to conceal his neglect of their cases. The clients discharged him and requested their files after learning the bankruptcy petitions had not been filed. Adams, however, had lost their files and so did not return them. He did refund their retainers, however.

The Iowa Supreme Court held that Adams violated Iowa Code of Professional Responsibility for Lawyers DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(4) (dishonesty, deceit, or misrepresentation), DR 2-110(A)(2) (failing to deliver client's papers and property), DR 6-101(A)(3) (neglect), DR 7-101(A)(1) (intentionally failing to seek client's lawful objectives), and DR 9-102(A) (failing to deposit client's funds in trust account). The court suspended Adams' license indefinitely, with no possibility of reinstatement for three months.

James A. Schall, Public Reprimand, Supreme Court Order, February 12, 2001.

Schall took a fee of $5,000.00 from a client, not as a retainer but as a flat fee to be paid in advance before he would do anything for the client. He did not deposit the fee to his trust account to be withdrawn as earned but immediately deposited the money into his own account. In accord with the decisions of the Iowa Supreme Court in *Board v. Apland,* 577 N.W.2d 50 (Iowa 1998) and *Board v. Torgerson,* 585 N.W.2d 213 (Iowa 1998), Schall's failure to deposit that fee to his trust account to be withdrawn as earned was in violation of the Iowa Code of Professional Responsibility for Lawyers.

Schall was publicly reprimanded that in imposing as a condition of his employment, the payment of a $5,000.00 advance, not as a retainer but as a flat fee, before he would undertake any effort on behalf of a client, and then depositing the fee directly into his personal account, he collected an illegal fee, contrary to DR 2-106(A) of the Iowa Code of Professional Responsibility for Lawyers.

Board v. Michael D'Angelo, three-year suspension, 619 N.W.2d 333 (Iowa 2000).

D'Angelo committed multiple violations in five decedents' estates. In four of the estates he took his own fees before authorized by court order and before he had done the work required by Rule of Probate Procedure 2(d). He engaged in "a pattern of neglect and dishonesty" by failing to making required filings and by misrepresenting the status of the probate proceedings. In two of the estates he failed to timely comply with court orders requiring him to return money he had received for attorney fees or costs. His deposit of unearned fees and unpaid costs in his office account rather than his client trust account violated Canon 9 rules for safeguarding clients' funds. In one estate the terminally ill executor wrote him a check in the amount of $16,992, most of which was intended for payment of the inheritance tax. The money went into D'Angelo's operating account and was later withdrawn. D'Angelo eventually repaid the $16,992 to the estate.

The Iowa Supreme Court determined "the record reveals more inattention and disregard for probate statutes and the best interest of his client than intentionally dishonest behavior." The Court suspended D'Angelo's license indefinitely with no possibility of reinstatement for three years.

Injury Potential from Low Speed Rear-End Collisions

By

David B. Daubert
Professional Engineer
President
Search Engineering, Inc.
Waconia, Minnesota

Table of Contents

I. INTRODUCTION

The amount of litigation in our society has risen dramatically in recent years. A large portion of this litigation is related to low speed, minor damage vehicle accidents. The claims made by injured parties in these cases are sometimes difficult to judge, given the nature of the soft-tissue injuries that are so often involved. The use of the physical evidence found on vehicles involved is a tangible determination of the speeds, or lack of speeds (and thus energy), involved in these incidents. The original work done on low speed rear-end collisions was accomplished in 1955 by a team of doctors and engineers. At the time, a low speed collision was characterized as occurring between 10 and 20 mph. One of conclusions reached by the researchers still holds true today:

> "Evaluation of these cases is made exceedingly difficult because more than half of the subjects exaggerate their symptoms to a considerable degree."

Research into collisions below 10 mph has only occurred within the past five years. Until recently, the data was gathered from anthropomorphic dummies which could not represent the head-neck complex successfully at low speeds. This is still the case. To overcome the problem of determining what forces are involved in low speed collisions, those under 10 mph, human volunteers have been used. In some cases, the human volunteers have undergone extensive testing, including MRI screening before and after the testing. This paper attempts to explain what research has found in the past few years and to describe motion and the ways of measuring the forces of a low speed rear-end collision.

II. PHYSICS AND MOTION

To begin with, the physics of the crash has to be examined. Low speed incidents typically involve one stopped vehicle, or target vehicle, and a moving vehicle, or bullet vehicle. The bullet vehicle possesses a certain amount of kinetic energy due to it's motion. This energy is based on the velocity and the mass of the vehicle. When the vehicles make contact, some of the energy is transferred to the target vehicle, causing an acceleration, or change in velocity of the target vehicle.

This change in velocity of the lead vehicle is usually from a stop. This acceleration can be termed in g's, which is a scale of acceleration. One g is equivalent to the acceleration due to the earth's gravity, or 32.2 feet per second per second. When the two vehicles make contact, the bullet vehicle begins pushing on the target vehicle. The target vehicle resists. This pushing dissipates the energy once held by the bullet vehicle, slowing it down, while the target vehicle receives energy, thus speeding it up.

The energy of an accident has to be explained. The energy of a moving vehicle is defined as kinetic energy, $KE = \frac{1}{2}mv^2$. In comparing two collisions at different speeds, the energy is exponential, that is if the speed is doubled, the energy is four fold greater. To compare the energy of two collisions with the same vehicle (therefore we can ignore mass and look only at the speeds), the square of the speed has to be compared. For example, a collision at 2.5 mph compared to one at 5 mph, 2.5 squared is 6.25, 5 squared is 25, and 6.25 is one fourth of 25 or the 5 mph collision has four times the energy of the 2.5 mph collision.

Knowing the mass of a vehicle in a collision is important. Mass is a more technical means of talking about weight. Weight is dependent on what planet you weigh the object on and is related to

the gravity of the planet. The mass of the vehicle does not change when you change planets. As long as we stay on earth, think of weight and mass as the same. One of the best protections in a collision is the mass of the vehicle your occupying. The occupants of the target vehicle will feel the collision depending on the mass of the two vehicles. Let, for example, the front of a 2,000 pound vehicle collide with the rear of a 4,000 pound vehicle. The occupants of the 4,000 pound vehicle are going to feel half of the acceleration of the 2,000 pound vehicle.

III. BUMPERS

Bumper systems on vehicles use three basic components. They are: 1) the chassis, or frame, of the vehicle; 2) the bumper itself; 3) an energy absorber to connect the bumper to the vehicle frame. Two basic types of energy absorbers are used. The first is a Type I piston impact absorber. The absorber utilizes a piston assembly with a spring and/or hydraulics. When an impact occurs, the piston contracts, absorbing energy. Oil is also present in the piston chamber which dampens, or slows the reaction of the spring. The purpose of the absorber is to store the energy of the contact and release that energy over a longer period of time. The bumper absorber is nothing more than a shock absorber on a vehicle.

The other style of energy absorber is known as the foam-core bumpers. These bumpers use a foam block, which is then covered with a bumper cover. The basic idea of the foam-core is that the foam will deform more easily than any other part of the bumper system. The transferred energy is then absorbed by the deformation of this foam core.

Vehicles produced before 1980 were not required to have an energy absorbing bumper system. Vehicle bumpers became more decorative with more chrome and irregular shapes. The result was damage to vehicles in minor parking lot type bumps. The cost to repair the vehicles was out of proportion to the force and speed of the low speed contacts.

Since 1980, the government has set forth requirements for the performance of these energy absorbing bumpers on passenger vehicles. From 1980 to 1982, the bumpers were required to withstand a 5 mph contact speed. In 1983, these standards were lowered to 2.5 mph. Because of the lead time to redesign vehicles and the tooling required, many vehicles produced before 1980 did have 5 mph energy absorbing bumpers but were not required to do so. The automobile manufacturers complained that to have a 5 mph bumper added too much weight to the vehicle when they were required to meet fuel economy standards (CAFE). The law in 1983 stated that the bumper must be able to withstand a 2.5 mph contact without causing damage to the remainder of the vehicle. Certain vehicles are exempt from these energy absorbing bumper standards. These vehicles are commonly called LTV - light trucks and vans. Utility vehicles also fall into this category of exemption. Normally these types of vehicles are heavy and stiff, and have the bumper attached by means of a bracket directly to the frame.

IV. INJURIES

In high speed rear-end impacts, the passengers in the target vehicle are the most common claimant of injuries. The dynamics of the occupants in the target vehicles explains this. As their vehicle begins to move forward, the occupant remains stationary for a short time, lagging behind the motion of the vehicle. This presses the occupants rearward. As the occupants back presses against the

seat back, the torso begins to accelerate to the now-moving vehicle. However, the head of the

seat back, the torso begins to accelerate to the now-moving vehicle. However, the head of the occupant once again lags behind the motion of the vehicle and their torso. This difference in speed will extend the head of the occupant to the head rest or beyond, depending on speed. The result is a hyper-extension of the occupant's neck. Now the head will accelerate quickly, enough to pass the occupant's torso and sometimes hyper-flex, again depending on the speed. The motion is not as simple as it might seem. In addition to the body pressing against the seat, because the seat back is at an angle, the torso rides up the seat back. This is termed "ramping". As the body raises off the seat bottom, the head still wants to stay still as the vehicle tries to pass out from under the body. The head goes to the rear, creating the hyper-extension. As the speed of impact increases, the head will pass over the top of the head restraint and come down on top of the head restraint. The criteria for an extension beyond the tolerance of the human body is a movement of more than 60 degrees. In low speed collisions, those impacts of under approximately 8 mph, the range of motion which has been recorded does not exceed 20 degrees. This is within the range of motion which the human body can tolerate and under approximately 8 mph, no injuries should be permanent.

When the injuries of all types of accidents are compared, the rear end collision has a lower percentage of injuries than any other type of accident. One of the reasons is the protection offered by the seat. Seats are a soft cushion for the body. Seats also provide a brace for the body to be held rigid. The seat back is capable of absorbing up to 70 percent of the energy of a rear end collision. Recent studies of head rests have shown a wide range of energy absorbing capability, but all head restraints absorb some energy.

V. DELTA-V

If a vehicle were moving at some speed and was struck in the rear by a second vehicle, how do we now assess the forces on the occupants? Does the speed of the vehicles matter, or is it only the difference in their speeds? As an extreme example, a satellite is traveling at 20, 000 mph and collides with another satellite. This could be an extreme collision if both are occupied. But, what if the second satellite is traveling at 20,005 mph? Now it is not relevant that the first satilite was going so fast because the key thing is to know the difference in speed, not the absolute speed. Knowing the difference in speed has been the goal of the National Highway Safety Administration researchers. The term given to the difference in speed is Delta-V or change in velocity. The change in velocity is what is felt by the occupant of a motor vehicle in a collision. Most times the change in velocity is not harmful. Landing in an airplane from 400 mph to 0 mph is not harmful as long as the time to change velocity is long enough. If the plane runs into the side of the mountain, the change in velocity is too short in time for the human body to withstand. The same goes for g forces. A fighter pilot can not withstand 6 or 7 g's for more than a few seconds without blacking out. However, the human body can withstand, and regularly does, a force of 60 g's in an automobile collision. The difference is the length of time over which the g force is experienced. The human body in a collision is capable of withstanding, when wearing a properly routed three point restraint, a force of 60 g's and a Delta-V of 30 mph. The statistics which have been gathered over the past 25 years have focused on comparing the Delta-V of a collision with the injuries of a collision. The Delta-V of collisions is reported in 10 mph increments and the injuries are reported according to the Abbreviated Injury Scale (AIS - sometimes reported as the MAIS or modified abbreviated injury scale). Each category or block of Delta-V has been correlated with the AIS. If the block of Delta-V is below 10 mph, then only certain categories of AIS occur based on the past 25 years of data. When the Delta-V drops below 8 mph, injuries of a permanent nature have not been reported or found in the past 25 years.

In low speed, rear-end testing, the injuries are classified into three categories. These are: no injury, transient injury, and permanent injury. Transient injuries are classified as those injuries that spontaneously cease within a short period of time after the incident, usually 24 hours. These may be minor headaches or stiffness in the neck. Permanent injuries are those injuries which are still present one year after the test. In past tests conducted with human subjects, no permanent injuries were reported for rear-end impact with speeds of up to approximately 8 mph.

By using the damage reported on the vehicles involved in the low speed incident, the speed at which the contact took place can be ascertained to a reasonable degree of engineering certainty. With the speeds apparent, they can be compared to that of past tests conducted. These results then point to the inconsistencies in claimed injuries.

VI. DAMAGE TO THE VEHICLE - WHAT TO LOOK FOR

Though all accidents are different in configuration, rear-end type impacts generally occur in a direct in-line bumper to bumper configuration. In these instances, cosmetic damage to the bumper and its cover is not an indication of sufficient force to exceed the 2.5 mph energy absorbing bumper. If the vehicle is equipped with piston type absorbers, usually a ring is scratched into the surface to show that at some time in the past, the bumper has been pushed in. Foam type bumpers will almost always return to their original shape after a minor impact and in some cases after a substantial impact. In either the piston or foam bumper case, if the impact is below either the 2.5 or 5 mph limit, no energy will be transferred to the frame, tail lights, rear quarter panels or the trunk. One of the first places to be damaged on impacts slightly over the bumpers limit is the rear quarter panel above the wheel. The U shape of the frame above the axle is the weakest point of the frame. Also, the end of the frame where the bumper or absorber is attached to the frame will have a crease or wrinkle. Aligning the bumper is nothing more than pulling the bumper out because the pistons did not return to their original position. This is done with shims between the absorber and frame. It is not an indication that the limits of the absorber were compromised. Some absorbers are designed to use their entire length while others use only part of their length to accomplish the energy absorbing task. Aligning the frame of the vehicle indicates some energy was transferred to the frame, how much depends on how much the frame has to be straightened. Lack of damage to the plastic on the rear of the vehicle, such as the tail lenses, lack of a crinkle in the fender, lack of damage to the frame, are substantial indications that the contact was within the energy absorbing capability of the bumper.

VII. CONCLUSION

Many claims are made for soft tissue injury and sometimes substantial back injuries from low speed rear-end collisions. In many cases, the vehicles are undamaged. In other cases, the damage is slight and yet the occupants are claiming injury. In some cases, the occupant of the heavier vehicle is claiming injury while those in the lighter vehicle are uninjured. When the damage is not present, neither can the injuries be present.

ROADWAY DESIGN AND TRAFFIC ENGINEERING AS A COMPONENT OF AUTOMOBILE ACCIDENT RECONSTRUCTION

By

David B. Daubert
Professional Engineer
President
Search Engineering, Inc.
Waconia, Minnesota

TABLE OF CONTENTS

I. INTRODUCTION

The business of accident reconstruction involves determining the why of an accident by examining three possible areas which influence its occurrence. The three areas are the driver, the vehicle and the environment in which the accident occurred. The environment is most often the road on which the driver and vehicle are operating. It has been my experience that the driver of the vehicle or the investigator are more apt to blame the vehicle and the mechanics of the vehicle before the roadway is blamed as a contributor to the accident. However, upon examination, the roadway if often found to be the culprit. Recent studies have shown that less than 2.5% of all accidents are caused by vehicle malfunctions whereas over 40% of all accidents are partly caused by a faulty roadway. An accident has been described as the coming together of two or more failures at the same time and place. Normally if only one thing or item goes awry, the system, either the vehicle or driver, can recover. However when the system experiences more than one failure, the result is likely to be an accident.

The purpose of this paper is to discuss how the roadway can contribute to an accident by being one of the failures. Even with a curve in the road, the mere fact that there is a curve does not cause an accident. If the speed of the vehicle is added as one of the contributing factors, accidents may occur. If the curve if poorly built (i.e. improper superelevation) or the signing is incorrect before the curve, or if sufficient signing does not exist, accidents may occur.

First, here are a few basic philosophies of traffic safety. The concept of zero-based budgeting applies to traffic safety. At the outset of construction or review and inventory what is installed is the minimum signage, markings or control. If experience shows that the minimum is not enough, additional backup warning devices are added until the accident experience is reduced to an acceptable level. For example, at a rural intersection experiencing right angle accidents an interchange is not installed initially to correct the problem. The first step might be to install a Stop Ahead sign, then oversized Stop signs, then rumble strips, then flashing lights, then a four-way stop and then traffic signals. The object is to progress up a ladder from the least intrusive to the maximum reasonable control. Remember, the purpose of a road is to move vehicles with as few interruptions as possible.

Two types of professionals deal with the roadway, the highway engineer and the traffic engineer. The highway engineer is the person who builds the facility. Except in unusual circumstances, the highway is built to set standards. Having been around for a number of years, the standards have proven the test of time. The highway engineer does not make the highway work, he or she only builds the highway. Once it is built, it is turned over to the traffic engineer to make it function. It is the traffic engineer who decides on signs, markings, lighting, signals, capacity and safety. The traffic engineer takes what is given to him in the way of a roadway and makes it work safely. Traffic engineers are rare. Within a state department of transportation, the typical breakdown is 1 traffic engineer for 100 highway engineers. Unless a county or city is large, traffic engineers are not present. The job of making the highway function is left to some other type of engineer. The result is that roads are built well but operate poorly (or are unsafe). The more the highway strays from standards, the more signing is needed and the more work the traffic engineer has to do to make signs and markings compensate for deficient construction. We frequently see this in law suits. The construction of the highway is normally a policy (discretionary) whereas the operation and maintenance are not.

Another philosophy is consistency. A Stop sign is red and has the word Stop on an 8-sided background whether found in North Dakota, Mississippi or Alaska. Whether it is the shape of the sign, the sign message, the traffic signal system or the pavement markings, the entire country is the same. A contributing factor to an accident is the traffic control device which is not plainly understood by all motorists. The concept of consistency applies to all roads open to the public, or for that matter, off-road paths. The shopping center signing should conform to national standards for curves, sight distance, and signing, the same as the road. Driver expectancy has to be accounted for, which means the same meaning every time the driver encounters the same situation. Traffic engineers try to follow a philosophy of positive guidance and consistency.

The third philosophy is that traffic engineering solutions do not depend on enforcement to make them work. Speed limits signs are an example. Four-way stop signs are an effort to control speed and divert traffic. Consistently, it has been shown that four-way stop signs are not effective. Adding Stop signs to a roadway to slow or divert traffic is ineffective also. Speeds of vehicles tend to be higher between added Stop signs than the average speed on the road before their installation.

A key part to looking at accidents and hazardous areas on the roadway is to examine the accident history of the location. A location which has a number of accidents may not be of concern if the traffic volumes are high. However, if all the accidents are of the same type, additional investigation is warranted. Con-

versely, one other accident at a location does not mean the current accidents being investigated are part of a pattern. A low volume road with just a few accidents may have a higher rate of accidents than a high volume road with many accidents. Two types of rates are used. For an intersection, the number of accidents compared to the number of vehicles entering the intersection in a year's time is calculated. The rate is usually expressed as the accidents per million vehicles. Along a stretch of highway, the normal calculated rate is the number of accidents per one tenth of a mile per year per 100 million vehicles. Another attribute examined is the injury rate and the fatality rate. This will assess whether the location is causing particularly severe accidents.

The last philosophy is that of driver expectancy. We as engineers cannot modify drivers. The roadway has to be built and signed to what the driver expects and has encountered before. An example: suppose a curve sign is mounted before a long sweeping curve with an advisory speed plate of 30 mph. Midway through the curve, a speed limit sign is posted for 45 mph. What is the last sign the motorist sees and is in the memory of the motorist? Or take the case of a number of curve signs. The first sign is an advisory of 30 mph. However, the driver feels comfortable at 40 mph. What happens when the driver encounters a curve with an advisory sign which really means 30 mph? The incorrect signing on previous curves causes the drivers expectancy to be violated when called upon.

I have attempted to list some of the more common contributors to accidents. It is often the traffic control device which misleads the motorist and contributes to the accident, but it is the contributor most often overlooked. The investigating police officer rarely looks at the travel path of the motorist leading up to the location of the accident. When looking at an accident, look at the roadway for a few miles leading up to the scene and see the scene as the motorist did.

II. SPEED

As one considers the use of various methods of controlling traffic, several issues should be mentioned. One issue which is frequently perplexing to non-traffic engineers is that of speed control. While speed zones are frequently appropriate, we know that usually it is not possible to control traffic speeds by simply placing speed limit signs unless there is regular and frequent enforcement. Motorists will typically only lower their speeds if they clearly perceive a reason to do so. Thus, a sharp curve which is not readily perceived to be a hazard on an otherwise high-speed roadway is going to create problems even if the speed limit is reduced before the curve. All too frequently motorists are blamed for excessive speed when in fact they are merely responding as human factors engineers expected they would.

Most of our roads have been built to a design standard of 60 or 70 mph. The motorist "feels" comfortable driving at a higher speed than that which is posted.

It is not necessarily speed which causes accidents, but rather the variation in speed. In a recent study in which I was involved, along an arterial street, the speed limit was posted at 45 mph. The speed of the vehicles ranged between 20 mph and 80 mph and the road had a high accident rate. The speed limit on a roadway is set by monitoring the speed of the vehicles along the road. If no unusual circumstances exist, such as to limit visibility because of curves or hill crests, the speed limit is set at the speed at which 85 percent of the vehicles are traveling less than that speed (the 85th percentile speed). Sometimes it is the posting of the speed limit which is the problem. In another study I was conducting, along a 10 mile stretch of arterial highway, the speed limit changed 16 times. The speed limit varied from 35 mph to 55 mph with the shortest speed zones being 300 feet long. This is particularly a problem when a road traverses many jurisdictions. The motorist is constantly speeding up and slowing down which creates speed differentials and increases accidents.

III. WORK ZONES

An area where it is possible to cry wolf with signing is in the area of the work zone. Per mile of travel, the greatest number of fatal accidents occur in work zones. Not only are the workers at risk, but also the motorists traveling through the area. A distinct difference exists between the Road Construction sign and the Road Work sign. The Road Construction sign is for long term projects which have an effect on the traveled path of the motorist, for example, lane shifts for bridge construction or detour routes for road construction. Road Work is a short term project lasting but a few hours or a day. Road Work signs are used within a construction site to indicate the specific location of the work or where the workers will be in the roadway. The signs which indicate Road Work should be covered or removed when work is not actually being done. Leaving flagging signs in place at night and on weekends when obviously no work is in progress leads to disrespect by the motorist. When we really do want the motorist to obey and slow down, the motorist does not believe anything is currently happening on the road. At one location in the Twin Cities, temporary construction signs have been in place for over six years and no work has been done in that time. At least one fatal accident has been the direct result of the false signing.

Other related areas include the correct placement of the signs indicating which way a vehicle is to pass around a barricade. Signs with a diagonal slash are meant to indicate that the motorist passes on the side of the sign with the down slash

marks. If the diagonals run from upper right to lower left, the motorist is to pass to the left. Accidents happen when the motorist consistently passes to the same side and then someone puts the wrong sign in place and the motorist passes to the opposite side and into a tree, pole or off a cliff. Each project is required to have a specific work zone signing plan, not just a generic plan copied from a book. Each work zone in place for more than a day has to be inspected by a qualified person every day and at night.

A specific place which is often neglected and is a location of many accidents is the start of the queue for a work zone. Formulas have been developed to determined the length of the queue and the signing should start before the end of the queue. Many projects are not inspected often enough by qualified persons who should have moved signing far enough in advance of projects or to install the correct signs and to take into account the size of the signing.

Another area which is receiving more attention is the influence area of the work zone. Any work project involves delaying the motorist to some degree. Motorists are amazing at determining the shortest path between two locations. All those routes which are receiving that diverted traffic now become part of the influence area. For instance, a project on a highway causes long delays or closure. A detour route is established and marked. However, the detour route adds five miles of travel. A shortcut exists which only adds a mile. You can be sure that the motorists are not going to use the marked detour route, but will use the shortcut. How are the signs on the shortcut? Are the traffic controls adequate to handle all the new traffic? The shortcut is in the influence area and has to have the same attention as the marked detour route.

IV. RAILROAD CROSSINGS

Railroad crossing accidents involve only a few causes. One is the vehicle racing to beat the train. Not much can be done in the way of traffic engineering for this type of accident. Other problems include rough crossings and vehicles stopping on the tracks. The motorist crossing the railroad has a complex task. Not only must the driver look for trains but has to look for other oncoming traffic and often has to look for cross traffic at an adjacent street. The local motorist may know the crossing is rough while the following motorist does not, resulting in the speed differential problem. Roads crossing railroad tracks on curves in the tracks are particularly a problem for the motorist. The railroad tracks are at an uneven height because of banking the tracks. Vehicles often lose control at these crossings.

V. TRAFFIC SIGNALS

Traffic signals are designed to assign right-of-way. Most traffic signal controllers have as a part of their components a conflict monitor device. If the controller fails and attempts to give a green indication for conflicting traffic (such as vehicles at right angles), the conflict monitor will switch to an all red cycle and/or a red flashing cycle.

The progression of signals can sometimes determine who had the green light at an intersection. If the paths of the motorists are known and the accident occurred in a grid pattern of street, most likely the signals are synchronized. By use of a time-space diagram, it is possible to plot the paths of the vehicles leading up to the accident scene. Traveling from one signal to another requires time and distance, and thus speed. It is possible to discredit a motorist who claims to have had a green light and yet entered a progression of signals at a point where they could not have arrived at the accident scene on the green cycle (or to have arrived at that point they had to be traveling at an excessive rate of speed).

Left turn signals are a complicated area. Consistency is one of the basic tenants of traffic engineering. Adjacent jurisdictions who have different policies concerning left turn signalization can confuse the motorist. One form of turn signal is the protected turn. The motorist can only turn when a green arrow is indicated. This restricted type of turn should only be used when a problem exists at the intersection, such as a high speed road or a road with limited visibility. Motorists can often be seen turning left on a red arrow when no other traffic is present. Another form of left turn signal is the protected/permissive. The motorist first sees a green arrow which subsequently goes off for the green ball. The motorist can then turn left after yielding to opposing traffic. If no arrow is present, the motorist yields to oncoming traffic. Some unusual turn signal phasing exists in this area. Motorists become confused when the turn arrow fails to come on as they are facing the arrow, but rather the green ball comes on as their first indication. The other problem has to do with the protected arrow. The long cycle length of the protected phases leads to persons turning left on the "pink" light in order not to have to wait through a full cycle.

A related problem is the inconsistency of signal light placement. A main street which has a combination of corner or post mounted lights and overhead or mast mounted lights causes confusion for the driver. As the driver approaches each intersection, the lights are in different places. Some older installations have lights on span wire across the intersection. From many locations within the intersection, the lights cannot be seen. The left turning vehicle and the pedestrian have the most difficulty

observing a signal indication to know what to do. The trend has been to install a left sided post mounted signal in addition to overhead mast mounted signals. The driver following a large truck cannot see the signals overhead and mounted on the right side. From a safety viewpoint, the larger 12 inch lenses are more visible than the older 8 inch lenses. The smaller lenses are still authorized for some applications.

Traffic signals are installed according to warrants. Unless one of the 11 criteria for a signal is met, a traffic signal should not be installed or be present (those locations which do not continue to meet warrants should have signals removed). The warrants include volume of traffic, progression of traffic, pedestrians, schools, and accidents. Generally, if more than 5 accidents occur within a year, which would be corrected by signalization (normally this means broadside or right angle collision), then a traffic signal is warranted. Since signals are expensive, usually $100,000 per intersection, not all locations which warrant a signal have one. Each jurisdiction has to keep a list of signals meeting warrants and the priority for installing them. Keeping a list applies to all types of safety improvements.

The type of accidents at a signalized intersection can indicate the type of problem with the signal system. When the pattern of accidents is examined, the contributing factors of the signal or intersection design become even more apparent. For instance, a number of right angle accidents may indicate the lack of an all red clearance cycle. For safety, at the expense of capacity, an all red cycle for 1 or 2 seconds allows vehicles that extra margin to clear out of the intersection before the next direction starts to move. A number of rear end accidents may indicate that the signals are not visible, the yellow clearance phase is too short or the intersection is too wide and additional signal heads need to be installed. What I mentioned earlier, concerning looking beyond the intersection as the cause of an accident, also applies to signals. A motorist was blamed for going past a red flashing light at night and causing an accident. The owning jurisdiction had a policy of putting the lights on flash late at night. However, some lights were flashing red in all directions while some flashed red for one direction and yellow for another. The motorist stopped at the flashing red light and having been through a number of intersections which were flashing all red, assumed this intersection was like the last five. The cross traffic at the accident intersection was the other type, red for one direction and yellow for the other.

VI. CURVES

Curves can be built in a number of ways. The simple radius curve is the one most often encountered. Because motorist do not drive through a curve as a simple radius, some curves are being built

as spiral curves. Railroads have been building spiral curves since the first trains because of the ease with which the curve can be traversed. Another type of curve seen in urban areas is the compound curve which allows trucks to better negotiate the curve away from pedestrians and other objects. Most cities built the curbs long before we had tractor semitrailers which are now 65 feet long. Trucks have a difficult time negotiating in cities and yet are required to make deliveries and service industries. Trucks are often struck in urban areas as they try to negotiate around curbs which were never meant to accommodate them. Look at the curbs at intersections along truck routes. Notice how small the radius is at the curb.

Curves are built with or without superelevation. The banking seen on the curves at the race tracks is what is technically superelevation. Curves in urban areas are often built without superelevation because of low speeds. In northern climates, a maximum superelevation of 6 to 8 percent has been set (6 feet of rise per 100 feet of distance - not the same as 6 degrees - a curve is built to a radius or in engineering terms, to a certain degree). The limit has to be established because at low speeds and icy pavements, vehicles will slide to the inside of the curve if it has too much superelevation. In southern states, super-elevations of 10 percent are common, which allow higher speeds for the same radius curve. Because of poor construction or soil problems, the superelevation of a curve can be negative. Smaller jurisdictions often guess at the speed a vehicle should travel around a curve. The advisory speed for the curve is not set using the correct instruments.

The advisory speed of a curve is set for a low coefficient of friction (between 0.12 and 0.20) to represent a slippery condition. In most cases, on a dry day, we can drive the curve at a higher speed than the advisory sign because we have better friction with the pavement (normal friction is between 0.70 and 0.80). However, the truck which is heavily loaded with a load stacked to the roof has to drive at the advisory speed or less. If the truck drives too fast, it tips over whereas an automobile slides sideways.

One of the worst problems with curves is inconsistent posting between curves. All curves have to be checked with a ball bank indicator before the speed advisory sign is posted. The motorist which goes through five curves which are posted too low (the curve feels comfortable to the driver at 40 when posted at 25 mph), then encounters the sixth curve posted at 25 which really is 25 mph. The vehicle then goes off the curve and the driver is blamed for going too fast, which is incorrect since the driver was misled into the sixth curve by five incorrect postings.

VII. SIGHT DISTANCE

A. Passing

Two diverse methods have been developed to establish the distance needed to pass another vehicle. The first presented by the American Association of State Highway and Transportation Officials (AASHTO)[1] has the longer distance of the two. The second is presented in the Manual of Uniform Traffic Control Devices (MUTCD)[2] and has distances about one half as long. The roadways are striped according to the MUTCD. The argument was made in adopting the shorter distance for visibility required to make a pass that with longer distances, little opportunity would exist to pass. The limited passing zones would frustrate the drivers and they would pass anyway. The following table compares the two methods:

Table 1

Speed mph (kph)		AASHTO Distances in feet		MUTCD Distances in feet	
(meters)					
20	(30)	800	(250)	400	(120)
30	(44)	1100	(340)	500	(150)
40	(58)	1500	(460)	600	(180)
50	(73)	1800	(550)	800	(250)
60	(88)	2100	(650)	1000	(300)

B. Intersection

Intersection sight distance is based on the movement the driver is about to make. The left turn requires the most distance because of the need not only to make the turn, but also the need to gain speed to not interfere with the oncoming traffic. Not only do we deal in distance, but we also deal in time. Based on studies, the minimum acceptable gap which a driver will accept has been determined. For instance, at an unsignalized intersection, a driver will not turn left onto a two lane highway with a speed limit of 55 mph unless the driver has an 8.0 second gap. If traffic is heavy and no gaps are available, which means the driver waits and waits, the driver will take a chance with an unacceptable gap. Long delays are one of the criteria for signalization of the intersection. Accidents occur because the driver accepts a gap in traffic inconsistent with the speed of the approaching vehicle or the distance the vehicle is away. On a 55 mph highway, the intersection sight distance for the left turn is 1000 feet. This equates to a time for a vehicle travel-

---

[1] AASHTO

[2] MUTCD

ing at 55 mph of about 12 seconds. The driver of the left turning vehicle accepts a gap of 8 seconds and can safely make the turn. If the distance is too short or the approaching vehicle is traveling too fast, not enough time is available to make the left turn safely. It is also important to note that the intersection sight distances were established for cars, not trucks. Trucks usually take more that the 12 seconds to make the turn, thereby infringing on the approaching motorist.

As apart of the ordinance for each jurisdiction, a section on sight triangles at intersections should be included. Normally the distance is 25 feet back along both right-of-lines from the intersection and includes the area connected by the two lines. No objects or vegetation are allowed in the triangle created between a height of 2 feet and 8 feet. Jurisdictions also include a provision which allows the entity to remove whatever is in the triangle and bill the property owner.

C. Stopping

Various heights have been adopted for determining where the eye is located and what height an object has to be to be seen. For stopping, the eye height is 3.5 feet (42 inches or 1.1 m) and the object to be seen is 6 inches (0.15 m). The height of the eye does not change for passing or intersection sight distance, but the height of the object does. The object to be seen for both intersection and passing sight distance is 4.25 feet (51 inches or 1.3 m). A comparison of the minimum stopping sight distance from AASHTO for wet pavement and headlight distances is interesting. What is shown below is the normally accepted visibility distance for low and high beam headlights for the 6 inch (0.15 m) high object. States vary considerably in the required distance headlights have to be able to see an object.

Table 2

Speed mph (kph)	Minimum ft(m) Stopping Distance	Low Beam	High Beam	Panic Stop dry*	Panic Stop wet*
20 (30)	125 (38)	150 (37)	300 (62)	79(24)	93 (29)
30 (44)	200 (62)	150	300	131(40)	163 (50)
40 (59)	325 (100)	150	300	193(60)	251 (77)
50 (73)	475 (146)	150	300	265(81)	354(109)
60 (88)	650 (200)	150	300	347(107)	476(147)

*Assuming a 2 second perception-reaction time, no separate brake build up time and a .7 and .4 coefficient of friction for dry clean pavement and wet pavement respectively.

As a general rule, at high speeds it is quicker and safer to swerve to avoid an object. As low speeds, a vehicle can stop

quicker than the driver can swerve. The speed at which the choice is equal depends on the friction of the surface, but is approximately 42 mph.

It is not necessarily that the driver hit the object, such as a pedestrian or swerved too late to avoid something at night, but rather is the disparity between the headlight distance and the stopping distance. After age 20 - and every 13 years thereafter - a driver needs twice as much light to see an object. Therefore, at age 46, the driver needs four times as much light to see the same object as the 20 year old driver. The signing and markings on the roadway do not take into account the aging driver population. Signs which are poorly reflectorized from wear and old age are potential accident contributors at night. Even signs such as unreflectorized street name signs cause drivers to slow in traffic at night, causing a potential hazard.

VIII. REACTION TIME

The often quoted time of three quarters of a second for reaction time has been shown to be out of date. The number was obtained by testing persons in laboratories in the mid 1930's. By placing a person in a chair and telling them to press a button when they saw a red light, it was determined that the reaction time was the three quarters of a second often quoted. However, when you take that same person out onto the highway and tell them to drive, they react much differently when a surprise is presented to them. During experiments on the highway, the drivers were, for instance, told that they were going to be observed as to how they stopped at a Stop sign. Suddenly on the way to the sign, as they came over a hill, something came out into the road in their path. The times for perception and reaction were between 1.6 and 2 seconds. On the interstate highway, drivers are lulled into a false sense of security. All traffic is moving in the same direction at the same speed with no traffic signals and little merging traffic, large signs, and plenty of clear area adjacent to the highway. Perception reaction times tend to be longer and can range between 5 and 8 seconds under these conditions. The driver cannot adjust quickly enough to a situation which should not be present on the freeway, such as a pedestrian or vehicle coming at them head-on (violation of driver expectancy).

IX. LEFT TURN LANES

The lack of left turn lanes is a major cause of accidents. Drivers stop to make a turn where no lane is present and are hit, or the third or fourth car approaching the line of vehicles stopped plows into the back of the line. The vehicle stopping to make the left turn causes the vehicle behind to change lanes, which is another potential accident. Thirdly, wanting to make a left turn, the driver sees the vehicles bearing down behind him and makes the turn only to be hit by the car approaching from the

other direction. On two lane roads which have heavy left turning traffic at intersections or driveways, left turn lanes should be present. The easiest method is to create a left turn lane from the existing shoulders. Left turn lanes do not have to be 12 feet wide unless substantial truck traffic is present. A narrow, even 8 foot wide lane is superior from a safety standpoint than no turn lane. It is incumbent on the jurisdiction to continue to monitor their street for problems such as this. Four lane roads, which do not have a center turn lane, normally experience high left turn and side swipe accident rates. The jurisdiction has sacrificed safety for capacity. However, increasingly, studies are showing that a three lane road, one lane in each direction and a center two way left turn lane, will carry nearly the same amount of traffic and dramatically improve safety. On the four lane road, the two inside lanes are used for left turning lanes anyway.

Although it is not legal to pass on the right, most drivers will when a left turn lane is not present. If the area where drivers are passing on the right happens to be a gravel shoulder, the shoulder will wear quickly and form a pavement drop-off. Many head-on accidents are found at these spots where drivers have a wheel drop off the pavement and they steer sharply to the left. The result is the vehicle crossing into the oncoming lane.

X. PAVEMENT MARKINGS

The center line of a road should be yellow. Some jurisdictions still use other colors which lead to confusion and accidents. White is not allowed for any centerline, nor are other colors. Some entities believe they are exempt from national standards and whether it is a road or a path (such as the green centerline on the bike paths around the Twin Cities), the color for a centerline is yellow.

At the approach to a cross street, the dashed centerline should be replaced with a solid line. A vehicle slowing to turn left may not use a turn signal. One indication to the driver approaching from the rear is a solid line to indicate a no passing area through the intersection. Many jurisdictions continue a dashed centerline along a road in advance of intersections and through intersections. The centerline is an important guide feature for the driver, whether it is used to delineate a curve or to inform the turning or following motorist of an intersection ahead. Generally roads over 16 feet wide should have a centerline. The exception is the residential streets.

XI. CLEAR ZONES

A short amount of history is necessary to explain how we arrived at the point we are currently. Before the 1960's it was thought that if anyone ran-off-the-road, it was due to their own error

and heaven help them. When objects kept getting hit by vehicles leaving the road, traffic engineers made the objects bigger and heavier. The best example is the traffic signal post located in the median. Because they kept getting hit and knocked over, the maintenance people built larger and larger concrete bases around them. These came to be known as drunk catchers. In the 1960's, a new wave of safety arrived. Research conducted on the inter-state highway system showed that if an area 30 feet (10 M) outside of the traveled way (edge of the traveled lane, not the edge of the shoulder) could be kept clear of objects, about 85 percent of the errant motorists would be safe. The other 15 percent were going to go outside the 30 foot (10 m) clear zone, but that risk was accepted. The original studies were done for 70 mph (100 kph) highways and high volumes (i.e. the interstate system). Objects within this area were removed (first choice), relocated, made breakaway, or protected. The clear zone concept was subsequently applied to other highways. The 30 foot (10 m) clear zone was not cost effective for lower speed and lower volume roads. The recent approach takes into account the speed limit on the road, the volume, the side slope and whether a curve is present. In urban areas, the clear zone is not applied in most cases because the speeds are low, 30 mph (44 kph) or less and a curb is often present to slow or redirect vehicles leaving the road. Roadways with higher speeds, 40 (60) and above and with higher volumes, should have the clear zone concept applied to them.

The offender most often encountered in the clear zone is the utility pole. Recent cases in California have required all utility poles within the clear zone to be breakaway and to have reflective material on them. The minimum distance for a 40 mph (60 kph) roadway for the clear zone is about 15 feet (4.6 m). That is, everything within the 15 foot (4.6 m) distance should be considered when examining the roadway; trees over 4 inches (0.1 m) removed, utility poles made breakaway or relocated, culverts covered or extended, guard rails installed on steep side slopes and signs made breakaway. An interesting dilemma is the mail box. In rural areas the mail box is responsible for many fatalities. The box itself is located at windshield height and enters the passenger compartment. The posts on which the mailboxes are located often are made strong to prevent them from being knocked down or blown over. Yet, the postal department requires the mailboxes to be placed on the edge of the shoulder or traveled lane, at the start of the clear zone.

The area adjacent to the shoulder is called the side slope. Since the first design books were published in the 1920's, the requirement has been to make the side slope be gentle enough such that vehicles would not overturn. The ideal side slope is 6:1, that is 6 feet horizontally for every foot drop. The recommended side slope is one which is more gentle than 4:1 (25 percent slope). Consistently the research has shown that all vehicles

will overturn at a side slope steeper than 3:1, which is the absolute minimum within the clear zone. Vehicles with a higher center of gravity will overturn between 4:1 and 3:1 and the closer to 3:1, more vehicles will overturn. Steep side slopes within the clear zone must be protected, normally with guard rails.

XII. TRAFFIC CONTROL DEVICES

Stop signs are to assign right-of-ways at an intersection. Should every intersection have some sort of traffic control device? Well, not quite. The rural intersection which has good visibility and low volume and both roads have about the same low volume, possibly not. In an urban area where many obstructions to sight distance exist on the corners, definitely yes. Should they all be Stop signs? Probably not. The alternative to be considered is the Yield sign.

Many studies have shown that what is called peripheral vision does not exist for a moving driver. The driver of a vehicle only sees a certain width in front of them called the committed zone. Objects on crossroads, such as other vehicles, are not seen until the other vehicle is to close to react to it. The higher the speed, the less the peripheral vision is.

The most likely location where traffic control devices contribute to accidents is where the signs are not posted in the customary locations. A four-way intersection with one Yield sign and two Stop signs is inviting trouble. A three way intersection where the long leg of the intersection does not stop is also asking for trouble. Driver expectation has to be upheld. Anything which is different, unusual, unexpected or strange does not belong in the highway environment. Signing should meet the common sense test as well as the guidelines of the MUTCD:

1. Fulfill a need.
2. Command attention.
3. Convey a clear, simple meaning.
4. Command respect of road users.
5. Give adequate time for proper response.

Some examples might help. The sign "Slow Children", what does it mean? It depends on who you ask. Motorists see the sign so often that they ignore them. When children are asked what the sign means, the overwhelming response is that it means they are allowed to play in the street. I don't think that was the intent of the sign. The sign post which has 4 or 5 more signs on it is not a clear simple message. At major intersections at night, the

lack of adequately sized reflectorized street name signs does not allow for a proper driver response.

In addition to the MUTCD as a guide to what signs and locations are appropriate for signing, the Traffic Control Devices Handbook is the guide for installing signs and markings. The MUTCD has three categories; shall, should and may. A Stop sign shall be red, but no requirement exists to install the sign. However, if the decision to install the sign is made, it shall be at least 7 feet from the ground to the bottom of the sign and should be at least 6 feet from the edge of the shoulder, and may be an oversized sign if deemed appropriate.

XIII. PAVEMENT

The pavement can contribute to the accident. An old worn pavement which has little friction available can cause a vehicle on a curve to leave the road. Often the aggregate used in the concrete or asphalt is limestone. Over time limestone polishes and becomes quite slick, particularly when wet. Another cause of slick pavement is the bleeding of asphalt through to the surface. The portion between the tire tracks may have good traction whereas the tire track area is shiny and slick because of excessive oil. A main highway in this area has had a rough overlay applied at each intersection because of a pronounced rear end accident problem; drivers have difficulty stopping on the slick surface. Another contributor to accidents is the ruts which develop in pavement over time due to poor base or wear. The ruts collect water (or frozen water) and cause hydroplaning. As the pavement wears, overlays should be applied to encourage water to leave the surface. Newer pavement designs have an open course (a lot of spaces between the aggregates) on the surface and drain off the water just below the surface. This reduces hydroplaning and also spray from large trucks and thus improves visibility.

On gravel roads, the common problem is washboarding. Numerous accidents, and in particular fatal accidents, are attributable to a washboard road. To remove a washboard requires some work but also requires that the local jurisdiction have a knowledge of why they occur and how to get rid of the rough section. The name used for the grader seen on rural gravel roads "motor patrol" has the added meaning of examining the road for problems. Normally, the washboard section has to be broken up, wetted and rolled and the cause of the washboarding removed. The cause is often poor drainage or poor base.

The edge of the pavement is important. When pavement is freshly put down, asphalt in particular, a lip is present between the new and old pavement. This lip has been the source of many accidents. Another problem is when the old pavement is to be resurfaced. Sometimes a machine is used to take up part of the old pavement. As a result, a lip is also present between the part of

the pavement which has not been milled and the milled portion. Unless motorists are warned of the presence of the lip, it can be a source of vehicles losing control. Many narrow roads still exist in the inventory. The most troublesome area is where the narrow road does not have a paved shoulder. The interface between the asphalt and the gravel tends to ravel or fall away. Also, because the lanes are narrow, vehicles wander onto the shoulder more often than with wider lanes. The result is a ditch along the edge of the asphalt. Unless the maintenance personnel are constantly attending to the ditch and rut, this becomes a source of motorists losing control as a wheel falls off the edge of the pavement.

CONCLUSION

In conclusion, accidents which have a contributing cause due to the roadway are not easy to discern. Often the cause is hidden in the meaning of the signal, sign or marking and the driver has reacted subconsciously to something which under other circumstances would have been correct. We try to condition the driver to respond the same way every time the same device or sign is displayed. When the device or sign is misused, the driver is confused. Also, the related traffic engineering contribution may be somewhat remote from the accident scene. The signs leading up to the scene of the accident and the signs up ahead of the scene which led to the congestion which caused the accident may not be readily apparent when standing at the accident scene. Let me end with another example of how we have built in a danger. Children using a school bus have been taught to use the school bus as protection while crossing the street. That is, cross the street in front of the school bus while the lights are flashing. Because we still have people who do not stop for school buses, we install signs advising motorists to stop for a school bus with flashing lights (another sign to hit). Also, we have added more lights to the bus and have now added a red stop sign which comes out from the side of the bus with red flashing lights on the sign. After teaching our children for 12 years to cross in front of the bus, we find that a leading cause of pedestrians being killed is by walking in front of the transit bus and being hit by the car coming by or the bus. Signs are posted in the transit buses saying "do not cross in front of bus." We spend the next 12 years unlearning what we spent the first 12 years being taught. We have not quite reached the level of consistency which is desired.

Persons who drive through an accident scene after the fact, often have a feeling that something is not quite right with the roadway, signs, marking or something else to do with the roadway. In most cases, I have found these hunches are correct and once identified, everyone says, "I knew something just wasn't right."

BIBLIOGRAPHY

Manual of Traffic Engineering Studies (Fourth Edition), Institute of Transportation Engineers

Manual of Traffic Signals Design, Institute of Transportation Engineers

Roadside Design Manual, American Association of State Highway and Transportation Officials

Traffic Control Devices Handbook, U.S. Department of Transportation

A Policy on Geometric Design of Highways and Streets, American Association of State Highway and Transportation Officials

Design of Urban Streets, U.S. Department of Transportation

Manual on Uniform Traffic Control Devices, U.S. Department of Transportation

Transportation and Traffic Engineering Handbook (Fourth Edition), Institute of Transportation Engineers

HANDLING NOVEL ISSUES IN

ACCIDENT RECONSTRUCTION

By

David B. Daubert, P.E.
Search Engineering, Inc.
Waconia, Minnesota

Table of Contents

I. INTRODUCTION

The field of collision analysis has taken a sudden change since the first of the new millennium. The change as we enter the new millennium relates to the data which can be gathered concerning a collision. The black box which has received notoriety for providing information on the airplane crash has now come to the motor vehicle. This presentation will address the issues of the black box related to vehicles, both passenger vehicles and commercial vehicles.

II. CRASH DATA RETRIEVAL

The electronic computer located on vehicles since the early 1990's has done many tasks including providing fuel to the engine, monitoring emissions and activating the supplemental restraint system or air bag. However, not all of the data which was being monitored was being recorded for future access. The first question which arose was who owned the data. The automobile manufactures have taken the position in the past that the data belonged to them and they were not going to provide the data to anyone. The first company to break with this thinking was General Motors. In 1998, GM changed their position to now say that the data belongs to the owner of the vehicle. It is not clear at this time whether that means the owner themselves, the lien holder or the insurance company, although the case law concerning ownership of the black box in an airplane crash seems to apply to the motor vehicle. In any event, once that decision was made to give ownership of the data to some other party, a method of accessing the data had to be developed. The company which makes the electronic diagnostic tools seen in a vehicle service shop is Vetronix. GM contacted the company to develop a system of accessing the data within the vehicle computer module. The National Transportation Safety Board has advocated the installation of recorders capable of storing crash data. The GM system meets the first step in that data gathering process. Some data, although erratic is available from GM vehicles from 1990 to 1998. Vehicle manufactured in 1998 and newer have a different data gathering system and much more data is available.

III. WHERE TO FIND THE DATA

The data which is being gathered is contained in the module used to deploy the airbag, the module called the Sensing and Diagnostic Module (SDM). The SDM can be located in a number of locations on the vehicle including under the instrument panel, between the front seats or under the front seat. The module is small, approximately 4 inches by 4 inches by 1 inch and is silver and not black! The data is stored in the SDM is accessible forever. The module does not have to be in the vehicle to be accessed. The Crash Data Retrieval system will access the module after the module has been removed from the vehicle.

IV. THE SDM

As the name implies, the Sensing and Diagnostic Module records data which is sensed. Since the

data which is sensed relates to whether the air bag is deploying or not, the data relates to the air bag. The air bag has two levels of awareness. The first part is the waking of the air bag sensing module. The first step alerts the air bag to a possible collision and readies the air bag system to a second signal to deploy the air bag. Some items which can wake up the system are sudden maneuvers, hard braking, bumps, anything unusual which the air bag module senses. If this is not followed by a collision, the air bag sensor goes back to sleep to await the next message to wake up. The waking up process is kept in the sensor for 250 ignition sequences. Since it is like a running tape, the last items are kept in the memory and erased after 250 ignition sequences. In reading the modules on a number of rental cars, it was noted that the air bag module was activated a number of times. This indicates the rough handling of the rental car. Therefore, if one rents a vehicle and has treated the vehicle badly, sit at the airport and turn the ignition on and off 250 times to erase the memory of the trip.

V. PRE-CRASH DATA

Currently four items of data are available from the vehicle:

- Vehicle speed
- Throttle position
- Engine RPM
- Brake status

This data is available at one second increments for the five seconds before the collision.

VI. POST CRASH DATA

A number of pieces of data are available from the after crash data file. This data includes:

- The state of the seat belt, whether the driver's seat belt was fastened or not.
- The status of the passenger side air bag switch. Some vehicles have the ability to turn off the passenger side air bag
- The number of ignition cycles since the last event, as mentioned above, this will tell how many times the air bag has been alerted to a pending event even though the event did not occur.
- The change in velocity or Delta-V of the event. From an injury analysis, this is the most important piece of data as it indicates the severity of the collision

The SDM will also record a second event. For example, the vehicle collides with another vehicle and the air bag deploys, the event is recorded. If a second collision now occurs, the air bag has already deployed and is not available to protect the occupant. This second event will also be recorded. In multi-vehicle collisions, this could be important to determine whether the first event caused the injuries or the second event.

VII. ADDITIONAL INFORMATION AND THE FUTURE

Some other uses for the data include determination of a sudden acceleration. The data shows the percent of wide open throttle and also the brake pedal position. The other data which is being incorporated in the 2001 SDM and in future modules include:

- Whether the anti-locking brakes were working and what the ABS was doing in the time before the collision, was the vehicle skidding or not. Along with this, the condition of the road surface can be determined, ice, snow, wet or dry by the amount of force needed to activate the ABS.
- Many vehicles now display the outside temperature in a display above the driver. This data will be recorded along with the direction the vehicle was facing. This will go a long way in determining who was traveling in which direction on those cases where a collision occurs with no witnesses and no survivors.
- The steering wheel position will be recorded. The motion of the driver, what the driver did in the way of steering just before the collision will be recorded.
- Those vehicles with global position systems will record the position of the vehicle along with the time of various events. The collision which occurs in the night and the time of the collision is unknown will now be able to be determined, for example, the run-off-the road collision in the middle of the night.
- An automatic collision notification system is being developed for automatic dialing to the nearest 911 center providing a recorded message concerning the collision and location of the vehicles.

The only vehicles for which the data is currently available are General Motors vehicles. However, Ford Motor Company is currently in negotiation with Vetronix and has supplied the necessary data to decode the black box on Ford vehicles. The European manufactures have expressed an interest in providing access to the data on their vehicles. The Asian manufactures have not shown any interest in providing access to the data.

VIII. VALIDATION

As with any new device, the questions arises whether the data is accurate. In testing done by both the National Highway Traffic Safety Administration and the National Transportation Safety Board, the results from the Crash Data Retrieval was compared with other electronic monitoring of the collision. The results matched from both sources.

IX. COMMERCIAL VEHICLES

Only four manufacturers of commercial diesel engines are in business currently, Mack, Detroit, Cummins and Caterpillar. In an effort to increase mileage of the commercial truck, heavy trucks manufactured in the late 1990's are equipped with an electronic control module (ECM). All aspects of the engines operation are monitored by the ECM and data stored in the ECM. The

data available is similar to that from the SDM for the passenger vehicle but includes additional

- Vehicle speed
- Engine speed (rpm)
- Throttle position
- Brake sensor
- Overall fuel economy
- Idle time
- Number of hard braking occurrences
- Number of vehicle overspeeds
- Clock
- Engine governed speed

If the vehicle wheels decelerate at a rate of 10 ft/sec^2 (approximately 0 32 friction factor) or more, the ECM takes a snapshot of the vehicle at that time. The data is continuously monitored and the recorder notes the data for 1 minute before the rapid braking and for 15 seconds afterwards in one second increments. Instead of only 5 seconds of data from the passenger vehicle, the commercial vehicle will provide 75 seconds of data. The total data available is show in the attached table.

Recent developments with the ECM include a Lithium battery which acts as a backup for times when the normal external power sources - either the truck battery or alternator - is removed. The life of the Lithium battery is expected to be 4 to 6 years. Even if the truck or engine is located a number of years after the collision, the data will still be available. The ECM is located, normally, on the lower driver's side of the engine. A connector is located under the instrument panel in the truck for access to the ECM. If the cab is damaged, the ECM can be accessed directly on the unit or removed from the unit and accessed later

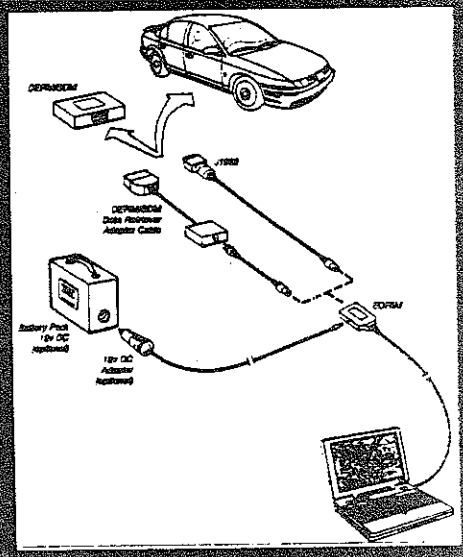
X CONCLUSIONS

For those vehicles which are equipped with sensing devices and which can be accessed, the question of what the driver was doing at the time of the collision can be determined from the vehicle data. The driver who states a speed at which they were traveling can now be determined up to 5 seconds before a collision. The data will also show where the driver reacted to a situation. As the fleet of vehicles change and more manufacturers provide the computer programs to access their data, the field of reconstruction will change to provide more reliable data

The Opportunities Are Vast

- 18,000 Tow-away crashes per day
- Equivalent to about $600 million worth of crash tests per day (18,000 crashes * $35,000 / test)
- Current total production of crash tests conducted for US vehicles is estimated around 5,000 / year

Vetronix Crash Data Retrieval (CDR) System



Background

- Need for real world crash data - crash pulses
- Today - methodology based on observation of post crash vehicle deformation
- Need for more detailed data to define crash conditions (pre-impact conditions, detailed deceleration data)
- Recommendations from NTSB & JPL

National Transportation Safety Board

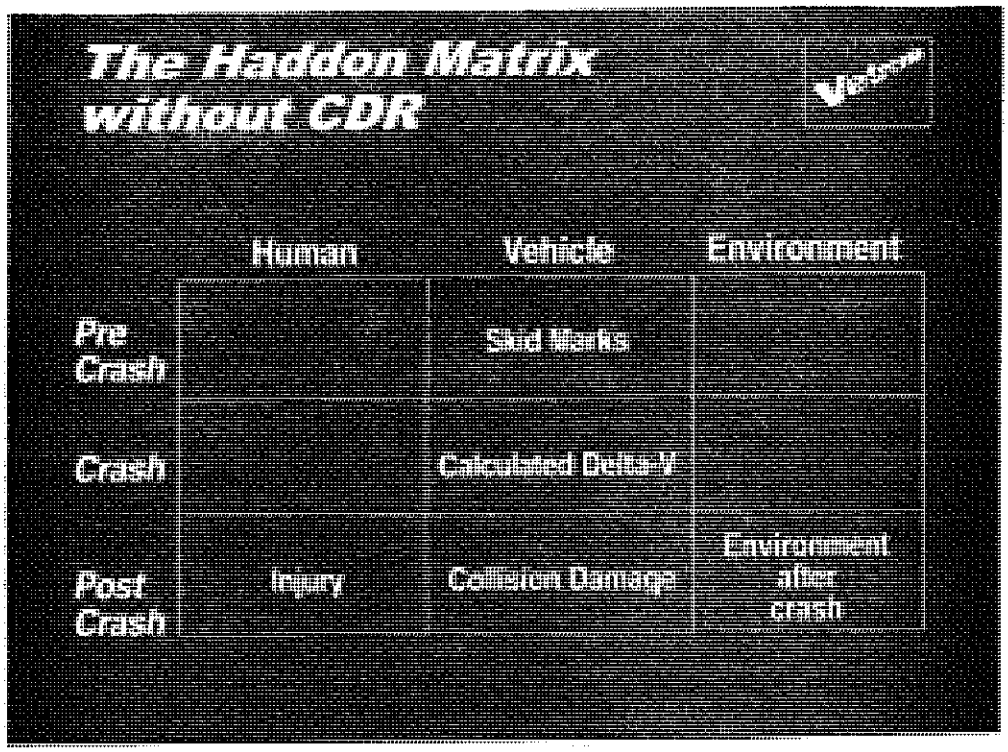
- NTSB public forum on air bags and child passenger safety (March 1997)
- NHTSA (H-97-18)
  - "Develop and implement, in conjunction with the domestic and international manufacturers, a plan to gather better information on crash pulses and other crash parameters in actual crashes, utilizing current or augmented sensing and recording devices."

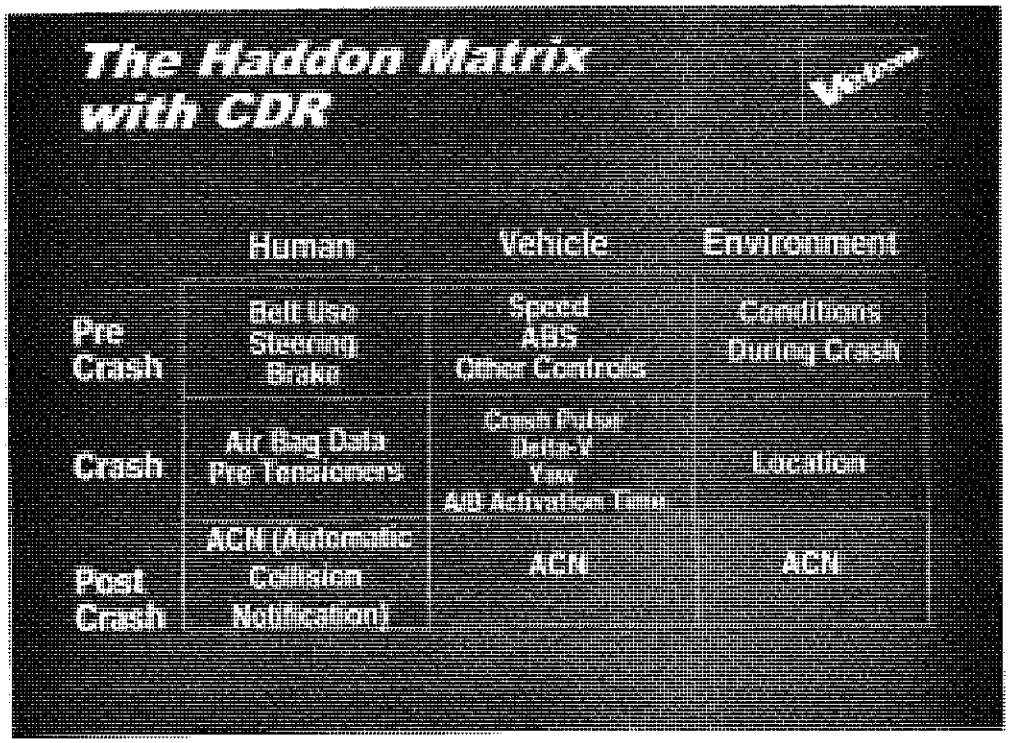
Jet Propulsion Lab (JPL)

- 1997 recommendation for NHTSA to work on Crash Data Retrieval Systems
- Study feasibility of installing and obtaining crash data for safety analyses from crash recorders on vehicles
- JPL findings
  - Crash recorders already exist on some vehicles with electronic air bag sensors, but data recorded are determined by the OEMs
  - These recorders could be basis for an evolving data recording capability that could be expanded for safety and other purposes

JPL (cont'd)

- Emergency rescues - information could be combined with occupant smart keys to provide critical crash & personal data to paramedics
- Questions of data ownership and data protection would have to be resolved, however
  - Where data ownership concerns arise, consultation with experts in the aviation community regarding use of aircraft flight recorder data is recommended


The Haddon Matrix without CDR
Human
Vehicle
Environment
Pre Crash
Skid Marks
Crash
Calculated Delta-V
Post Crash
Injury
Collision Damage
Environment after crash


The Haddon Matrix with CDR
Human
Vehicle
Environment
Pre Crash
Belt Use
Steering
Brake
Speed
ABS
Other Controls
Conditions During Crash
Crash
Air Bag Data
Pre Tensioners
Crash Pulse
Delta-V
Yaw
AIB Activation Time
Location
Post Crash
ACN (Automatic Collision Notification)
ACN
ACN

Potential Uses of Crash Data

Category	Potential Examples
Improve Vehicle Design/Highway Infrastructure	Vehicle systems - airbag sensing system deployment criteria highway systems - roadside safety feature design standards
Provide a Basis for Regulatory & Consumer Information Initiatives	- driver frontal impact severity - average/extreme vehicle decel pulses
Provide Objective Data for Crash Reconstruction	Aborted defects & Injuries - pre-crash vehicle accelerations - crash & airbag deployment sequence
Develop an Objective Driver Behavior Database	- pre-crash driver braking/steering - belt use - vehicle speed

Types of Crash Events

Near Deployment Event

- Pre-Crash Data (Engine Speed, Vehicle Speed…)
- Crash Data (Seat Belt, Warning Lamp Status…)

Deployment Event

- Pre-Crash Data (Engine Speed, Vehicle Speed…)
- Crash Data (Seat Belt, Warning Lamp Status…)

Number of Events and Duration Stored

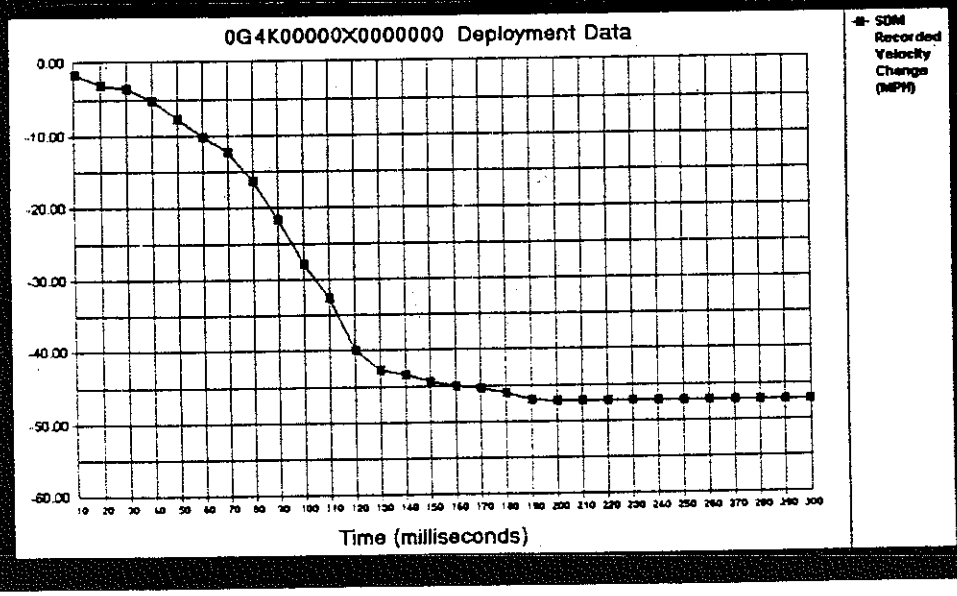
Near Deployment Event

- Stores one event
- Cleared after 250 ignition cycles or
- Overwritten by a greater Vehicle Forward Velocity Change (Delta V)

Deployment Event

- Stores up to two events
- Cannot be erased
- Replace SDM

Post-Impact Data



Data Summary Table

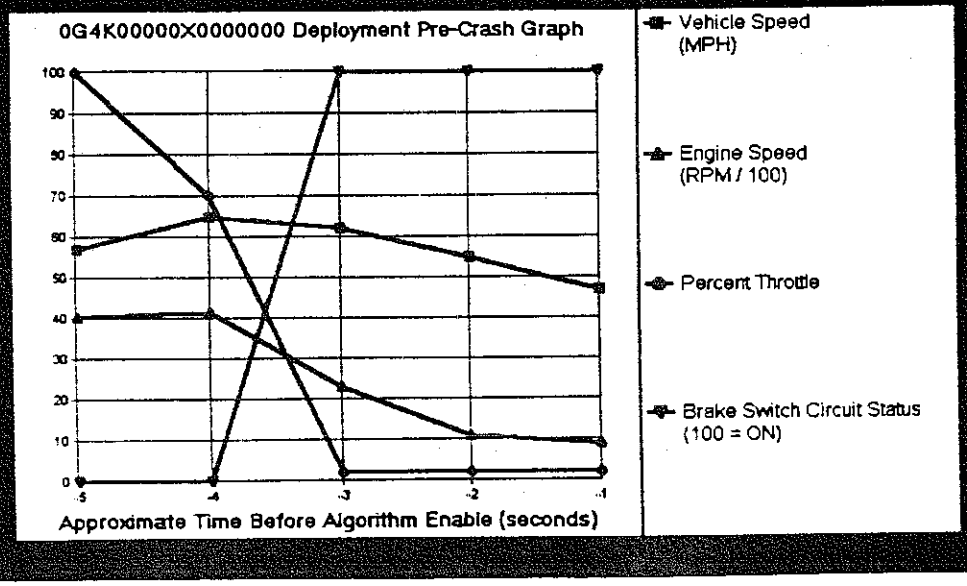
SIR Warning Lamp Status	OFF
Driver's Belt Switch Circuit Status	UNBUCKLED
Passenger Front Air Bag Suppression Switch Circuit Status	ON
Ignition Cycles At Deployment	187
Ignition Cycles At Investigation	213

-5	57	4032	100	OFF
-4	65	4160	70	OFF
-3	62	2304	2	ON
-2	55	1098	2	ON
-1	47	896	2	ON

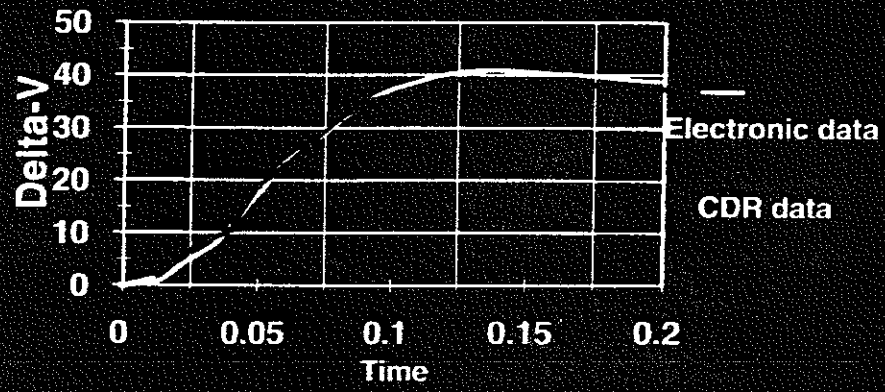
	-1.54	-3.07	-3.51	-5.27	-7.68	-10.09	-12.29	-16.24	-21.50	-27.86	-32.69	-39.93	-42.76	-43.44	-44.32
	-44.99	-45.42	-46.07	-46.95	-47.17	-47.17	-47.17	-47.17	-47.17	-47.17	-47.17	-47.17	-47.17	-47.17	-47.17

	N/A

Pre-Impact Data



Validation



NHTSA Case with CDR Involvement

Delta-V

- Struck a heavy, parked truck in a severe bumper under-ride impact.
- Such crashes typically generate long crash pulses.
- WINSMASH estimated a Delta-V of 23 mph.
- The investigator noted this Delta-V estimate appeared to be low.
- Data from the on-board recorder indicated a Delta-V of approximately 50 mph.

Belt Use

- Belt use status unsure Investigator.
- CDR was read.
- CDR indicated "Belt Used."
- CDR was correct.

Chevrolet Malibu

Cases Involving Vetronix's Data Retrieval System

MY - Make - Model	Driver Belted: Field	Driver Belted: CDR	Delta-V (mph): SMASH	Delta-V (mph): CDR	Comments
1998 Chevrolet Malibu	Y	N	23	50	Final seat belt determination was "not belted" Severe under-ride
1995 Saturn SL	N	N	13	16	Very minor damage
1996 Geo Metro	Y*	Y	19	20	*Physical evidence indicated shoulder portion of the belt under the driver's arm
1995 Saturn	N	N	NR	11	Driver stated belt used, no physical evidence
1996 Oldsmobile 98	Y	Y	NR	17	Under-ride - visual of 14-18 mph
1995 Chevrolet Lumina	N	N	12	24	Under-ride, 24 mph @ 150 msec
1995 Geo Metro	Y	Y	14	9	The report writer specified the SDM Delta-V data as more representative of this crash
1995 Geo Metro	N	N	NR	11	Undercarriage impact Visual estimate of 9-14 mph
1998 Pont. Grand Prix	Y	Y	NR	2	Inadvertent deployment

NR = No Results

Conclusions

- Potential to greatly improve highway safety
- NHTSA's Crash Data Retrieval Working Group will establish guidelines for future on-board data recording capability
- CDR Data is now being stored in NHTSA's National Crash Data Bases

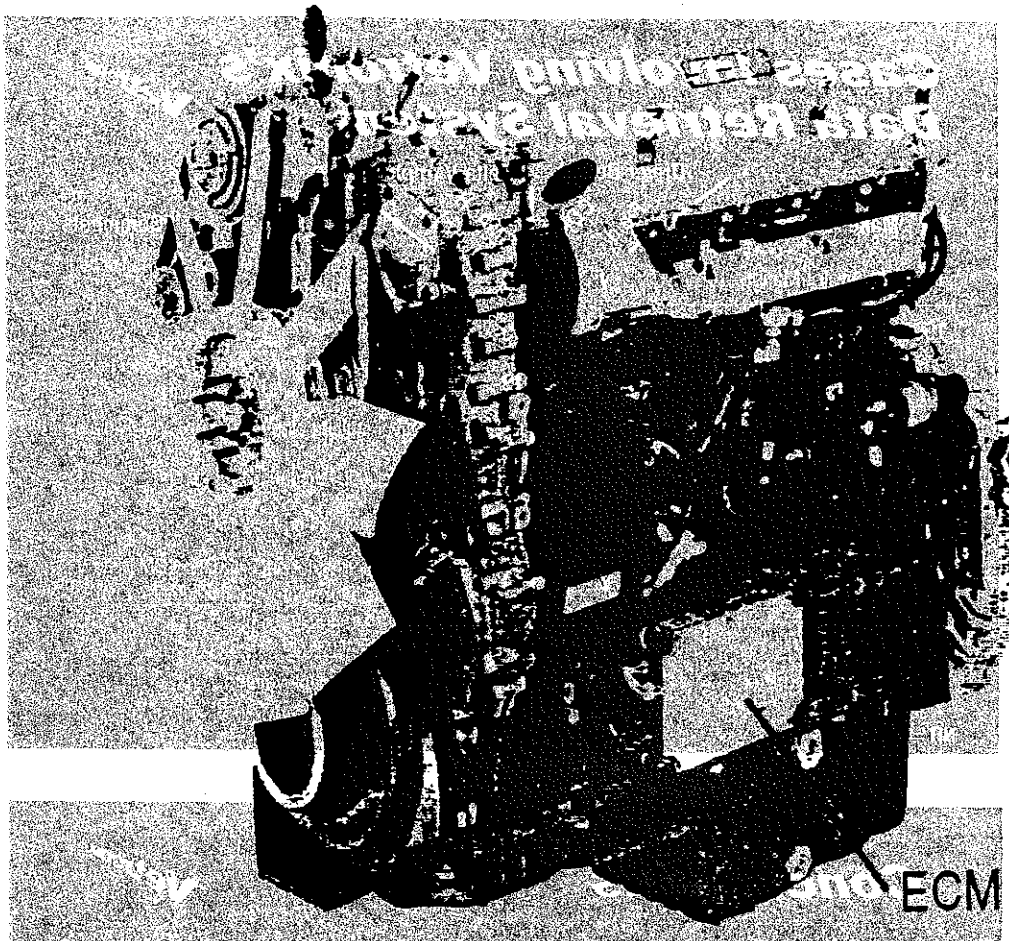


Figure 1- Detroit Diesel Series 60 Engine

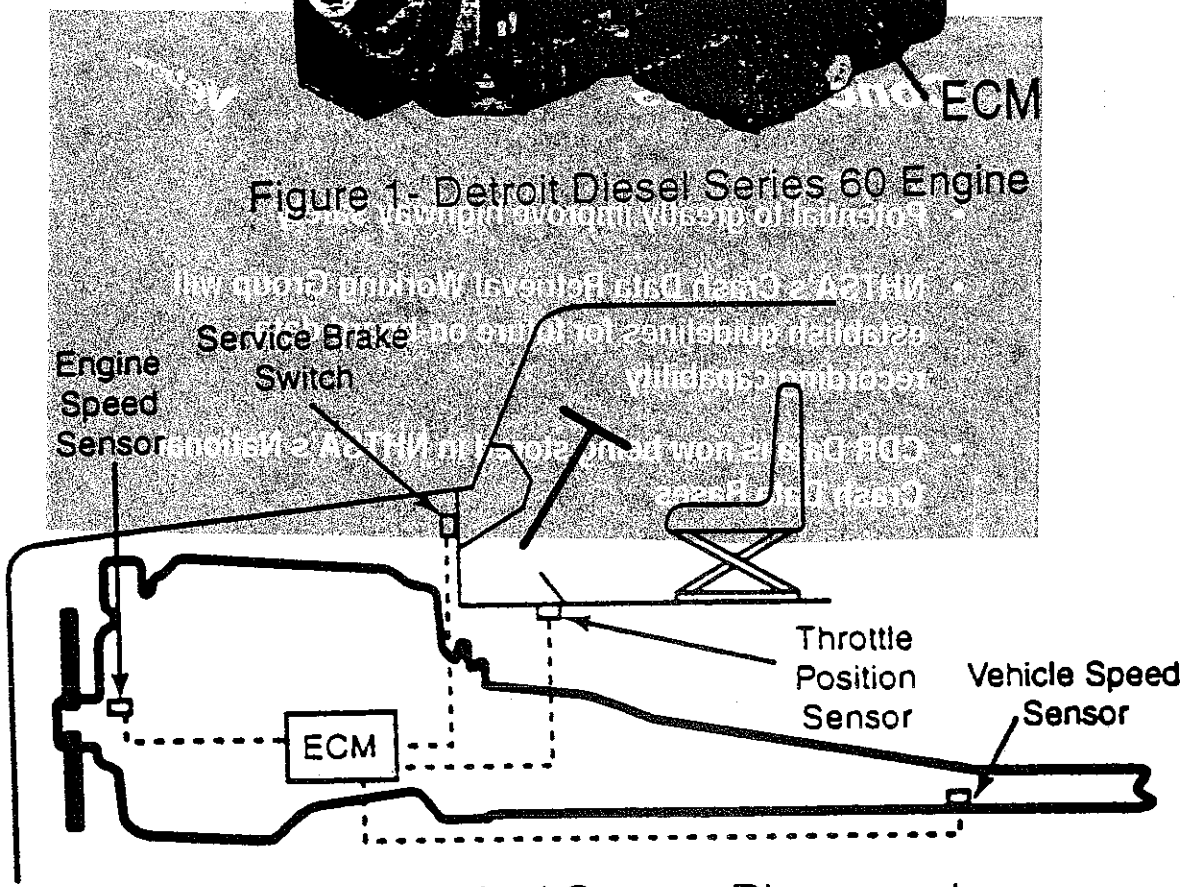
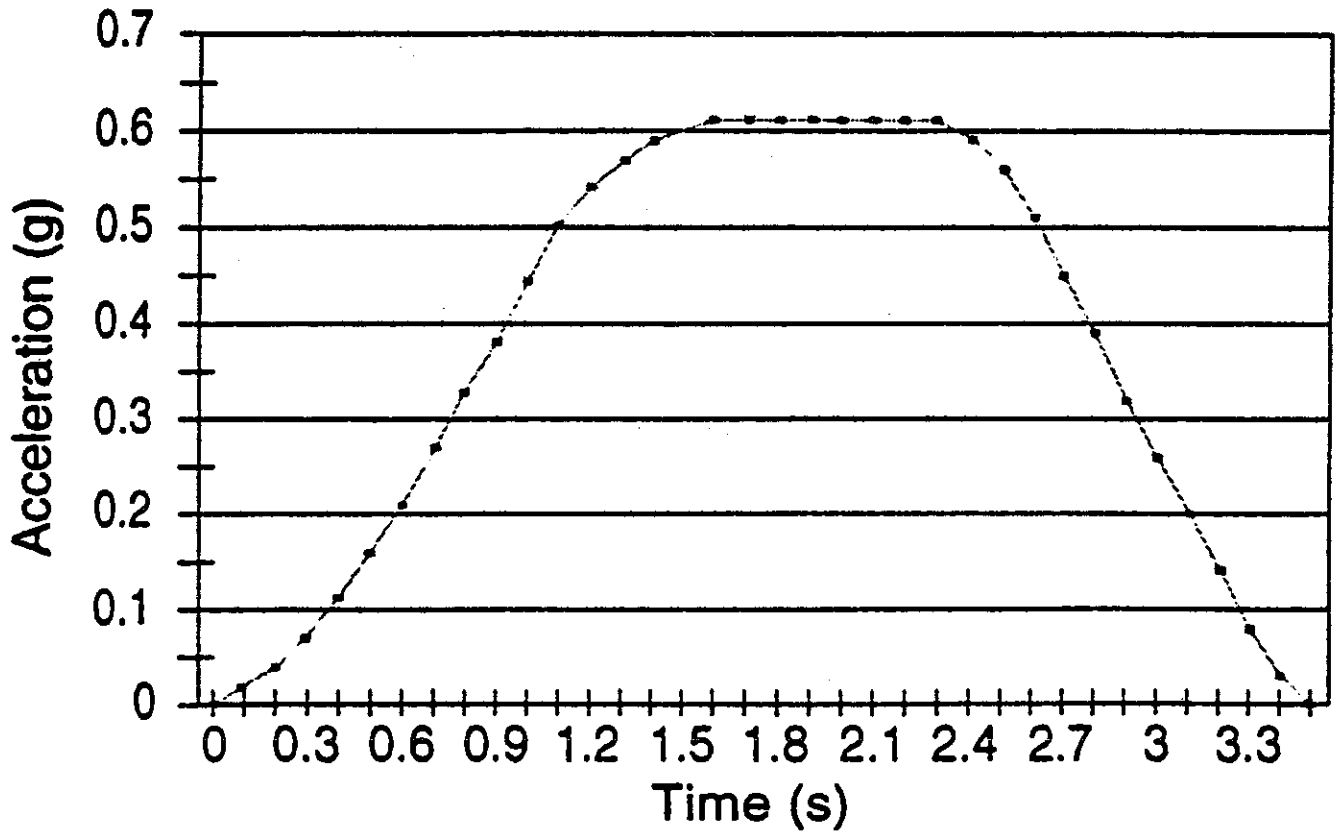
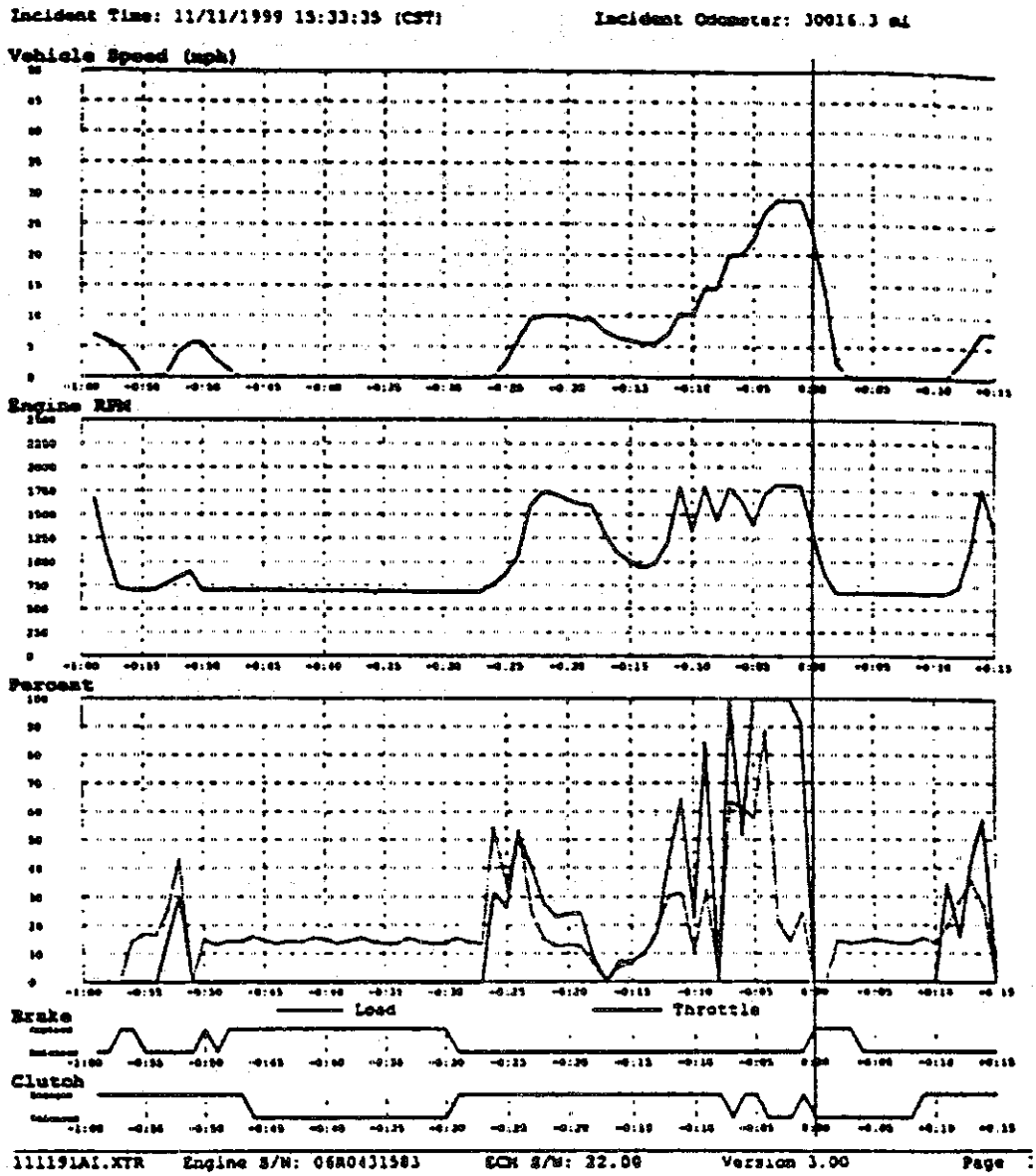


Figure 2- Typical Sensor Placement

Table 1 - Engine and Vehicle Parameters Monitored and/or Controlled by the Electronic Control Module

TOTAL VEHICLE DRIVING TIME	TOTAL VEHICLE DRIVING DISTANCE	TRIP DRIVING TIME
TRIP DISTANCE	FUEL CONSUMPTION (GAL/HR)	OVERALL FUEL ECONOMY (MPG)
LOAD FACTOR	IDLE TIME	AVG. DRIVING SPEED
VEHICLE SPEED LIMIT	ENGINE GOVERNED SPEED	# OF ENGINE OVERSPEEDS
MAXIMUM VEHICLE SPEED RECORDED	MAXIMUM ENGINE SPEED RECORDED	# OF VEHICLE OVERSPEEDS
# HARD BRAKE INCIDENTS	CURRENT THROTTLE POSITION (%)	CURRENT VEHICLE SPEED (MPH)
CURRENT ENGINE SPEED (RPM)	BRAKE SWITCH STATUS (ON/ORR)	CLUTCH SWITCH STATUS (ON/OFF)
MAX. AND MIN. CRUISE SPEED LIMITS	ODOMETER	CLOCK




Incident Time: 11/11/1999 15:33:35 (CST)
Incident Odometer: 30016.3 mi
Vehicle Speed (mph)
Engine RPM
Percent
Load
Throttle
Brake
Clutch
111191AI.XTR
Engine S/N: 06R0431583
ECM S/W: 22.00
Version 3.00
Page

EMPLOYMENT LAW UPDATE

JAMES C. HANKS
DANIELLE J. LATHAM
AHLERS, COONEY, DORWEILER,
HAYNIE, SMITH & ALLBEE, P.C.
100 COURT AVENUE, SUITE 600
DES MOINES, IOWA 50390
(515) 243-7611
jhanks@ahlerslaw.com

The following is a summary of employment law cases decided by the U.S. Supreme Court, Eight Circuit Court of Appeals, the Supreme Court of Iowa, and other federal courts during the years 2000 and 2001. This summary is not an exhaustive review of all employment law cases during this period of time.

I. ARBITRATION

In 1925, Congress enacted the Federal Arbitration Act (FAA). In order to achieve its purpose, the FAA compels judicial enforcement of a wide range of arbitration agreements. In a 1995 case, **Allied-Bruce Terminix Co. v. Dobson**, 513 U.S. 265 (1995), the Supreme Court interpreted the words "involving commerce" in the FAA's coverage provision, §2, to have an expansive reach. What was left undetermined, however, was the interpretation of the exemption clause found in §1. The exemption clause provides the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1 (2000).

A. After some debate in the Circuit Courts, the Supreme Court recently had the opportunity to interpret the exemption clause in **Circuit City Stores, Inc. v. Adams, 121 S.Ct. 1302 (2001).**

Upon applying for a job at Circuit City Stores, Saint Clair Adams signed an employment application that included a binding arbitration clause that covered any and all employment disputes. Two years after being hired, Adams filed a lawsuit against Circuit City in state court alleging employment discrimination based upon California's Fair Employment and Housing Act and asserting other state tort claims. Circuit City filed suit in federal court seeking to enjoin the state-court action and to compel arbitration. The District Court entered the requested order, but the Ninth Circuit Court of Appeals reversed, holding that the arbitration agreement was contained in a "contract of employment", and therefore, was not subject to the Federal Arbitration Act (FAA). The Supreme Court reversed the Ninth Circuit and held that the FAA applied to Adam's employment with Circuit city.

In **Circuit City**, The Court in noted that § 2 of the FAA reaches to the full extent of Congress' commerce power, which includes employment contracts. **Circuit City**, 121 S.Ct. at 1308. The Court also focused upon §1, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court employed the statutory canon of *ejusdem generis* to interpret the clause "any other class or workers engaged in . . . interstate commerce" as referring to employees who are similarly situated to seamen and railroad employees. Id. at 1308-1309. The Court ultimately held that "[s]ection 1 exempts from the FAA only contracts of employment of transportation workers." Id. at 1311.

The significance of **Circuit City** becomes apparent when viewed within the context of the Supreme Court's prior holdings. In **Southland Corp. v. Keating**, 465 U.S. 1 (1984), the Court held that Congress intended the FAA to apply in state courts, and to preempt state anti-arbitration laws to the contrary. See id. at 16. It was not surprising, therefore, that the attorneys general of 22 States provided *amici* briefs objecting to a reading of §1 that would allow the FAA to cover employment contracts. Many state statutes restrict arbitration of employment claims. In the Iowa Code, for example, the section upholding binding arbitration clauses within written contracts makes an exception for "[a] contract between employers and employees." Iowa Code § 679A.1(2)(b) (2001).

B. **Lyster v. Ryan's Family Steak Houses, 239 F.3d 943 (8th Cir. 2001)** is an Eighth Circuit case that demonstrates the utility of arbitration agreements in employment contracts. Kathy Lyster made a sexual harassment claim to the EEOC and the Missouri Commission on Human Rights and received a right-to-sue letter. She subsequently filed an action alleging unlawful sexual harassment against her former employer, Ryan's Family Steak Houses, Inc (Steak House). At the time Lyster submitted her application for employment, she signed an arbitration agreement with Employment Dispute Services, Inc. (EDSI) which provided that Lyster would submit any employment-related dispute with Steak House to arbitration. Steak House was named as a third-party beneficiary of the Agreement. Lyster argued that the arbitration agreement terminated when her employment with Steak House ended. The wording of the arbitration agreement, however, stated that all employment related disputes would be arbitrated "even if the Agreement has been terminated since the date of the claim." Id. at 947.

The court found that the contract was valid, and according to the clear wording of the contract, Lyster was bound to submit her claims to arbitration. The court also refused to find the agreement an unconscionable adhesion contract, stating that Lyster had not established that undue harshness existed in the terms of the

agreement in light of Missouri law governing unconscionability. The court remanded with directions to enter an order compelling arbitration in accordance with the terms of the Agreement, and to enter an order staying the proceedings pending resolution of the arbitration.

While the Eighth Circuit refused to find the agreement in **Lyster** unconscionable, the Eighth Circuit recognized two years ago in **Dobbins v. Hawk's Enterprises**, 198 F.3d 715 (8th Cir. 1999) the potential that substantial arbitration fees may make an arbitration agreement unconscionable. **Dobbins**, 198 F.3d at 717.

C. The Supreme Court has recently addressed the issue of arbitration fees in **Green Tree Financial Corp.-Alabama v. Randolph, 121 S.Ct. 513 (2000)**. In that case the Court held that the party seeking to invalidate an arbitration agreement because of prohibitive arbitration fees bears the burden of proof and the possibility of such party incurring prohibitive costs is too speculative to invalidate an arbitration agreement where the record reveals only that the agreement is silent on the subject of arbitration costs. Id. at 522.

D. **Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Nixon 210 F.3d 814 (8th Cir. 2000), cert. denied, 531 U.S. 958 (2000),** is another arbitration case decided by Eighth Circuit, but this case has a slightly different twist. In this case, an arbitrator ruled in favor of the employer. Then, the employer brought an action seeking to enjoin the Missouri Commission on Human Rights from proceeding with discrimination claims in an administrative action against the employer on behalf of the employee. The district court enjoined the Commission from seeking monetary relief but allowed the Commission to proceed with injunctive relief. On appeal by the Commission, the court of appeals affirmed in part, vacated in part and remanded. The Court of Appeals held that the arbitration of discrimination claims constituted a final judgment for purposes of collateral estoppel and res judicata, thereby precluding either the employee or the Commission from proceeding against the employer for monetary relief. The Court found that monetary relief was highly individual in nature and that when the Commission seeks such an award, the Commission acts more as a representative for the employee than as a separate entity seeking to vindicate public rights. The Court also found that the Commission was an arm of the state and was entitled to immunity from suit under the eleventh amendment. The Court therefore directed the Commission to be dismissed from the suit, allowing it to pursue injunctive relief against them employer.

A case similar to **Nixon** is currently pending before the Supreme Court: **EEOC v. Waffle House Inc., No. 99-1823.** This case arose in the Fourth Circuit, and it deals with an EEOC action for injunctive relief that was barred by employee's agreement to arbitrate statutory discrimination claims.

II. ELEVENTH AMENDMENT AND STATE IMMUNITY

A number of recent cases from the Supreme Court and the Eighth Circuit have helped to define the breadth of state immunity from suit based upon the 11th Amendment.

A. **In Kimel v. Florida Board of Regents, 528 U.S. 62 (2000),** the main issue was whether the states were immune from employment claims brought under the ADEA. The case was a consolidation of appeals all involving age discrimination where the state employer filed a motion to dismiss based on immunity under the Eleventh Amendment. The Eleventh Circuit held that the ADEA does not abrogate the state's Eleventh Amendment immunity, and the Supreme Court affirmed the judgment of the Court of Appeals.

The Court's analysis of the state sovereign immunity question was composed of two parts. First, the Court focused upon the statutory issue of whether Congress intended to override the States' immunity through the federal law. Second, the Court addressed the constitutional issue of whether Congress acted pursuant to a valid grant of constitutional authority.

Addressing the statutory issue, the Court stated, "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Id. at 73. The ADEA incorporates the enforcement provisions found in the FLSA as well as including its own enforcement provision in subsection 626(c). The Court found that "the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." Id. at 74.

The Court then turned to the constitutional issue. The Court employed the congruence and proportionality test. According to the Constitution, states may discriminate on the basis of age as long as the classification is rationally related to a legitimate state interest. Even so, the Court still might have been willing to uphold the ADEA's enforcement provision against the states had the legislation identified a widespread pattern of age discrimination by the states. The ADEA's legislative record did not reveal evidence of any such discrimination. Ultimately, the Court stated:

> In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the

> ADEA is not a valid exercise of Congress' power under §5 of the Fourteenth Amendment. The ADEA's purported abrogation of the State's sovereign immunity is accordingly invalid.

Id. at 91. The effects of Kimel, however, may not be the complete elimination of an employee's suit against a state employer for age discrimination. As the Court indicates, almost all states have some form of age discrimination statute. Id. The ultimate effect of **Kimel** may be that state employees will bring their age discrimination claims under state law.

B. Almost a year after **Kimel** was decided, the Supreme Court heard another case dealing with the Eleventh Amendment and state immunity. This time, it was the ADA that was the focus of the case. **In Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001)**, the Court determined that the Eleventh Amendment prohibits the application of the ADA to a state entity. The Court again applied the two-part analysis. Such a suit is permissible only when Congress (1) unequivocally acts to abrogate the states' immunity and (2) acts pursuant to a valid grant of constitutional authority. Just as in **Kimel**, the Court found that the first requirement had been satisfied but that the second had not.

The Court examined §5 of the Fourteenth Amendment, the equal protection clause. The Court held that states may treat the disabled differently from other people so long as there is a rational relationship between the disparity of treatment and the legitimate governmental purpose. Once again, the Court was unable to find within the legislative record any evidence that revealed a widespread pattern of employment discrimination against the disabled by the states. Although Congress heard incidents of adverse action against disabled individuals by the states, it is not clear that the states acted irrationally based upon discriminatory intent. The Court held that the States were immune from suits brought by state employees under the ADA. It is important to note, however, that the Court did not decide the constitutionality of Title II of the ADA, which pertains to services, programs, or activities of a public entity.

C. In between the Supreme Court's decision in **Kimel** and **Garrett**, the Eighth Circuit decided a case that dealt with state immunity from FMLA suits. **In Townsel v Missouri, 233 F.3d 1094 (8th Cir. 2000)**, the Court affirmed the dismissal of plaintiff's FMLA claim against the State of Missouri as barred by Eleventh Amendment immunity. The Court stated:

> The key point is that the FMLA makes illegal a great deal of conduct not even arguably prohibited by the Fourteenth Amendment, and provides for remedies a great deal more extensive than the Fourteen

> Amendment could even arguably require. Accordingly, we hold that the FMLA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.

Id. at 1096. All of the circuit courts and district courts to consider the same issue since 1998 have concluded that Congress lacked power to abrogate states' immunity from suit under the FMLA.

D. While the States have been held to be immune from suits brought under the ADEA and the ADA, the same has not been true for cases based upon sex and race discrimination. **In Okruhlik v. University of Arkansas, No. 00-3896, (8th Cir. 2001)**, the Eighth Circuit confirmed that Congress acted pursuant to a valid grant of authority in abrogating immunity under Title VII. Congress acted unequivocally to abrogate the states' immunity, and Congress had the authority to do so under §5 of the Fourteenth Amendment. For both race and sex discrimination, there is a higher constitutional standard and more evidence of wrongdoing by the States.

E. Another area where states have been unsuccessful in establishing the Eleventh Amendment immunity to suit defense is in cases involving Section 504 of the Rehabilitation Act, 29 U.S.C. §794. In **Jim C. v. Atkins School District, 235 F.3d 1079 (8th Cir. 2000)**, plaintiffs, parents of a child with autism, brought a suit against the defendant, the Arkansas Department of Education, alleging that the defendant had failed to comply with its obligations under certain statutes, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

Section 504 of the Rehabilitation Act prohibits "any program or activity" that receives federal financial assistance from discriminating against a qualified individual with a disability. 29 U.S.C. §794(a) (2000). The Rehabilitation Act requires States that accept federal funds to waive their Eleventh Amendment immunity to suits brought in federal court for violations of Section 504. When federal funds have been accepted, the whole state does not lose its immunity to suit, but rather only the department or agency that received the aid. The Eighth Circuit en banc held that statutory abrogation of states' Eleventh Amendment immunity from suit under Rehabilitation Act section prohibiting recipient of federal funds from discriminating on basis of disability was a proper exercise of Congress' spending power.

III. AMERICANS WITH DISABILITIES ACT CASES

The Eighth Circuit has handed down a number of decisions dealing with the Americans

with Disabilities Act (ADA). In particular, the Eighth Circuit has applied and followed previous Supreme Court decisions such as **Sutton v. United Air Lines, Inc.**, 527 U.S. 471 (1999)(rejecting the EEOC interpretive guidance regarding mitigating measures, thus allowing courts to consider the impact of mitigating measures on coverage determinations under the ADA) in defining "disability."

Employment lawyers benefitted from the Circuit's pragmatic application of the ADA. The ADA statutory framework is conceptually difficult. The various EEOC guidelines provide an additional layer to the analysis. Given the typically difficult factual situations involved in these cases, the Eight Circuit is to be commended for taking a consistently pragmatic approach in its analysis.

A. In **Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000),** the court determined whether a person suffering from epileptic seizures could be considered disabled. Rhonda Otting, a J.C. Penney employee, suffered from epileptic seizures two or three times each month. A doctor determined that brain surgery might mitigate her seizures, and she took a two-month medical disability leave to undergo the procedure. Upon returning to work, the Company assigned her to work in the Shoe Department. In addition to her normal employment duties, working in the Shoe Department required Otting to climb a ladder in order to retrieve merchandise. She worked in the Shoe Department for four months without incident, but her seizures continued. Her doctor gave her a restriction stating that she was not to climb ladders until she had been free from seizures for six months.

When J.C. Penney's was notified of Otting's restriction, she was terminated. It was Company policy that any employee with a restriction could not return to work. Otting had worked in different departments in the past including the Fine Jewelry Department and the Housewares Department, neither of which required her to be on a ladder. She requested work in one of the other departments. Despite her requests, J.C. Penney was unwilling to make an exception to its Company policy.

Under the ADA, a "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of an individual." See 42 U.S.C. §12102(2)(A). On appeal, the Eighth Circuit agreed with J.C. Penny's that climbing a ladder was not "a major life activity," but the Court still held that Otting fit the definition of "disability." When she had her epileptic seizures, she "could not speak, walk, see, work, or control the left side of her body;" all of which were "major life activities" that should be considered in determining her disability. Id. at 710, 711. Therefore, despite Otting's attempts to mitigate her seizures, she was still found to be disabled under the ADA. Perhaps a key component of the analysis was the unpredictability of Otting's seizures.

The Eighth Circuit also reinstated the jury's award of punitive damages. When Otting informed J.C. Penney's of her restriction not to climb ladders, J.C. Penney's terminated her. Otting asked if there were available positions in other departments that would have been compatible with her restriction. The Company refused to accommodate her restriction based upon Company policy. In the two months after Otting had been terminated, the Company "hired two full-time sales associates in the Men's and Children's Departments" neither of whom was disabled. Id. at 708. Otting was required to initiate the interactive process, which she did when she asked about positions in other departments. The Company policy interfered with the employer's obligation to engage in an interactive process with Otting to reasonably accommodate Otting's request. The Eighth Circuit determined that J. C. Penney's knew that it "may be acting in violation of federal law," and that such conduct can constitute "malice and reckless indifference." Id. at 711-12.

B. In **Anderson v. North Dakota State Hospital, 232 F.3d 634 (8th Cir. 2000)**, the Eighth Circuit addressed the plaintiff's fear of snakes. Plaintiff was employed by the North Dakota State hospital as a switchboard operator when she learned that a snake had been seen in her work area. She refused to return to her position and took a leave from work for several months. When Anderson returned to work, she was transferred to a different location and given a lower paying position as a nursing assistant. While the Eighth Circuit held that the hospital was immune from suit based upon the Eleventh Amendment, it still addressed the ADA claim.

The Court first looked at what "major life activities" were affected by Anderson's alleged disability. The Court assumed, without deciding, that both driving and working are major life activities. Next, the Court considered whether Anderson's fear of snakes substantially limited her in driving or working. The Court noted that Anderson's inability to drive was a "temporary response," which did not "rise to the level of a substantial limitation." Id. at 636. The Court held that in order for Anderson to show that her ability to work has been substantially limited by her fear of snakes, "she must show that she cannot work in a broad class of jobs." Id. This she was unable to do. At most, she was able to show that she was unable to work in areas where snakes had been seen. As the Court states, "The fact that Ms. Anderson cannot perform one particular job does not constitute a substantial limitation on her ability to work." Id. Therefore, the Court held that Ms. Anderson's fear of snakes does not substantially limit her ability to work.

The Court also summarily dismissed Anderson's claim that the hospital regarded her as being disabled, and therefore, that she was disabled within the meaning of the statute. See 42 U.S.C. § 12102(2)(C). While the hospital did force Anderson to use her sick leave and was aware of Anderson's fear of snakes, the court held that these two facts were insufficient to establish a genuine issue of material fact

on the question of whether the hospital considered her disabled, and summary judgment was appropriate.

C. In **Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011 (8th Cir. 2000)**, the er Eighth Circuit addressed the issues of "reasonable accommodation" and the "interactive process." Cravens was an eighteen-year employee of Blue Cross and Blue Shield who spent a substantial amount of her time typing claim information into a computer system. Cravens was diagnosed with bilateral carpal tunnel syndrome and thus was permanently restricted to little or no keyboard activity. Blue Cross and Blue Shields gave Cravens ten to twelve weeks to find another position within the Company and told her to use the internal application process. Cravens was told that if she could not find another job with the Company, she would be terminated. In the interim, she was retained in her limited duty position. Cravens sent a memorandum to the human resources department requesting "as much assistance as possible." Id. at 1015. Ten weeks later, when she still had not found a job, Cravens was terminated. Cravens brought suit against Blue Cross and Blue Shield on ADA and Missouri Human Rights Act claims. The district court granted summary judgment for Blue Cross and Blue Shields, but the Eighth Circuit reversed.

The Court first found that Cravens was disabled within the meaning of the ADA. Next, the Court found that Blue Cross and Blue Shields could not have reasonably accommodated Cravens within her original position because of the restriction on typing. Finally, the Court found, "[T]he only reasonable accommodation that would have allowed Cravens to continue working for Blue Cross and Blue Shields was reassignment to another position within the company." Id. at 1017.

The Court noted that "reassignment is an accommodation of last resort" and that the "prospect of reassignment does not even arise unless an 'accommodation within the individual's current position would pose an undue hardship.'" Id. at 1019. Furthermore, the reassignment must be for an *existing* position that is either *vacant* or will become vacant in a short period of time. A promotion is not required, and an employer may reassign an employee to a lower grade and paid position if a comparable position is not available. Finally, the reassignment need not be the one requested or preferred by the employee; it merely must be a "reasonable" accommodation.

The Court also held that genuine fact issues existed as to whether Blue Cross and Blue Shields acted in good faith and engaged in the interactive process regarding reasonable accommodations. There is no per se liability if an employer fails to engage in an interactive process. But, for purposes of summary judgment, the failure of an employer to engage in an interactive process is prima facie evidence that the employer is acting in bad faith. Id. at 1021. The Court stated:

> To establish that an employer failed to participate in an interactive process, a disabled employee must show: (1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Id. Blue Cross and Blue Shields knew of Craven's disability, and Craven's had requested assistance. The Court believed that a genuine dispute existed as to whether Blue Cross and Blue Shields made a good faith effort to assist Craven. The opinion seems to suggest that an employer must do more than direct an employee to its internal application process. Once the employee has asked for assistance, the employer must engage in the interactive process and help identify appropriate job vacancies.

D. **Lloyd v. Hardin County, Iowa, 207 F.3d 1080 (8th Cir. 2000)**, is another Eighth Circuit case that addressed the issue of "reasonable accommodation." Lloyd was working for the road department of Hardin County, Iowa, when he injured his spinal cord in a non-work related incident, limiting his ability to walk. His employment duties included locating and replacing broken drainage tiles, clearing snow from roads with a road maintainer, and cutting brush out of ditches with a chainsaw. Lloyd's employer engaged in the interactive process contemplated by the ADA in attempting to see if modifications to the road maintainer would be possible to allow Lloyd to operate it. Despite attempts to accommodate Lloyd, he was ultimately terminated.

The Eighth Circuit affirmed summary judgment for the employer on the ADA claim. While it was possible that Lloyd could drive the road maintainer with accommodation, he could not demonstrate that he could perform the other two essential employment duties with or without accommodation, i.e. replacing drainage tiles and cutting brush. The court held, "[Lloyd's] employer, Hardin County, cannot be required under the ADA to provide him with such a position because that would necessarily entail reallocating one or more of the essential functions of Lloyd's job, which he cannot perform with or without reasonable accommodation." Id. at 1084.

E. Most Courts of Appeal have held that reliance upon a bona fide promotional system based upon seniority does not violate the ADA. The Eighth Circuit included itself within this majority when it decided **Benson v. Northwest Airlines, Inc.**, 62 F 3d 1108 (8th Cir. 1995) in 1995. It reaffirmed that decision in **Boersig v. Union Electric Co., International Brotherhood of Electrical Workers, Local 1439, 219 F.3d 816 (8th Cir. 2000)**, when it held that the ADA

does not require an employer to accommodate a disabled employee by violating a "bona fide" seniority system. Id. at 821. Boersig attempted to maneuver around the holding in **Benson** by invoking a disparate impact theory of ADA liability rather than a reasonable accommodation theory. A disparate impact theory defines discrimination as including the use of "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with a disabilities" unless such criteria are "shown to be job-related for the position in question and [are] consistent with business necessity." 42 U.S.C. §12112(b)(6).

The Court declined to include seniority systems within the definition of "selection criteria" for purposes of 42 U.S.C. §12112(b)(6). The Court reasoned that seniority systems contained in collective bargaining agreements create rights protected by the National Labor Relations Act. The Court was unwilling to disrupt legitimate expectations of union employees unless an employee can show that a seniority system was designed to discriminate against the disabled. The promotional system was found to be bona fide, and the Court affirmed summary judgment for the employer and union.

Unlike all other Courts of Appeal to address the issue, the Ninth Circuit in **U.S. Airways v. Barnett**, 228 F.3d 1105 (9th Cir. 2000)(en banc), held that a seniority system is not a per se bar to reassignment being a reasonable accommodation. In that case, the seniority system in question was not contained within a collective bargaining agreement. The Supreme Court granted certiorari to **Barnett**, and it is currently pending before the Court.

F. **Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000).** The Eighth Circuit held that: (1) claims alleging emotional distress placed employee's medical condition at issue; (2) psychotherapist-patient privilege was waived by a plaintiff who places his or her medical condition at issue; (3) the district court did not abuse its discretion by declining to seal employee's medical records; (4) there was no error in dismissal of emotional distress claims as a discovery sanction; (5) employee suffered no adverse employment actions; and (6) supervisor's abusive conduct did not establish hostile work environment sexual harassment, where there was no evidence it was based on employee's sex.

G. **Cargill, Inc. v. Conely, 620 N.W.2d 496 (Iowa 2000).** In this workers compensation and ADA case, the Court held that, if an employer wishes to preclude the Industrial Commissioner from considering its allegedly discriminatory conduct in making an assessment of industrial disability, the employer must raise the issue at the agency level.

H. **Walsted v. Woodbury County, 113 F. Supp.2d 1318 (N.D. Iowa 2000).** The issue in this case was whether an employer may lawfully discharge an employee

with very limited intellectual ability for work-place misconduct where the conduct in question was arguably not understood as improper by the employee. The Court concluded that plaintiff had generated a genuine issue of material fact regarding whether her mental impairment substantially limited the major life activities of learning, reading, thinking, and concentrating. The Court also concluded that plaintiff had generated a genuine issue of material fact as to whether or not she was an individual with a disability who, with reasonable accommodation, could perform the essential functions of a custodian. The employer's motion for summary judgment was denied.

I. **Berkey v. Henderson, 120 F.Supp.2d 1189 (S.D. Iowa 2000).** In this case, the Court held that forcing an employer to accommodate unpredictable tardiness or absenteeism is unreasonable even if it is the direct result of the employee's disability. Plaintiff's requested accommodation to make up lost time by working over lunch and at the end of the day was held by the Court to be unreasonable because it was unduly burdensome for defendant to reassign the duties of other employees to compensate for the unpredictable tardiness of a single employee.

J. **Flowers v. Southern Regional Physician Services Inc., 247 F.3d 229 (5th Cir. 2001).** An HIV-positive former employee brought an action against the employer under the ADA alleging hostile work environment and wrongful discharge. The United States District Court for the Middle District of Louisiana entered judgment on jury verdict finding in favor of employer on wrongful discharge claim and in favor of employee on hostile work environment claim. The employer appealed. The Court of Appeals held that: (1) cause of action for disability-based harassment existed under ADA; (2) there was sufficient evidence to support finding that employer harassed employee; but (3) there was insufficient evidence to support a finding of emotional harm.

K. **Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. April 13, 2001).** The Fourth Circuit Court of Appeals determined that an action for hostile work environment is available under the ADA, that plaintiff had sufficiently proved that a hostile work environment existed, and that the compensatory damages and medical expenses were appropriate.

L. **Schroeder v. UPS, 2001 WL 739560 (S.D. Iowa 2001).** In this case, the Court found that Plaintiff could not show that her frostbite problem amounted to anything more than a moderate limitation on any major life activity. The Court therefore, held such frostbite did not qualify her for ADA protection.

M. **Kellogg v. Union Pacific Railroad Co., 233 F.3d 1083 (8th Cir. 2000).** Plaintiff's mental impairment, which limited him to a 40-hour work week, did not substantially limit him in the major life activity of working. The Court held that

Defendant's knowledge of plaintiff's mental impairment, without more, was not sufficient to establish a "regarded as disabled" claim.

N. **Taylor v. Nimock's Oil company, 214 F.3d 957 (8th Cir. 2000).** An employee's heart condition which was controlled by medication did not qualify as a disability because her limitations on major life activities were moderate, she had presented no evidence that she could not perform a class of jobs given her weight limit and hour restrictions, and she failed to show that her employer regarded her as having a disability.

O. **Allen v. Interior Construction Services, Ltd., 214 F.3d 978 (8th Cir. 2000).** The Court of Appeals held that: (1) Employee, who worked for company on as-needed basis prior to his injury, failed to show that company's failure to employ him after his injury gave rise to an inference of intentional discrimination, thus defeating prima facie case under the ADA; (2) the employer had no duty, under the ADA reasonable accommodation provisions, to contact employee about available work; and (3) the employee failed to establish pretext.

P. **Kampouris v. The St. Louis Symphony Society, 210 F.3d 845 (8th Cir. 2000).** Affirming summary judgment for the employer on the employee's ADA and ADEA claims, the Court noted that the Plaintiff failed to establish that the symphony orchestra perceived him to be disabled, failed to establish he was capable of performing the job without accommodation, and failed to show the adverse action was discriminatory.

Q. **Maziarka v. Mills Fleet Farm, Inc., 2001 WL 314892 (8th Cir. Apr. 3, 2001).** Affirming summary judgment for the employer on discrimination claims under the ADA and the Minnesota Human Rights Act, the Court held that the Plaintiff presented sufficient evidence to allow a trier of fact to find that he was substantially limited in the major life activity of working due to his chronic, incurable, and unusually severe irritable bowel syndrome, but the Court held that he was not "qualified" because dependable attendance was an essential function of the position.

R. **Lowery v. Hazelwood Sch. Dist., 244 F.3d 654 (8th Cir. 2001).** Affirming summary judgment for the employer under the ADA and Missouri Human Rights Act Claims, the Court held that, because the termination occurred after the most egregious of a series of failures to maintain security at the school district, no reasonable jury could have concluded that there was a causal link between his disability and termination.

S. **Land v. Washington County, Minn, 243 F.3d 1093 (8th Cir. 2001).** Affirming summary judgment for the employer on an ADA claim, the Court held that the

plaintiff did not show that he was qualified for a position as sergeant or field training officer in a larger jail based on his past performance as a corrections officer.

T. **Disability Related Inquires and Medical Examinations of Employees Under the Americans with Disability Act.** On July 27, 2000, the EEOC issued an enforcement guidance regarding disability related inquiries. This Guidance contains the EEOC position on questions such as "may an employer require an employee to go to a health care professional of the employer's (rather than the employee's) choice when the employee requests a reasonable accommodation?" It can be found at http://www.eeoc.gov/docs/guidance-inquiries.html.

IV. Title VII CAP ON DAMAGES

Several cases have been decided in the last year regarding caps on Title VII damages. The Supreme Court issued its decision in **Pollard v. E.I. DuPont** and held that front pay awarded to an employee was not an element of compensatory damages under Title VII. Therefore, front pay is not subject to the Act's $300,000 statutory cap on "compensatory damages".

The Eighth Circuit had previously reached the same conclusion as the Supreme Court on this issue, **Kramer v. Logan School Dist.**, 157 F.3d 620 (8th Cir. 1998). Following **Du Pont**, the Eighth Circuit reaffirmed its position with regard to the damages cap and the Iowa Courts adopted the position in Pollard. A summary of these recently decided cases follows:

A. **Pollard v. E.I. Du Pont de Nemours & Co., 121 S.Ct. 1946 (2001).** A former employee brought action against a former employer for hostile work environment sexual harassment under Title VII, and the District Court entered judgment for former employee. The Sixth Circuit Court affirmed the damages award. The Supreme Court held that front pay was not an element of compensatory damages within the meaning of Civil Rights Act of 1991, and therefore, was not subject to the Act's $300,000 statutory cap on "compensatory damages."

B. **Madison v. IBP, Inc., 2001 WL 704432 (8th Cir. 2001).** The Court of Appeals held that: (1) evidence of harassment and discrimination directed at other employees was admissible; (2) there was sufficient evidence to submit issue of punitive damages to jury; (3) the employee was not entitled to recover damages under Title VII or §1981 for acts committed outside applicable limitations periods; (4) there was sufficient evidence to support recovery of emotional distress damages; (5) the allocation of compensatory damages to employee's Iowa Civil Rights Act (ICRA) claim was warranted, and thus employer was not entitled to reduction of damages pursuant to Title VII; (6) a jury award of compensatory

damages in the amount of $266, 750 for emotional distress was not excessive; (7) the employer was not entitled to reduction of jury award on retaliation and constructive demotion claims; and (8) the Title VII damages limitation provision was constitutional.

C. **Channon v. United Parcel Service, Inc., 2001 WL 793138 (Iowa 2001).** The Iowa Supreme Court held: (1) front pay awarded to a former employee on Title VII claims for sexual discrimination and retaliation was not subject to the damages cap; (2) the trial court should have awarded uncapped compensatory damages of $527,872 on the ICRA claims and capped punitive damages in amount of $300,000 under Title VII; (3) the employee's tortious infliction of emotional distress claim was preempted by ICRA; (4) whether employee's salary was less than that paid to male co-employee due to factors other than sex was an issue for the jury; and (5)whether the employee was subjected to adverse employment action, so as to support claims of sex discrimination and retaliation under ICRA were issues for jury.

V. SEXUAL HARASSMENT CASES

In 1998 and 1999, the United States Supreme Court defined two defenses for employers in sexual harassment cases. Both defenses relate to imputing liability for damages to employers for the conduct of employees. **Burlington Indus., Inc. v. Ellerth**, 524 U.S. 742 (1998) and **Faragher v. City of Boca Raton**, 524 U.S. 775 (1998), concerned **vicarious liability for supervisory harassment, whereas Kolstad v. American Dental Ass'n**, 527 U.S. 526 (1999), considered the circumstances under which the conduct of an employee can be imputed to his employer for liability for punitive damages. In 2000, the Eighth Circuit discussed the **Ellerth/Faragher** affirmative defense in several cases of interest, with two of the discussions involved evidentiary issues. The Eighth Circuit applied various aspects of the **Kolstad** punitive damage analysis in a couple other statutory employment cases.

A. **Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000).** In this case, a Title VII sexual harassment case, the Eighth Circuit addressed the **Ellerth/Faragher** defense and the Supreme Court's holding in **Kolstad**. Id. at 1006-007, 1008-10. Ogden was a store manager for Wax Works. During the last two years of her employment, Ogden's district manager, Hudson, made unwelcome physical advances, propositioned Ogden, mistreated her at work, and finally withheld her annual raise because Ogden would not succumb to his numerous advances. Ogden complained directly to Hudson's immediate supervisor, who agreed to investigate. Id. at 1003-04. In the investigation that ensued, Hudson characterized Ogden's complaints as a "personality conflict," and the investigation focused on Ogden's performance, which had never been questioned before, rather than Judson's conduct. Id. at 1003-05.

Wax Works' sexual harassment policy encouraged employees to report any alleged violations of the policy to a member of management or directly to the Director of Human Services. The policy promised a "thorough" investigation of "all such complaints." Id. at 1005.

In affirming the district court's denial of defendant's motion for judgment as a matter of law on the issue of punitive damages, the Eighth Circuit relied on **Kolstad's** clarification fo "the precise burden a plaintiff must carry to prove malice or recklessness for purposes of 42 U.S.C. §1981a(b)(1). Id. at 1008. **Kolstad** rejected an interpretation of Section §1981(b)(1) which defined punitive damages to require "egregious" conduct and focused on an employer's state of mind. Id.

The Court then found that the jury reasonably rejected the affirmative defense because there was substantial evidence that Wax Works never conducted a "thorough investigation" nor did it take "appropriate action" as promised in the sexual harassment policy. Id. at 1007. In analyzing **Kolstad's** "good faith efforts to comply with Title VII" criteria, the Eighth Circuit held that there was substantial evidence that Wax works minimized Ogden's complaints and performed only a cursory investigation which focused on Ogden's performance rather than on Hudson's conduct. Id. at 1010.

B. **Henderson v. Simmons Foods, Inc. 217 F.3d 612 (8th Cir. 2000).** Plaintiff Henderson alleged that her employer, Simmons, constructively discharged her by not responding to her complaints of sexual harassment against two co-workers. Id. at 613. Henderson worked at Simmons' chicken processing plant for thirteen years before a male coworker began to "persistently and continuously" harass her. Id. at 613-14. Henderson complained and was eventually transferred to a different area almost a year later. After a short period of time, the harasser was moved to Henderson's new area and began working near Henderson again. The harassment began again shortly thereafter. Henderson complained again and Simmons did nothing. Id. at 14.

The Eighth Circuit on review held that: (1) the finding that Henderson was subjected to hostile work environment was supported by the evidence; (2) a finding that Henderson was constructively discharged as a result of a male co-worker's sexual harassment was supported by the evidence; and (3) the jury's award of punitive damages was supported by evidence of the employer's deliberate indifference to the employee's complaints.

C. **Stuart v. General Motors Corp. 217 F.3d 621 (8th Cir. 2000).** In this case, plaintiff Lora Stuart appealed the district court's grant of summary judgment to GM on her claims fo sexual harassment and retaliation. Stuart worked for GM for

eleven years. Id. at 626. Stuart alleged that a pornographic program was installed in a computer delivered to her work area in 1990. Stuart never complained about the pornographic computer program until 1996, however. Id. at 626-27. In July 1996, Stuart complained about (1) the pornographic computer program, (2) the conduct of her supervisor and several coworkers, and (3) offensive posters which were placed in her locker. Id. at 627-28.

In response to Stuart's complaints, GM did all of the following in a timely manner: (1) investigated and considered taking fingerprints of the photos in the locker, but determined too many fingerprints would be in the locker, (2) immediately removed the computer with the pornographic program, (3) checked all other computers for the pornographic program, (4) interviewed thirty people, over a period of a week, inquiry into what they knew about the pornographic program and (5) re-circulated the company's sexual harassment policy and sent a letter to every employee further explaining the policy. Id. at 633.

The Eighth Circuit held that: (1) the employee failed to exhaust administrative remedies prior to bringing a claim of retaliation by discipline; (2) the employee failed to show that alleged sexual harassment was subjectively offensive, as required for hostile environment claim; (3) alleged incidents of sexual harassment did not affect a term, privilege, or condition of employment, as required for hostile environment claim; (4) the employer's response to the sexual harassment complaint was prompt and adequate, precluding liability; and (5) the employee failed to establish that the employer's proffered reason for terminating her was false and a pretext for retaliation.

D. **Stephens v. Rheem Mfg. Co., 220 F.3d 882 (8th Cir. 2000).** The issues before the Eighth Circuit in this case were evidentiary in nature. However, they related to the defendant's reliance on the **Ellerth/Faragher** defense. Stephens sued her employer for hostile environment sexual harassment by her immediate supervisor. The allegations of sexual harassment concerned Stephens' superior's infatuation with her. The jury returned a verdict in favor of the employer, Rheem. Id. at 884.

Prior to trial, Rheem filed a motion asking the district court to exclude rumors of sexual affairs among members of Rheem management and employees. The district court excluded the evidence under Rule 403 of the Federal Rules of Evidence. The Court found that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Stephens argued on appear that the district court should have admitted the evidence notwithstanding the threat of prejudice because the particular evidence would have effectively rebutted Rheem's **Ellerth/Faragher** defense. Id. at 885.

In affirming the lower court and holding that the inclusion of evidence regarding consensual affairs between company management and employees would have been unduly prejudicial, the Court stated the verdict was based upon plaintiff's failure to establish a sexually hostile work environment, not on Rheem's **Ellerth/Faragher** defense. Id.

E. **Williams v. City of Kansas City, 223 F.3d 749 (8th Cir. 2000).** The City of Kansas City appealed a jury verdict in favor of plaintiff Williams on her claims that her supervisor had created a hostile work environment and retaliated against her after she complained. On appeal, the Eighth Circuit affirmed the jury's finding on her hostile work environment claim but found that the evidence did not support her claim of retaliation.

The Court's discussion of the **Ellerth/Faragher** defense came in the context of an evidentiary ruling by the district court. The Court held that **Ellerth/Faragher** defense does not open the door for evidence of incidents occurring after a plaintiff's complaint. The evidentiary errors were harmless, however. Id. at 755. The Court did find error in the decision to allow testimony on affairs of the alleged harasser. The Court found that the affairs were removed in time, one of them being nineteen years ago. The Court ruled that the supervisor's prior affairs were clearly inadmissible because they were of only minimal relevance to any issue in the case. Id.

F. **Hocevar v. Purdue Fredrick Co., 216 F.3d 745 (8th Cir. 2000).** The Court of Appeals held that the employee could not maintain a hostile work environment claim. The Court found no fact question concerning whether the conduct was welcomeness, whether it was based upon sex, and whether it was severe. But the Court held that the employee could not maintain a hostile work environment claim based on a supervisor's use of offensive language or based on four incidents involving other company officials and occurring over a three-year period. On retaliation, the Court found several reasons to preclude summary judgment on Title VII retaliation claim. One of the material issues included the close proximity of the decision to the filing of EEOC sexual harassment charge.

G. **Moring v. Arkansas Dept. of Corrections, 243 F.3d 452 (8th Cir. 2001).** The Plaintiff alleged that the defendant supervisor violated her right to equal protection of the laws under the Fourteenth Amendment by sexually harassing her. Id. at 454. The defendant supervisor engaged plaintiff in a conversation of a sexual nature while she was a passenger in his car. He also appeared barely clothed at the door of plaintiff's hotel room, he sat on her bed, he touched her thigh, and he attempted to kiss her. Id. at 455.

On appeal, the Court held that a single incident of severe conduct can be sufficient for harassment. The Court stated: "Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." Id. at 456. In this case, the Court held that the supervisor's behavior was sufficiently severe to alter the terms and conditions of employment, though it was one isolated incident. Id.

H. **Beard v. Flying J, Inc., 116 F.Supp.2d 1077 (S.D. Iowa 2000).** The Plaintiff brought an employment discrimination case against her former employer. She brought claims of sexual harassment against both her employer and another employee, a constructive discharge claim against her employer, and an assault and battery claim against the fellow employee. Id. at 1081. The jury returned a verdict in plaintiff's favor on the first charge and the last charge, but rejected the constructive discharge claim. Id. All parties filed motions for new trials or for judgment as a matter of law. Id.

On appeal, the Court denied all motions except for partially granting the defendant employee's motion, finding that the jury's original verdict that he did not sexually harass plaintiff should stand where the defendant employer was still liable for the sexually hostile environment claim without a finding of defendant employee's liability. Id. at 1090. The Court also found that the jury was entitled to use evidence of co-employee harassment when deciding sexual harassment claims against the employer and that the employer was liable even the employee was not liable for sexual harassment. Id. at 1084-85.

I. **Ayers v. Food & Drink, 2000 WL 1298731 (Iowa App. 2000).** The Iowa Court of Appeals affirmed a jury award to the employee for $15,000 in damages based upon her sexual harassment and battery claims. While the employee did not contend that she suffered physical injury or loss of mental function as a result of the battery, a showing of actual damages is not an element of battery.

VI. REEVES CASES

Reeves v. Sanderson Pluming Products, Inc., 530 U.S. 133 (2000), addressed the allocation of the burden of proof and the burden of persuasion in applying the **McDonnell Douglas**, burden shifting analysis.

The **McDonnell Douglas** framework consists of three different stages. First, an employee must establish a prima facie case of discrimination. Once a prima facie case has been made, a presumption in favor of the employee is established, and the burden of production shifts to the employer. In the second stage, in order to rebut the presumption, the employer must come

forward with a nondiscriminatory explanation for the adverse employment action taken against the employee. During the third stage, the employee attempts to show that the employer's explanation is pretextual and attempts to create a reasonable inference that the true reason for the adverse employment action stems from discriminatory animus. Although intermediate evidentiary burdens shift back and forth under this framework, the burden of persuasion remains with the plaintiff throughout.

In **Reeves**, the United States Supreme Court agreed to consider the proper legal standard for overturning a jury verdict and granting summary judgment as a matter of law. Although **Reeves** was an ADEA case, it has been applied to other employment discrimination claims.

A. **Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000).** The issue in Reeves was whether a plaintiff alleging discrimination under the **McDonnell Douglas** analysis must only (1) make a prima facie case of discrimination, and (2) present sufficient evidence that the defendant's legitimate business reason was false, but also (3) present evidence that the defendant's real reason for acting was discriminatory. Id. at 2104-05. The Supreme Court rejected the pretext-plus evidentiary standard.

Reeves was fifty-seven years old and a supervisor at Sanderson Plumbing. Sanderson accused Reeves, his immediate supervisor, Caldwell, who was forty-five years old, and another supervisor, who was in his middle thirties, of failing to maintain accurate time records. When Sanderson's management reviewed the time records, they determined that Reeves and Caldwell were responsible for timekeeping problems and for a failure to discipline employees. Even though a jury found for Reeves, the United States District Court for the Northern District of Mississippi determined on a Rule 50 motion that Reeves failed to meet his burden of demonstrating pretext because he had failed to offer independent evidence of discrimination. The Fifth Circuit Court of Appeals Affirmed.

The Supreme Court, on review, noted that Reeves had made a "substantial showing" that the management's proffered explanation was false. Id. at 2107. Reeves produced written records going back a number of years demonstrating the consistency and accuracy of the timekeeping, proof that the timeclock had malfunctioned and, finally, that he was out of town on two days when a particular employee was clocked-in although she was not at work. The Supreme Court emphasized that proof that a defendant's explanation is not believable is simply one form of circumstantial evidence that can be probative of discrimination. Id. at 2108.

In the last year, the Eighth Circuit has responded to the United States Supreme Court's holding in **Reeves**. Prior to Reeves, the Eighth Circuit had not required plaintiffs to meet a "pretext plus" evidentiary standard of discrimination in order to avoid summary judgment.

Following **Reeves**, the Eighth Circuit relied on **Reeves** in several cases to examine the **McDonnell Douglas** analysis and to review evidence in several situations where pretext was an issue.

B. **Scroggins v. University of Minn. 221 F. 3d 1042 (8th Cir. 2000).** In this case, the Eighth Circuit affirmed the University of Minnesota's three-day suspension and subsequent termination of Scroggins, an African-American, who was a custodian at the University. Id. at 1043. The Court decided Scroggins shortly after the Supreme Court filed its decision in **Reeves**. The Eighth Circuit discussed the holding in **Reeves**, stating, "the Supreme Court held that a prima facie case of discrimination combined with sufficient evidence of pretext may support a finding of intentional discrimination. The Court, however, emphasized such a showing will not always be adequate to support a finding of liability." Id. at 1044 (citing **Reeves**).

Scroggins had chronic performance and conduct problems on the job. Id. The University finally terminated him after his supervisor found him asleep fifteen minutes after the end of his official break. Id. Scroggins' termination occurred thirteen days after he filed a complaint with the EEOC based on an earlier suspension. Id. at 1045. The Eighth Circuit found that Scroggins failed to produce evidence of pretext and that his failure to do so defeated both his Title VII claim of racial discrimination and his claim of retaliation.

In dealing with the temporal connection between Scroggins' protected conduct of filing a charge with the EEOC and his termination, the Court determined that Scroggins' "intervening unprotected conduct eroded any causal connection that was suggested by the temporal proximity of his protected conduct in his termination." Id. at 1045 (citing **Kiel v. Select Artificials, Inc.**, 169 F.3d 1131, 1136 (8th Cir.), cert. denied, 528 U.S. 818 (1999)). In other words, being fired for sleeping on the job, a bona fide work rule, trumped any causal connection that could have been suggested by the brief thirteen-day time period between Scroggins' filing his charge and his termination.

The Court did not reach the **Reeves** issue relating to independent evidence of discriminatory intent, since it found that Scroggins had failed to produce evidence of pretext or to establish a prima facie case of retaliation. However, the Eighth Circuit's did discuss pretext evidence in Scroggins, and this discussion provides some guidance for future cases.

C. **Fisher v. Pharmica & Upjohn, 225 F.3d 915 (8th Cir. 2000).** In this ADEA case, the Eighth Circuit cited the holding in **Reeves**. The Eighth Circuit stated:

> [T]he court made clear that additional, independent evidence of

> discriminatory animus is not always required to support an inference of discrimination, and that evidence supporting the plaintiff's prima facie case and exposing as pretextual the employer's reason for an adverse employment action should be considered, along with any other evidence that may exist, in determining whether an inference of discrimination has been raised.

Id. at 922. In this particular case, the court was not forced to decide whether the plaintiff's prima facie case and evidence of pretext would alone support an inference of discrimination. The plaintiff also had evidence of stray remarks made by the vice president and other supervisory personnel including: "We need to get rid of the old guys," "[W]anted to bring some of the younger people along faster," and the plaintiff occasionally being referred to as "the old guy." Id.

The Court concluded that these stray remarks constituted circumstantial evidence, and when considered in conjunction with the plaintiff's prima facie case and evidence of pretext, they gave rise to an inference of intentional discrimination. Therefore, the Court reversed the trial court's grant of summary judgment to the defendants.

D. **Taylor v. QHG of Springdale Inc., 218 F.3d 898 (8th Cir. 2000).** In this case, the Eighth Circuit addressed the holding in **Reeves**, but stated that it was not applicable. The Court stated that the plaintiff had failed to produce evidence of pretext. The Eighth Circuit affirmed the district court's grant of summary judgment and stated, "**Reeves** only helps [the plaintiff] if she has produced sufficient evidence to reject the legitimate explanation. [The plaintiff] has not, so **Reeves** does not mandate reversal." **Taylor**, 218 F.3d at 900-01.

E. **Dammen v. UniMed Medical Center, 236 F.3d 978 (8th Cir. 2001).** In **Reeves**, the Supreme Court identified two situations in which a defendant could prevail on a motion for summary judgment despite the fact that the plaintiff had established a prima facie case and evidence of pretext. The first situation is where "the record conclusively reveal[s] some other nondiscriminatory reason for the employer's decision," and the second situation occurs when "the plaintiff create[s] only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." **Reeves**, 530 U.S. at 148.

In Dammen v. UniMed Medical Center, 236 F.3d 978 (2001), the Eighth Circuit was faced with the second situation. The Court held, "Even assuming Dammen has presented a prima facie case of age discrimination, the weakness of his prima facie case and the low probative value of his evidence that UniMed's explanation is false convinces us that he has failed to present a submissible case of

age discrimination." Id. at 982. The Court's decision gave life to the Supreme Court's statement in Reeves, "This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability." **Reeves**, 530 U.S. at 148.

VII. FMLA CASES

The Eighth Circuit has recently addressed a number of different issues related to the Family and Medical Leave Act (FMLA). Some of those issues include: Department of Labor regulations related to notification to employees that their leave is FMLA leave, Department of Labor regulations concerning eligibility for FMLA leave, restoration of an employee's position upon returning from FMLA leave, and clarification of what qualifies as a "serious health condition."

A. In **Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933 (8th Cir. 2000)**, the Eighth Circuit addressed the Department of Labor's FMLA regulations. The regulations in question essentially state that unless an employer prospectively designates leave taken by the employee as FMLA leave, the twelve weeks of leave to which the employee is entitled by the FMLA does not begin to run. The plaintiff in this case was an employee of Wolverine Worldwide (Wolverine) who was diagnosed with cancer. She requested medical leave, and Wolverine granted her request. Wolverine's policy was that an employee who had worked for more than six months could receive leave for up to seven months. While Wolverine ultimately granted Ragsdale seven months of leave, far more than the 12 weeks required by the FMLA, it failed to designate the leave as FMLA leave and notify Ragsdale to that effect.

When Ragsdale had exhausted the seven months of leave and was still unable to work, Wolverine terminated her employment. At this point, Ragsdale requested additional leave under the FMLA. Wolverine stated that all of Ragsdale's leave had been used, and it declined to return Ragsdale to work part time. Ragsdale brought a claim against Wolverine under the FMLA in district court, alleging that Wolverine had not followed the Department of Labor's regulation of designating the leave as FMLA-qualifying, and therefore, that she was entitled to an additional twelve weeks of leave. The district court found the Department of Labor's interpretation of the FMLA erroneous and refused to enforce the provision.

The Eighth Circuit affirmed the district court's ruling. The Court noted that there is a split in authority between the Eleventh and Sixth Circuits as to whether the Department of Labor regulations were to be given deference. The Court decided that the Eleventh Circuit's decision was more persuasive, and it found that the Department of Labor's interpretation was contrary to the clear intent of the

statute. As the court noted, the FMLA requires an employer to provide an eligible employee a minimum of twelve weeks of unpaid leave, but at the same time, twelve weeks is the maximum the statute requires. The Department of Labor's interpretation could require an unwary employer to provide much more than the twelve-week minimum.

While choosing not to follow the Department of Labor regulations in this context, the Court also stated that not all Department of Labor regulations requiring employers to designate leave as FMLA leave would be invalid.

B. The Eighth Circuit has also joined the Seventh and Eleventh Circuits in declining to follow the Department of Labor's interpretation of the FMLA in another situation. In an unpublished opinion, **Evanoff v. Minneapolis Pub. Schs., Spec. Sch. Dist. No. 1, 243 F.3d 1164 (8th Cir. 2001)(per curiam)**, the Eighth Circuit held that the Department of Labor regulation, 29 C.F.R. §825.110(d), conflicts with the plain language of the FMLA. The regulation states that "where [an] employee does not give notice of unexpected need for FMLA leave more than two business days before commencing leave, he will be deemed eligible if employer does not advise him of his failure to meet the 1,250-hours-of-service requirement within two days of receiving FMLA leave request." Id. The Court held that the regulation "is invalid insofar as it purports to extend FMLA's eligibility provision to an otherwise ineligible employee." Id. Although this was an unpublished opinion, it provides some insight into the Court's direction.

C. Addressing the issue for the first time in a reported opinion, the Eighth Circuit recently held in **Hatchett v. Philander Smith College, 251 F.3d 670 (8th Cir. 2001)**, that the FMLA does not require employers to grant employees intermittent leave when the employee is not capable of performing the essential functions of her position.

The plaintiff, Minnie Hatchett, was granted twelve weeks of FMLA leave after being hit in the head by falling debris. When her twelve weeks of leave had ended, Hatchett was still unable to perform the essential functions of her position as Business Manager, and she was not entitled to be restored to her former position. However, Hatchett argued that, if the College had allowed her to work on a reduced schedule, she would have been able to perform the essential functions of her position by the end of the intermittent leave period. The court states, "The purpose of the FMLA is to allow an employee to be away from the job, as opposed to using the statute as a means to force an employer to be directly involved in an employee's rehabilitation." Id. at 676-77. Therefore, the FMLA does not require an employer to grant an employee intermittent leave when the employee is unable to perform the essential functions of her position.

D. Another Eighth Circuit case dealing with the FMLA and restoration is **Cooper v. Olin Corp., Winchester Div., 246 F.3d 1083 (8th Cir. 2001)**. Ms. Cooper worked as an intra-plant locomotive engineer at an Army Ammunition Plant. She had been diagnosed with depression, and various personal problems caused her to take leave at the advice of her doctor. After a period of time, she returned to work with her doctor's release. It was the Company's policy to have its medical department independently review all employees who were returning from leave. The Company assigned Cooper to work in the office answering phones, until the Company doctor could establish that she was capable of running the locomotive. While Cooper was in the office, she maintained her title as locomotive engineer as well as the same amount of pay and benefits. After the third day of working in the office, Cooper again spoke with the doctor who stated that he had not yet spoken with her physician. Cooper again took leave, claiming that the doctor's refusal to let her drive the train and the humiliation of working in the office had caused a relapse of her depression. Two weeks later, Cooper returned to work with a letter from her doctor stating that she could return to work as a locomotive engineer without restrictions. Dr. Olmstead again refused to return Cooper to her engineer position, and the Company directed her to work in the office.

The FMLA requires an employer to return an employee who has been on FMLA leave to the same position she was in or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. The employer may have a uniformly applied practice of requiring the employee to receive certification from her physician, stating that she is able to return to work. Likewise, an employer, with the employee's permission, may seek clarification upon the certification statements. In the meantime, however, the employee is entitled to be restored to her same position or to an equivalent position. The FMLA defines an "equivalent position" as one with *equivalent duties and functions of the job*, as well as the pay, terms, and benefits.

The Eighth Circuit dismissed the district court's grant of summary judgment for the employer and stated that on remand, "the fact-finder must determine whether Cooper's office assignment was an equivalent position within the meaning of FMLA." Id. at 1091-92.

E. The following three Eighth Circuit cases, **Rankin v. Seagate Technologies, Inc., 246 F.3d 1145 (8th Cir. 2001), Stekloff v. St. John's Mercy Health Systems, 218 F.3d 858 (2000), and Caldwell v. Holland of Texas, Inc., 208 F.3d 671 (2000)**, consider whether the plaintiffs' condition qualifies as a "serious health condition" as defined by the FMLA. In all three cases, the district court granted summary judgment to the employer on the employee's FMLA claim. The Eighth Circuit, however, reversed the district court's grant of summary judgment in each of the three cases. The determination that there was a genuine issue of material

fact as to the plaintiff's serious health condition was based upon very fact specific scenarios.

1. In **Rankin**, the plaintiff was at work when she became ill to the point of vomiting in a work bathroom. Between October 1, and October 16, 1997, Rankin did not report to work. On October 2, Rankin visited her health care provider for a regularly scheduled appointment, mentioned her symptoms, but was not prescribed any medication. On October 8, Rankin saw a nurse practitioner who diagnosed Rankin's symptoms as a viral illness and prescribed cough suppressant, decongestant, and an inhaler. The nurse gave Rankin a note stating that she could return to work on October 13. Rankin did not give her employer the note until October 15. She then informed her employer that she had an appointment on October 16. On October 16, Rankin was fired for excessive absenteeism.

   During the October 16 appointment, Rankin's prescription was renewed. Rankin again saw the nurse practitioner on October 22 and 24.

   The Court in Rankin noted, "We have previously observed that although conditions like the common cold or the flu will not routinely satisfy the requirements of a 'serious health condition,' absences resulting form such illnesses are protected under the FMLA when the regulatory tests are met." Rankin, 246 F.3d at 1147. The objective test that the Court used required Rankin to prove "(1) that she had a 'period of incapacity requiring absence from work,' (2) that this period of incapacity exceeded three days, and (3) that she received 'continuing treatment by . . . a health care provider' within the period." Id. at 1148 (quoting **Thorson v. Gemini, Inc.**, 205 F.3d 370, 377 (8th Cir. 2000)). Rankin's evidence that she was incapacitated included her affidavit testimony that she was "too sick to work" and communications detailed in medical records from her October 2 and October 8 appointments. The Court found this evidence sufficient to establish a genuine issue of material fact concerning Rankin's incapacity.

   The district court had determined that Rankin did not satisfy the "continuing treatment" requirement of the objective test. The Eighth Circuit stated, "[T]he fact that an employee is 'sufficiently ill to see a physician two times in a period of just a few days' is all that FMLA requires for 'continuing treatment.'" Id. at 1149 (quoting **Thorson**, 205 F.3d at 379). The Court held that Rankin had established genuine issues of material fact concerning each of the three parts of the objective test. Therefore, the Court reversed the district court's grant of summary judgment.

The **Rankin** case is instructive to employers. Rankin had already received two written attendance warnings prior to the illness in question. On Friday, September 26, 1997, Rankin received a performance evaluation stating that "further absences could result in the termination of her employment." Id. at 1145. On the following Monday, September 30, Rankin got sick at work. Between October 1 and October 16, Rankin did not work, although she claimed that she had continued to update the company regarding her condition. Furthermore, on October 15, Rankin gave her employer a note saying that she could return on October 13. The Court mentions these facts in passing. Even if an employee is merely suffering from a cold or the flu, as long as the regulatory tests are met, an employee is protected by the FMLA regardless of her prior record of absenteeism.

2. In **Stekloff**, the plaintiff claimed that the serious health condition was a result of a mental condition. Stekloff, a psychiatric nurse, got into an argument with her supervisor over personal calls that she had made while at work. After the argument, Stekloff told her supervisor that she was too upset to work and left. Stekloff's doctor met her at her place of employment and gave her a note saying that she should not return to work for two weeks. Stekloff placed the note in her supervisor's mailbox before leaving. Eight days later, Stekloff's employer fired her for "job abandonment."

   The critical issue of the case was whether Stekloff was incapacitated for more than three days. At the same time that Stekloff was working at St. John's as a psychiatric nurse, she was also hired as a nurse for a different company, and she continued to work there even after taking leave at St. John's. St. John's argued Stekloff did not suffer a period of incapacity of longer than three days because she was able to continue working as a nurse for her other employer.

   The Court held that "[A] demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show that the employee is incapacitated, even if that job is the only one that the employee is unable to perform." Stekloff, 218 F.3d at 861. Since it was the environment at St. John's that was "re-injuring a traumatized area of her life," Id. at 860, the fact that Stekloff continued to work for another employer did not preclude her from arguing that she was incapacitated for more than three days, that she was suffering from a serious medical condition, and that she was entitled to FMLA leave.

3. In **Caldwell**, the majority opinion for the Eighth Circuit concluded that an

employee's son, who had an ear infection that later required surgery, suffered from a serious health condition, and the employee was entitled to FMLA leave. Once again, the critical issue was whether the son was incapacitated for more than three days.

On June 7, 1997, Caldwell took her son to an emergency clinic where a doctor diagnosed the son as having an acute ear infection and prescribed enough antibiotics for ten days. The doctor also told Caldwell that her son would need surgery to avoid permanent hearing loss. Following this visit to the doctor, Caldwell claims that her son stayed inside and remained in bed as much a possible. Likewise, either the mother or the grandmother gave the child his antibiotics throughout this ten-day period. Another appointment was scheduled with the child's regular doctor on July 1. The doctor noted that the ear infection was "persistent" and prescribed another ten-day course of antibiotics. On July 17, the child had surgery, after which, he was to remain in bed for one week and take antibiotics.

The Court used an objective two-prong test to decide the case. First, Caldwell had to show that her son's serious illness caused "a period of incapacity of more than three consecutive calendar days." Id. at 674. Second, Caldwell had to show that her son "subsequently received continued, supervised treatment relating to the same condition." Id.

The majority opinion provided three different scenarios that would satisfy the first prong of the test dealing with incapacity. The first scenario describes the incapacitated period as the entire time from June 7- July 17. The second scenario describes the incapacitated period as the ten days after the child's initial visit to the doctor. The third scenario suggests that the incapacitated period could be considered the convalescence after the surgery took place. The Eighth Circuit did not explicitly state which scenario it used to base its decision, but held that the ear infection was a serious health condition.

Another interesting aspect of the **Caldwell** case involves the way in which the employer dealt with Caldwell's absence. Caldwell called her employer on June 7, stating that she would not be able to come into work due to her son's illness. Caldwell went in to work on June 9, the next time she was scheduled, and her manager "abruptly fired [her] without discussing her absence of June 7, 1997." **Caldwell**, 208 F.3d at 673. In response to the employer's actions, the court stated:

> An employer does not avoid liability by discharging an employee who takes leave in order to seek treatment for a

> condition that is later held to be covered by the FMLA. The employer who precipitously fires an employee, when the latter claims the benefits of leave under FMLA, bears the risk that the health condition in question later develops into a serious health condition within the meaning of 29 C.F.R. § 825.114(a).

Id. at 677. Whether the employer intended to free itself from liability is undetermined. The Court makes clear, however, that such an attempt will be unsuccessful.

VIII. OTHER CASES OF INTEREST

A. RACE BASED HARASSMENT

Dowd v. United Steel Workers Union, (8th cir. 6/15/01) (Union liability under Title VII and harassment outside of the workplace.)

Bogren v. State, 236 F.3d 399 (8th Cir. 2000) (Race and gender: comparables must be "similarly situated in all respects.")

Calvin v. Yellow Freight Systems, Inc., 218 F.3d 904 (8th Cir. 2000) ("Having reviewed the case, we agree with the District Court's determination that Calvin failed to come forward with evidence to show that Yellow Freight's articulated reasons for selecting a person other than Calvin for the full-time job were a pretext for racial discrimination.")

Griffin v. Super Valu, 218 F.3d 869 (8th cir. 2000) (The Eighth Circuit did not discuss the holding or significance of Reeves. Nevertheless, the Eighth Circuit carefully considered the quality of Griffin's evidence of pretext, rejecting Griffin's allegations of disparate treatment.)

B. 180 DAY WAITING PERIOD: EEOC

Slaughter v. Catholic Health Services, (SD Iowa 3/1/01) ("The court agrees with the reasoning of the Ninth and Eleventh Circuits and their progeny, that there is no point in making claimants wait around if the EEOC knows it is not going to be able to do anything with their claim.")

C. ADEA CASES

Tatom v. Georgia-Pacific corp., 228 F.3d 926 (8th Cir. 2000) (Court of Appeals held that: (1) there was no legally sufficient evidentiary basis for a reasonable jury to find that

supervisory employee was constructively discharged when he was suspended without pay for 120 days for a safety violation, and (2) even assuming employee established a prima facie case of age discrimination and that there was sufficient evidence for the jury to reject employer's stated reason for imposing the suspension, no rational jury could find that employee's suspension was the result of intentional discrimination based upon age.)

Fisher v. Pharmacia & Upjohn, 225 F.3d 915 (8th Cir. 2000) (Court of Appeals held that: (1) employee's transfer was adverse employment action; (2) employee established that he performed his job at level that met employer's legitimate expectations; (3) fact issues existed as to whether employer's proffered non-discriminatory reasons for transfer were pretextual; and (4) employee raised reasonable inference that age was determinative factor in transfer.)

Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (8th Cir. 2001). Court of Appeals held that: (1) employer's goal of retaining its best employees after reduction in force justified use of lay-off guidelines and employee ranking process; (2) ranking process did not have disparate impact on older employees; (3) legitimate business reason of economic necessity for layoffs was not shown to be pretextual; (4) rankings of older workers that led to their layoffs were not violative of ADEA; (5) statistical evidence did not suggest general climate of age bias; and (6) employer's decision to rely heavily on recent performance evaluations did not render pretextual its lay off of employees.)

DEFENDING THE RECREATIONAL VEHICLE CASE: Chapter 461C Protection of Landowners

William G. Nicholson
Rush Law Firm, P.L.C.
100 1st Street SW, Suite 111
P.O. Box 637
Cedar Rapids, Iowa 52406-0637

I. Statutory scheme of Chapter 461C "Public Use of Private Lands and Waters"

(full text of the statute appears at end of outline)

A. Who is protected?

* Owners of the land (§461C.3)
* "Holders" of the land, defined as "a tenant, lessee, occupant or person in control of the premises" (§461C.2(2))
* "Holder" does NOT include the State of Iowa, its subdivisions or any of its agencies, etc. (§461C.2(2))

B. When are they protected?

* They allow use of their land without charge
* The land is used by others for "recreational purposes"

C. Scope of protection?

* Owners duty of care to keep premises safe or warn of danger is abrogated (§461C.3)
* Owner who leases or transfers interest to United States or its subdivisions for recreational purposes is protected as owner and "holder" (§461C.5)

* Holder does not confer status of invitee or licensee upon user by permitting or inviting the use (§461C.4(2))

* Holder does not assure premises are safe for any purpose by permitting or inviting use (§461C.4(1))

* Holder does not incur liability for acts of the user (§461C.4(3))

D. Limits of protection?

* No protection if a willful or malicious failure to guard or warn (§461C.6(1)

* No protection if the owner charges for the recreational use (payments under leases to governmental units are not charges) (§461C.6(2))

* No protection from doctrine of attractive nuisance (§461C.7(3))

II. Four cases in thirty years.

Originally enacted as Chapter 111C, this provision of the Code of Iowa first was effective in 1971. Since then, only four cases have resulted in reported decisions.

A. Hegg v. U.S., 817 F.2d 1328 (8th Cir. 1987)

(Woman fell from swing at Coralville Reservoir. Defendant's motion for summary judgment affirmed.)

Significant points in opinion:

* the list of activities in the statutory definition of "recreation" is illustrative and non-exclusive

* the fact that a fee was charged to campers is irrelevant here because Hegg was picnicking

* the statutory protection of owners includes governmental owners, not just private persons

* summary judgment was appropriate on "willful or malicious failure to guard or warn" claim in light of no prior injuries on swing, no defect in swing itself and it is "generally acceptable and reasonable" to use soil as a playground material beneath swings.

* it was "critical" to the cases that there was no evidence that the U.S. was aware of any previous injuries at the site or any danger present.

B. Petersen v. Schwertly, 460 N.W.2d 469 (Iowa 1990)

(Trespassing user dove headfirst into farm pond frequently used as swimming hole against owner's wishes. Defendant's motion for summary judgment affirmed.)

* §461C.3 creates a "broad abrogation of duty" for the landowner

* owner need not give permission (distinguishing other state's statutes)

* looks to purpose of user and recreational use of land

* Court noted that §461C.4 was not involved, so it did not address if permissive use is necessary under that provision

C. Scott v. Wright, 486 N.W.2d 40 (Iowa 1992)

(Hayrack ride guest injured when landowner's tractor and hayrack overturned after slipping on wet, grassy slope. Jury verdict for guest affirmed.)

* only two specific duties abrogated (to keep premises safe, to warn of danger); "nothing in the language of [§461C] suggests a legislative intent to immunize all negligent acts of landowners"

* the statutory purpose was to serve "a growing need for additional recreation areas" and the "public's incentive to enter and enjoy private agricultural land would be greatly diminished if users were subject, without recourse, to human error as well as natural hazards."

* claim held to be based on vicarious liability arising from tractor/hayrack ownership and not premises liability, so the "intervening act of negligence" of poor tractor driving "takes the case outside of the purview of" §461C

D. Bird v. Economy Brick Homes, 498 N.W. 408 (Iowa 1993)

(Trespassing motorcyclist injured when he struck a steel cable defendant owner placed across access road. Summary judgment for landowner affirmed.)

* placing cable across the road does not create an issue of fact on "willful or malicious" failure to guard or warn against a dangerous condition, use, structure, or activity

* there were no markings on the cable to warn of its presence

* Hegg case and various States' tests for "willful or malicious" conduct in similar statutes are discussed but no definition or test is adopted expressly

* Scott is cited only for its lack of guidance on "willful or malicious" but no discussion of its limiting statements about the statute and no discussion of human error versus natural hazards

III. Practice Implications

* Ascertain ownership or "holder" status and recreational use by claimant

* Ascertain premises liability theory of recovery ad no other theories

* Ascertain lack of fee or at least lack of fee to injured party

* File motion for summary judgment

461C.1 Purpose.

The purpose of this chapter is to encourage private owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

461C.2 Definitions.

As used in this chapter, unless the context otherwise requires:

1. *"Charge"* means any consideration, the admission price or fee asked in return for invitation or permission to enter or go upon the land.

2. *"Holder"* means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises; provided, however, holder shall not mean the state of Iowa, its political subdivisions, or any public body or any agencies, departments, boards or commissions thereof.

3. *"Land"* means abandoned or inactive surface mines, caves, and land used for agricultural purposes, including marshlands, timber, grasslands and the privately owned roads, water, water courses, private ways and buildings, structures and machinery or equipment appurtenant thereto.

4. *"Recreational purpose"* means the following or any combination thereof: Hunting, trapping, horseback riding, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, motorcycling, nature study, water skiing, snowmobiling, other summer and winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites while going to and from or actually engaged therein.

461C.3 Liability of owner limited.

Except as specifically recognized by or provided in section 461C.6, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

461C.4 Users not invitees or licensees.

Except as specifically recognized by or provided in section 461C.6, a holder of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance that the premises are safe for any purpose.

2. Confer upon such person the legal status of an invitee or licensee to whom the duty of care is owed.

3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

461C.5 Duties and liabilities of owner of leased land.

Unless otherwise agreed in writing, the provisions of sections 461C.3 and 461C.4 shall be deemed applicable to the duties and liability of an owner of land leased, or any interest or right therein transferred to, or the subject of any agreement with, the United States or any agency thereof, or the state or any agency or subdivision thereof, for recreational purposes.

461C.7 Construction of law.

Nothing in this chapter shall be construed to:

1. Create a duty of care or ground of liability for injury to persons or property.

2. Relieve any person using the land of another for recreational purposes from any obligation which the person may have in the absence of this chapter to exercise care in the use of such land and in the person's activities thereon, or from the legal consequences of failure to employ such care.

3. Amend, repeal or modify the common law doctrine of attractive nuisance.

461C.6 When liability lies against owner.

Nothing in this chapter limits in any way any liability which otherwise exists:

1. For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

2. For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land or any interest or right therein, leased or transferred to, or the subject of any agreement with, the United States or any agency thereof or the state or any agency thereof or subdivision thereof, any consideration received by the holder for such lease, interest, right or agreement, shall not be deemed a charge within the meaning of this section.

IOWA PRODUCTS LIABILITY LAW AND TOBACCO LITIGATION

Michael W. Thrall
Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C.
700 Walnut Street, Suite 1600
Des Moines, Iowa 50309
Telephone: 515-283-3189
Facsimile: 515-283-8045
E-mail: mwt@nyemaster.com

I. WRIGHT v. BROOKE GROUP LIMITED, et al., No. C99-3090 (N.D. Iowa) – New theories and new claims

A. Civil Conspiracy

B. Fraud in Failure to Warn Product Liability Context

C. Negligent Undertaking Predicated on Advertisements

D. Manufacturing Defect/Breach of Implied Warranty Applied to Products Sold in Intended Condition, No Different Than Comparable Products

II. JUDGE BENNETT'S RULING ON DEFENDANT'S MOTION TO DISMISS – Wright v. Brooke Group Ltd., 114 F.Supp.2d 297 (N.D. Iowa 2000)

III. JUDGE BENNETT'S ORDER CERTIFYING QUESTIONS OF LAW TO THE IOWA SUPREME COURT

A. In a design defect products liability case, what test applies under Iowa law to determine whether cigarettes are unreasonably dangerous? What requirements must be met under the applicable test?

B. Under Iowa law, can Defendants rely on Comment i of § 402A of the RESTATEMENT (SECOND) OF TORTS to show that cigarettes are not unreasonably dangerous?

C. Under Iowa law, does the common knowledge of the health risks associated with smoking, including addiction, preclude tort and warranty liability of cigarette manufacturers to smokers because cigarettes are not unreasonably dangerous insofar as the risks are commonly known? If yes, then:

1. Between what period of time would such knowledge be common?

2. Is there a duty to warn of the risks associated with smoking cigarettes in light of such common knowledge?

3. Is reliance on advertisements, statements or representations suggesting that there are no risks associated with smoking, including addiction, justifiable in light of such common knowledge?

D. Under Iowa law, can Plaintiffs bring a civil conspiracy claim arising out of alleged wrongful conduct that may or may not have been an intentional tort – i.e., strict liability for manufacturing a defective product or intentionally agreeing to produce an unreasonably dangerous product?

E. Under Iowa law, can a manufacturer's alleged failure to warn or to disclose material information give rise to a fraud claim when the relationship between a Plaintiff and a Defendant is solely that of a customer/buyer and manufacturer?

F. Does an "undertaking" arise under § 323 of the RESTATEMENT (SECOND) OF TORTS, as adopted in Iowa, by reason of a product manufacturer's advertisements or statements directed to its customers?

G. Does Iowa law allow a Plaintiff to recover from a cigarette manufacturer under a manufacturing defect theory when the cigarettes smoked by Plaintiff were in the condition intended by the manufacturer?

H. Does Iowa law allow Plaintiff to recover from a cigarette manufacturer for breach of implied warranty of merchantability when the cigarettes smoked by Plaintiff were in the condition intended by the manufacturer and Plaintiff alleges Defendants' cigarettes are "substantially interchangeable"?

IV. IOWA DEFENSE COUNSEL/DEFENSE RESEARCH INSTITUTE AMICUS BRIEF

V. STATUS OF IOWA SUPREME COURT DECISION ON CERTIFIED QUESTIONS

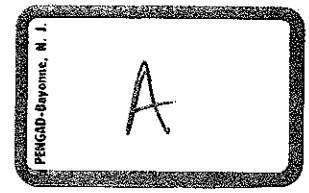
APPENDIX

A. PETITION

B. WRIGHT v. BROOKE GROUP, LTD., 114 F.Supp.2d 797 (N.D. Iowa 2000)

C. ORDER CERTIFYING QUESTIONS OF LAW TO THE IOWA SUPREME COURT

D. IOWA DEFENSE COUNSEL/DEFENSE RESEARCH INSTITUTE AMICUS BRIEF



IN THE IOWA DISTRICT COURT FOR CERRO GORDO COUNTY

ROBERT A. WRIGHT, and DEANN K. WRIGHT,

Plaintiffs,

vs.

BROOKE GROUP LIMITED;
LIGGETT & MYERS, INC.;
LIGGETT GROUP INC.;
PHILIP MORRIS INCORPORATED (PHILIP MORRIS U.S.A.);
PHILIP MORRIS COMPANIES, INC.;
R. J. REYNOLDS TOBACCO COMPANY;
R. J. R. NABISCO, INC.;

Defendants.

LAW N
LA CV 05867

PETITION AT LAW

COME NOW the Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT by their attorneys, WALKER LAW FIRM, P.C., WANDRO & ASSOCIATES, P.C., HAWKINS & NORRIS, BROWN, KINSEY & FUNKHOUSER, P.L.C. and SPOHRER, WILNER, MAXWELL, MACIEJEWSKI & STANFORD, and for their Petition at Law against the defendants, state as follows:

I. PLAINTIFFS

1.1. Plaintiff, ROBERT A. WRIGHT, is and has been at all times relevant an Iowa resident currently residing at 1231 North Hampshire Place, Mason City (Cerro Gordo) Iowa 50317. Plaintiff, Robert A. Wright, is the spouse of Plaintiff, DeAnn K. Wright.

1.2 Plaintiff, DEANN K. WRIGHT, is and has been at all times relevant an Iowa resident currently residing at 1231 North Hampshire Place, Mason City (Cerro Gordo) Iowa

50317 Plaintiff, DeAnn K. Wright, is the spouse of Plaintiff, Robert A. Wright.

II. DEFENDANTS

2.1. Brooke Group Limited (hereinafter generally "Brooke Group") is a Delaware corporation with its principal place of business located at 300 North Duke Street, Durham, North Carolina. Defendant Brooke Group is the parent corporation of Defendant Liggett. At times pertinent to this Petition (including through the present date), Defendant Brooke Group individually and/or through its agent, alter ego, subsidiary and/or division, Defendant Liggett, designed, tested, manufactured, marketed and sold cigarettes for use in the State of Iowa and/or materially participated, conspired, assisted, encouraged and otherwise aided and abetted one or more of the Defendants in doing so.

2.2. Liggett & Myers, Inc. (hereinafter "Liggett & Myers") is a Delaware corporation whose principal place of business is located at 700 West Main Street, Durham, North Carolina 27701. Defendant Liggett & Myers is a wholly-owned subsidiary or division of Defendant Liggett Group, Inc. At times pertinent to this Petition (including through the present date), Defendant Liggett & Myers designed, tested, manufactured, marketed and sold cigarettes for use in the State of Iowa and/or materially participated, conspired, assisted, encouraged and otherwise aided and abetted one or more of the Defendants in doing so.

2.3. Liggett Group Inc. (hereinafter generally "Liggett") is a Delaware corporation whose principal place of business is located at 300 North Duke Street, Durham, North Carolina, 27701. Defendant Liggett is the parent corporation of Defendant Liggett & Myers. At times pertinent to this Petition (including through the present date), Defendant Liggett individually and/or through its agent, alter ego, subsidiary and/or division, Defendant Liggett & Myers,

designed, tested, manufactured, marketed and sold cigarettes for use in the State of Iowa and/or materially participated, conspired, assisted, encouraged and otherwise aided and abetted one or more of the Defendants in doing so.

2.4. Philip Morris Incorporated (Philip Morris U.S.A.) (hereinafter "Philip Morris USA") is a Virginia corporation whose principal place of business is located at 120 Park Avenue, New York, New York 10016. Defendant Phillip Morris USA is a subsidiary of Defendant Phillip Morris Companies, Inc. At times pertinent to this Petition (including through the present date), Defendant Phillip Morris USA designed, tested, manufactured, marketed and sold tobacco products, including cigarettes, for use in the State of Iowa and/or materially participated, conspired, assisted, encouraged and otherwise aided and abetted one or more of the Defendants in doing so.

2.5. Philip Morris Companies, Inc. (hereinafter generally "Philip Morris") is a Virginia corporation whose principal place of business is located at 120 Park Avenue, New York, New York 10016. Defendant Phillip Morris is the parent corporation of Defendant Phillip Morris USA. At times pertinent to this Petition (including through the present date), Defendant Phillip Morris USA designed, tested, manufactured, marketed and sold tobacco products, including cigarettes, for use in the State of Iowa and/or materially participated, conspired, assisted, encouraged and otherwise aided and abetted one or more of the Defendants in doing so.

2.6. R.J. Reynolds Tobacco Company (hereinafter "R.J. Reynolds") is a New Jersey corporation whose principal place of business is 4th & Main Street, Winston-Salem, North Carolina 27102. R.J. Reynolds is a wholly-owned subsidiary of RJR Nabisco, Inc. At times pertinent to the Petition (including through the present date), Defendant R.J. Reynolds

designed, tested, manufactured, marketed and sold tobacco products, including cigarettes, for use in the State of Iowa and/or materially participated, conspired, assisted, encouraged and otherwise aided and abetted one or more of the Defendants in doing so.

2.7 RJR Nabisco, Inc. (hereinafter generally "Nabisco") is a Delaware corporation whose principal place of business is 1301 Avenue of the Americas, New York, New York 10015. Nabisco is the parent corporation of R.J. Reynolds. At times pertinent to this Petition (including through the present date), Defendant Nabisco individually and/or through its agents, alter ego, subsidiary, and/or division, Defendant R.J. Reynolds, designed, tested, manufactured, marketed and sold tobacco products, including cigarettes, for use in the State of Iowa and/or materially participated, conspired, assisted, encouraged and otherwise aided and abetted one or more of the Defendants in doing so.

III. JURISDICTION

3.1. Upon information and belief, plaintiffs and their counsel respectfully submit that the amount at issue in this lawsuit exceeds the statutory minimum necessary to invoke the jurisdiction of this Court.

3.2. Upon information and belief, plaintiff alleges that each of the defendants can be found in and does business in Cerro Gordo County, Iowa, and that they have done so at all times relevant and material to this lawsuit. Further, Plaintiff, ROBERT A. WRIGHT, upon numerous occasions purchased tobacco products in Cerro Gordo County, Iowa, designed, manufactured and distributed by various Defendants.

IV. GENERAL ALLEGATIONS

4.1. Each of the following allegations of this Petition are based upon information and belief and contain material, facts, beliefs and allegations which are not meant to be exclusive or limited by the language thereof.

4.2. Plaintiff, ROBERT A. WRIGHT, purchased and used tobacco products, including cigarettes, designed, manufactured, advertised, marketed and/or sold by Defendants at times material to this Petition. Defendants' tobacco products, including cigarettes, are referred to variously herein as "tobacco products", "cigarette products", "cigarettes" and "products."

4.3. Through a duplicitous and guileful course of conduct over the last half century, Defendants, themselves or through related companies and agents, have manufactured, promoted and sold tobacco products or have conspired to manufacture, promote and sell tobacco products to Plaintiff, ROBERT A. WRIGHT, and other members of the public knowing, but denying and concealing, that the nicotine in their tobacco products is a highly addictive drug, and have, unbeknownst to the public, controlled and manipulated the amount of nicotine in cigarettes for the purpose and with the intent of creating and sustaining addiction.

4.4. Defendants' tobacco products, when used as intended, were highly likely to cause, or contribute to in substantial fashion, a wide variety of human illnesses, injuries, and conditions.

4.5. So highly likely were the serious health consequences of Defendants' tobacco products that over one in three foreseeable users would be expected to suffer premature death

or serious impairment.

4.6 At times material, the ordinary consumer, including Plaintiff, ROBERT A. WRIGHT, did not in the exercise of ordinary diligence know of the likelihood of, or the severity of, the risks from Defendants' tobacco products, which risks are outlined above.

4.7. The Defendants' tobacco products, when used as intended, were highly likely to induce in foreseeable users a state of addiction, habituation, habit formation, and/or dependence, characterized by users' great difficulty in terminating or restricting their chronic use.

4.8. The risks of harm to foreseeable users, as listed in the above paragraphs, would increase in any of the following circumstances:

4.8.1 Greater cumulative consumption, including rate of consumption and length of time the product was consumed; and

4.8.2 Beginning use at an early age in life.

4.9. At times material, Defendants conducted an aggressive marketing and advertising campaign intended to induce, encourage, suggest, and reinforce foreseeable users to purchase their tobacco products. Such marketing and advertising occurred in printed media, on television, radio, billboards and by other means.

4.10. Plaintiff, ROBERT A. WRIGHT, purchased and used Defendants' tobacco products in Cerro Gordo County, within the state of Iowa and in other jurisdictions at times material to this Petition.

4.11. Plaintiff, ROBERT A. WRIGHT, used the Defendants' tobacco products in the intended manner and without significant change in their condition from time of purchase.

4.12. Plaintiff, ROBERT A. WRIGHT, was induced to purchase the Defendants'

tobacco products by Defendants and relied upon the Defendants' superior knowledge regarding cigarette products. The products were impliedly or expressly warranted as safe and Plaintiff, ROBERT A. WRIGHT, was impliedly or expressly instructed in their use by Defendants' advertising, marketing and other efforts.

4.13. As a direct and proximate result of Plaintiff, ROBERT A. WRIGHT's, use of the Defendants' tobacco products, Plaintiff, ROBERT A. WRIGHT, suffered addiction and bodily injury. Some of the injuries and diseases suffered by ROBERT A. WRIGHT include, but they are not limited to, cancer of the right tonsil, severe emphysema, chronic obstructive pulmonary disease, and permanent cellular damage, the full and complete extent of all such injuries being as yet unknown.

4.14. As a direct and proximate result of Plaintiff, ROBERT A. WRIGHT's, use of the Defendants' tobacco products, Plaintiff, ROBERT A. WRIGHT, suffers from severe, permanent and disabling injuries to his mind and body, in particular, but not limited to, damage to his tonsil and cancer, the full and complete extent of all such injuries being as yet unknown.

4.15. As a direct and proximate result of Plaintiff, ROBERT A. WRIGHT's, use of the Defendants' tobacco products, Plaintiff has incurred and will incur in the future doctor, x-ray, hospital, drug and other medical expenses for the necessary care and treatment for Plaintiff, ROBERT A. WRIGHT's, injuries.

4.16. As a direct and proximate result of Plaintiff, ROBERT A. WRIGHT's, use of the Defendants' tobacco products, Plaintiff, ROBERT A. WRIGHT, suffered and will suffer in the future physical and mental pain, suffering, anguish, humiliation, embarrassment and disability, lost the ability to enjoy the fruits and benefits of a normal life, suffered shortened life expectancy

and loss of the function and coordination of his body

4.17 Plaintiff, ROBERT A. WRIGHT, was disabled as a result of tobacco-related diseases and conditions and became addicted to tobacco products, including but not limited to Defendants' tobacco products.

4.18. All of the above damages and injuries sustained by Plaintiff, ROBERT A. WRIGHT, were a direct and proximate result of the negligence of the Defendants, and each of them; the intentional conduct of the Defendants, and each of them; the breaches of contract and express and implied warranties by the Defendants, and each of them; fraud on the part of Defendants, and each of them; the malfeasance, misfeasance and nonfeasance of the Defendants, and each of them; breach of an assumed duty by Defendants, and each of them; and the defective and unreasonably dangerous condition of the cigarette products designed, manufactured, marketed and sold by the Defendants, and each of them, a conspiracy by and between the Defendants, and each of them, and such other wrongful and negligent conduct as is set forth in greater detail below.

4.19. The actions of the Defendants, and each of them, by and through their officers, agents, servants, and employees, were willful, wanton, malicious, and outrageous, in actively concealing the addictive nature of nicotine, the manipulation of nicotine levels in the cigarette products, the intent to addict the cigarette consuming public, and concealing the true nature of their research on the adverse health effects of their products. The actions of the Defendants, and each of them, by and through their officers, agents, servants, employees and other representatives were designed and intended to cause significant harm and addiction to the Plaintiff, ROBERT A. WRIGHT. The actions of the Defendants, and each of them, by and

through their officers, agents, servants, employees and other representatives, were intended to deceive Plaintiff, ROBERT A. WRIGHT, to prevent the Plaintiff, ROBERT A. WRIGHT, from learning the true nature and content of the cigarettes Defendants offered for sale, and to hide significant information and facts, which if known, would have resulted in Plaintiff, ROBERT A. WRIGHT, refusing to purchase the Defendants' products. The actions of the Defendants, and each of them, by and through their officers, agents, servants, and employees, were a willful and wanton disregard for the rights, health and safety of the Plaintiff, ROBERT A. WRIGHT. The actions of the Defendants, and each of them, by their officers, agents, servants, and employees, were specifically directed toward the Plaintiff, ROBERT A. WRIGHT. As a result of the intentional, willful, wanton, outrageous and malicious actions of the Defendants, and each of them, in disregard of the rights and safety of others, including Plaintiff, ROBERT A. WRIGHT, Plaintiffs are entitled to an award of exemplary damages as provided for by IOWA CODE § 668A.1 in a substantial amount to be determined by the jury.

4.20. The Plaintiffs in this lawsuit are not seeking reimbursement or claiming any right to recover benefits which have been paid by the state of Iowa pursuant to Chapter 249A of the Iowa Code.

4.21. The headings and subheadings in this Petition are included for the Court's and the parties' convenience only. They are not intended, nor should they be read, as restricting any of the causes of action being pled.

4.22. At all pertinent times, Defendants acted individually and by and through their duly authorized agents, servants and employees who were then acting in the course and scope of their employment and in furtherance of the business of the Defendants.

4.23. The cigarettes for which these Defendants are responsible are substantially interchangeable

4.24. At all pertinent times, Defendants purposefully and intentionally engaged in the above described activities, and continue to do so, knowing full and well that when the consumers used those tobacco products, including cigarettes, as they were intended to be used, the Plaintiffs, and those like situated would be substantially certain to suffer injury, disability, disease, and illness, including cancer, emphysema, COPD, heart disease and other illnesses, premature death, and/or loss of consortium.

4.25. Defendant Nabisco has acted individually and/or through its subsidiary, R. J. Reynolds, including but not limited to the following:

4.25.1 Nabisco publicly touts itself as a tobacco company and member of the tobacco industry;

4.25.2 Ultimate control of Reynolds' legal affairs rested with Nabisco;

4.25.3 Nabisco has been actively involved with the two tobacco industry trade organizations -- the Tobacco Institute and the Council for Tobacco Research -- and involved in industry lobbying activities involving smoking and health;

4.25.4 Nabisco has been involved in cigarette product development;

4.25.5 Nabisco reviews and directs Reynolds' strategic and business plans;

4.25.6 Nabisco has played an active role in creating and reviewing cigarette advertisements;

4.25.7 Nabisco was involved in the development and funding of a "safer cigarette;"

4.25.8 Nabisco has been involved in the promotion of cigarettes and smoking.

Count I
Negligence of Cigarette Manufacturer Defendants

COME NOW the Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT, and for Count I of their claim against the Defendants state:

5.1. Paragraphs 1 through 4.25.8 of this Petition are hereby incorporated as though set forth in full herein.

5.2. At times material to this action, Defendant cigarette manufacturers actually knew, or in the discharge of ordinary care, should have known of the following:

5.2.1 that the harms listed above would or were likely to occur if their tobacco products were used as intended;

5.2.2 that the harms listed above would more likely be experienced if users did not restrict their intake of Defendants' tobacco products, or if they began to use the products at an early age;

5.2.3 that use of the tobacco products as intended was likely to lead to addiction, habituation, or dependence;

5.2.4 that termination or limitation of use of tobacco products would be exceedingly difficult if consumption was initiated and that this difficulty would increase as cumulative consumption increased;

5.2.5 that developing knowledge before and after 1970 demonstrated that previous users are at great risk of harm (as listed above) and should seek medical monitoring;

5.2.6 that Defendants could test and evaluate their tobacco products for harmful or addictive properties and establish a reasonably safe dose for foreseeable users;

5.2.7 that there were feasible improvements in design, composition, or manufacture of tobacco products such as to materially decrease the foreseeable risk to users; and

5.2.8 that "light" cigarettes are not safer or less likely to cause the harms listed above than regular cigarettes.

5.3 Defendants at times material had the following legal duties to users and foreseeable users who consumed their tobacco products, including the Plaintiff; ROBERT A WRIGHT,

5.3.1 a duty to warn of the likelihood, probability, or foreseeability that the harms listed above would or might occur if the products were used as intended;

5.3.2 a duty to warn that the harms listed above would be more likely experienced if users did not restrict their intake of Defendants' tobacco products, and/or to provide some guidelines on reasonably safe dosage or amount of consumption, and a duty to warn that use of the product at an early age was most harmful;

5.3.3 a duty to warn that use of the product as intended was likely to lead to addiction, habituation, or dependence;

5.3.4 a duty to warn users that termination or limitation of use would be exceedingly difficult if consumption was initiated and that this difficulty would increase as cumulative consumption increased;

5.3.5 a continuing duty to warn users and previous users of developing knowledge demonstrating that previous users are at great risk of harm (as listed above) and should seek medical monitoring;

5.3.6 a duty to test, evaluate and conduct scientific research on their tobacco products for harmful or addictive properties and to establish a reasonably safe dose for foreseeable users;

5.3.7 a duty to design, manufacture, and sell a product that when used as intended was reasonably safe for foreseeable users;

5.3.8 a duty to make such feasible improvements in design, composition, or manufacture, of tobacco products such as to materially decrease the foreseeable risk to users;

5.3.9 a duty to disclose to consumers of tobacco products the results of their own and other scientific research known to them which indicated that use of tobacco products, including cigarettes, exposed users to a great risk of harm (as listed above);

5.3.10 a duty to warn previous users, users and foreseeable users through non-advertising and non-promotional communications of the dangers listed above; and,

5.3.11 a duty to promote and/or advertise their tobacco products in a manner which did not mislead or misrepresent to consumers the true health dangers posed by use of the products as intended.

5.4 Defendants negligently breached one or more of their duties to users and foreseeable users of their tobacco products including the Plaintiff, ROBERT A. WRIGHT, in one or more of the following ways:

5.4.1 in failing to warn or warn adequately of the likelihood, probability, or foreseeability that the harms listed above would or might occur if the products were used as intended;

5.4.2 in failing to warn or warn adequately that the harms listed above would be more likely experienced if users did not restrict their intake of Defendants' tobacco products, and/or in failing to provide some guidelines on reasonably safe dosage or amount of consumption, and/or in failing to warn that use of the product at an early age was exceedingly harmful;

5.4.3 in failing to warn or warn adequately that use of the product as intended was likely to lead to addiction, habituation, or dependence;

5.4.4 in failing to warn or warn adequately that termination or limitation of use would be exceedingly difficult if consumption was initiated and that this difficulty would increase as cumulative consumption increased;

5.4.5 in failing to warn or warn adequately of developing knowledge demonstrating that previous users are at great risk of harm (as listed above) and should seek medical monitoring;

5.4.6 in failing to test, to test adequately, or conduct scientific research on their tobacco products for harmful or addictive properties, and in failing to establish a reasonably safe dose for foreseeable users;

5.4.7 in designing, manufacturing, and selling a product that when used as intended was not reasonably safe for foreseeable users;

5.4.8 in failing to make such feasible improvements in design, composition, or manufacture of their tobacco products such as to materially decrease the foreseeable risk to users;

5.4.9 in failing to disclose to the Plaintiff, ROBERT A. WRIGHT, and other foreseeable users of their tobacco products of the Defendants' own scientific and other scientific research known to them which disclosed that use of tobacco products as intended caused a great risk of harm as described above;

5.4.10 in failing to warn or adequately warn previous users, current users and foreseeable users through non-advertising and non-promotional communications of the dangers listed above;

5.4.11 in failing to promote and/or advertise their tobacco products in a manner which did not mislead or misrepresent to the Plaintiff, ROBERT A. WRIGHT, and other foreseeable users the true health dangers posed by use of the products as intended; and/or

5.4.12 in designing "light" cigarettes in such a way that they generate lower tar and nicotine ratings on standard machine smoking tests than regular cigarettes while typically they do not actually deliver less tar or nicotine as actually smoked by most cigarette smokers.

5.5. The negligence of the Defendants, and each particular thereof, caused the Plaintiff ROBERT A. WRIGHT, to become addicted to tobacco products, including but not limited to Defendants' tobacco products, and to suffer adverse health effects arising from the use of these products, thus causing the Plaintiff, ROBERT A. WRIGHT, to incur damages.

5.6. The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, together with interest thereon and costs.

5.7. Defendants' conduct as alleged above constituted willful and wanton disregard for the rights or safety of others and were directed specifically at the Plaintiff, ROBERT A. WRIGHT, and were such as would warrant an award of punitive damages.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor against the

Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs further pray for punitive damages. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances.

Count II
Strict Liability of Defendant Cigarette Manufacturers

COME NOW the Plaintiffs, ROBERT A. WRIGHT AND DEANN K. WRIGHT, and for Count II of their claim against the Defendants state as follows:

6.1. Paragraphs 1 through 5.7 of this Petition are hereby incorporated as though set forth in full herein.

6.2. Defendants' tobacco products were defective and unreasonably dangerous to foreseeable users, including Plaintiff, ROBERT A. WRIGHT, for the following reasons:

6.2.1 the tobacco products when used as intended caused or contributed to the illnesses listed above;

6.2.2 the tobacco products were addictive, habituating, habit-forming, and once used caused physical and psychological dependence;

6.2.3 the tobacco products failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the consumer;

6.2.4 the risk of danger from the design of Defendants' tobacco products outweighed the benefits obtained with the use of the products;

6.2.5 Defendants' tobacco products did not contain sufficient warnings as alleged in Count I, supra, or alternatively, were labeled with inadequate warnings;

6.2.6 Defendants' tobacco products failed to contain sufficient instructions for use or for safer use, including but not limited to the following:

6.2.6.1 directions to smoke fewer cigarettes;

6.2.6.2 directions on how to smoke to reduce carcinogenic dosage;

6.2.6.3 directions to avoid blocking vent holes;

6.2.6.4 directions to attempt to quit smoking;

6.2.6.5 directions to use lower tar cigarettes;

6.2.6.6 directions to avoid compensatory smoking;

6.2.6.7 directions regarding the uncertainty of health gains in low yield (CO, tar, and/or nicotine) cigarettes;

6.2.6.8 directions to avoid smoking entire cigarettes;

6.2.6.9 directions to avoid exceeding the addiction threshold;

6.2.6.10 directions to avoid smoking while in the presence of children; and,

6.2.6.11 directions to seek regular physical examinations.

6.2.7 The tobacco products were otherwise defective in design in one or more of the following respects:

6.2.7.1 insufficient reduction in tar and other carcinogens by removal, dilution and filtration;

6.2.7.2 lack of distinctly marked vent holes;

6.2.7.3 lack of stop smoking markings;

6.2.7.4 excessive nicotine delivery;

6.2.7.5 failure to utilize substitute and/or expanded cigarette;

6.2.7.6 failure to utilize smaller cigarettes;

6.2.7.7 failure to package fewer cigarettes per pack;

6.2.7.8 failure to contain product information data sheets;

6.2.7.9 failure to list accurately and legibly the ingredients contained within the tobacco product and the smoke therefrom, including known carcinogens; and,

6.2.7.10 in being designed to yield less carcinogens when measured by artificial means, than was actually received in the lungs of tobacco smokers.

6.3. The defective and unreasonably dangerous tobacco products of Defendants caused the Plaintiff, ROBERT A. WRIGHT, to become addicted to tobacco products, including but not limited to Defendants' tobacco products, and to suffer adverse health effects arising from the use of these products, thus causing the Plaintiff to incur damages.

6.4. The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, together with interest thereon and costs.

6.5. Defendants' conduct as alleged above constituted willful and wanton disregard for the rights or safety of others and were directed specifically at the Plaintiff, ROBERT A. WRIGHT, and were such as would warrant an award of punitive damages.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor against the Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs further pray for punitive damages. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances.

Count III
Breach of Implied Warranty

COME NOW the Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT, and

for Count III of their claim against the Defendants state as follows:

7.1. Paragraphs 1 through 6.5 of this Petition are hereby incorporated as though set forth in full herein.

7.2. Defendants impliedly warranted that their cigarette products, which they designed, manufactured, marketed and/or sold to Plaintiff, ROBERT A. WRIGHT, were merchantable and fit and safe for their ordinary use.

7.3. Defendants' tobacco products purchased and consumed by Plaintiff, ROBERT A. WRIGHT, were addictive, unmerchantable, and unfit for use when sold, and subjected Plaintiff, ROBERT A. WRIGHT, and similarly situated persons to addiction and/or adverse health effects. Therefore, Defendants breached the implied warranty of merchantability.

7.4. As a direct and proximate result of the breach of the implied warranty of merchantability by the Defendants, Plaintiff, ROBERT A. WRIGHT, became addicted to tobacco products, including but not limited to addiction to Defendants' tobacco products, and suffered adverse health effects, causing the Plaintiff, ROBERT A. WRIGHT, to incur damages.

7.5. The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, plus interest and costs.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor against the Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances.

Count IV

Breach of Express Warranty

COME NOW the Plaintiffs, ROBERT A. WRIGHT and WRIGHT, and for Count IV of their claim against the Defendants state as follows:

8.1. Paragraphs 1 through 7.5 of this Petition are hereby incorporated as though set forth in full herein

8.2. At all times material, Defendants sold tobacco products and warranted through their advertisements and promotional statements that their products were not addictive, that they did not intend to addict Plaintiff, ROBERT A. WRIGHT, that the tar and nicotine levels in their products were at non-addictive levels, and that there were no adverse health effects arising for the use of their products.

8.3. As a result of Defendants' warranties and in reliance thereon, Plaintiff, ROBERT A. WRIGHT, purchased and used Defendants' tobacco products.

8.4. The Defendants' tobacco products did not conform to the foregoing express warranties in that Defendants manipulated the nicotine levels in the tobacco products, the tobacco products were addictive and the products caused the Plaintiff, ROBERT A. WRIGHT, to suffer adverse health effects.

8.5. This breach of the express warranties of Defendants caused Plaintiff, ROBERT A. WRIGHT, to become addicted to tobacco products, including but not limited to Defendants' tobacco products, and to suffer adverse health effects arising from the use of these products, thus causing the Plaintiff, ROBERT A. WRIGHT, to incur damages.

8.6. The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, together with interest thereon and costs.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor against the Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances.

Count V
Breach of Special Assumed Duty

COME NOW the Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT, and for Count V of their claim against the Defendants state as follows:

9.1. Paragraphs 1 through 8.6 of this Petition are hereby incorporated as though set forth in full herein.

9.2. The Defendants through their own actions have voluntarily assumed the duty to report honestly and competently on all research regarding smoking and health regarding their tobacco products through their public pronouncements.

9.3. Defendants breached their duty and responsibility to report such research, and also suppressed unfavorable research data and perpetuated a false "controversy" regarding the human health consequences of smoking.

9.4. The Defendants knew or should have known that the Plaintiff, ROBERT A. WRIGHT, as an user and foreseeable user of their tobacco products, would rely upon their public pronouncements.

9.5. Defendants knew or should have known that such reliance would result in injury.

9.6. As a direct consequence of the Defendants' negligent performance of their

voluntary undertaking, state regulators were unable to take appropriate regulatory action and the Plaintiff, ROBERT A. WRIGHT, has suffered injuries in the form of addiction, cancer and other illnesses and diseases, requiring medical care, facility, and services.

9.7. The violations of the Defendants were knowing and undertaken with reckless disregard for the rights of Plaintiff, ROBERT A. WRIGHT.

9.8. This breach of the special duty assumed by Defendants caused Plaintiff, ROBERT A. WRIGHT, to become addicted to tobacco products, including but not limited to Defendants' tobacco products, and to suffer adverse health effects arising from the use of these products, thus causing the Plaintiff, ROBERT A. WRIGHT, to incur damages.

9.9. The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, together with interest thereon and costs.

9.10. Defendants' conduct as alleged above constituted willful and wanton disregard for the rights or safety of others and were directed specifically at the Plaintiff, ROBERT A. WRIGHT, and were such as would warrant an award of punitive damages.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor against the Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs further pray for punitive damages. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances.

Count VI
Fraudulent Misrepresentation

COME NOW the Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT, and

for Count VI of their claim against the Defendants state as follows:

10.1 Paragraphs 1 through 9.10 of this Petition are hereby incorporated as though set forth in full herein.

10.2 At all times material, Defendants, through advertising in the mass media and by other communications, made repeatedly the representation that nicotine was not addictive, that cigarette smoking was not a proven cause of disease, and that they do not manipulate nicotine levels in tobacco products so as to addict consumers. Moreover, Defendants have represented that "light" cigarettes deliver less tar and nicotine.

10.3 These representations were false and were material.

10.4 The Defendants knew the representations were false when made and were made with reckless indifference to the health and safety of the Plaintiff, ROBERT A. WRIGHT, and others similarly situated.

10.5 These misrepresentations were made deliberately, wilfully and maliciously to mislead Plaintiff, ROBERT A. WRIGHT, and others similarly situated into reliance and action thereon, and to cause them to purchase Defendants' tobacco products.

10.6 By reason of the Plaintiff ROBERT A. WRIGHT's aforesaid induced purchase of and resulting addiction to tobacco products, including but not limited to Defendants' tobacco products, Plaintiff, ROBERT A. WRIGHT, suffered adverse health effects and the Plaintiff, ROBERT A. WRIGHT, has been damaged.

10.7 The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, together with interest thereon and costs.

10.8. Defendants' conduct as alleged above constituted willful and wanton disregard

for the rights or safety of others and were directed specifically at the Plaintiff, ROBERT A WRIGHT, and were such as would warrant an award of punitive damages.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor against the Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs further pray for punitive damages. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances

Count VII
Fraudulent Nondisclosure

COME NOW the Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT, and for Count VII of their claim against the Defendants state as follows:

11.1 Paragraphs 1 through 10.8 of this Petition are hereby incorporated as though set forth in full herein.

11.2 At all times material, there existed circumstances which gave rise to a duty of disclosure between Plaintiff, ROBERT A. WRIGHT, and Defendants. Defendants possessed superior knowledge with respect to the addictive nature of nicotine, the level of nicotine used in Defendants' tobacco products, and the relationship between smoking cigarettes and disease.

11.3 At all times during which the foregoing circumstances existed, Defendants failed to disclose to Plaintiff, ROBERT A. WRIGHT, the following material information:

11.3.1 nicotine is addictive;

11.3.2 nicotine is highly addictive;

11.3.3 defendants manipulate nicotine levels in their tobacco products so as to addict consumers; and

11.3.4 smoking cigarettes causes adverse health consequences

11.4 Defendants were under a duty to disclose to Plaintiff, ROBERT A. WRIGHT, the addictive nature of nicotine; the manipulation of the nicotine levels in tobacco products; their intent to addict the tobacco consuming public; and the full extent of their research and knowledge on the adverse health effects of using their products. Defendants had sole access to material facts concerning the addictive nature of nicotine, the manipulation of nicotine levels in tobacco products, the intent to addict Plaintiff, ROBERT A. WRIGHT, and the cigarette consuming public, and their research on the adverse health effects of using their products. Defendants knew that, prior to their addiction to nicotine, the Plaintiff, ROBERT A. WRIGHT, and others similarly situated could not reasonably have discovered the addictive nature of nicotine; the manipulation of the nicotine levels in cigarette products; the intent to addict the Plaintiff, ROBERT A. WRIGHT, and the cigarette consuming public; and the Defendants' research on the adverse health effects of their products. In addition, Defendants actively concealed the addictive nature of nicotine, the manipulation of nicotine levels in the cigarette products, and the intent to addict the cigarette consuming public and their research and knowledge on the adverse health effects of their products.

11.5 The undisclosed information was material to Plaintiff's ROBERT A. WRIGHT decision making as to whether to use Defendants' tobacco products.

11.6 Defendants knowingly failed to make the disclosures.

11.7 Defendants intended to deceive the Plaintiff, ROBERT A. WRIGHT, by withholding such information.

11.8 Defendants' omissions were made deliberately, wilfully, and maliciously to mislead

Plaintiff, ROBERT A. WRIGHT, into taking the action of purchasing and using Defendants' tobacco products.

11.9 Defendants' failure to disclose was a proximate cause of Plaintiff's ROBERT A. WRIGHT injuries and damages, including Plaintiff, ROBERT A. WRIGHT's, addiction to tobacco products, including but not limited to Defendants' tobacco products and adverse health effects.

11.10 The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, together with interest thereon and costs.

11.11 Defendants' conduct as alleged above constituted willful and wanton disregard for the rights or safety of others and were directed specifically at the Plaintiff, ROBERT A. WRIGHT, and were such as would warrant an award of punitive damages.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor against the Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs further pray for punitive damages. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances.

Count VIII
Civil Conspiracy

COME NOW the Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT, and for Count VIII of their claim against the Defendants state as follows:

12.1 Paragraphs 1 through 11.11 of this Petition are hereby incorporated as though set forth in full herein.

12.2 The following persons and parties participated in a civil conspiracy, the purposes of which are detailed in paragraph 12.5 below:

12.2.1 R. J. Reynolds Tobacco Company; RJR Nabisco, Inc; The American Tobacco Company; American Brands, Inc; Brown & Williamson Tobacco Corporation; B.A.T. Industries, PLC; Batus Holdings, Inc.; British American Tobacco Company, Ltd; British-American (Holdings) Ltd; Philip Morris Incorporated (Philip Morris U.S.A.); Philip Morris Companies, Inc.; Liggett & Myers, Inc.; Liggett Group, Inc.; the Brooke Group, Limited; Lorillard Tobacco Company; Lorillard Incorporated; Loews Corporation, United States Tobacco Company; and UST, Inc. Brown and Williamson Tobacco Company, successor by merger to American Tobacco Company; Brown and Williamson Tobacco Company; The Tobacco Institute, Inc., Council for Tobacco Research-USA, Inc., f/k/a The Tobacco Industry Research Committee, Hill and Knowlton, Inc.;

12.2.2 other unnamed co-conspirators; and,

12.2.3 other unknown co-conspirators.

12.3 The civil conspiracy existed at all times material to this lawsuit, and continues to exist at the present time.

12.4 By virtue of their collective dominance of the cigarette industry, their political and financial influence, their force of members, and their acting in unison, the conspirators possessed a peculiar power of coercion which power they each individually could not possess.

12.5 The purposes of the conspiracy were:

12.5.1 to conceal knowledge of the harmful and addictive effects of cigarette smoking from the public;

12.5.2 to frustrate the flow of information from the medical and scientific community to the general public on the health risks and addictive nature of cigarettes;

12.5.3 to create an illusion of conducting scientific research on cigarettes so as to mislead the public into believing that cigarettes were safe

to smoke, when in reality no such bona fide research was ever conducted;

12.5.4 to improperly influence law and policy in local, state and national government by misrepresenting the state of scientific knowledge about the health and addictive effects of cigarettes;

12.5.5 to improperly influence physicians, health workers, teachers, and otherwise in the community to subvert these persons' belief in the dangers of cigarette smoking, so as to minimize the instructions and recommendations on smoking cessation that would otherwise have been forthcoming;

12.5.6 to sell cigarettes to minors to ensure a future lucrative market for cigarettes as older smokers died or quit; and,

12.5.7 to create the illusion that a medical and scientific "controversy" existed as to whether or not cigarettes were harmful to human health when in truth and fact no such controversy existed, so as to encourage the public to start or to continue smoking cigarettes.

12.6 Over the years the conspirators, acting in concert, performed numerous overt acts to further the purposes of the conspiracy. Because many of these acts were concealed, Plaintiff is not able to state all overt acts but alleges the following as examples:

12.6.1 a meeting between conspirators in 1953 to form the Tobacco Industry Research Committee ("T.I.R.C.")(now Council for Tobacco Research ("CTR")), which would have as its stated purpose the promotion of research on cigarette and smoking dangers, but which in fact was a public relations tool to spread disinformation on the dangers of smoking;

12.6.2 various and sundry meetings over the years of T.I.R.C. and its successor CTR wherein the conspirators discussed and acted upon their previously stated goals;

12.6.3 research studies funded by T.I.R.C. which avoided the issue of cancer and addiction and instead focused on other matters, while giving the public the appearance that the "cancer question" was under "investigation;"

12.6.4 the publication by the conspirators of "A Frank Statement to Cigarette Smokers" promising to the public to do research to reveal the truth about cigarette dangers, when in fact these dangers were already well known and the conspirators had no intent to do meaningful research;

12.6.5 a publication sent to over 200,000 physicians in the United States claiming that cigarette smoking dangers were not real, when in fact the conspirators knew that such dangers were real;

12.6.6 a magazine article appearing in *True* magazine paid for by conspirators but appearing to be a bona fide article by a respected author, deliberately misstating the dangers of cigarette smoking;

12.6.7 the creation of the Tobacco Institute, of which the conspirators were members and directors, with the purpose of providing disinformation to media and otherwise on the dangers of cigarette use;

12.6.8 the suppression of and refusal to publish, various and sundry research studies carried out by co-conspirator which revealed that cigarette smoking was harmful and addicting;

12.6.9 various and sundry meetings over the years of the Tobacco Institute wherein the conspirators discussed and acted upon their previously stated goals;

12.6.10 various and sundry publications, news releases, telephone calls, contacts with the press, the media, the government, and otherwise, by the Tobacco Institute and otherwise in the conspiracy, consisting of suggestions to the media to present the "other side" of the "health controversy" about cigarettes, and to quote tobacco industry sources when reporting on scientific developments showing the dangers of cigarette smoking, which suggestions were accompanied by references to the amount of advertising carried in the magazine or newspaper and threats that such advertising would be dropped if the magazine did not comply;

12.6.11 numerous statements in the period 1950-1962 falsely criticizing scientific publications and reports which showed that lung cancer and other diseases were caused by cigarette smoking;

12.6.12 a publication in 1953 by T.I.R.C. 18 pages long containing false statements about the connection between smoking and lung cancer, sent to various sources;

12.6.13 statements and publications by Clarence Cook Little, spokesman for co-conspirator T.I.R.C., to the effect that the scientific evidence showing the dangers of cigarette smoking was "not proven" or was "merely statistical," including but not limited to statements made in Atlantic magazine in 1957, which statements were made with an intent to deceive the public into believing that cigarette smoking was safe;

12.6.14 lobbying efforts in the period 1962-1966 to prevent or frustrate the passage of the Cigarette Labeling Act of 1965, and similar efforts in 1969 and 1984, which involved making false statements to Congress and the press about the dangers of cigarette smoking;

12.6.15 a 1985 publication entitled "Of Cigarettes and Science" authored by co-conspirator R.J. Reynolds falsely claiming that cigarettes did not cause heart disease, which publication was the subject of an F.T.C. charge of false advertising;

12.6.16 testimony before Congressional subcommittees in 1994 by the co-conspirators, to the effect that cigarette smoking was not addictive and not harmful, when such assertions were false and known to be false;

12.6.17 a national advertising campaign in 1984, challenging the "studies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary." (R.J. Reynolds advertisement, Can we have an open debate about smoking? (1984)) No such evidence ever existed;

12.6.18 a statement by co-conspirator R.J. Reynolds in 1964 before a Congressional subcommittee that "[many distinguished scientists are of the opinion that it has not been established that smoking causes disease," and claimed a "lack of clinical and laboratory scientific evidence of the relationship between smoking and health." These statements were knowing attempts to mislead the public by misrepresenting the state of knowledge about cigarettes and human health;

12.6.19 a statement by co-conspirator R.J. Reynolds in 1982 that "science

to date after much research including over $100 million funded by our industry, indicates that no causal link [between smoking and human disease] has been shown," and that "there is absolutely no proof that cigarettes are addictive;"

12.6.20 "Research Reports on Tobacco and Health", generated on behalf of the Defendants by The Tobacco Institute, Inc. and published for many years dispute the known health consequences of smoking. These releases reported on fringe medical theories of the cause of lung cancer, other than cigarettes, in order to allay the public's fear regarding the deadly health consequences of smoking. These theories, as reported by the Tobacco Institute, Inc., for the conspirators include, but are not limited to, the following: that smoking lowers fatty substances in human lungs, that lung cancer is caused by a certain personality, and that emphysema is an outcome of childhood measles; and,

12.6.21 manufacture of cigarettes by co-conspirator, acting in concert or individually with knowledge and ratification, in such a way as to control and manipulate the nicotine content in such cigarettes, with the purpose of securing acceptance, habituation, and addiction.

12.7. The acts of the conspiracy, including those set forth herein, were unlawful acts and/or such acts were done to achieve unlawful purposes, including but not limited to those acts forming the basis of the causes of action alleged in this Petition.

12.8. The acts described above, and others not yet known or admitted by Defendants, were committed intentionally and in unison by the Defendants; (a) with reckless disregard of human life and with conscious indifference to the consequences of their action; and (b) with knowledge that these actions would probably and most likely result in severe personal injury and death. These actions constitute gross negligence on the part of Defendants and their co-conspirators.

12.9. Each act of the conspiracy was ratified by other co-conspirators, who acted as

each other's agents.

12.10. Each and every Defendant is alleged to have been a member of, or participant in, the conspiracy described wherein, and each and every act of the conspiracy was directed, in whole or in part, towards the residents of the State of Iowa, including the Plaintiff, ROBERT A. WRIGHT.

12.11. The conduct of the Defendants, and each particular thereof, caused the Plaintiff, ROBERT A. WRIGHT, to become addicted to tobacco products, including but not limited to Defendants' tobacco products, and to suffer adverse health effects arising from the use of these products, thus causing the Plaintiff, ROBERT A. WRIGHT, to incur damages.

12.12. The Plaintiffs are therefore entitled to damages in an amount to be proven at trial, together with interest thereon and costs.

12.13. Defendants' conduct as alleged above was malicious, intentional and outrageous and constituted willful and wanton disregard for the rights or safety of others and were directed specifically at the Plaintiff, ROBERT A. WRIGHT, and were such as warrant an award of punitive damages.

WHEREFORE, Plaintiffs, ROBERT A. WRIGHT and DEANN K. WRIGHT, pray that judgment be entered in their favor against the Defendants, and each of them, for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiffs further pray for punitive damages. Plaintiffs pray that costs be assessed against the Defendants. Finally, Plaintiffs pray for such further relief as the Court deems equitable or appropriate under the circumstances.

Count IX
Loss of Consortium

COME NOW the Plaintiff, DEANN K. WRIGHT, and for Count IX of her claim against the Defendants states as follows:

13.1. Paragraphs 1.1 through 12.13 of this Petition are hereby incorporated as though set forth in full wherein.

13.2. Plaintiff, DEANN K. WRIGHT, is and at all relevant times was, the spouse of ROBERT A. WRIGHT.

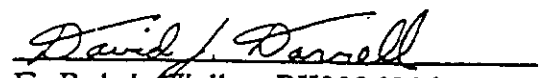
13.3. Plaintiff, ROBERT A. WRIGHT, and his spouse, DEANN K. WRIGHT, enjoyed a full and complete marital life prior to the injuries of ROBERT A. WRIGHT which are the subject to this lawsuit.

13.4. As a direct and proximate result of the negligence of the Defendants, and each of them; the intentional conduct of the Defendants, and each of them; the breaches of contract and express and implied warranties by the Defendants, and each of them; the fraud and breach of assumed duty of the Defendants, and each of them; the malfeasance, misfeasance and nonfeasance of the Defendants, and each of them; and the defective and unreasonably dangerous condition of the tobacco products designed, manufactured, marketed and sold by the Defendants, and each of them, and such other wrongful and negligent conduct as is set forth in greater detail above in causing the injuries of ROBERT A. WRIGHT, Plaintiff, DEANN K. WRIGHT, has been deprived of the aid, services, support, companionship and consortium of her spouse, from the time of his diagnosis of and suffering from a tobacco-related disease to and including the present and continuing in the future.

135 Plaintiff, DEANN K. WRIGHT, has been damaged in a substantial sum reasonably believed to exceed the statutory minimum necessary to invoke the jurisdiction of this Court.

WHEREFORE, Plaintiff, DEANN K. WRIGHT, prays that judgment be entered in her favor against the Defendants for money damages in an amount to be determined by a jury, plus interest as allowed by law. Plaintiff further prays that costs be assessed against the Defendants. Finally, Plaintiff prays for such further relief as the Court deems equitable or appropriate under the circumstances.

WALKER LAW FIRM, P.C.



E. Ralph Walker PK0006346
David J. Darrell PK0007743
Harley C. Erbe PK001617
2501 Grand Avenue, Suite E
Des Moines, IA 50312
Telephone: 515-281-1488
FAX: 515-281-1489

SPOHRER, WILNER, et al.

Norwood Wilner Atty.
Florida Bar No. 222194
111 East Duval St.
Jacksonville, Florida 32202
Telephone: 904-354-8310
FAX: 904-358-6889

JK: C:\OFFICE\WPWIN\WPDOCS\Wright\Petition.wpd

WANDRO & ASSOCIATES P.C.

Steven P. Wandro 484762548
Megan A. Claypool 485824559
2501 Grand Avenue, Suite B
Des Moines, IA 50312
Telephone: 515-281-1475
FAX: 515-281-1474

HAWKINS & NORRIS

Lex Hawkins PK0002181
Glenn L. Norris PK0004035
George F. Davison, Jr. 493567366
Carla T. Schemmel PK0008610
David N. May PK0015912
2501 Grand Avenue, Suite C
Des Moines, Iowa 50312
Telephone: 515-288-6532
FAX: 515-288-9733

ry lies wholly in the past and no relief other than money is conceivable." *Davis v. Streekstra*, 227 F.3d. 759, 761 (7th Cir. 2000), *citing Perez v. Wisconsin Department of Corrections*, 182 F.3d at 536–37

In the two cases dealt with by the Seventh Circuit in *Davis v. Streekstra*, "the district court resolved, in favor of the no-exhaustion view, the question reserved in *Perez*." *Davis v. Streekstra*, 227 F.3d. at 761. The Seventh Circuit did not reach the merits of this question in *Davis v. Streekstra* because it concluded that the orders denying the prison officials' motions to dismiss based on § 1997e(a) were non-appealable interlocutory orders.

[2] Mr. Wells alleges that on one occasion, a correctional officer used excessive use of force on him. The defendant does not argue that there is any relief Mr. Wells could receive through the administrative appeals process for this incident. This court believes that the result reached by the Wisconsin district court in *Davis v. Streekstra* is a common sense approach that preserves the values of § 1997a(e) and *Perez v Wisconsin Department of Corrections*, by requiring prisoners to present their claims to prison officials where there is a chance that they might obtain any beneficial relief, but not mandating it where no relief is available and exhaustion would be a useless act wasting the time of both prisoners and prison officials.

For the foregoing reasons, the court **DENIES** the defendant's motion to dismiss [docket # 17].

IT IS SO ORDERED.

Robert A. WRIGHT and Deeann K. Wright, Plaintiffs,

v.

BROOKE GROUP LIMITED; Liggett & Myers, Inc.; Liggett Group Inc.; Philip Morris Incorporated (Philip Morris U.S.A.); Philip Morris Companies, Inc.; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc., Defendants.

No. C99–3090.

United States District Court,
N.D. Iowa,
Central Division.

Sept. 29, 2000.

Smoker and his wife brought products liability action in state court against cigarette manufacturers, alleging strict liability, negligent design, breach of warranties, and fraudulent misrepresentation and nondisclosure. After removal to federal court, manufacturers moved to dismiss. The District Court, Bennett, Chief Judge, held that: (1) strict liability and negligence claims were not precluded by fact that tobacco itself was not defective; (2) common knowledge doctrine did not bar claims; (3) Federal Cigarette Labeling and Advertising Act preempted action only to extent that it was predicated on inadequacy of warnings; (4) smoker had no duty to notify manufacturer of defects as condition precedent of warranty claims; and (5) smoker failed to plead fraud with sufficient particularity.

Motion granted in part, and denied in part.

1. Products Liability ⇐8

Under Iowa law, plaintiff asserting theory of strict liability must establish that product was in defective condition and unreasonably dangerous to consumer.

2. Products Liability ⇐8, 10

Under Iowa law, plaintiff asserting negligence theory in products liability action must establish that product was unreasonably dangerous because manufacturer failed to use reasonable care.

3. Products Liability ⇐8

Under Iowa law, both consumer contemplation test and risk-utility test are used to determine whether or not product is unreasonably dangerous in products liability actions. Restatement (Second) of Torts § 402A.

4. Products Liability ⇐59

Under Iowa law, as predicted by the district court, cigarette smoker's strict liability and negligence claims against cigarette manufacturers were not precluded by fact that tobacco itself was not defective. Restatement (Second) of Torts § 402A comment.

5. Products Liability ⇐59

Risk of addiction was not lesser included risk of health risks of cigarette smoking, and thus fact that health risks were common knowledge did not preclude plaintiff from establishing that cigarettes had design defect, under Iowa products liability law, as result of cigarette manufacturers' concealment of extra knowledge, beyond common knowledge, concerning harmful effects of smoking, such as manipulation of nicotine levels.

6. Evidence ⇐1

Because effect of judicial notice is to deprive party of opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that fact is beyond controversy. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

7. Evidence ⇐14

Court would refrain from taking judicial notice that health risks of cigarette smoking have been common knowledge to consumers since 1954. Fed.Rules Evid. Rule 201, 28 U.S.C.A.

8. Evidence ⇐14

Court would refrain from taking judicial notice that risk of addiction from cigarettes has been common knowledge to consumers since 1954. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

9. Federal Civil Procedure ⇐1831

Issue of whether risk of danger from design of cigarettes was common knowledge when smoker began smoking cigarettes in 1954 raised fact issue that could not be determined on motion to dismiss smoker's strict products liability and negligent design claims against cigarette manufacturers based on common knowledge doctrine.

10. Products Liability ⇐14

Under Iowa law, any distinction between strict liability and negligence principles on failure to warn claim are illusory.

11. Products Liability ⇐14

Under Iowa law, manufacturer owes duty to warn consumer if manufacturer: (1) knows or has reason to know that product is or is likely to be dangerous for use for which it is supplied; (2) has no reason to believe that those for whose use product is supplied will realize its dangerous condition; and (3) fails to exercise reasonable care to inform them of its dangerous condition or of facts that make it likely to be dangerous. Restatement (Second) of Torts §§ 388, 394.

12. Products Liability ⇐14

In testing manufacturer's liability under Iowa law for negligence in failing to warn, manufacturer should be held to standard of care of expert in its field.

13. Products Liability ⇐14

Under Iowa law, manufacturer of product has no duty to warn where risks are known and obvious.

14. Federal Civil Procedure ⇐1831

Issue of whether health risks of smoking, including risk of addiction, were commonly known when smoker began smoking

cigarettes in 1954 raised fact issues that could not be determined on motion to dismiss smoker's failure to warn claim against cigarette manufacturers based on common knowledge doctrine.

15. **Fraud** ⇐3

Required elements of fraudulent misrepresentation under Iowa law are: (1) material (2) false (3) representation coupled with (4) scienter and (5) intent to deceive, which other party (6) relies upon with (7) resulting damages to relying party.

16. **Fraud** ⇐16

Under Iowa law, representation need not be affirmative misstatement; concealment of or failure to disclose material fact can also constitute fraud.

17. **Fraud** ⇐58(1)

Under Iowa law, plaintiff must prove elements of fraudulent misrepresentation or fraudulent concealment by clear and convincing evidence.

18. **Federal Civil Procedure** ⇐1831

Issue of whether smoker justifiably relied on cigarette manufacturers' denial of their conduct in manipulating level of nicotine in cigarettes and their statements refuting common knowledge of health risks of smoking, including risk of addiction, raised fact issues that could not be determined on motion to dismiss smoker's fraudulent misrepresentation and fraudulent nondisclosure claims against manufacturers based on common knowledge doctrine.

19. **Federal Civil Procedure** ⇐1831

Issue of whether health risks of smoking, including risk of addiction, were commonly known when smoker began smoking cigarettes in 1954 raised fact questions that could not be determined on motion to dismiss smoker's express warranty claim against cigarette manufacturers based on common knowledge doctrine. I.C.A. § 554.2313.

20. **States** ⇐18.13

There is presumption that historic police powers of states are not to be superceded by federal act unless that is clear and manifest purpose of Congress, especially where preemption would displace power of state to protect health and safety of its citizenry.

21. **Consumer Protection** ⇐11

States ⇐18.84

Positive enactments by state with respect to cigarette promoting and advertising are preempted by Federal Cigarette Labeling and Advertising Act. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334.

22. **Products Liability** ⇐59

States ⇐18.65

Common law failure to warn action against cigarette manufacturer is preempted by Federal Cigarette Labeling and Advertising Act to extent that is relies on state law requirement or prohibition with respect to advertising or promotion. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334.

23. **Products Liability** ⇐59

States ⇐18.65

State law claims that tobacco companies neutralized effect of federally mandated warnings through their advertising and promotional activities are preempted by Federal Cigarette Labeling and Advertising Act. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334.

24. **Products Liability** ⇐59

States ⇐18.65

Smoker's post–1969 claim of common law fraud against cigarette manufacturers based upon their alleged concealment of health risks of smoking, including risk of addiction, was preempted by Federal Cigarette Labeling and Advertising Act to extent that it was predicated on duty to issue additional or clearer warnings through advertising and promotion. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334.

25. **Products Liability** ⇐59
States ⇐18.65

Smoker's post–1969 claim that cigarette manufacturers concealed material facts regarding health risks of smoking was not preempted by Federal Cigarette Labeling and Advertising Act insofar as claim relied on state-law duty to disclose such facts through channels of communication other than advertising or promotion. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334.

26. **Products Liability** ⇐59
States ⇐18.65

Smoker's state law claim against cigarette manufacturers for failure to warn based on their failure to include additional cautionary statements on cigarette packages conflicted with statutory purpose of national uniformity for cigarette packaging, and thus smoker's package based failure to warn claim was preempted by Federal Cigarette Labeling and Advertising Act. Federal Cigarette Labeling and Advertising Act, §§ 2, 5, as amended, 15 U.S.C.A. §§ 1331, 1334.

27. **Federal Civil Procedure** ⇐1772

Complaint should not be dismissed merely because it does not state with precision all elements that give rise to legal basis for recovery. Fed.Rules Civ.Proc. Rules 8(a), 12(b)(6), 28 U.S.C.A.

28. **Federal Civil Procedure** ⇐1773

Dismissal of action for failure to state claim should be granted only in unusual case in which plaintiff includes allegations that show on face of complaint that there is some insuperable bar to relief. Fed. Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

29. **Federal Civil Procedure** ⇐1831

Issue of whether cigarette manufacturers failed to adequately test cigarettes for harmful or addictive properties, or failed to make feasible improvements in cigarettes' design to decrease risk to users raised fact questions that could not be determined on motion to dismiss smoker's negligent manufacturing defect claims against manufacturers for failure to state claim.

30. **Sales** ⇐427

To establish breach of implied warranty of merchantability under Iowa law, plaintiff is required to prove (1) merchant sold goods; (2) goods were not merchantable at time of sale; (3) injury or damage occurred to plaintiff's person or property; (4) defective nature of goods caused damage proximately and in fact; and (5) notice was given to seller of injury. I.C.A. § 554.2314.

31. **Sales** ⇐427
States ⇐18.65

Federal Cigarette Labeling and Advertising Act preempted smoker's state law claim against cigarette manufacturers for breach of implied warranty of merchantability to extent it alleged failure to provide additional warnings after 1969. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334; I.C.A. § 554.2314.

32. **Sales** ⇐427
States ⇐18.65

Federal Cigarette Labeling and Advertising Act did not preempt smoker's state law claim against cigarette manufacturers for breach of implied warranty of merchantability to extent that it was based on specific allegations that manufacturers knowingly designed, manufactured and distributed product that they knew was both carcinogenic and addictive and, thus, not fit for ordinary purpose for which it was intended. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334; I.C.A. § 554.2314.

33. **Sales** ⇐427
States ⇐18.65

Federal Cigarette Labeling and Advertising Act did not preempt smoker's state law claim against cigarette manufacturers for breach of implied warranty of merchantability to extent that it was based on allegations that manufacturers manipu-

lated nicotine level in tobacco in order to induce addiction, thereby rendering it unfit for ordinary purpose for which it was intended. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334; I.C.A. § 554.2314.

34. **Sales** ⇐434

Smoker alleging that cigarette manufacturers breached express warranties that cigarettes were not addictive and that there were no adverse health effects from using them was not required to produce any explicit statements or affirmations regarding smoking prior to commencement of discovery. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

35. **Sales** ⇐285(1)

Under Iowa law, plaintiff alleging breach of warranty against seller must give notice of defect to seller as condition precedent to recovery. I.C.A. § 554.2607(3)(a).

36. **Sales** ⇐285(1)

Under Iowa law, smoker was not required to notify cigarette manufacturers of defect in product as condition precedent for recovery of breach of warranty, as manufacturers did not sell cigarettes to user. I.C.A. § 554.2607(3)(a).

37. **Sales** ⇐285(3)

Under Iowa law, even if smoker was required to give notice of defect to cigarette manufacturers as condition precedent for recovery for breach of warranty, smoker's filing of suit against manufacturers sufficiently notified them of his warranty claims, absent evidence that lack of notice prejudiced them. I.C.A. § 554.2607(3)(a).

38. **Negligence** ⇐234

Under Iowa law, one who undertakes to render services to another that he should recognize as necessary for protection of other's person or things is subject to liability to other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (1) his failure to exercise such care increases risk of such harm, or (2) harm is suffered because of other's reliance upon undertaking. Restatement (Second) of Torts § 323.

39. **Negligence** ⇐218

In deciding whether party has voluntarily assumed duty to another under Iowa law, court should consider: (1) relationship between parties, (2) reasonable foreseeability of harm to person who is injured, and (3) public policy considerations. Restatement (Second) of Torts § 323.

40. **Federal Civil Procedure** ⇐1831

Issue of whether cigarette manufacturers voluntarily assumed special duty to inform smoker of their research regarding health risks of smoking raised fact issue that could not be determined on motion to dismiss smoker's action against manufacturers for breach of special duty for failure to state claim. Restatement (Second) of Torts § 323.

41. **Products Liability** ⇐59

States ⇐18.65

Federal Cigarette Labeling and Advertising Act did not preempt smoker's state law claim against cigarette manufacturers for breach of special assumed duty to report to public all of its research regarding health risks of smoking. Federal Cigarette Labeling and Advertising Act, § 5, as amended, 15 U.S.C.A. § 1334.

42. **Federal Civil Procedure** ⇐636

Smoker did not plead with sufficient particularity allegation that cigarette manufacturers fraudulently misrepresented health risks of smoking, including risk of addiction; smoker did not specifically identify speakers of various statements that he alleged were fraudulent, or where alleged false statements were published. Fed. Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

43. **Federal Civil Procedure** ⇐636

Plaintiff must plead fraudulent nondisclosure claims with particularity. Fed. Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

44. Fraud ⇐17

Existence of legal duty to disclose information can arise from inequality of condition and knowledge.

45. Federal Civil Procedure ⇐636

Smoker failed to plead with sufficient particularity his fraudulent nondisclosure claims against cigarette manufacturers for failing to publicly disclose its research regarding health risks of smoking; smoker failed to allege information relating to identity, time and place.

46. Removal of Cases ⇐118

Plaintiff could amend his state court complaint to plead fraud claims with particularity after removal of action to federal court. Fed.Rules Civ.Proc.Rules 9(b), 15(a), 28 U.S.C.A.

47. Conspiracy ⇐1.1

Under Iowa law, civil conspiracy is not in itself actionable; rather, it is acts causing injury undertaken in furtherance of conspiracy that give rise to action.

48. Conspiracy ⇐1.1

Under Iowa law, civil conspiracy requires mutual mental action coupled with intent to commit act that results in injury.

49. Conspiracy ⇐1.1

Under Iowa law, civil conspiracy claim may not be based on negligence.

50. Conspiracy ⇐7

Under Iowa law, civil conspiracy claim may be based on allegation that defendants are strictly liable for intentionally agreeing to produce unreasonably dangerous product.

E. Ralph Walker, David J. Darrell and Harley C. Erbe of Walker Law Firm, Des Moines, IA, for Plaintiff.

Robert A. VanVooren and Thomas Waterman of Lane & Waterman, Davenport, IA, Timothy E. Congrove and Patrick Sullivan of Shook, Hardy & Bacon, L.L.P., Kansas City, MO, for Defendant Philip Morris, Inc.

Richard R. Chabot of Sullivan & Ward, P.C., Des Moines, IA, for Defendants The Brooke Group, Ltd., Liggett & Myers, Inc., and Liggett Group Inc.

Steven L. Nelson, of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, IA, and Todd Kennard of Jones, Day, Reavis & Pogue, Cleveland, OH, for Defendant R.J. Reynolds Tobacco Co.

MEMORANDUM OPINION AND ORDER REGARDING CERTAIN DEFENDANTS' MOTION TO DISMISS

BENNETT, Chief Judge.

TABLE OF CONTENTS

Over 23 centuries ago, Aristotle wrote: "Thus every action must be due to one or other of seven causes: chance, nature, compulsion, habit, reasoning, anger, or appetite." ARISTOTLE'S RHETORIC, Bk. I, ch. 10. The ultimate resolution of the rising tide of tobacco litigation may some day prove the wisdom of Aristotle's observation. However, this Motion to Dismiss presents initial vexing legal questions that must be resolved by interpreting more mundane issues of Iowa law on the lengthy journey to that final resolution.

I. INTRODUCTION

On October 29, 1999, Robert A. Wright ("Mr. Wright") and DeeAnn K. Wright ("Mrs. Wright") filed a petition in state court, alleging that they have been damaged as a result of Mr. Wright's cigarette smoking. Mr. Wright alleges that he has developed cancer, as well as suffering from other personal injuries, and Mrs. Wright alleges loss of consortium because of Mr. Wright's alleged injuries. Plaintiffs' complaint contains the following nine counts: (1) Negligence; (2) Strict Liability; (3) Breach of Implied Warranty; (4) Breach of Express Warranty; (5) Breach of Special Assumed Duty; (6) Fraudulent Misrepresentation; (7) Fraudulent Nondisclosure; (8) Civil Conspiracy; and (9) Loss of Consortium. On November 26, 1999, defendants removed this case to federal court based on diversity jurisdiction. *See* 28 U.S.C. § 1441.[1]

Thereafter, on January 21, 2000, certain defendants,[2] Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brooke Group Ltd., Liggett & Myers, Inc. and Liggett Group Inc.[3], filed a Motion to Dis-

1. Because this case is before the court based on diversity jurisdiction, it is controlled by Iowa law. *First Bank of Marietta v. Hogge*, 161 F.3d 506, 510 (8th Cir.1998); *Frideres v. Schiltz*, 113 F.3d 897, 898 (8th Cir.1997).

2. The court dismissed defendant R.J.R. Nabisco, Inc. on February 12, 2000, from this action without prejudice pursuant to a Joint and Stipulated Motion. Thereafter, on April 12, 2000, the court also dismissed from this action without prejudice defendant Philip Morris Companies, Inc. pursuant to a Joint and Stipulated Motion.

3. On January 26, 2000, defendants Brooke Group Ltd., Liggett & Myers, Inc., and Liggett Group Inc. joined in all statements, arguments, and defenses asserted by defendants Philip Morris Inc. and R.J. Reynolds Tobacco Company in their Motion to Dismiss and the accompanying Memorandum in Support of

miss plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants [4] assert that all nine of the plaintiffs claims fail as a matter of law because of the following reasons. First, defendants assert that common knowledge of the risks of cigarette smoking bars Mr. Wright's negligence and strict liability design defect and failure to warn claims (Counts I and II) because cigarettes are not unreasonably dangerous under Iowa law and defendants contend they had no duty to warn Mr. Wright of commonly known risks. Second, defendants assert that Mr. Wright's express warranty, fraudulent misrepresentation, and fraudulent nondisclosure claims (Counts IV, VI, and VII) are barred because Mr. Wright could not have justifiably relied on any statements or nondisclosures of defendants in light of the common knowledge of the risks of cigarette smoking and express warnings on cigarette packages and cigarette advertisements. Third, defendants assert that to the extent that Mr. Wright's negligence and strict liability failure to warn and fraudulent nondisclosure claims (Counts I, II, and VII) are based on alleged actions or omissions occurring after 1969, they are preempted by the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"). Fourth, defendants assert that Mr. Wright fails to state a claim that there was a negligent manufacturing defect (Count I), and that there was a breach of implied or express warranties (Counts II and IV), or that there was a breach of special assumed duty (Count V). Fifth, defendants assert that Mr. Wright's fraudulent misrepresentation and fraudulent nondisclosure claims (Counts VI and VII) are not pleaded in accordance with Rule 9(b) of the Federal Rules of Civil Procedure. Sixth, defendants assert that Mr. Wright's civil conspiracy claim (Count VIII) and Mrs. Wright's consortium claim (Count IX) fail, because Mr. Wright's substantive claims fail.

On February 3, 2000, plaintiffs filed a stipulated Motion for Extension of Time, which this court granted, allowing plaintiffs to and including March 15, 2000, in which to file their resistance. Plaintiffs complied, filing their resistance on March 15, 2000, and asking this court to deny, in its entirety, defendants' Motion to Dismiss. Defendants, thereafter, filed a reply, to which the plaintiffs, after seeking permission from this court, filed a surreply.

On July 19, 2000, the court heard oral arguments on defendants' Motion to Dismiss. Plaintiffs were represented by E. Ralph Walker, David J. Darrell and Harley C. Erbe of Walker Law Firm, Des Moines, Iowa. Defendant Philip Morris, Inc., was represented by Robert A. VanVooren and Thomas Waterman of Lane & Waterman, Davenport, Iowa, and Timothy E. Congrove and J. Patrick Sullivan of Shook, Hardy & Bacon, L.L.P., Kansas City, Mo. Defendants The Brooke Group, Ltd., Liggett & Myers, Inc., and Liggett Group Inc. were represented by Richard R. Chabot of Sullivan & Ward, P.C., Des Moines, Iowa. Defendant R.J. Reynolds Tobacco Co., was represented by Steven L. Nelson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, Iowa, and J. Todd Kennard of Jones, Day, Reavis & Pogue, Cleveland, Ohio.

II. STANDARDS FOR MOTION TO DISMISS

The issue on a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is not whether a plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence in support of his or her claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *United*

their Motion to Dismiss filed herein on January 24, 2000.

4. Rather than referring to "certain defendants" throughout this opinion, the court will refer to them simply as "defendants." Additionally, the court refers to the plaintiffs in all three of the following ways throughout this opinion: Mr. Wright, Mrs. Wright and plaintiffs.

States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1376 (8th Cir.1989). In considering a motion to dismiss under Rule 12(b)(6), the court must assume that all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir.1999) ("On a motion to dismiss, we review the district court's decision *de novo*, accepting all the factual allegations of the complaint as true and construing them in the light most favorable to [the non-movant]."); *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir.1999) ("We take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff."); *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir.1999) (same); *Midwestern Machinery, Inc., v. Northwest Airlines*, 167 F.3d 439, 441 (8th Cir.1999) (same); *Duffy v. Landberg*, 133 F.3d 1120, 1122 (8th Cir.) (same), *cert. denied*, 525 U.S. 821, 119 S.Ct. 62, 142 L.Ed.2d 49 (1998).

The United States Supreme Court and the Eighth Circuit Court of Appeals have both observed that "a court should grant the motion and dismiss the action only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir.1997) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)); *accord Conley*, 355 U.S. at 45–46, 78 S.Ct. 99 ("A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Thus, "[a] motion to dismiss should be granted as a practical matter only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir.1995) (internal quotation marks and ellipses omitted). The court will now turn to defendants' Motion to Dismiss with these standards in mind.

III. LEGAL ANALYSIS

A. Negligence and Strict Liability Claims

Plaintiffs' pleading essentially alleges that defendants' cigarettes were unreasonably dangerous and caused the plaintiff, Mr. Wright, "to become addicted to tobacco products, including but not limited to Defendants' tobacco products, and to suffer adverse health effects arising from the use of these products," including cancer of the right tonsil, severe emphysema, chronic obstructive pulmonary disease, and permanent cellular damage. *See* Plaintiffs' Complaint ¶ 4.13, ¶ 5.5 and ¶ 6.3. Mr. Wright asserts that the alleged unreasonable dangerousness of defendants' cigarettes is caused by all three types of defects: design, manufacturing and failure to warn.

1. Design defect claims

[1, 2] In adopting strict liability for defective products, codified at § 402A of the Restatement (Second) Torts, the Supreme Court of Iowa specifically recognized that this theory did not replace claims based on negligence. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 698 (Iowa 1999) (citing *Hawkeye–Security Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 685 (Iowa 1970)). Indeed, courts in Iowa have consistently recognized a distinction between the two theories. *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 835 (Iowa 1978). Strict liability claims focus on the condition of the product, while negligence claims focus on the conduct of the defendant. *Id.*; *Chown v. USM Corp.*, 297 N.W.2d 218, 220 (Iowa 1980). Under a theory of strict liability, the plaintiff must establish that the product was in a defective condition and unreasonably dangerous to the consumer. *Chown*, 297 N.W.2d at 220. Under a negligence theory, the plaintiff must establish that the product was unreasonably danger-

ous because the manufacturer failed to use reasonable care *Ackerman v American Cyanamid Co.*, 586 N.W.2d 208, 220 (Iowa 1998) (citing *Chown*, 297 N.W.2d at 220).

However, the Iowa Supreme Court has held that despite the distinctions between the two theories of liability, the "unreasonably dangerous" element of a negligent design claim is the same as the "unreasonably dangerous" element of a strict liability design claim. *See id.*; *accord Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 75–76 & n. 2 (Iowa 1991) (noting in that case "the strict liability claim depend[s] on virtually the same elements of proof as are required to establish the negligence claim" and making the further observation that "a growing number of courts and commentators have found that, in cases in which the plaintiff's injury is caused by an alleged defect in the design of a product, there is no practical difference between theories of negligence and strict liability"); *accord Chown v. USM Corp.*, 297 N.W.2d 218, 220 (Iowa 1980) (stating that proof of unreasonable danger is an essential element under both theories of negligence and strict liability). In deciding whether the evidence supports a finding that a product was "unreasonably dangerous," courts in Iowa apply the principles set forth in Comment i of § 402A of the Restatement (Second) of Torts. *Ackerman*, 586 N.W.2d at 220 (citing *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 916 (Iowa 1990)) (quoting definition of "unreasonably dangerous" from § 402A Comment i, at 352 of Restatement (Second) of Torts (1965)); *Maguire v Pabst Brewing Co.*, 387 N.W.2d 565, 569–70 (Iowa 1986). Comment i of § 402A, in pertinent part, states:

> "The article sold 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."

Restatement (Second) of Torts § 402A cmt. i (1965). Comment i is commonly referred to as the consumer contemplation test.

In this case, defendants assert that the *Maguire* case makes it abundantly clear that, under both negligence and strict liability theories, only the consumer contemplation test is applied in determining whether a product is unreasonably dangerous. Plaintiffs, however, disagree, contending that not only is the consumer contemplation test applied in determining whether a product is unreasonably dangerous, but that the risk-utility test is also applied in determining whether a product is unreasonably dangerous. Thus, while it is clear that Iowa law utilizes the consumer contemplation test to determine if a product is unreasonably dangerous, whether this is the only test used to determine if a product is unreasonably dangerous under Iowa law is not so clear.

a. What test is used in Iowa to determine whether or not a product is unreasonably dangerous?

In *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830 (Iowa 1978), the Iowa Supreme Court first considered in detail the appropriate standard for a design defect analysis. The plaintiff in *Aller* alleged that a power saw was defectively designed because it did not have an adequate guard system and could be activated when a person's hand was too near the blade. *Id.* at 832. The case went to the jury solely on the theory of strict liability. The jury returned a verdict for the defendant manufacturer and the plaintiff appealed, requesting that the court eliminate the phrase "unreasonably dangerous" from the strict liability test, or at a minimum, change its definition. *Id.* at 835. In ruling on this appeal, the Supreme Court of Iowa explained how the proper test for the strict liability standard was to be applied. In doing so, however, the *Aller* court vacillated between the consumer contemplation test and risk-utility test, and significantly failed to indicate which test was proper in determining whether a product is "unreasonably dangerous" under a strict liability claim. The *Aller* court initially explained that a plaintiff had to establish that the

product was more dangerous than a reasonable consumer would have expected. *Id.* at 834. Thus, this explanation ostensibly adheres to the contemplation test outlined in Comment i of § 402A Restatement (Second) of Torts. Shortly thereafter, however, the *Aller* court explained that in determining whether the product is dangerous to an unreasonable extent requires a balancing of the product's risk and utility:

> Whether the doctrine of negligence or strict liability is being used to impose liability the same process is going on in each instance, i.e., weighing the utility of the article against the risk of its use. Therefore, the same language and concepts of reasonableness are used by courts for the determination of unreasonable danger in product liability cases.

Id. at 835. The *Aller* court stated that "this balancing process is the same as that used in negligence cases." *Id.*

Thereafter, the Iowa Supreme Court, in *Chown v. USM Corp.*, 297 N.W.2d 218 (Iowa 1980), displayed the same ambivalence concerning which test is used to determine when a product is "unreasonably dangerous." In that case, the plaintiff claimed the absence of a barrier guard made the machine at issue defective as a matter of both negligence and strict liability. *Chown*, 297 N.W.2d 218 at 220. The trial court found in favor of the manufacturer, concluding that, as a matter of law, the product at issue was not "unreasonably dangerous" and "defective." The plaintiff appealed. In affirming the trial court, the Iowa Supreme Court, explicitly referencing the *Aller* decision, indicated that there are two tests used to determine whether a product is unreasonably dangerous. *Id.* at 220. The *Chown* court explained that one test is whether the danger is greater than an ordinary consumer with knowledge of the product's characteristics would expect it to be; another test is whether the danger outweighs the utility of the product, explaining:

> In a design case, the risk-utility analysis involves balancing the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Id. at 220 (internal citation marks omitted). The *Chown* court, like its predecessor, failed to indicate whether there was a single proper test, and instead applied both tests:

> "Under this record, we cannot say the trial court was compelled as a matter of law to find the calender [machine] was unreasonably dangerous. The court was not required to find that the defendant in 1900–1904 could reasonably have foreseen that a consumer in 1975 would expect barrier guards to be included in the design. . . . Furthermore, employing the risk-utility analysis, the court was not compelled to find that the safety device was technologically and practically feasible at the time of the manufacture."

Chown, 297 N.W.2d at 221

Similarly, in *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911 (Iowa 1990), a case that involved a strict liability design defect claim, the Iowa Supreme Court articulated and applied both the consumer contemplation test and the risk-utility test to determine whether the product at issue was unreasonably dangerous. In so holding, the *Fell* court stated "in line with what we said in *Aller*," that the expert's report generated several fact questions as to whether the elevator, the product at issue, was unreasonably dangerous based on both the consumer contemplation test and the risk-utility test. *Fell*, 457 N.W.2d 911 at 918. With respect to the consumer contemplation test the *Fell* court stated "that a normal user would not appreciate the danger posed by the missing gear guard when operating the shifter lever from the ground." *Id.* With respect to the risk-utility test the *Fell* court stated that "a fact question existed whether the risks

in using such a product outweighed the utility of the product." *Id.*

Moreover, in *Lovick v. Wil-Rich*, 588 N.W.2d 688 (Iowa 1999), the plaintiff instituted a strict liability and negligence action for defective design of a cultivator against the manufacturer. In submitting the design defect claim to the jury, the trial court instructed only on a strict liability theory. The manufacturer appealed the adverse verdict, claiming that the consumer contemplation instruction under the strict liability theory was an unfair standard for manufacturers and that the risk-utility analysis under the negligence theory should have been utilized. On appeal, the *Lovick* court refused to merge the two theories, instead preserving the distinction between the two theories, namely that strict liability focuses on the condition of the product, while negligence focuses on the conduct of the defendant. *Id.* at 698–99. However, the *Lovick* court found no legal error in the trial court's instruction. Specifically, the *Lovick* court stated:

> First, the trial court did not instruct on both negligence and strict liability theories. It only instructed on strict liability. The instruction to the jury included the risk-utility balancing analysis utilized in negligence. Thus, even if strict liability actually applied negligence principles, no prejudice occurred.

Id. at 699. The *Lovick* case follows *Aller*, *Choun*, and *Fell*, in applying both the consumer contemplation test and the risk-utility test in strict liability and negligent design defect claims. Indeed, even though the trial court instructed only on a strict liability claim, the *Lovick* court found that no error occurred due to the trial court's failure to submit a separate instruction for negligence because the strict liability instruction included the risk-utility test "utilized in negligence". *Id.*

[3] This court notes that although the court in *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565 (Iowa 1986), the case upon which defendants principally rely for their argument, only utilized the consumer contemplation test to determine whether or not the product at issue was "unreasonably dangerous," this test is only one of two tests that have been utilized by Iowa courts. Certainly, the holding in *Maguire* did not foreclose the idea of applying two tests, and based on the cases examined above, admittedly not a model of clarity, the court concludes that under Iowa law, both the consumer contemplation test and the risk-utility test are used to determine whether or not a product is "unreasonably dangerous."[5] This is true for design defect claims brought under a theory of strict liability and a theory of negligence. In the alternative, defendants, in a footnote of their reply brief, argue that the risk-utility test should not be applied to Mr. Wright's design defect claims because the risk-utility test does not apply to products whose potential risks are well-known such as cigarettes. For this proposition defendants rely on *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1409, 1412 (7th Cir.1994) and *Filkin v. Brown & Williamson Tobacco Corp.*, No. 99 C238, 1999 WL 617841, at *1 (N.D.Ill. Aug. 11, 1999). This argument, however, presupposes that the risks asso-

5. Iowa Civil Jury Instruction 1000.5 provides the following:

> Unreasonably Dangerous—Definition 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 whether the design benefits outweigh the risks, 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 costs 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

ciated with smoking cigarettes, including addiction, are well-known and that this court will take judicial notice of this fact. Therefore, before determining whether or not the risk-utility test, in addition to the consumer contemplation test, is applicable here, the court must venture forth to determine whether it will take judicial notice that the risks associated with smoking cigarettes, including addiction, are, in fact, common knowledge. Initially, however, the court will first address defendants' argument that Comment i of § 402A of the Restatement (Second) of Torts bars Mr. Wright's design defect claims.

b. Does Comment i of § 402A of the Restatement (Second) of Torts bar Mr. Wright's design defect claims?

According to the defendants, because the plain language of Comment i makes it clear that cigarettes are not unreasonably dangerous, Mr. Wright cannot properly state a claim for design defect with respect to the cigarettes he allegedly smoked. Defendants point out that tobacco is explicitly held out as an example of a product that is not unreasonably dangerous in § 402A and Comment i:

> Many products cannot be made safe for all consumption, and any food or drug necessarily involves some risk of harm . . . That is not what is meant by unreasonably dangerous in this section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whisky, containing a dangerous amount of fuel oil, is unreasonably dangerous. *Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.*

Restatement (Second) of Torts § 402A, cmt. i (emphasis added). Based on the plain language of this comment, therefore, defendants argue that because tobacco is not unreasonably dangerous, an essential element under Mr. Wright's negligence and strict liability design defect claims, such claims fail as a matter of law.

Additionally, in their reply brief, defendants argue that the distinction asserted by the plaintiffs between "good tobacco," as listed in Comment i, and manufactured cigarettes is without merit. This is so, because defendants contend that Comment e of § 402A specifically contemplates § 402A's application to manufactured products:

> Normally, the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing.

Restatement (Second) of Torts § 402A, cmt. e. Thus, defendants assert that in addition to Comment e, the plain language of Comment i, as well as its historical context and "legislative history," make it clear that the framers of § 402A meant to exempt manufactured cigarettes as a definitional example of a non-defective product. Defendants' Reply Brief at 4. The court rejects this argument.

[4] Initially, defendants are correct that Iowa has adopted Comment i of § 402A. However, this court finds that even so, plaintiffs' claims would not necessarily be barred. Indeed, while not binding on this court, many courts that have addressed this same argument have concluded that, because cigarettes are manufactured products and not raw tobacco, Comment i "does not, as a matter of law, remove all claims of defective tobacco products from the operation of Section 402A." *Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515, 1522 (D.Kan.1995) (noting that although "good tobacco," without any additives or foreign substances, may not be unreasonably dangerous, that does not automatically mean that all tobacco-containing products are not unreason-

ably dangerous); *See also Witherspoon v. Philip Morris Inc.*, 964 F Supp. 455, 466 (D.D.C.1997) (citing *Burton*); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F Supp.2d 70, 85 n. 9 (N.D.N.Y.2000) (noting that R.J. Reynolds' reliance on Comment i of § 402A to show that cigarettes are not unreasonably dangerous when manufactured according to plan is not New York law and therefore unavailing); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1053 n. 8 (Ind.Ct.App.1990) (noting that because cigarettes are manufactured products and not raw tobacco, Comment i does not, as a matter of law, remove all claims of defective tobacco products from the operation of § 402A). For example, in *Hill v R.J. Reynolds Tobacco Co*, 44 F Supp.2d 837 (W.D.Ky. 1999), the district court explained that design defect claims that allege the deliberate addition of harmful substances beyond those naturally occurring in tobacco disqualify cigarettes as "good tobacco" and thus "would allow a finding that they are defective and unreasonably dangerous." *Id.* at 852–53.

This court points out that no Iowa court has concluded that cigarettes are not an unreasonably dangerous product, as a matter of law, based on Comment i of § 402A. The court is mindful that this tobacco case is one of first impression in the State of Iowa, and, thus, to a large extent, is the reason that this part of Comment i dealing with tobacco has never been mentioned in any Iowa case. However, even the majority of cases that have dismissed cigarette product liability claims have done so not based on Comment i, but after a thorough analysis of the specific risks claimed by the respective plaintiff to have caused his or her injury and whether those risks were "common knowledge" during the relevant time period. *See Guilbeault v R.J. Reynolds Tobacco Co.*, 84 F Supp.2d 263, 273 (D.R.I.2000) (refusing to blindly apply Comment i to bar plaintiff's claims); *Hollar v. Philip Morris Inc.*, 43 F.Supp.2d 794, 806–07 (N.D.Ohio 1998); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F Supp. 228, 230–31 (N.D.Ohio 1993). *But see Estate of Edward D. White v. R.J. Reynolds Tobacco Co.*, 2000 WL 1133537, *6 ("The insurmountable obstacle to recovery on plaintiffs' strict liability claim is comment i to § 402A, known as the consumer expectation test."). In a similar vein, this court, refuses to dismiss Mr. Wright's design defect claim solely on the basis of the language contained in Comment i of § 402A of Restatement (Second) of Torts. *See Insolia v Philip Morris Inc*, 216 F.3d 596, 603 (7th Cir.2000) (stating that "we explicitly reject the tobacco industry's invitation to declare that cigarettes are not unreasonably dangerous"). Thus, defendants' motion to dismiss Mr. Wright's strict liability and negligence design defect claims based solely on Comment i § 402A of the Restatement (Second) of Torts is denied.

c. The "common knowledge" doctrine

In the alternative, defendants argue that even if the plain language of Comment i § 402A of the Restatement (Second) of Torts does not persuade this court that cigarettes are not unreasonably dangerous, the common knowledge doctrine completely defeats Mr. Wright's design defect claims. The common knowledge doctrine rests upon the premise that a product is not unreasonably dangerous if everyone knows of its inherent dangers. Comment i of § 402A of the Restatement of (Second) of Torts incorporates the common knowledge doctrine. Comment i, which describes the term "unreasonably dangerous," states: "The article sold 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." Restatement (Second) of Torts § 402A cmt. i (1965).

According to defendants, both state and federal courts throughout the country have applied the laws of the states in which they sit and repeatedly dismissed claims brought by cigarette smokers because information regarding the risks of smoking,

including addiction, have long been available to, and known by, the public. *See e.g. Roysdon v R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir.1988); *Filkin v. Brown & Williamson Tobacco Corp.*, 1999 WL 617841, *1 (N.D.Ill. Aug.11, 1999); *Paugh v. R.J Reynolds Tobacco Co*, 834 F.Supp. 228, 230–31 (N.D.Ohio 1993); *Gunsalus v. Celotex Corp*, 674 F.Supp. 1149, 1158 (E.D.Pa.1987); *Tune v Philip Morris*, No. 97–4678–CI, at 6 n. 4 (6th Jud.Cir.Ct., Pinellas County Fla. Feb. 10, 1999). Thus, defendants argue here, that because the health risks of smoking, including the possibility of addiction, are and have been common knowledge in the State of Iowa, as a matter of law, cigarettes cannot be found to be unreasonably dangerous.

Whether the common knowledge doctrine defeats plaintiffs' design defect claims based on both strict liability and negligence, as a matter of law, is a novel question in Iowa. Other courts considering this very issue have reached different results regarding when, if at all, assorted risks, namely general disease-related risks and risks of addiction, associated with smoking became common knowledge. In *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F.Supp.2d 263 (D.R.I.2000), the district court noted that the "Northern District of Ohio, applying Ohio law, has been particularly active in dismissing smokers' claims under Rule 12(b)(6) based on the common knowledge of health risks associated with smoking since at least 1966 and as far back as 1940." *Id.* at 270. *See e.g. Glassner v. R.J. Reynolds Tobacco Co*, 223 F.3d 343, 2000 WL 1229061, * 7 (6th Cir. Aug.31, 2000) (affirming district court's dismissal of plaintiff's wrongful death claims against the defendant tobacco companies pursuant to FED.R.CIV.P. 12(b)(6) because the common knowledge doctrine barred her claims during the relevant time period when plaintiff began to smoke, 1969, until the time plaintiff ceased to smoke, 1997); *Hollar v. Philip Morris Inc.*, 43 F.Supp.2d 794, 807 (N.D.Ohio 1998) (dismissing two plaintiffs' product liability claims, who began smoking in 1968 and 1971 respectively, because "[t]he case law is well settled that the health hazards of smoking were within the ordinary citizen's common knowledge at that time"); *Paugh v R.J Reynolds Tobacco Co.*, 834 F.Supp. 228, 230–31 (N.D.Ohio 1993) (dismissing claims of plaintiff who smoked from 1940–1990 because "the dangers posed by tobacco smoking have long been within the ordinary knowledge common to the community"). After observing this fact, the district court in *Guilbeault* concluded:

> [A]fter thoroughly reviewing the facts regarding the evolution of the public's knowledge of smoking-related dangers, the Court is satisfied that it can take judicial notice of the community's common knowledge of the general disease-related health risks associated with smoking, including the risk of contracting cancer, as of 1964.

Guilbeault, 84 F.Supp.2d at 273.

Moreover, several courts have granted summary judgment to the defendant tobacco companies because the risks associated with smoking were common knowledge. *See Allgood v R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir.), *cert. denied*, 519 U.S. 930, 117 S.Ct. 300, 136 L.Ed.2d 218 (1996) (applying Texas law) (affirming grant of summary judgment to defendant on "lifetime smoker's" failure to warn claim for failure to comply with statute of limitation, and alternatively under "common knowledge" theory, as "the dangers of cigarette smoking have long been known to the community") (citing *Roysdon* and *Paugh*); *Roysdon v. R.J Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988) (applying Tennessee law) (applying common knowledge doctrine to affirm grant of summary judgment to defendant on plaintiff's product liability claims spanning 1974–1984, citing with approval the district court's observation that " 'tobacco has been used for over 400 years . . . Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the

common knowledge of the community.' "); *The American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 429–31 (Tex.1997) (applying Texas law) (granting summary judgment to defendant on claims based on failure to warn of health risks of smoking since 1952 because the general ill-effects of smoking were common knowledge at that time).

Courts in other jurisdictions, however, have refused to dismiss claims based on the common knowledge doctrine. *See Tompkins*, 92 F.Supp.2d at 87 (refraining from taking judicial notice that the risks of cigarette smoking have been "open and obvious" to consumers since plaintiff began smoking in 1938 because such an issue involves questions of fact); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F.Supp.2d 837, 844 (W.D.Ky.1999). The district court in *Hill* observed:

> [T]he judicial notice inquiry [in this case] would focus on the state of popular consciousness concerning cigarettes before 1969. The Court is simply unwilling to take judicial notice of something as intangible as public knowledge over three decades in the past. The exercise seems inherently speculative and an inappropriate topic for judicial notice.

Hill, 44 F.Supp.2d at 844. As demonstrated, these above-mentioned cases focus the common knowledge inquiry on whether the link between cigarette smoking and general health risks was common knowledge during the relevant time period. Other cases that have analyzed the common knowledge inquiry have distinguished between knowing about the general health risks of smoking and knowing about the risk of addiction, or other specific illnesses or injury allegedly caused by defendants' tobacco products. In this case, defendants contend that the risk of addiction is a "lesser included risk" of the general risks of smoking.

d. Is the risk of addiction a "lesser included risk" of the risks of smoking?

Several courts have said that whether or not there is a distinction between knowing about the general risks of smoking and knowing about the risk of addiction is a question of fact that should be decided by the jury. *See State of Texas v. American Tobacco Co.*, 14 F.Supp.2d 956, 966 (E.D.Tex.1997) (when facts are viewed in light most favorable to plaintiff, "while the health risks of tobacco consumption are generally known, the addictive nature of tobacco consumption is not generally known due to the concealment and misrepresentation by Defendant"); *Castano v. American Tobacco Co.*, 961 F.Supp. 953, 958 n. 1, 959 (E.D.La.1997); *Grinnell*, 951 S.W.2d at 429–31 (refusing to grant summary judgment on failure to warn of the addictive nature of cigarettes because "we cannot simply assume that common knowledge of the general health risks of tobacco use naturally includes common knowledge of tobacco's addictive quality") [6]; *Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515, 1525–26 (D.Kan.1995). In *Burton*, the district court refused to find as a matter of law that the dangers of smoking have been common knowledge since the 1950's. *See Burton*, 884 F.Supp. at 1526. The *Burton* court, quoting a state court decision, noted that:

> "[t]here is no basis for our judicially noticing what the ordinary consumer's knowledge concerning the addictive qualities of cigarettes may have been

6. The court's holding in *Grinnell* regarding the addictive nature of cigarettes has been superseded by statute as stated by the Fifth Circuit Court of Appeals in *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 490 (5th Cir. 1999). In 1993, after the lawsuit in *Grinnell* was filed, the Texas legislature codified Comment i to § 402A of the Restatement (Second) of Torts to preclude product liability actions based on cigarettes. *See id.* at 489. The *Sanchez* court concluded that the statute superseded the *Grinnell* court's holding regarding the addictive nature of cigarettes because the plain language of the statute and its legislative history established that the Texas legislature did not intend to distinguish between general health dangers and addictive dangers of smoking when assessing "common knowledge." *See id.* at 490.

> when [plaintiff] began smoking in 1940. The state of knowledge attributable to the community of individuals consuming cigarettes has changed over time and will continue to do so. It was not until 1988 that the Surgeon General published a report informing of the addictive nature of cigarettes."

Id. (quoting *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1054 (Ind.App. 1990)).

The Seventh Circuit Court of Appeals, in *Insolia v. Philip Morris Incorp.*, 216 F.3d 596 (7th Cir.2000), has taken the holdings reached in these cases one step further by explicitly stating that "there is a considerable difference between knowing that smoking is bad and knowing that smoking is addictive." *Insolia*, 216 F.3d at 603. Thus, the *Insolia* court did not consider whether or not the existence of a distinction between the general risks of smoking and the risk of addiction was a question of fact to be determined by a jury; rather, the *Insolia* court unequivocally recognized that such a distinction does, in fact, exist. The issue, however, in *Insolia*, was whether or not the plaintiffs presented sufficient evidence to generate a genuine issue of material fact that the risk of addiction was not commonly known.

In *Insolia*, the plaintiffs appealed the district court's granting summary judgment on their strict liability claim based on the common knowledge doctrine, arguing that although the typical consumer was aware that smoking was bad, he or she didn't know back then that smoking was addictive. *Id.* at 601. The *Insolia* court affirmed the district court's decision, stating that the evidence in the record "that the ordinary consumer at the time the plaintiffs began smoking was unaware of smoking's addictive danger [was] surprisingly thin." *Id.* at 603. The *Insolia* court also emphasized the plaintiffs' concession that the ordinary consumer at the time in question knew that smoking was habit forming, which the *Insolia* court concluded was tantamount to plaintiffs conceding that the ordinary consumer at the time in question knew that smoking was addictive. *Id.* The court rejected plaintiffs attempt to distinguish between a habit that can easily be broken and a physiological addiction that is difficult to stop, stating that whether smoking is habit forming or addictive is a "semantical distinction beyond the grasp of our Average Joe." *Id.* Therefore, the *Insolia* court affirmed the district court's granting summary judgment to defendant because of plaintiffs' concession and the "surprisingly thin" amount of evidence plaintiffs presented that tobacco's addictive nature was generally unknown. Significantly, the Seventh Circuit Court of Appeals in *Insolia* stated with clarity that its ruling was limited to the facts in the record before it, stating:

> Based on this particular evidentiary record, no reasonable trier of fact could find for the plaintiffs that the ordinary consumer in 1935 and in the early 1950's did not appreciate the health risks of smoking. This decision does not foreclose the possibility that other plaintiffs might prevail on a strict liability claim against the tobacco industry. Another record in another case might be different. Another plaintiff might marshal better evidence that the haze of the tobacco companies' propaganda obscured whatever hazards were known to the average consumer. We explicitly reject the tobacco industry's invitation to declare that cigarettes are not unreasonably dangerous.

Id.; *See also Guilbeault*, 84 F.Supp.2d 263 at 275 n. 2 (taking judicial notice that the general disease related health risks associated with smoking were part of the common knowledge as of 1964, however, noting in *dicta* that in the face of a claim that the plaintiff alleged that he was addicted to defendant's cigarettes, the "common knowledge" analysis might be different).

Most recently, moreover, the Sixth Circuit Court of Appeals handed down two decisions that stress the distinction between common knowledge of the general health hazards of smoking versus common knowledge of specific illnesses or injuries allegedly caused by the defendants' tobacco products. In *Tompkin v. American*

Brands, 219 F.3d 566 (6th Cir.2000), the Sixth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the defendant tobacco companies, holding that whether the dangers of smoking, namely the link between smoking and lung cancer, were common knowledge between 1950 and 1965 presented a question of fact for the jury. *Tompkin*, 219 F.3d at 572. In reaching this decision, the *Tompkin* court expressly noted:

> The pertinent issue here is not whether the public knew that smoking was hazardous to health at some undifferentiated level, but whether it knew of the specific linkages between smoking and lung cancer.

Tompkin, 219 at 572. Thus, because the plaintiffs in *Tompkin* alleged that defendants' tobacco products caused Mr. Tompkin's lung cancer, the Sixth Circuit Court of Appeals concluded that the common knowledge inquiry must be narrowed to the question of whether the link between cigarette smoking and lung cancer was common knowledge, not merely whether the link between cigarette smoking and general health maladies was common knowledge. The *Tompkin* court explained its reason for narrowing the inquiry, stating:

> It is one thing to be aware generally that a product might have an attenuated and theoretical connection with a deadly disease like lung cancer; it is another altogether to comprehend that it is the cause of an overwhelming majority of lung cancer cases. The "common knowledge" requirement is emasculated if a defendant may show merely that the public was aware that a product presented health risks at some vague, unspecified, and undifferentiated level.

Tompkin, 219 F.3d at 572.

Additionally, in *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 2000 WL 1229061 (6th Cir. Aug. 31, 2000), the Sixth Circuit Court of Appeals reiterated with approval the analysis employed in *Tompkin*, namely narrowing the question regarding common knowledge. *Glassner*, 223 F.3d 343, 351. In *Glassner*, however, the Sixth Circuit Court of Appeals affirmed the district court's dismissal of plaintiff's wrongful death action against the defendant tobacco companies for failure to state a claim upon which relief might be granted pursuant to FED.R.CIV.P. 12(b)(6). The difference being that the plaintiff in *Glassner* failed to allege any specific illness or injury caused by defendants' tobacco products, whereas the plaintiff in *Tompkin* alleged that the defendants' tobacco products caused his lung cancer. Indeed, the plaintiff in *Glassner* merely alleged that smoking cigarettes is hazardous to one's health and that his wife, the decedent, was harmed as a result of smoking. In so doing, the *Glassner* court limited its common knowledge inquiry to the question of whether the link between cigarette smoking and general health risks was common knowledge during the relevant time period. As a result, the *Glassner* court found that, indeed, there existed widespread public awareness of the health risks associated with smoking, which the *Glassner* court imputed to the decedent, thereby presuming that she was aware and assumed those risks.

In this case, defendants argue that this court should not recognize this distinction, because defendants assert that the risk of addiction is a "lesser included risk" of the risks of smoking. Defendants attempt to marshal case-law in support of their claim that the risks of smoking, and the "lessor included risk" of addiction, have been common knowledge. *See e.g. Allgood*, 80 F.3d at 172; *Sanchez*, 187 F.3d at 490; *Arnold v. R.J. Reynolds Tobacco Co.*, 956 F.Supp. 110, 115 n. 8 (D.R.I.1997);[7] *Lonkowski v. R.J. Reynolds Tobacco Co.*, 1996 WL

7. In *Arnold*, the district court in Rhode Island stated that "the dangers of smoking and the addictive nature of nicotine have become common knowledge in today's society." *Arnold*, 956 F.Supp. at 115 n. 8. This statement, however, does not stand for the proposition that the risk of addiction is a lesser included risk of the risks of smoking. Indeed, the fact that the district court expressly articulated the

888182 (W.D.La.1996).[8] Despite defendants' protestations, these cases, as will be discussed, do not hold for such a sweeping proposition.

Defendants correctly state that the Fifth Circuit Court of Appeals in *Allgood* affirmed the trial court's dismissal of product liability claims brought by a deceased smoker's spouse. Defendants assert that by explaining that "like the dangers of alcohol consumption, the dangers of cigarette smoking have long been known to the community" with knowledge that the plaintiff claimed that her husband started smoking as early as 1936 and "was so addicted that no amount of warning could induce him to quit," *Id.* at 172, the *Allgood* court implicitly refused to distinguish between the risk of addiction and the risks of smoking. In so doing, defendants, by way of inference, contend that the *Allgood* court held that the risk of addiction was subsumed within the risks of smoking when it concluded that "the dangers of cigarette smoking have long been known to the community." *Id.* at 172. This court, however, points out that the *Allgood* court did not inquire into the extent of knowledge regarding the link between smoking and addiction, nor did it specify the nature of the risk the public allegedly knew. It merely made a bald finding that people believe that smoking has health hazards. Indeed, this court concludes that, such a bare finding is an insufficient predicate for concluding as a matter of law that the nexus between cigarette smoking and addiction was common knowledge. Furthermore, because the Fifth Circuit Court of Appeals in *Allgood* did not expressly hold that the risk of addiction was subsumed within the risks of smoking, the *Allgood* court did not pass on whether or not such a distinction existed. *See Castano v. The American Tobacco Co.*, 961 F.Supp. 953, 958 n. 7 (E.D.La.1997) (stating that the *Allgood* opinion does not hold that nicotine's alleged addictiveness or the defendants' alleged concealment and manipulation was within the "common knowledge").

In *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486 (5th Cir.1999), the Fifth Circuit Court of Appeals did refuse to make such a distinction and determination between "common knowledge as to general health dangers" and "common knowledge as to the specific danger of addiction from smoking." *Sanchez*, 187 F.3d 486 at 490. The reason for the Court's refusal, however, was based upon a state statute. Indeed, the *Sanchez* court concluded that the plain language of the state statute and its legislative history established that the Texas legislature did not intend to distinguish between general health dangers and the addictive dangers of smoking when assessing "common knowledge."[9] *Id.* at 490.

[5] Based on the foregoing authority, this court concludes that there is a considerable difference between knowing that smoking is bad and knowing that smoking is addictive. *See Insolia*, 216 F.3d at 603. Therefore, this court rejects defendants' argument, and concludes that the risk of addiction is not, as defendants assert, "a lesser included risk," of the risks of smoking.

e. Will the court take judicial notice that the risks of smoking are "common knowledge?"

Defendants assert that both the Eighth Circuit Court of Appeals and the Iowa

dangers of smoking and the addictive nature of nicotine indicate to this court that, such a distinction between the dangers of smoking and addiction does, in fact, exist.

8. In *Lonkowski* the district court held that '[a]lthough a precise finding of when the dangers of cigarettes become common knowledge is beyond the scope of this ruling, the court notes that as early as 1952, prior to the start of Mr. Londkowski's smoking, knowledge of the dangers of cigarettes was widespread.' *Id.*, 1996 WL 888182 at *7. Thus, the court did not pass upon whether or not there is a distinction between the risks of smoking and the risk of addiction.

9. *See supra* note 6 for a more detailed discussion of the *Sanchez* decision.

Supreme Court recognize that judicial notice can be taken of commonly known facts. Defendants ask that this court take judicial notice that the health risks of smoking, including addiction, are commonly known in Iowa. Defendants assert that many courts in other jurisdictions, cited above, have taken judicial notice of the fact that the health risks of smoking, including addiction, are common knowledge.

Plaintiffs, however, argue that taking judicial notice that the health hazards of smoking were common knowledge in the Northern District of Iowa since the 1950's through the present is improper because there exists considerable dispute devoted to the issues of what information was known among the scientists during this period, what information was known to the tobacco companies, what public statements and actions were being undertaken by the tobacco companies through this period to create false controversy as to those issues, and what the public actually knew or understood during this time. Also, plaintiffs stress that it is improper for this court to take judicial notice of a fact merely because a different court took judicial notice of that same fact.

[6] Pursuant to Rule 201 of the Federal Rules of Evidence, a federal court may take judicial notice of an adjudicative fact that is both "not subject to reasonable dispute" and either:

> (1) generally known within the territorial jurisdiction of the trial court or
>
> (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

FED R. EVID. 201(b); *See Qualley v. Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1128 (8th Cir.2000) (stating that Rule 201 governs only the judicial notice of "adjudicative facts." FED.R.EVID 201(a)); *see also* FED R.EVID. 201(b) Advisory Committee's Note ("With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy;" "A high degree of indisputability is an essential prerequisite."); *General Electric Capital Corp v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir.1997) ("In order for a fact to be judicially noticed, indisputability is a prerequisite.") (citation omitted). Because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b). *See* FED R.EVID. 201(b) Advisory Committee Notes; *International Star Class Yacht Ass'n v. Tommy Hilfiger USA, Inc.*, 146 F.3d 66, 70 (2d Cir.1998) (noting that "[c]are must be taken that the requisite notoriety exists [and][e]very reasonable doubt upon the subject should be resolved promptly in the negative") (quoting *Brown v. Piper*, 91 U.S. 37, 43, 23 L.Ed. 200 (1875)).

This court is familiar with Rule 201 of the Federal Rules of Civil Procedure and its application, having taken judicial notice of various adjudicative facts. *See Laird v. Stilwill*, 969 F.Supp. 1167, 1175 (N.D.Iowa 1997) (taking judicial notice of the five-step process both parties advanced in their memorandums to provide the background necessary to adequately explain the issues at hand to the uninitiated reader); *Commercial Savings Bank v. Commercial Federal Bank*, 939 F.Supp. 674, 677 (N.D.Iowa 1996) (taking judicial notice of the fact that the cities of Carroll, Dedham, and Lanesborro are all located in Carroll County, Iowa); *Curtis 1000, Inc. v. Youngblade*, 878 F.Supp. 1224, 1238 (N.D.Iowa 1995) (taking judicial notice of the fact that, at the time Youngblade entered into the Agreement with Curtis 1000, the property on which Gateway 2000 is now located was outside the corporate limits of the town of North Sioux City, South Dakota).

[7, 8] In this case, however, the court will refrain from taking judicial notice that the risks of cigarette smoking have been common knowledge to consumers since Mr. Wright began smoking in 1954. Additionally, because this court agrees with the Seventh Circuit Court of Appeals in *Inso-*

lia that "there is a considerable difference between knowing that smoking is bad and knowing that smoking is addictive," *Insolia*, 216 F 3d at 603, this court will likewise refrain from taking judicial notice that the risk of addiction has been common knowledge to consumers since Mr. Wright began smoking in 1954. These issues involve questions of fact. To extend the doctrine of judicial notice to the length pressed by the defendants would allow defendants to do through argument to this court what it is required by due process to do at the trial. Such an extension would turn the doctrine of judicial notice into a pretext for dispensing with a trial. *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292, 302, 57 S.Ct. 724, 81 L.Ed. 1093 (1937) ("To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be to turn the doctrine into a pretext for dispensing with a trial.") Although the court is cognizant that courts in different jurisdictions have taken judicial notice that the risks of smoking, sometimes including the risk of addiction, are common knowledge, this court cannot take judicial notice of the findings of other courts. *See Holloway v. A.L. Lockhart*, 813 F.2d 874, 878–79 (8th Cir.1987) (holding district court could not take judicial notice of finding of another court that use of tear gas was reasonable and necessary). Also, the simple fact that courts disagree about whether or not to take judicial notice of this fact further illustrates to this court that this fact is subject to considerable dispute, such that taking judicial notice of it would be improper. Moreover, taking judicial notice of the fact that the risks of smoking, including addiction, are common knowledge based in large part on journals, periodicals and the like, has none of the *indicia* of trustworthiness found in a public record or a well-established treatise. *General Electric Corp.*, 128 F.3d at 1084 (stating that Gray's anatomy is an example of a well-established treatise); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3rd Cir.1993) (refusing to take notice of government test on vehicle rollovers because results are not "readily provable through a source whose accuracy cannot be reasonably questioned"); *Cofield v. Alabama Pub. Serv. Comm'n*, 936 F.2d 512, 517 (11th Cir.1991) (holding that a statement of fact that appears in a daily newspaper does not of itself establish that the stated fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") (citing FED. R. EVID. 201(b)(2)).

[9] As this is a motion to dismiss, the court must assume that all the facts alleged in Mr. Wright's complaint are true, and must liberally construe those allegations in the light most favorable to Mr. Wright. *See St. Croix*, 178 F.3d at 519 ("We take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff."); *Gordon*, 168 F.3d at 1113 (same); *Midwestern Machinery, Inc.*, 167 F.3d at 441 (same). Mr. Wright alleges that he did not, in the exercise of ordinary diligence, know of the likelihood of, or the severity of, the risks from defendants' tobacco products, including the risk of addiction. Among other things, Mr. Wright alleges in his design defect claim based on negligence that defendants failed to test, to test adequately, or conduct scientific research on their tobacco products for harmful or addictive properties; failed to establish a reasonably safe dose for foreseeable users; failed to design a product that when used as intended was reasonably safe for foreseeable users; failed to make such feasible improvements in design and composition of their tobacco products such as to materially decrease the foreseeable risk to users; and in designing "light" cigarettes in such a way that they generate lower tar and nicotine ratings on standard machine smoking tests than regular cigarettes while typically they do not actually deliver less tar or

nicotine as actually smoked by most cigarette smokers. Mr. Wright also alleges that defendants controlled and manipulated the amount of nicotine in cigarettes for the purpose and with the intent of creating and sustaining addiction. Furthermore, in his design defect claim based on strict liability, Mr. Wright alleges, among other things, that the tobacco products were addictive, habituating, habit-forming, and once used caused physical and psychological dependence; the tobacco products failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the consumer; that the risk of danger from the design of defendants' tobacco products outweighed the benefits obtained with the use of the products; that the defendants' tobacco products were insufficient in reducing tar and other carcinogens by removal, dilution and filtration; that defendants' tobacco products excessively delivered nicotine; and that defendants controlled and manipulated the amount of nicotine in cigarettes for the purpose and with the intent of creating and sustaining addiction. All of these allegations are at war with the claim that consumers knew they were buying a dangerous product. Without factual development, the court cannot conclude that dismissal based on the common knowledge doctrine is appropriate. Therefore, the court denies defendants' motion to dismiss plaintiffs' strict liability and negligent design defect claims based on the common knowledge doctrine. In so doing, plaintiffs' Objection to and Motion to Strike Defendants' Exhibits and Alternative Motion for Leave to File Response and Supplemental Exhibits (# 62) is **denied** as moot.

Furthermore, this court noted that defendants' previous argument—that the risk-utility test is not applicable to Mr. Wright's design defect claims because the test does not apply to products whose potential risks are well-known such as cigarettes—presupposed that this court would take judicial notice that the risks associated with smoking, including addiction, are common knowledge. Because this court will refrain from taking judicial notice that the risks associated with smoking, including addiction, are common knowledge at this preliminary motion to dismiss stage, application of the risk-utility test, in addition to the consumer contemplation test, to Mr. Wright's negligent and strict liability design defect claims is appropriate.

2. Failure to warn claims

[10, 11] In *Olson v. Prosoco, Inc.*, 522 N.W.2d 284 (Iowa 1994), the Iowa Supreme Court stated that any distinction between strict liability and negligence principles on a failure to warn claim are illusory. *Id.* at 288. Thus, under Iowa law, Mr. Wright's strict liability failure to warn claim merges into his negligent failure to warn claim. *Id.* at 289. In determining whether a manufacturer owes a duty to warn, Iowa courts apply the principles of the Restatement (Second) of Torts § 388. *See West v. Broderick & Bascom Rope Co.*, 197 N.W.2d 202, 209 (Iowa 1972). Section 388 provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388 (§ 394 makes § 388 applicable to manufacturers).

[12, 13] In testing the defendants' liability for negligence in failing to warn, the defendants should be held to the standard of care of an expert in its field. *Id.* at 289 (citing *West*, 197 N.W.2d at 210 and *Castrignano v E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 782 (R.I.1988)). Therefore, the relevant inquiry is whether the reasonable manufacturer knew or should have known of the danger, in light of the generally recognized and prevailing best scientific knowledge, yet failed to provide warning to users or consumers. *Prosoco*, 522 N.W.2d at 290 (citations omitted). However, a manufacturer of a product has no duty to warn where the risks are known and obvious. *See Sandry v. John Deere Co.*, 452 N.W.2d 616, 619 (Iowa App.1989) ("Where risks are known and obvious there is no need for a warning," citing *Nichols v. Westfield Indus., Ltd.*, 380 N.W.2d 392, 400–01 (Iowa 1985)).

Defendants contend that because the risks of smoking have long been commonly known, they had no duty to warn of such risks. Defendants argue that given the warnings printed on each package of cigarettes since 1966, and the common knowledge that smoking can be hazardous, they had no duty to warn of such risks. Conversely, plaintiffs contend that the risks from smoking are not an obvious danger or within the contemplation of the ordinary consumer. Indeed, in their complaint, plaintiffs allege that Mr. Wright and the general public did not know and understand the dangers presented by smoking.

[14] The court concludes that although defendants properly state the rule that a manufacturer cannot be held liable for obvious or commonly known dangers, dismissal based on the common knowledge that smoking is dangerous is inappropriate. Because this court previously refrained from taking judicial notice that the health risks of smoking are commonly known, whether the health risks of smoking, including the risk of addiction, in terms of a duty to warn, and whether Mr. Wright appreciated the danger sufficiently to obviate defendants' liability, are questions of fact for the jury. In his complaint, Mr. Wright alleges that he had no knowledge of the risks associated with smoking, including addiction, thus creating a jury question as to whether the danger was open and obvious or part of the common knowledge and whether a warning was required. Moreover, as this court explained in *Rowson v. Kawasaki Heavy Indus., Ltd.*, 866 F.Supp. 1221 (N.D.Iowa 1994), even if Mr. Wright knew or may have known of the risks of smoking, including addiction, created by the use of defendants' tobacco products, it is for the jury to say whether Mr. Wright appreciated these risks sufficiently to obviate the necessity of the warning. *Id.* at 1242 (citing *Bandstra v. Int'l Harvester Co.*, 367 N.W.2d 282, 287 (Iowa App.1985)). Therefore, defendants' motion to dismiss Mr. Wright's failure to warn claim based on the common knowledge doctrine is also denied.

B. Express Warranty, Fraudulent Misrepresentation and Fraudulent Nondisclosure Claims

Defendants assert that because of the common knowledge doctrine, Mr. Wright cannot allege justifiable reliance, and, consequently, Mr. Wright's fraud and express warranty claims are barred as matter of law.

1. Does the common knowledge doctrine bar Mr. Wright's fraudulent misrepresentation and fraudulent nondisclosure claims?

[15–17] The required elements of fraudulent misrepresentation under Iowa law are: (1) a material (2) false (3) representation coupled with (4) scienter and (5) intent to deceive, which the other party (6) relies upon with (7) resulting damages to the relying party. *Doe v. Hartz*, 52 F.Supp.2d 1027, 1055 (N.D.Iowa 1999) (internal quotations and citations omitted); *accord In re Marriage of Cutler*, 588 N.W.2d 425, 430 (Iowa 1999) (same elements). Moreover, under Iowa law, [a]

representation need not be an affirmative misstatement; the concealment of or failure to disclose a material fact can [also] constitute fraud. *Doe*, 52 F.Supp.2d at 1055 (internal quotations and citations omitted). Iowa courts have recognized that "[a] misrepresentation may occur when one with superior knowledge, dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact in the transaction." *Id.* (citing *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996)) (in a case involving fraudulent concealment in the sale of a car, the court stated, "for concealment to be actionable, the representation must relate to a material matter known to the party . . . which it is his legal duty to communicate to the other contracting party whether the duty arises from a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances," and "[a] misrepresentation may occur when one with superior knowledge, dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact in the transaction") (citations and internal quotations omitted). Thus, fraudulent nondisclosure and fraudulent concealment have the following elements: [10]

1. Special circumstances existed which gave rise to a duty of disclosure between the plaintiff and the defendant. (Describe the relationship found to give rise to a duty of disclosure.)

2. While such relationship existed, the defendant [was aware of the following facts] [intended the following course of action] (state the facts or intent alleged to have been withheld).

3. While such relationship existed, the defendant concealed or failed to disclose [the knowledge or intent alleged to have been withheld].

4. The undisclosed information was material to the transaction.

5. The defendant knowingly failed to make the disclosure.

6. The defendant intended to deceive the plaintiff by withholding such information.

7. The plaintiff acted in reliance upon the defendant's failure to disclose and was justified in such reliance.

8. The failure to disclose was a proximate cause of the plaintiff's damage.

9. The nature and extent of the plaintiff's damage.

Iowa Civil Jury Instructions, 810.2; *see also Jones Distrib. Co.*, 943 F.Supp. at 1473; *Cutler*, 588 N.W.2d at 430 (defining the elements of fraud as including (1) misrepresentation or failure to disclose when under a legal duty to do so, (2) materiality, (3) scienter, (4) intent to deceive, (5) justifiable reliance, and (6) resulting injury or damage). The plaintiff must prove the elements of fraudulent misrepresentation or fraudulent concealment by clear and convincing evidence. *Cutler*, 588 N.W.2d at 430. As the Iowa Supreme Court has observed,

> [F]or concealment to be actionable, the representation must "relate to a material matter known to the party . . . which it is his legal duty to communicate to the other contracting party whether the duty arises from a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances." *Sinnard [v. Roach]*, 414 N.W.2d [100,] 105 [(Iowa 1987)] (quoting *Wilden Clinic, Inc. v. City of Des Moines*, 229 N.W.2d 286, 293 (Iowa 1975)).

Clark, 546 N.W.2d at 592; *McGough v. Gabus*, 526 N.W.2d 328, 331 (Iowa 1995) (fraud may arise from a special relationship giving rise to a duty to disclose and failure to make that disclosure). Iowa cases have not provided a specific test for determining when a duty to reveal arises in fraud cases. *See Clark*, 546 N.W.2d at

10. Under Iowa law, fraudulent nondisclosure and fraudulent concealment are the same. Therefore, for purposes of this motion to dismiss, the court will refer to fraudulent nondisclosure and fraudulent concealment interchangeably.

592 (citing *Sinnard*, 414 N.W.2d at 106); *Arthur v. Brick*, 565 N.W.2d 623, 625 (Iowa Ct.App.1997). However, Iowa courts have recognized that "[a] misrepresentation may occur when one with superior knowledge, dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact in the transaction." *See Clark*, 546 N.W.2d at 592 (*quoting Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984)); *Arthur*, 565 N.W.2d at 625 (*quoting Clark*); see also Gouge, 586 N.W.2d at 714 (*quoting Arthur*).

Both misrepresentation and fraudulent nondisclosure require reliance that is justified. The Iowa Supreme Court explained that:

> Reliance is justified when a reasonably careful person would be justified in relying on the information supplied. Reliance is not justified if the person receiving the information knows or in the exercise of ordinary care should know that the information is false.

Pollmann v. Belle Plaine Livestock Auction, Inc., 567 N.W.2d 405, 410 (Iowa 1997). A plaintiff cannot recover if he "blindly relies on a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." *Lockard v. Carson*, 287 N.W.2d 871, 878 (Iowa 1980); *accord* Restatement (Second) of Torts § 541 cmt. a (1977). Nevertheless, Iowa courts have refused to impose an objective standard of ordinary care on plaintiffs in fraud actions, stating:

> that the test for determining whether a party to a transaction has a right to rely on representations of the other is not whether a reasonably prudent person would be justified in relying on such representations but rather, whether the complaining party, in view of his own information and intelligence, had a right to rely on the representations. This subjective standard depends not on what an ordinarily prudent person reasonably would do to protect his or her interests, but upon what the complaining party reasonably could be expected to do.

Id. at 877.

[18] According to defendants, because the risks associated with cigarette smoking are common knowledge and have been communicated to smokers through package warnings and advertisements since 1966 and 1972, as matter of law, Mr. Wright cannot show justifiable reliance on any alleged statements or nondisclosures of defendants. The court does not agree.

As indicated previously, the court refuses, at this early stage in the proceedings, to take judicial notice of the fact that the risks associated with smoking, including addiction, are common knowledge. Even if this court did take judicial notice of this fact, it does not mean that Mr. Wright may not have been defrauded by defendants' alleged statements denying their conduct in manipulating the level of nicotine in cigarettes and by their attempts to refute the common knowledge of the harm of cigarettes by representing to the public that nicotine and cigarettes are not addictive.

Under Iowa law, justifiable reliance is a subjective rather than an objective inquiry and because this is a motion to dismiss, Mr. Wright's allegations must be viewed as true and in the light most favorable to him. *See Gross*, 186 F.3d at 1090 (accepting all the factual allegations of the complaint as true and construing them in the light most favorable to the non-movant). Mr. Wright maintains that he did not in the exercise of ordinary diligence know of the likelihood of, or the severity of, the risks from defendants' tobacco products. The Wrights have alleged that the tobacco companies conspired and engaged in a half of century to misrepresent the dangerous health effects of their products, to conceal that their products are addictive, to manipulate the level of nicotine, to ensure the addictiveness of their products, and to misrepresent the level of scientific knowledge about these qualities in their cigarettes. The Wrights further allege that the tobac-

co companies have produced light cigarettes and represented that they supply lower tar and nicotine allegedly knowing full well that smokers still received the same amount of nicotine as in regular cigarettes. Based on these allegations, and the court's refusal to take judicial notice that the risks of smoking are common knowledge, it is conceivable that Mr. Wright would have relied upon defendants' alleged representations designed to convince the public that cigarettes are not harmful or addictive. Therefore, the court denies the defendants' motion to dismiss plaintiffs' fraudulent misrepresentation and fraudulent nondisclosure claims based on the common knowledge doctrine.

2. Does the common knowledge doctrine bar Mr. Wright's express warranty claim?

Defendants also claim that Mr. Wright cannot allege justifiable reliance because the risks of smoking are commonly known, and, therefore, his express warranty claim fails as a matter of law.

Under Iowa law, an express warranty may be created by any affirmation of fact or promise made by a seller which relates to the goods. Iowa Code § 554.2313(1)(a). Iowa Code § 554.2313(1)(a) provides that an express warranty is created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." Further, § 554.2313(1)(a) states that the express warranty must serve as part of the "basis of the bargain." [11] The language creating an express warranty need not contain special phrases or formal words such as guarantee or warranty. Iowa Code § 554.2313(1)(b). In fact, a seller need not have intended that the language create an express warranty. Iowa Code § 554.2313(2). Every statement made by a seller, however, does not create an express warranty. Moreover, "affirmations relating merely to the seller's opinion or commendation of goods do not create a warranty." *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806, 809 (8th Cir.1976) (applying Iowa law).

[19] As indicated previously, because the court will not take judicial notice that the risks of smoking, including addiction, were common knowledge, the court also denies defendants' motion to dismiss plaintiffs' express warranty claims based on the common knowledge doctrine.

C. Federal Preemption

[20] In the alternative, defendants argue that plaintiffs' post–1969 fraudulent nondisclosure claims, and failure to warn claims are preempted by the Federal Cigarette Labeling and Advertising Act of 1965, as amended by the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § § 1331–1340. Initially, this court notes that there is a presumption that the historic police powers of the states are not to be superceded by a federal act unless that is the "clear and manifest" purpose of Congress. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). The presumption is

11. Iowa Code § 554.2313 states in full that:

1. Express warranties by the seller are created as follows:

a. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

c. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

2. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

especially strong where, as here, preemption would displace the power of a state to protect the health and safety of its citizenry. *Id.* at 518, 112 S.Ct. 2608.

In July 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act. 15 U.S.C. § § 1331–1340. The 1965 Act mandated warnings on cigarette packages (§ 5(a)), but barred the requirement of such warnings in cigarette advertising (§ 5(b)). § 1333–1334. Section 2 of the 1965 Act declares the statute's two purposes: (1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations.[12] In furtherance of the first purpose, § 4 of the 1965 Act made it unlawful to sell or distribute any cigarettes in the United States unless the package bore a conspicuous label providing: "Caution: Cigarette Smoking May Be Hazardous to Your Health." In furtherance of the second purpose, § 5, entitled "Preemption," provided in relevant part:

> "(a) No statement relating to smoking and health, other than the statement required by section 4 of the Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

15 U.S.C. § 1334.

Thereafter, Congress enacted the Public Health Cigarette Smoking Act of 1969 ("the Labeling Act"), which amended the 1965 Act in the following ways. First, the Labeling Act strengthened the warning label, in part by requiring a statement that cigarette smoking "is dangerous" rather than it may be "hazardous." *See* 15 U.S.C. § 1333 (1969). Second, the Labeling Act banned cigarette advertising in "any medium of electronic communication subject to [FCC] jurisdiction." Third, and related, the Labeling Act modified the preemption provision by replacing the original § 5(b) with a provision that reads:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), the Supreme Court addressed, in a plurality opinion, preemption under the Labeling Act with respect to a number of state law claims against manufacturers of cigarettes. Parts I through IV of Justice Stevens's opinion represent the opinion of the Court, but parts V and VI of his opinion were joined by only three other Justices. Justice Stevens's opinion as a whole, however, is ultimately supported by a majority of the Court. In parts V and VI of the opinion, the plurality stated that some state law claims based on the common law were preempted by the Labeling Act and some were not. *Id.* at 523–24,

12. "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

> "(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> "(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

15 U.S.C. § 1331 (1982 ed.); *See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 1308–09, 146 L.Ed.2d 121 (2000) (stating that the Labeling Act created a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," and was explicitly designed to ensure that "the public was adequately informed that cigarette smoking may be hazardous to health.").

112 S.Ct. 2608. Justices Scalia and Thomas would have held that all state law claims were preempted by the 1969 Act. *Id.* at 544, 112 S.Ct. 2608 (Scalia, J., concurring in part and dissenting in part). Conversely, Justices Blackmun, Kennedy and Souter, would have limited the preemptive effect of the Labeling Act to positive enactments only and not preempted any common law actions. *Id.* at 531, 112 S.Ct. 2608 (Blackmun, J., concurring in part and dissenting in part). Therefore, Justice Stevens's position that some common law claims are preempted and some common law claims are not preempted can find support from a majority of the Court at any given point.

[21] *Cipollone* clearly stated that positive enactments by a state with respect to cigarette promoting and advertising are preempted by the Labeling Act. The question is to what extent state damage actions founded upon the common law are preempted. In *Cipollone*, the plurality held that the Labeling Act expressly preempts certain state law damage actions, including some actions based on the common law:

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules.

505 U.S. at 521, 112 S.Ct. 2608. The plurality also held that the obligation to pay damages is premised upon common law duties, and those duties impose requirements and prohibitions that may be preempted by the Labeling Act. *Id.*

Cipollone rejected the notion that the descriptive label a plaintiff attaches to a particular claim determines whether it is preempted. "Nor does the statute indicate that any familiar subdivision of common law claims is or is not preempted." *Id.* at 523, 112 S.Ct. 2608. Rather, preemption analysis applies the following test:

> The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading.

Id. at 523–24, 112 S.Ct. 2608 (ellipses in original). The Court then scrutinized the predicate legal duty imposed by each of the claims before it to determine which were preempted. *Id.*

[22, 23] The claims held to be preempted were broad in scope. The plurality held that any common law failure to warn action is preempted to the extent that is relies on a state law requirement or prohibition with respect to advertising or promotion. *Id.* In other words, "insofar as claims under either failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are preempted." *Id.* The Court also held that claims that the tobacco companies neutralized the effect of the federally mandated warnings through their advertising and promotional activities were preempted. *Id.* at 527, 112 S.Ct. 2608. Thus, each of the *Cipollone* plaintiff's claims, grounded in whole or in part upon any alleged inadequacy of the federally mandated warnings, was held to be preempted.

While many claims were held to be preempted, the Court also held that some claims were not preempted. These non-preempted claims included: (1) claims based on a "contractual commitment voluntarily undertaken" and therefore not "regarded as a 'requirement . . . imposed under State Law' " (i.e., breach of express warranty). *Id.* at 524, 112 S.Ct. 2608.(2) Fraudulent misrepresentation claims based on allegedly false statements of material fact. In other words, "claims . . . not predicated on a duty 'based on smoking and health' but rather a more general obligation—the duty not to deceive" (fraud by intentional misstatement). *Id.* at 529, 112 S.Ct. 2608.(3) Claims based exclusive-

ly on actions unrelated to advertising or promotion—i.e., "claims that rely solely on . . . testing or research practices . . . ." *Id.* at 524–25, 112 S.Ct. 2608. Finally, (4) claims that rely on a state law duty to disclose information through "channels of communication other than advertising or promotion"—e.g., a state law that obligated tobacco companies to disclose material facts about smoking and health to a state administrative agency. *Id.* at 528, 112 S.Ct. 2608.

1. *Does the Labeling Act preempt Mr. Wright's post–1969 fraudulent nondisclosure and failure to warn claims?*

As indicated previously, the question of whether or not Mr. Wright's claims are preempted turns on "whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Cipollone*, 505 U.S. at 523–24, 112 S.Ct. 2608. Thus, the court must determine whether or not the nature of Mr. Wright's claims fall within this test.

a. Fraudulent nondisclosure claim

Plaintiffs have alleged that defendants are liable for fraudulent nondisclosure. This claim is based on the defendants' alleged concealment of information pertaining to the addictive nature of nicotine, the level of nicotine used in their tobacco products, and the health hazards associated with smoking cigarettes. Plaintiffs argue the *Cipollone* decision squarely addressed the issue of whether fraudulent nondisclosure claims are preempted by the Labeling Act, and assert that fraudulent nondisclosure claims, whether they are based on affirmative representations or on concealment, and even if they concern advertising and promotion, are not preempted. Plaintiffs argue that their fraud claims are not preempted because such claims are predicated not on a duty based on smoking and health, but rather on a more general obligation, the duty not to deceive, which falls squarely within one of the exceptions to preemption carved out in *Cipollone*.

In *Cipollone*, the plaintiff alleged two theories of fraudulent misrepresentation. Plaintiff's first theory alleged that the cigarette manufacturers, through their advertising, neutralized the effect of federally mandated warning labels. Such a claim was predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. The *Cipollone* court held this fraud claim was preempted by the Labeling Act, because it was inextricably linked to the plaintiff's failure to warn theory. *Cipollone*, 505 U.S. at 527–28, 112 S.Ct. 2608. However, the *Cipollone* court found that the plaintiff's second fraudulent misrepresentation theory, which alleged false representation and concealment of material facts, was not preempted insofar as those allegations relied on a state law duty to disclose material facts through channels other than advertising and promotion. *Id.* at 528, 112 S.Ct. 2608. Moreover, the *Cipollone* court held that fraud claims based in deceptive advertising also are not preempted because "such claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528–29, 112 S.Ct. 2608.

[24, 25] Therefore, this court finds that Wright's post–1969 claim of fraud based upon concealment is preempted to the extent that it is predicated on a duty to issue additional or clearer warnings through advertising and promotion. However, the court finds that Mr. Wright's post–1969 claim that defendants concealed material facts is not preempted insofar as the claim relies on a state-law duty to disclose such facts through channels of communication other than advertising or promotion. *Id.* at 528, 112 S.Ct. 2608. Based on the pleadings in this case, plaintiffs may have trouble prevailing on this claim, however,

defendants' argument that this claim is preempted by the Labeling Act fails.

Although the court does not understand defendants to be arguing that the Labeling Act preempts plaintiffs' fraudulent misrepresentation claims, which are based on allegations that defendants included false statements in their advertising and promotional materials, assuming defendants did make this argument, preemption would not apply to these claims because, as indicated previously, the Supreme Court clearly stated that "such claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive," *id.* at 528–29, 112 S.Ct. 2608, and that the Labeling Act "does not encompass the more general duty not to make fraudulent statements." *Id.* at 529, 112 S.Ct. 2608.

b. Failure to warn claim

Plaintiffs argue that their failure to warn claim is not preempted by the Labeling Act because they do not claim that the warnings in defendants' advertising and promotions were inadequate; rather, plaintiffs argue that the warnings on cigarette packages were inadequate.[13] Specifically, plaintiffs argue that, following *Cipollone's* interpretation of § 5(a) of the Labeling Act, which deals with the required warnings on cigarette packages, plaintiffs are not preempted from bringing a state tort action for money damages with regard to cigarette packaging and labeling. Plaintiffs contend that the *Cipollone* court held that the 1965 version of § 5(a) preempted only affirmative legislative acts by state legislatures or agencies which would require additional warning labels on cigarette packages, and does not preempt state tort actions based on inadequate warnings. According to plaintiffs' argument, because § 5(a) was not modified by the 1969 Act, the preemptive scope of § 5(a) remains the same, which plaintiffs contend is limited. In essence, therefore, by focusing on the warnings on defendants' cigarette packages, instead of focusing on the warnings in defendants' advertisements and promotions, plaintiffs argue that they effectively circumvent *Cipollone's* preemption holding. The court, however, is not so convinced.

Although plaintiffs' allegations are couched in terms of the packaging of the cigarettes and not the advertising and promotion, the allegations are nonetheless predicated primarily on the theory that the products are unreasonably dangerous because the warnings on cigarette packages are inadequate. Such a claim, in this court's opinion, would have the effect of requiring defendants to include additional cautionary statements on cigarette packages, a requirement that is prohibited by § 5(b) of the Labeling Act. *See Glassner*, 223 F.3d 343, 348 ("To the extent that Glassner [the plaintiff] alleges failure-to-warn claims based upon some duty owed by Defendants to issue additional or more clearly stated warnings on cigarette packages, his OPLA [Ohio Product Liability Act] claims are preempted"); *see also Little v. Brown & Williamson Tobacco Corp.*, 1999 U.S.Dist. LEXIS 21630, at * 25 (D.S.C. March 3, 1999) (stating that plaintiffs' claims that would impose a duty to provide further warnings on cigarette packages are preempted); *LaBelle v. Brown & Williamson Tobacco Corp.*, No. 2:98 3235–23, 1999 U.S.Dist. LEXIS 21629, at *15 (D.S.C. March 18, 1999) (stating that requiring defendant tobacco companies to include cautionary statements on cigarette labels and packages is flatly prohibited by § 5 of the Labeling Act).

[26] Furthermore, the court points out that the Labeling Act states as one of its purposes that interstate commerce "not (be) impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any rela-

13. Plaintiffs refer to a 1997 law review article in support of their argument that package-based failure to warn claims are not preempted by the Labeling Act. *See* Michael D. Green, *Cipollone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption*, 82 IOWA L.REV 1257 (1997).

tionship between smoking and health." 15 U S C § 1331. The court finds that permitting a package based failure to warn claim based on inadequate warnings would conflict with the statutory purpose of national uniformity for cigarette packaging.[14] Therefore, the court concludes that plaintiffs' post–1969 package based failure to warn claim is preempted.

D. Manufacturing defect claim

Defendants assert that Mr. Wright's negligent manufacturing defect claims should be dismissed because the allegations in the complaint do not support a claim for relief. Defendants argue that Mr. Wright has not alleged that he suffered harm from using cigarettes that were not in the condition intended by the manufacturing defendants. Based on his allegations, defendants contend that the negligent manufacturing defect theory is inapplicable to these allegations and to further buttress their argument, defendants rely on *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F.Supp. 539, 551 (D.Md.1997) (dismissing negligent manufacturing defect claim because it failed adequately to identify the defect), and *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 621–22 (Minn.1984) (manufacturing defect measured by objectively comparing the allegedly defective product to a flawless product). Conversely, plaintiffs contend that defendants are jumping the gun because they argue that at this motion to dismiss stage, they are in no way confined to any particular theory.

[27, 28] In *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir.1999), the Eighth Circuit Court of Appeals stated that all that is required of a complaint is "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 864 (citing FED.R.CIV.P. 8(a)); *see also Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir.1974); FED R CIV P 8(a). Furthermore, the complaint is to be liberally construed in the light most favorable to the plaintiff. *See Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir.1994). A court must assume that all the facts alleged in the complaint are true. *See id.* A Rule 12(b)(6) motion to dismiss a complaint should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief. *See id.* Nor should a complaint be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. *See Bramlet*, 495 F.2d at 716. Thus, as a practical matter, a dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *See id.*

[29] Here, Mr. Wright has alleged, *inter alia*, in support of his negligent manufacturing defect claim that the defendants negligently breached one or more of their duties in the following ways:

> 1. failing to test, to test adequately, or conduct scientific research on their tobacco products for harmful or addictive properties, and in failing to establish a reasonably safe dosage for foreseeable users; ¶ 5.4.6
>
> 2. in designing, manufacturing, and selling a product that when used as intended was not reasonably safe for foreseeable users; ¶ 5.4.7
>
> 3. in failing to make such feasible improvements in design, composition, or manufacture of their tobacco products such as to materially decrease the foreseeable risk to users. ¶ 5.4.8

Because it does not appear beyond a doubt that Mr. Wright can prove no set of facts which would entitle him to relief based on

14. In his article, Green takes issue with this point, arguing that the *Cipollone* court found that the 1965 Labeling Act did not preempt warnings claims despite the existence of this statement of purpose. This, however, is undoubtedly the reason that Congress amended the 1965 Labeling Act with the broader language contained in the 1969 version of the Labeling Act that extended § 5(b)'s preemptive reach. *Cipollone*, 505 U.S. at 522, 112 S.Ct. 2608.

these allegations, as well as other allegations in the complaint, the court denies defendants' motion to dismiss his negligent manufacturing claim for failure to state a claim on which relief can be granted.

E. Claim for Breach of Implied or Express Warranties

1. Implied warranty of merchantability

[30] Iowa Code § 554.2314 governs warranties of merchantability. Section 554.2314 2(c) states that, to be merchantable, goods must be "fit for the ordinary purposes for which such goods are used." *Id.* Under this theory, a plaintiff is required to prove (1) a merchant sold the goods; (2) the goods were not "merchantable" at the time of the sale; (3) injury or damage occurred to the plaintiff's person or property; (4) the defective nature of the goods caused the damage "proximately and in fact"; and (5) notice was given to the seller of the injury. *See Van Wyk v. Norden Laboratories, Inc.*, 345 N.W.2d 81, 87 (Iowa 1984).

Defendants assert that Mr. Wright's implied warranty of merchantability claim should be dismissed because the authorities cited by defendants demonstrate that, absent a manufacturing defect, cigarettes do not breach the implied warranty of merchantability. Conversely, plaintiffs assert that defendants' contention should be rejected by this court. Plaintiffs argue that they are not limited to proving their implied warranty of merchantability claim by showing that the defendants' cigarettes were defective; rather, plaintiffs contend that the cigarettes were unmerchantable because they were not accompanied by adequate warnings of the health hazards associated with smoking. The court does not agree.

[31–33] As indicated previously, the Labeling Act preempts plaintiffs' post–1969 failure to warn claims. Accordingly, plaintiffs' implied warranty of merchantability claim is preempted to the extent it alleges failure to provide additional warnings after 1969, and is therefore dismissed. However, Mr. Wright's breach of an implied warranty claim survives to the extent that it is based on specific allegations that defendants knowingly designed, manufactured and distributed a product which they knew was both carcinogenic and addictive and, thus, not fit for the ordinary purpose for which it was intended. *See Magnus v. Fortune Brands, Inc.*, 41 F.Supp.2d 217, 224 (E.D.N.Y.1999). Additionally, plaintiffs' allegations that the manipulative enhancement of the nicotine level in tobacco in order to induce addiction could possibly prove that the product was defective and, thus, not fit for the ordinary purpose for which it was intended. *See Castano*, 870 F.Supp. 1425 at 1434. (holding that the implied warranty claims were not based on smoking and health, or on the advertising and promotion of cigarettes; rather, the claims were based upon a duty "not to manufacture and sell cigarettes that contain addictive nicotine, the levels of which have been purposefully manipulated in order to induce or maintain the plaintiffs' addiction."). Therefore, defendants' motion to dismiss Mr. Wright's implied warranty of merchantability claim for failure to state a claim upon which relief can be granted, because of the alleged defective condition of cigarettes, is denied.

2. Express warranty claim

Defendants assert that Mr. Wright's allegations that defendants' advertising and promotional statements relating to addiction, tar and nicotine level in cigarettes, smoking, and health created express warranties, fail as a matter of law to state an express warranty claim. Specifically, defendants contend that Mr. Wright has failed to identify sufficiently the nature, extent, and language of any alleged representations and how he relied on them.[15]

15. Defendants also contend that in light of the common knowledge of the risks of cigarette smoking, they had not duty to provide Mr. Wright with any additional information. This argument is unavailing as this court has previously refused to take judicial notice of the fact that the risks of smoking are common knowledge. The court reiterates that taking

[34] The court discussed in further detail Mr. Wright's allegations and the requirements for an express warranty claim under Iowa law in the preceding section, captioned B 2. It must be remembered that this is a motion to dismiss, which is premised on the pleadings. As such, plaintiffs are not required to produce any explicit statements or affirmations regarding smoking, particularly when no discovery has been conducted. In his complaint, Mr. Wright alleges that:

> Defendants sold tobacco products and warranted through their advertisements and promotional statements that their products were not addictive, that they did not intend to addict Mr. Wright, that the tar and nicotine levels in their products were at non-addictive levels, and that there were no adverse health effects arising from the use of their products. ¶ 8.1
>
> As a result of defendants' warranties and in reliance thereon, Mr. Wright purchased and used defendants' tobacco products. ¶ 8.2
>
> The defendants' tobacco products did not conform to the foregoing express warranties in that defendants manipulated levels in the tobacco products, the tobacco products were addictive and the products caused Mr. Wright to suffer adverse health effects. ¶ 8.3

Thus, the court finds that Mr. Wright has sufficiently plead an express warranty claim in accordance with Rule 8(a)(2) of the Federal Rule of Civil Procedure. *See* FED.R.CIV.P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief").

3. *Does Mr. Wright's failure to notify defendants of the alleged breach of warranty preclude his warranty claims?*

Defendants assert that because Mr. Wright has not alleged in his complaint that he provided notice of any defect to any defendant or agent of the defendant, Mr. Wright's warranty claims should be dismissed. Plaintiffs concede that they did not give notice to the defendants, however, they contend that the notice requirement should not preclude their warranty claims. First, plaintiffs assert that Mr. Wright purchased the cigarettes from a retailer, and therefore, because he never purchased cigarettes directly from the defendants, application of the notice requirement between a buyer and seller is inapplicable. Second, plaintiffs argue that because other courts have held that the Uniform Commercial Code's ("UCC") notice provision is inapplicable to products liability cases, so too should this court in this case. Plaintiffs argue in the alternative, that if Mr. Wright was required to give notice to defendants, that notice should not be required here because they assert that notifying defendants about Mr. Wright's injuries and warranty claims would only serve to tell the defendants what they already know—that the cigarettes that they manufacture are hazardous. Thus, plaintiffs appear to be asserting that the defendants were on "constructive notice" of the alleged defects in their cigarettes in light of the vast amount of litigation. Lastly, plaintiffs argue that notice of their warranty claims was provided in the form of this lawsuit.

[35] The UCC notice requirement that defendants assert bars Mr. Wright's warranty claims in Iowa is codified at Iowa Code § 554.2607(3)(a). § 554.2607(3)(a) provides in pertinent part:

> When the buyer has accepted a tender of goods, the buyer must notify the seller of any breach of warranty within a reasonable time or be barred from any remedy.

Id. The Iowa Supreme Court has held that "the giving of a notice must be pleaded as a condition precedent to recovery." *Randa v. U.S. Homes, Inc.*, 325 N.W.2d 905,

judicial notice as to whether or not the risks of smoking are common knowledge would be improper at this motion to dismiss stage.

909 (Iowa App.1982) (citing *Winter v. Honeggers' & Co.*, 215 N.W.2d 316, 327 (Iowa 1974)). Moreover, under Iowa law, "ordinarily this notice must be more than a mere complaint." *Dailey v. Holiday Distributing Corp.*, 260 Iowa 859, 151 N.W.2d 477, 487 (Iowa 1967).

[36] Here, defendants argue that because § 554.2607(3)(a) expressly required timely notice as a condition precedent for recovery of breach of warranty and because Mr. Wright did not give notice to defendants, his warranty claims should be dismissed. Although defendants correctly state the requirements of this notice provision, this court does not find that it is applicable here. This is so, because the defendants are not sellers within the meaning of this notice provision. Indeed, § 554.2103 defines seller as "a person who sells or contracts to sell goods." Because defendants never sold cigarettes to Mr. Wright or contracted to sell cigarettes to Mr. Wright, the notice provision of § 554.2607(3)(a) was never triggered. In so doing, § 554.2607(3)(a) never imposed a duty on Mr. Wright to notify defendants of his warranty claims.

[37] In *McKnelly v. Sperry Corp.*, 642 F.2d 1101 (8th Cir.1981) (applying Iowa law), the Eighth Circuit Court of Appeals addressed whether or not the plaintiff's failure to give the defendant notice of the breach of express warranty until filing suit barred the plaintiff from any remedy. *Id.* at 1107. The defendant argued that it did, citing Iowa Code § 554.2607(3)(a) (1967) and *Winter v. Honeggers' & Co., Inc.*, 215 N.W.2d 316 (Iowa 1974). The *McKnelly* court thought otherwise, explaining:

> [W]e are not persuaded the Iowa Supreme Court would, under all the circumstances here, hold the notice provision of the Uniform Commercial Code applicable to McKnelly's suit. By its terms Section 554.2607(3)(a) applies only to a buyer who has accepted tender of goods from a seller. *It does not expressly apply as between an injured third person other than the buyer and a manufacturer instead of a seller.*

Id. at 1107 (emphasis added). Thus, in interpreting § 554.2607(3)(a), the Eighth Circuit Court of Appeals stated that the notice provision of § 554.2607(3)(a) was not applicable to third persons, and was likewise not applicable to manufacturers; rather, § 554.2607(3)(a) is only applicable to a buyer and seller. In light of the Eighth Circuit's interpretation of § 554.2607(3)(a), and the definition of a "seller," this court concludes that Mr. Wright's warranty claims are not barred because § 554.2607(3)(a) is not applicable here. Because the court finds that § 554.2607(3)(a) is not applicable, the court need not address plaintiffs' other arguments in support of their contention that failure to notify defendants about the alleged breach should not bar their warranty claims. Nevertheless, even if the Iowa Supreme Court were to conclude that section § 554.2607(3)(a) is applicable in such a case as this, this court finds that such notice was given in the form of plaintiffs' lawsuit.

As far as defendants' argument that they will be prejudiced if Mr. Wright is permitted to circumvent the notice provisions, the court is not persuaded. First, the court points out that Mr. Wright is not circumventing UCC notice provisions because § 554.2607(3)(a) is not applicable. Second, defendants fail to elucidate in what capacity they are prejudiced. In fact, based on the defendants' thoroughly written and researched briefs, coupled with their strong oral arguments, it is clear to this court that the defendants were not prejudiced by the lack of notice of the alleged breach of warranty claims in this case. Therefore, defendants' motion to dismiss Mr. Wright's warranty claims for failure to notify of the alleged breach is denied.

F. Claim for Breach of Special Assumed Duty

[38] Plaintiffs incorrectly state that Restatement (Second) of Torts § 323, captioned "Negligent Performance of Under-

taking to Render Services," has not been adopted in Iowa.[16] Indeed, in *American State Bank v. Enabnit*, 471 N.W.2d 829 (Iowa 1991), the Iowa Supreme Court stated "[w]e have applied Restatement section 323, or cited it with approval, a number of times." *Id.* at 832 (citing *DeBurkarte v. Louvar*, 393 N.W.2d 131, 135, 140–41 (Iowa 1986); *Van Iperen v. Van Bramer*, 392 N.W.2d 480, 485 (Iowa 1986); *Wilson v. Nepstad*, 282 N.W.2d 664, 673 n. 1 (Iowa 1979)). Thus, Restatement (Second) of Torts § 323 is cognizable in Iowa. Restatement (Second) of Torts § 323 (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Id.

Mr. Wright alleges, *inter alia*, in his complaint that defendants' breached their duty and responsibility to report research regarding smoking and health regarding their tobacco products through their public pronouncements, suppressed unfavorable research data, and perpetuated a false "controversy" regarding the human health consequences of smoking, and that this breach caused Mr. Wright to become addicted to tobacco products and to suffer adverse health effects arising from the use of cigarettes, thus causing Mr. Wright to incur damages.

[39] On the other hand, defendants argue that the above alleged actions do not amount to voluntary assumption of duty, emphasizing that a legal duty is a question of law appropriately decided by the court on a motion to dismiss. *See, e.g. J.A.H. v. Wadle & Associates, P.C.*, 589 N.W.2d 256, 258 (Iowa 1999). A legal duty "is defined by the relationship between individuals; it is a legal obligation imposed upon one individual for the benefit of another person or particularized class of persons." *Sankey v. Richenberger*, 456 N.W.2d 206, 209 (Iowa 1990). "Whether, under a given set of facts, such a duty exists is a question of law." *Leonard v. State*, 491 N.W.2d 508, 509 (Iowa 1992). In deciding whether a legal duty exists in this case, three factors govern the analysis: (1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations. *Id.* at 509–12. These factors are used under a balancing approach and not as three distinct and necessary elements. *Id.* at 512. In the end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm. *Larsen v. United Fed. Sav & Loan Ass'n*, 300 N.W.2d 281, 285 (Iowa 1981).

16. Plaintiffs assert that despite the inapplicability of § 323 they still state a claim for relief because Restatement (Second) of Torts § 324A, which has been adopted by the Iowa Supreme Court, is closely related to § 323. § 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking

The rule stated in this section parallels the one stated in § 323, as to the liability of the actor to the one to whom he has undertaken to render services. This section, however, deals with liability to third persons.

[40] The court agrees with plaintiffs' assertion that dismissal of this claim would be premature, and that they should be afforded the opportunity to establish whether defendants owed plaintiffs a special duty through discovery. The court reiterates that because this is a motion to dismiss, the court must take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences in the light most favorable to plaintiffs. *See St. Croix*, 178 F.3d at 519 ("We take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff."). Consequently, defendants' motion to dismiss Mr. Wright's breach of special assumed duty is denied.

[41] Moreover, to the extent that defendants argue that plaintiffs' post–1969 duty to disclose claim that "defendants voluntarily assumed the duty to report honestly and competently on all research regarding smoking and health regarding their tobacco products through their public announcement," ¶ 9.2, is preempted, the court does not agree. If it is established that defendants "voluntarily undertook this duty to disclose" such claim would not be preempted as it would fall squarely within one of the exceptions articulated by *Cipollone*, because the predicate duty is imposed not by the State but by the party assuming the obligation. *Id* at 524 ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement ... imposed under State law' within the meaning of [Federal Cigarette Labeling and Advertising Act] § 5(b).").

G. Fraud Claims

Defendants correctly point out that Mr. Wright's fraud claim is subject to the heightened pleading requirements of Rule 9(b). This court has articulated the elements of fraud under Iowa law and the standards for pleading fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure in several recent decisions. *See Doe v. Hartz*, 52 F.Supp.2d 1027, 1055 (N.D.Iowa 1999) (elements and pleading); *Brown v North Cent. F.S., Inc.*, 987 F.Supp. 1150, 1155–57 (N.D.Iowa 1997) (pleading); *Brown v. North Cent. F.S., Inc*, 173 F.R.D. 658, 664–65 (N.D.Iowa 1997) (pleading); *Tralon Corp. v. Cedarapids, Inc.*, 966 F.Supp. 812 (elements); *North Cent. F.S, Inc. v. Brown*, 951 F.Supp. 1383, 1407–08 (N.D.Iowa 1996) (pleading); *Jones Distrib Co. v. White Consol. Indus, Inc.*, 943 F.Supp. 1445, 1469 (N.D.Iowa 1996) (elements of fraud and fraudulent non-disclosure); *DeWit v. Firstar Corp*, 879 F.Supp. 947, 970 (N.D.Iowa 1995) (elements and pleading). Thus, only a brief discussion of these matters is required here.

Rule 9(b) of the Federal Rules of Civil Procedure " 'requires a plaintiff to allege with particularity the facts constituting the fraud.' " *See Brown*, 987 F.Supp. at 1155 (quoting *Independent Business Forms v. A–M Graphics*, 127 F.3d 698, 703 n. 2 (8th Cir.1997)). " 'When pleading fraud, a plaintiff cannot simply make conclusory allegations.' " *Id.* (quoting *Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir.1997)). In *Commercial Property Inv., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639 (8th Cir.1995), the Eighth Circuit Court of Appeals explained:

> Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." " 'Circumstances' include such matters as the time, place and content of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir.1982), *adhered to on reh'g*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983). Because one of the main purposes of the rule is to facilitate a defendant's ability to respond and to prepare a defense to charges of fraud, *Greenwood v Dittmer*, 776 F.2d 785, 789 (8th Cir.1985), conclusory allegations

that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule. *In re Flight Transp Corp. Sec. Litig.*, 593 F.Supp. 612, 620 (D.Minn.1984).

Commercial Property, 61 F.3d at 644; *see Roberts*, 128 F.3d at 651 (noting that factors a court should examine in determining whether the "circumstances" constituting fraud are stated with particularity under Rule 9(b) "include the time, place, and contents of the alleged fraud; the identity of the person allegedly committing fraud; and what was given up or obtained by the alleged fraud.").

Defendants assert that Mr. Wright's allegations of fraudulent misrepresentation and fraudulent nondisclosure fall short of satisfying Rule 9(b), because defendants contend that Mr. Wright has failed to identify the speakers or the time and place of the alleged fraudulent statements necessary to comply with Rule 9(b).[17] Plaintiffs disagree. Plaintiffs contend that, when viewed as a whole, their petition does meet the pleading requirements of Rule 9(b). In other words, plaintiffs virtually concede that the allegations contained in the complaint under the captioned headings for fraudulent misrepresentation and fraudulent nondisclosure are not pleaded with the particularity required by Rule 9(b), however, plaintiffs argue that the allegations set forth in the complaint under the captioned heading, civil conspiracy, do specify the alleged fraudulent statements, identify the speaker, state where and when the statements were made and explain why the statements were fraudulent. Although the court agrees that the allegations under the civil conspiracy claim do provide more specificity, the court is still not convinced that the pleadings satisfy the heightened pleading requirement for fraudulent misrepresentation and fraudulent nondisclosure pursuant to Rule 9(b).

17. Because the court previously articulated the elements for fraudulent misrepresentation and fraudulent nondisclosure in the section B1, a reprisal of these elements here is unnecessary.

1. Mr. Wright's fraudulent misrepresentation claim

[42] Mr. Wright alleges that defendants, through advertising in the mass media and by other communications, repeatedly made representations that nicotine was not addictive, that cigarette smoking was not a proven cause of disease, and that they did not manipulate nicotine levels in tobacco products so as to addict consumers. ¶ 10.2. Also, Mr. Wright alleges that defendants have fraudulently represented that "light" cigarettes deliver less tar and nicotine. *Id.* Mr. Wright alleges that he relied on these misrepresentations to his detriment, including addiction to tobacco products and suffering adverse health effects. Based on the pleadings, the court concludes that Mr. Wright's fraudulent misrepresentation allegations fail to satisfy the pleading with particularity requirement of Rule 9(b) even when read in concert with his claim of civil conspiracy for the following reasons.

First, as noted by the defendants, Mr. Wright does not specifically identify the speakers of the various statements that he alleges were fraudulent; rather, he collectively alleges the following: The following persons and parties participated in a civil conspiracy . . . :

> R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; The American Tobacco Company; American Brands, Inc.; Brown & Williamson Tobacco Corporation; B.A.T. Industries, P.L.C.; Batus Holdings, Inc.; British American Tobacco, Ltd.; British-American (Holdings) Ltd.; Philip Morris Incorporated (Philip Morris U.S.A.); Philip Morris Companies, Inc.; Liggett & Myers, Inc.; Liggett Group, Inc.; the Brooke Group, Limited; Lorillard Tobacco Company; Lorillard Incorporated; Loews Corporation, United States Tobacco Company; and United States, Inc. Brown and Wil-

liamson Tobacco Company, successor by merger to American Tobacco Company; Brown and Williamson Tobacco Company; The Tobacco Institute, Inc., Council for Tobacco Research—USA, Inc., f/k/a The Tobacco Industry Research Committee, Hill and Knowlton, Inc.

Plaintiffs' complaint at 12.2.1. Significantly, of the eighteen (18) tobacco companies that plaintiffs identify, several were never defendants in this action, and two, namely R.J.R. Nabisco, Inc. and Philip Morris Companies, have been dismissed by this court pursuant to a joint and stipulated motion to dismiss. As this court explained in *DeWit v. Firstar Corp*, 879 F.Supp. 947 (N.D.Iowa 1995), where a plaintiffs' complaint "accuses multiple defendants of participating in the scheme to defraud, the plaintiffs must take care to identify which of them was responsible for the individual acts of fraud." *DeWit*, 879 F.Supp. at 972. Specifically, examining all twenty-one of the paragraphs (¶ 12.6.1 – ¶ 12.6.21) of plaintiffs' complaint in which plaintiffs allege fraudulent misrepresentation on behalf of defendants, plaintiffs only identify the identity of the speakers in five of the twenty-one paragraphs, namely ¶ 12.6.13, ¶ 12.6.15, ¶ 12.6.17, ¶ 12.6.18 and ¶ 12.6.19. Therefore, because Mr. Wright failed to take care in identifying which of the defendants was responsible for each individual act of fraudulent misrepresentation, such allegations fall short of satisfying the particularity requirement of Rule 9(b). Second, although plaintiffs contend that "several of the paragraphs provide specific times at which the alleged fraudulent statements occurred," and that "most of the paragraphs specify why the statements were fraudulent," this contention is contrary to Rule 9(b), which expressly states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED.R.CIV.P. 9(b). In so doing, all of Mr. Wright's averments, as opposed to "several" or "many," must be plead with particularity. The court draws the plaintiffs attention to the following paragraphs, which are deficient in either one or both of these respects: ¶¶ 12.6.2 – 12.6.7, ¶¶ 12.6.9 – 12.6.10. Moreover, several of the statements that plaintiffs do identify cover far ranging periods, including 1950–1962 (¶ 12.6.11) and 1962–1966 (¶ 12.6.14). Such wide time frames during which misrepresentations were allegedly made fail to provide the specificity required by Rule 9(b). *See Brown*, 173 F.R.D. at 668 (stating that allegations of such wide time frames during which misrepresentations were allegedly made simply do not provide the specificity required under Rule 9(b)). Third, plaintiffs have failed to allege where any of the alleged false statements were published or made available to the general public. For example, plaintiffs refer to "various and sundry publications" and "publications" without identifying any of them. ¶ 12.6.5, ¶ 12.6.6 12 and ¶ 12.6.10 ("various and sundry publications, news releases, telephone calls, contacts with the press, the media, the government ..."). For these reasons, Mr. Wright has failed to plead fraudulent misrepresentation with particularity in accord with Rule 9(b) of the Federal Rules of Civil Procedure.

2. *Mr. Wright's fraudulent nondisclosure claims*

[43–45] Mr. Wright must also plead his fraudulent nondisclosure claims with the particularity in accord with Rule 9(b) of the Federal Rules of Civil Procedure. *See Roberts v. Francis, M.D.*, 128 F.3d 647, 651 (8th Cir.1997) (analyzing whether or not plaintiff's fraudulent concealment claim was plead with particularity in accord with Rule 9(b)). Mr. Wright's fraudulent nondisclosure claims are no more specific than his fraudulent misrepresentation claims. Mr. Wright generally alleges that the defendants failed to disclose the following material information:

that nicotine is addictive ¶ 11.3.1

that nicotine is highly addictive ¶ 11.3.2

that defendants manipulate nicotine levels in their tobacco products so as to addict consumers ¶ 11.3.3

that smoking cigarettes causes adverse health consequences ¶ 11.3.4

Mr. Wright further alleges the suppression of and refusal to publish, various and sundry research studies carried out by a co-conspirator which revealed that cigarette smoking was harmful and addicting. ¶ 12.6.8. Mr. Wright asserts that defendants were under a duty to disclose the full extent of their research and knowledge concerning the adverse health effects of using their products, because of their superior knowledge regarding cigarette products. The court previously concluded that Mr. Wright has sufficiently plead justifiable reliance [18], however, the court has not passed on whether or not the defendants were under a duty to disclose the alleged information they possessed concerning these allegations outlined above. This is so, because the defendants have not moved to dismiss Mr. Wright's fraudulent nondisclosure claims on a lack of duty argument. Nevertheless, even if the defendants set forth this argument, the court would disagree because the existence of a legal duty can arise from inequality of condition and knowledge. *See Doe*, 52 F.Supp.2d at 1055 (stating that "for concealment to be actionable, the representation must relate to a material matter known to the party . . . which it is his legal duty to communicate to the other contracting party whether the duty arises from a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances . . .") (internal citation omitted); *see also U.S. ex rel. Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 834 (8th Cir.1991) (stating that a duty to disclose may arise from inequality of position, a fiduciary relationship between the parties, or a demonstration of superior knowledge on the part of one party that is not within the fair and reasonable reach of the other party) (citation omitted). As far as whether Mr. Wright has sufficiently plead his fraudulent nondisclosure claims, the court concludes that he has not sufficiently plead the circumstances constituting such alleged fraud, including information relating to the identity, time and place. *See Roberts*, 128 F.3d at 651 (stating that the pleading requirements of Rule 9(b) include circumstances relating to the time, place, and the identity of the person allegedly committing fraud). Without pleading this specific information, therefore, Mr. Wright's fraudulent nondisclosure claims fail to comply with Rule 9(b) of the Federal Rules of Civil Procedure.

[46] Rule 15(a) of the Federal Rules of Civil Procedure allows parties to amend pleadings freely before responsive pleadings are filed or otherwise upon leave of court. Because this case was removed to federal court by defendants,[19] and plaintiffs have not yet amended their complaint, they will be given leave to amend the complaint to cure the Rule 9(b) defect. Therefore, for the reasons stated above, defendants' motion to dismiss plaintiffs' fraudulent misrepresentation and fraudulent nondisclosure claims pursuant to Rule 9(b) is denied, and plaintiffs are given leave to amend their complaint to state claims for fraud adequately.

H. Civil Conspiracy Claim and Loss of Consortium Claim

Defendants assert that because Mr. Wright's fraudulent misrepresentation and fraudulent nondisclosure claims fail as a matter of law, so too does his conspiracy claim. Similarly, defendants assert that Mrs. Wright's consortium claim fails because Mr. Wright's substantive claims fail. Plaintiffs, on the other hand, contend that their conspiracy claim is not contingent on their fraud claims. This is so, because plaintiffs argue that their civil conspiracy

18. See discussion under heading B1.

19. In support of plaintiffs' argument for permission to amend their fraud complaint in accordance with Rule 9(b), they impress upon the court that this case was originally filed in state court, having been removed by defendants to federal court, and that Iowa's state court standards for pleading fraud are substantially less stringent than those imposed by Rule 9(b).

claim can survive based on their other substantive claims, namely their negligence claim. In the same vein, plaintiffs argue that the loss of consortium claims does not fail as a matter of law.

1. Mr. Wright's civil conspiracy claim

[47, 48] A recognized aspect of Iowa law is the legal theory of civil liability for conspiracy to commit a wrongful act. *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 232–33 (Iowa 1977); *Cora v. Strock*, 441 N.W.2d 392, 394 (Iowa Ct.App.1989). However, the Iowa Supreme Court has repeatedly "recognized that '[c]ivil conspiracy is not in itself actionable; rather it is the acts causing injury undertaken in furtherance of the conspiracy which give rise to the action.' " *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 302 (Iowa 1994) (quoting *Basic Chems., Inc.*, 251 N.W.2d at 233, and *Lindaman v. Bode*, 478 N.W.2d 312, 317 (Iowa Ct.App. 1991)). The Iowa Supreme Court explained the nature of civil conspiracy in *Basic Chemicals* as follows:

> A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful. It may be proven by substantial evidence.

Basic Chems., Inc., 251 N.W.2d at 232; *accord Cora*, 441 N.W.2d at 394 (quoting *Basic Chemicals*). To put it another way, civil conspiracy requires "mutual mental action coupled with an intent to commit the act which results in injury." *Basic Chems., Inc.*, 251 N.W.2d at 233. Thus, "[t]he principal element of conspiracy is an agreement or understanding between two or more persons to effect a wrong against or injury upon another." *Id.*; *accord Locksley v. Anesthesiologists of Cedar Rapids, P.C.*, 333 N.W.2d 451, 456 (Iowa 1983).

In this case, defendants contend that Mr. Wright's conspiracy claim is inextricably linked with his fraud claims—that is, plaintiffs' conspiracy claim falls if their fraud-based claims fall. Plaintiffs disagree, arguing that even if their fraud claims do not survive, their civil conspiracy claim still survives if any of their other substantive claims survive. Specifically, plaintiffs argue that the underlying tort of the civil conspiracy need not be an intentional tort, and, therefore, plaintiffs argue that the defendant tobacco companies can conspire to commit negligence, stating that "without a doubt people can conspire to act in a careless fashion." For this proposition, plaintiffs rely on *Robbins v. Heritage Acres*, 578 N.W.2d 262 (Iowa Ct.App.1998).

In *Robbins*, the plaintiff had been involuntarily discharged from a nursing home. Plaintiff Robbins set forth a negligence and civil conspiracy claim. Robbins based his civil conspiracy claim on the defendants' decision to "rid" the nursing home and staff of Robbins who allegedly required more attention and work than the staff was willing to perform. *Id.* at 263. Even though Robbins did not set forth an intentional tort as the underlying wrong, the Iowa Court of Appeals reversed the district court's granting of defendants' motion to dismiss, explaining:

> Robbins' conspiracy allegations include an agreement to withhold or deprive him of necessary medical or nursing home care. These allegations implicate Heritage's contractual duties to Robbins and the standards of professional care and conduct of the named employees. We cannot say Robbins is unable to sustain a civil conspiracy claim under any state of facts under the petition.

Id. at 265. Thus, the wrong contemplated by the *Robbins* court was allegedly based on an agreement to withhold or deprive the plaintiff of necessary medical or nursing home care. The *Robbins* court further stated that the underlying wrong of plaintiff's civil conspiracy claim was based on breach of contract or violation of the standards of professional care. Significantly, however, the *Robbins* court did not hold that the underlying wrong of a civil conspiracy could be predicated on negligence.

[49] In so far as the plaintiffs contend that the underlying tort in a civil conspiracy claim may be based on negligence, the court does not agree. Indeed, the court finds this contention to be a paradox. The Supreme Court of Iowa has explained that a "conspiracy involves some mutual action coupled with an intent to commit the act which results in injury." *Bump v. Stewart, Wimer & Bump, P.C.*, 336 N.W.2d 731, 737 (Iowa 1983) (citing *Basic Chemicals, Inc.*, 251 N.W.2d at 233). Therefore, because conspiracy requires an agreement to commit a wrong, there can hardly be a conspiracy to be negligent—that is, to intend to act negligently.[20] *See Sackman v. Liggett Group, Inc.*, 965 F.Supp. 391, 395 (E.D.N.Y.1997) (stating that for plaintiffs to state a viable cause of action for conspiracy, it must be based on their products liability claim and not on the negligence claim); *Sonnenreich v. Philip Morris Inc.*, 929 F.Supp. 416, 419 (S.D.Fla.1996) (recognizing in the context of a lawsuit against tobacco manufacturers that "[l]ogic and case law dictate that conspiracy to commit negligence is a non sequitur"); *Rogers v. Furlow*, 699 F.Supp. 672, 675 (N.D.Ill. 1988) ("[w]hat the plaintiffs suggest is a conspiracy to commit negligence, a paradox at best"); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 n. 2 (Tex.1995) ("Given the requirement of specific intent, parties cannot engage in a civil conspiracy to be negligent.").

Furthermore, *Robbins* is not to the contrary. While the *Robbins* court held that the underlying wrong on which plaintiff's civil conspiracy claim was based was breach of contract or violation of the standards of professional care, the *Robbins* court did not hold that the underlying wrong of a civil conspiracy could be predicated on negligence. Simply because the plaintiff in *Robbins* only set forth two claims, civil conspiracy and negligence, does not mean that, in permitting the civil conspiracy claim to survive, the *Robbins* court held that the underlying wrong was based on negligence. Indeed, the *Robbins* court clearly stated that the plaintiff's conspiracy allegations "include an agreement to withhold or deprive him of necessary medical or nursing care." *Robbins*, 578 N.W.2d at 265. Thus, the underlying wrong in *Robbins* for the civil conspiracy claim was not negligence, as plaintiffs contend; rather it was breach of contract or violation of the standards of professional care.

[50] Notwithstanding, it must be remembered that Mr. Wright also alleges, *inter alia*, that the defendants manufacture cigarettes, acting in concert or individually with knowledge and ratification, in such a way as to control and manipulate the nicotine content in such cigarettes, with the purpose of securing acceptance, habituation, and addiction. *See* ¶ 12.6.21. Indeed, this claim appears to be grounded in Mr. Wright's allegation that cigarettes are unreasonably dangerous. Whether Mr. Wright may maintain a cause of action for conspiracy to produce unreasonably dangerous products—as a strict liability tort—under Iowa law is a matter of first impression. At this early stage of the proceeding, the court concludes that Mr. Wright has adequately plead a civil conspiracy claim premised on the allegation that defendants intentionally agreed to produce an unreasonably dangerous product—cigarettes—an underlying wrong for which they could be held strictly liable. *See Basic Chemicals, Inc.*, 251 N.W.2d at

20. Iowa Civil Instructions 3500 1, "Essentials for Recovery–Conspiracy," states: In order to recover for the claim of conspiracy, the plaintiff must prove all of the following propositions:

1. (Name of co-conspirator) committed the wrong of (describe the alleged wrong), as defined in Instruction No ____.

2. The defendant participated in a conspiracy with (name of co-conspirator) to (describe the alleged wrong).

3. The nature and extent of damage.

The Note to this instruction provides: The "wrong" must be a tortious act. *But see Robbins*, 578 N.W.2d at 265 (holding that the plaintiffs stated a claim premised on a conspiracy to breach a contract, which is not a tort)

233; *Ezzone v. Riccardi*, 525 N.W.2d 388, 397–98 (Iowa 1994) (stating that the conspiracy claim is valid only to the extent that another claim is valid and an agreement was made to commit the wrong which forms the basis of the other claim). The court is cognizant that there is a paucity of law on this issue, and that the law involving tobacco litigation is continually evolving. Therefore, the court notes that on a more fully developed record or in light of intervening controlling authority or a comprehensive review of persuasive authority, Mr. Wright's civil conspiracy claim based on an underlying wrong subject to strict liability may not be viable.

For now however, the court concludes that although Mr. Wright cannot state a viable cause of action for conspiracy based on his negligence claim, Mr. Wright can state a viable cause of action for civil conspiracy based on his allegation that defendants intentionally agreed to produce an unreasonably dangerous product—cigarettes—an underlying wrong for which they could be held strictly liable. Accordingly, defendants' motion to dismiss Mr. Wright's civil conspiracy claim is denied. This is true even if Mr. Wright cannot successfully amend his fraud claims in accordance with Rule 9(b) of the Federal Rules of Civil Procedure.

2. *Mrs. Wright's loss of consortium claim*

Similarly, Mrs. Wright's consortium claim does not fail as a matter of law, because several of Mr. Wright's substantive claims still exist. Thus, defendants' motion to dismiss Mrs. Wright's loss of consortium claim is denied.

IV. CONCLUSION

Upon review, the court concludes that the plaintiffs have stated valid claims for the following: negligent manufacturing defect claim, negligent design defect claim, pre–1969 negligent failure to warn claim, strict liability design defect claim, pre–1969 strict liability failure to warn claim, breach of special assumed duty, breach of implied warranty of merchantability, breach of express warranty, civil conspiracy claim and loss of consortium claim. Therefore, defendants' motion to dismiss these claims is denied. The court further concludes that plaintiffs have failed to state a claim for the following: post–1969 negligent package-based failure to warn claim, and post–1969 strict liability package-based failure to warn claim. Therefore, defendants' motion to dismiss these claims is granted. With regard to the fraud claims, plaintiffs are granted leave to amend. Therefore, the court concludes that defendants' Motion to Dismiss is **granted** in part, and **denied** in part.

Furthermore, plaintiffs' Objection to and Motion to Strike Defendants' Exhibits and Alternative Motion for Leave to File Response and Supplemental Exhibits (# 62) is **denied** as moot.

IT IS SO ORDERED.

Adam STEELE and Northern Herald Publications, Inc., a Minnesota Corporation, Plaintiffs,

v.

The CITY OF BEMIDJI, MINNESOTA, a Municipal Corporation, et al., Defendants.

Civil No. 99–1862(RHK/RLE).

United States District Court, D. Minnesota.

Aug. 29, 2000.

Newspaper owner brought action against private individuals and businesses for conspiring to interfere with owner's First Amendment rights by refusing to allow owner to distribute his newspaper within their private places of business or

C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT A. WRIGHT and DEANN K. WRIGHT, Plaintiffs, vs. BROOKE GROUP LIMITED, et al., Defendants.	No. C99-3090MWB **ORDER CERTIFYING QUESTIONS OF LAW TO THE IOWA SUPREME COURT**

This diversity case presents several questions of law of the State of Iowa which are potentially determinative of this case and as to which there is either no controlling precedent in the decisions of the appellate courts of the State of Iowa, or the existing precedent is ambiguous. On March 2, 2001, this court held a hearing on the defendants' Motion to Certify Questions of Law to the Iowa Supreme Court, and granted defendants' motion. Following the filing of a joint status report by the parties, in which the parties attempted to agree upon the questions to certify to the Iowa Supreme Court, the court now enters this order certifying several state law questions pursuant to the authority of the Iowa Uniform Certification of Questions of Law Act, Iowa Code Chapter 684A and Local Rule 83.10 of the Local Rules of the United States District Court for the Northern and Southern Districts of Iowa.[1]

[1] IOWA CODE § 684A.1 provides that:
The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the
(continued...)

PARTIES AND COUNSEL

The plaintiffs in this action are Robert A. Wright and DeAnn K. Wright. The defendants are Philip Morris, Inc., R.J. Reynolds Tobacco Co., and Brooke Group Holding Inc., formerly known as Brooke Group, Ltd., Liggett & Myers, Inc., and Liggett Group Inc. Plaintiffs are represented by E. Ralph Walker, David J. Darrell and Harley C. Erbe of Walker Law Firm, 2501 Grand Avenue, Suite E, Des Moines, Iowa 50312, telephone: (515) 281-1488, Glenn L. Norris, George F. Davison, Jr., Carla T. Schemmel and David N. May of Hawkins & Norris, P.C., 2501 Grand Avenue, Suite C, Des Moines, Iowa 50312, telephone: (515) 288-6532, Steven P. Wandro, CeCelia Ibson Wagner, Elizabeth S. Hodgson, and Michelle M. Casper of Wandro, Lyons, Wagner & Baer, P.C., 2501 Grand Avenue, Suite B, Des Moines, Iowa 50312, telephone: (515) 281-1475, and Norwood S. Wilner of Spohrer, Wilner, Maxwell & Matthews, P.A., 444 East Duval St., Jacksonville, Florida 32202, telephone: (904) 354-8310. Defendant Philip

---

[1](...continued)

> intermediate appellate court of another state, when requested by the certifying court, if there are involved in a proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of this state.

Local Rule 83.10 of the United States District Court for the Northern District of Iowa provides that:

> When there is involved in any proceeding a question of law of a state which may be determinative of the cause then pending in this court and as to which it appears there is no controlling precedent in the decisions of the appellate courts of the state, a motion may be made to certify the question of law to the highest appellate court of the state. This court, on such motion or on its own motion, may certify such question to the appropriate court, if authorized by statute or rule.

Morris, Inc., is represented by Robert A. VanVooren and Thomas Waterman of Lane & Waterman, 220 North Main St., Suite 600, Davenport, Iowa, 52801, telephone: (319) 324-3246, and Timothy E. Congrove and J. Patrick Sullivan of Shook, Hardy & Bacon, L.L.P., 1200 Main Street, Kansas City, Missouri 64105-2118, telephone: (816) 474-6550. Defendants Brooke Holding Inc. are represented by Richard R. Chabot of Sullivan & Ward, P.C., 801 Grand Avenue, Suite 500, Des Moines, Iowa 50309-2719, telephone: (515) 244-3500. Defendant R.J. Reynolds Tobacco Co., is represented by Steven L. Nelson and Kris Holub Tilley of Davis, Brown, Koehn, Shors & Roberts, P.C., 666 Walnut Street, Suite 2500, Des Moines, Iowa, 50309-3993, telephone: (515) 288-2500, and J. Todd Kennard, Jeffrey J. Jones, and Scott C. Walker of Jones, Day, Reavis & Pogue, 1900 Huntington Center, Columbus, Ohio 43215, telephone: (614) 469-3939.

STATEMENT OF THE CASE AND FACTS

On October 29, 1999, plaintiffs Robert and DeAnn Wright filed a petition in state court,[2] alleging that they have been damaged as a result of Mr. Wright's cigarette smoking. Mr. Wright alleges that he has developed cancer, as well as suffering from other personal injuries, and Mrs. Wright alleges loss of consortium because of Mr. Wright's alleged injuries. Plaintiffs' complaint contains the following nine counts: (1) Negligence; (2) Strict Liability; (3) Breach of Implied Warranty; (4) Breach of Express Warranty; (5) Breach of Special Assumed Duty; (6) Fraudulent Misrepresentation; (7) Fraudulent Nondisclosure; (8) Civil Conspiracy; and (9) Loss of Consortium.

On January 21, 2000, the defendants filed a Motion to Dismiss plaintiffs' complaint

---

[2]On November 26, 1999, the defendants removed this case to federal court based on diversity jurisdiction. *See* 28 U.S.C. § 1441.

pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This court heard oral arguments on that motion on July 19, 2000, and on September 29, 2000, issued its ruling, granting in part and denying in part defendants' motion to dismiss. *See Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797 (N.D. Iowa 2000). At the time of the ruling, this court was aware that its ruling was the first adjudication by any court applying Iowa law directly addressing the viability of smokers' claims against cigarette manufacturers. Although this court, cast in the role of prognosticator, gave its best prediction how the Iowa Supreme Court would resolve the questions raised by the parties in this tobacco case, the court finds that the far-reaching implications of the resolution of these questions, which are set forth below, warrant certification to the Iowa Supreme Court. The court finds that the Iowa Supreme Court, and not a federal court, should determine the substantive law of the State of Iowa with respect to the significant legal issues involved in tobacco litigation. Therefore, because the Iowa appellate courts have yet to resolve these legal issues involved in tobacco litigation, and because of the ambiguous nature of existing precedent with respect to the first question set forth below, the court concludes that the following questions shall be certified to the Iowa Supreme Court pursuant to IOWA CODE § 684A.4:

Questions of Law Certified

The court concludes that the following questions are hereby certified to the Iowa Supreme Court for consideration and response:

> 1. In a design defect products liability case, what test applies under Iowa law to determine whether cigarettes are unreasonably dangerous? What requirements must be met under the applicable test?
>
> 2. Under Iowa law, can Defendants rely on Comment i of § 402A of the Restatement (Second) of Torts to show that cigarettes are not unreasonably dangerous?
>
> 3 Under Iowa law, does the common knowledge of the health risks

associated with smoking, including addiction, preclude tort and warranty liability of cigarette manufacturers to smokers because cigarettes are not unreasonably dangerous insofar as the risks are commonly known? If yes, then:

a. Between what period of time would such knowledge be common?

b. Is there a duty to warn of the risks associated with smoking cigarettes in light of such common knowledge?

c. Is reliance on advertisements, statements or representations suggesting that there are no risks associated with smoking, including addiction, justifiable in light of such common knowledge?

4. Under Iowa law, can Plaintiffs bring a civil conspiracy claim arising out of alleged wrongful conduct that may or may not have been an intentional tort—i.e., strict liability for manufacturing a defective product or intentionally agreeing to produce an unreasonably dangerous product?

5. Under Iowa law, can a manufacturer's alleged failure to warn or to disclose material information give rise to a fraud claim when the relationship between a Plaintiff and a Defendant is solely that of a customer/buyer and manufacturer?

6. Does an "undertaking" arise under § 323 of the Restatement (Second) of Torts, as adopted in Iowa, by reason of a product manufacturer's advertisements or statements directed to its customers?

7. Does Iowa law allow a Plaintiff to recover from a cigarette manufacturer under a manufacturing defect theory when the cigarettes smoked by Plaintiff were in the condition intended by the manufacturer?

8. Does Iowa law allow Plaintiff to recover from a cigarette manufacturer for breach of implied warranty of merchantability when the cigarettes smoked by Plaintiff were in the condition intended by the manufacturer and Plaintiff alleges Defendants' cigarettes are "substantially interchangeable"?

CLERK TO FORWARD UNDER SEAL

The clerk if this court is directed to forward this Order Certifying Questions of Law

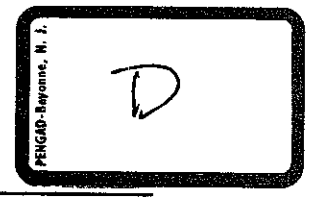
to The Iowa Supreme Court under this court official seal, pursuant to IOWA CODE § 684A.4.

IT IS SO ORDERED.

DATED this 3rd day of May, 2001.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Copies mailed on 5/3/01
to counsel of record or pro se
parties as shown on the docket
sheet.
Deputy Clerk



IN THE SUPREME COURT OF IOWA

NO. 01-712

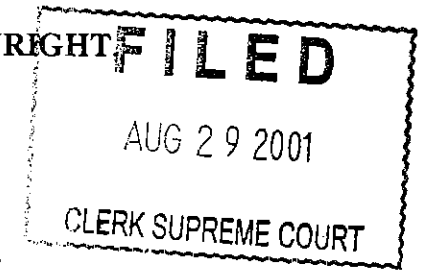
ROBERT A. WRIGHT and DEANN K. WRIGHT,

Plaintiffs,

v.

BROOKE GROUP LIMITED, *et al.*,

Defendants.



ON CERTIFIED QUESTIONS OF LAW FROM
THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION
THE HONORABLE MARK W. BENNETT

BRIEF OF THE *AMICUS CURIAE* PARTIES, IOWA DEFENSE COUNSEL ASSOCIATION AND THE DEFENSE RESEARCH INSTITUTE, INC.

Richard J. Sapp
Michael W. Thrall
Nyemaster, Goode, Voigts, West, Hansell & O'Brien, PC
700 Walnut Street, Suite 1600
Des Moines, IA 50309-3899

Kevin M. Reynolds
Richard J. Kirschman
Whitfield & Eddy, PLC
317 6th Avenue, Suite 1200
Des Moines, IA 50309

ATTORNEYS FOR *AMICUS CURIAE*,
IOWA DEFENSE COUNSEL ASSOCIATION AND
THE DEFENSE RESEARCH INSTITUTE, INC.

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(Certified Question 4)

A CIVIL CONSPIRACY CLAIM CANNOT BE PREDICATED UPON THE TORT OF STRICT PRODUCT LIABILITY.

Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751 (Iowa 1999)

Tubbs v. United Central Bank, N.A., 551 N.W.2d 177 (Iowa 1990)

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994)

Adam v. Mt. Pleasant Bank & Trust Co., 387 N.W.2d 771 (Iowa 1986)

Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599 (Iowa 1984)

Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977)

Murphy v. First Nat'l Bank of Chicago, 228 N.W.2d 372 (Iowa 1975)

Ducommun v. Johnson, 252 Iowa 1192, 110 N.W.2d 271 (1961)

Weber v. Paul, 241 Iowa 121, 40 N.W.2d 8 (1949)

Robbins v. Heritage acres, 578 N.W.2d 262 (Iowa App. 1998)

Wright v. Brooke Group Ltd., 114 F. Supp. 2d 797 (N.D. Iowa 2000)

Campbell v. A. H. Robins Co., 615 F. Supp. 496 (W.D. Wis. 1985)

Cresser v. American Tobacco Co., 662 N.Y.S.2d 374 (1997)

Roberts River Rides, Inc. v. Steamboat Dev. Corp., 520 N.W.2d 294 (Iowa 1994)

Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999)

Aller v. Rodgers Mach. Mfg. Co., Inc., 368 N.W.2d 830 (Iowa 1978)

Spaur v. Mullens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Meyn v. State, 594 N.W.2d 31 (Iowa 1999)

Long v. McAllister, 319 N.W.2d 256 (Iowa 1982)

(Certified Question 5)

A MANUFACTURER'S ALLEGED FAILURE TO WARN IN A PRODUCT LIABILITY CASE DOES NOT GIVE RISE TO A FRAUD CLAIM WHEN THE RELATIONSHIP BETWEEN A PLAINTIFF AND A DEFENDANT IS SOLELY THAT OF A CUSTOMER/BUYER AND MANUFACTURER.

Restatement (Second) of Torts § 388

West v. Broderick & Bascom Rope Co., 197 N.W.2d 202 (Iowa 1970)

Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994)

Iowa R. Civ. P. 69

Fed. R. Civ. P. 8

American Fire & Cas. Co. v. Ford Motor Co., 588 N.W.2d 437 (Iowa 1999)

Cunningham v. Kartridg Pak Co., 332 N.W.2d 881 (Iowa 1983)

Smith v. Air Feeds, Inc., 519 N.W.2d 827 (Iowa Ct. App. 1994), on subsequent appeal, 556 N.W.2d 160 (Iowa App. 1994)

Iowa Code § 668.1 (2000)

Iowa Uniform Civil Jury Instruction No. 1000.7 (2000)

Fed. R. Civ. P. 9(b)

Tratchel v. Essex Corp., 452 N.W.2d 171 (Iowa 1990)

Mercer v. Pittway, 616 N.W.2d 602 (2000)

Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999)

(Certified Question 6)

NEITHER A PRODUCT MANUFACTURER'S ADVERTISEMENTS NOR STATEMENTS DIRECTED TO ITS CUSTOMERS CONSTITUTE AN "UNDERTAKING TO RENDER SERVICES" WITHIN THE MEANING OF RESTATEMENT (SECOND) OF TORTS § 323.

Restatement (Second) of Torts § 323

Jain v. State, 617 N.W.2d 293 (Iowa 2000)

American State Bank v. Enabnit, 471 N.W.2d 829 (Iowa 1991)

DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Van Iperen v. Van Bramer, 392 N.W.2d 480 (Iowa 1986)

Power v. Boles, 110 Ohio App.3d 29, 673 N.E.2d 617 (1996)

Turbe v. Government of Virgin Islands, Virgin Islands Water & Power Auth., 938 F.2d 427 (3d Cir. 1991)

(Certified Question 7)

EVIDENCE THAT A PRODUCT DEVIATED FROM OTHER IDENTICAL PRODUCTS PRODUCED BY A MANUFACTURER IS A PREREQUISITE TO A MANUFACTURING DEFECT CLAIM.

Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994)

Stoffel v. Thermogas Co., 998 F. Supp. 1021 (N.D. Iowa 1997)

Dobbs on Torts § 355 at 979-80 (1st ed. 2000)

Wheeler v. HO Sports, Inc., 232 F.3d 754 (10th Cir. 2000)

Momen v. U.S., 946 F. Supp. 196 (N.D.N.Y. 1996)

Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776 (Tex. Ct. App. 1997)

Willard v. Park Indus., Inc., 69 F. Supp. 2d 268 (D.N.H. 1999)

In re TMJ Prod. Liab. Litig., 872 F. Supp. 1019 (D. Minn. 1995), aff'd, 97 F.3d 1050 (8th Cir. 1996)

Rosburg v. Minnesota Mining & Mfg. Co., 226 Cal. Rptr. 299 (Cal. Ct. App. 1986)

Lee v. Electric Motor Div., 215 Cal. Rptr. 195 (Cal. Ct. App. 1985)

Mitchell v. Wayne Corp., 536 N.E.2d 241 (Ill. Ct. App.), appeal denied, 545 N.E.2d 114 (Ill. 1989)

Rix v. General Motors Corp., 723 P.2d 195 (Mont. 1986)

Nerud v. Haybuster Mfg., Inc., 340 N.W.2d 369 (Neb. 1983)

Spectron Dev. Lab. v. American Hollow Boring Co., 936 P.2d 852 (N.M. Ct. App. 1997)

Lombard v. Centrico, Inc., 557 N.Y.S.2d 627 (N.Y. App. 1990)

Boudreau v. Baughman, 368 S.E.2d 849 (N.C. 1988)

Sims v. Washex Mach. Corp., 932 S.W.2d 559 (Tex. Ct. App. 1995)

Torres v. Caterpillar, Inc., 928 S.W.2d 233 (Tex. Ct. App. 1996)

Morris v. Parke, Davis & Co., 667 F. Supp. 1332 (C.D. Cal. 1987)

Barker v. Lull Eng'g Co., Inc., 573 P.2d 443 (Cal. 1978)

Richcreek v. General Motors Corp., 908 S.W.2d 772 (Mo. Ct. App. 1995)

Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978)

Plenger v. Alza Corp., 13 Cal. Rptr. 2d 811 (Cal. Ct. App. 1992)

(Certified Question 8)

TO RECOVER UNDER AN IMPLIED WARRANTY OF MERCHANTABILITY THEORY, PURSUANT TO § 554.2314 OF THE IOWA CODE, A PLAINTIFF MUST DEMONSTRATE THAT THE PRODUCT DEVIATES FROM OTHER SIMILAR PRODUCTS.

Iowa Code § 554.2314 (2001)

Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634 (Iowa 1988)

Van Wyk v. Norden Lab., Inc., 345 N.W.2d 81 (Iowa 1984)

Iowa Code § 554.2314(2)

Uniform Commercial Code Official Comment to Section 554.2314

Spain v. Brown & Williamson Tobacco Corp., 230 F.3d 1300 (11th Cir. 2000)

Rynders v. E.I. DuPont, de Nemours & Co., 21 F.3d 835 (8th Cir. 1994)

Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91 (3rd Cir. 1991)

Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968) (Simpson, J. dissenting), aff'd, 409 F.2d 1166

Standard Structural Steel Co. v. Bethlehem Steel Corp., 597 F. Supp. 164 (D. Conn. 1984)

Blockhead, Inc. v. Plastic Forming Co., Inc., 402 F. Supp. 1017 (D. Conn. 1975)

Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976)

Woodruff v. Clark County Farm Bur. Coop. Ass'n, 286 N.E.2d 188 (Ind. Ct. App. 1972)

Price Bros. Co. v. Philadelphia Gear Corp., 649 F.2d 416 (6th Cir.), cert. denied, 454 U.S. 1099 (1981)

James J. White and Robert S. Summers, Uniform Commercial Code, § 9-8, at 364 (5th ed. 2000)

INTEREST OF THE AMICUS CURIAE

The Iowa Defense Counsel Association ("Iowa Defense Counsel") has a membership of over 400 active members consisting primarily of trial attorneys involved in the defense of legal actions in the State of Iowa. Many of the Iowa Defense Counsel's members are involved in the defense of product liability cases. Further, many of the clients represented by Iowa Defense Counsel members in those cases are Iowa businesses and manufacturers.

The Defense Research Institute ("DRI") is the largest national organization of lawyers specializing in the defense of civil litigation. DRI has over 21,000 individual lawyer

members located in all 50 states, including Iowa, and some 400 corporate members. A large portion of DRI's members are involved in the defense of product liability matters.

The questions certified by the United States District Court to the Iowa Supreme Court have implications for Iowa product liability law well beyond the specific context in which this case arises. The interests of the amicus curiae are not in defending the product at issue but rather preserving the integrity of the law regardless of the context in which the issues arise. Plaintiffs seek to (a) rewrite existing product liability law, urging novel and previously unrecognized causes of actions; (b) expand product liability to include claims of civil conspiracy; (c) create a cause of action based on fraud in a failure to warn product liability context; (d) create a new cause of action for negligent undertaking predicated upon a manufacturer's advertisements or marketing statements; and (e) expand manufacturing defect and breach of implied warranty of merchantability claims to products that were sold in the condition intended by the manufacturer and no different than other comparable products on the market.

Iowa Defense Counsel and DRI are vitally interested in these issues and seek to be heard on several of them. This Court's resolution of these questions, collectively or individually, should it adopt Plaintiffs' approach, would greatly expand and dramatically change what has been to this date well recognized and established product liability law applied in this State. Importantly, and for good reason, no court in any state has adopted the radical approach advocated by Plaintiffs. This Court's resolution of these issues could have far-reaching implications and adversely impact numerous manufacturers and distributors of products, including Iowa businesses, that its members often represent.

The Iowa Defense Counsel and DRI respectfully submit this brief in their desire to assist the Court in assessing these important questions in the State of Iowa. The Iowa

Defense Counsel and DRI have specifically limited their involvement in this matter to address certified questions 4 through 8 as those issues are of more general applicability, and are critically important to the maintenance and development of fair and predictable product liability law in Iowa.

ARGUMENT

(Certified Question 4)

A CIVIL CONSPIRACY CLAIM CANNOT BE PREDICATED UPON THE TORT OF STRICT PRODUCT LIABILITY.

While Iowa appellate courts have recognized civil conspiracy, the tort has not been applied to anything other than conspiracies to commit intentional torts.[1] Civil conspiracy has never been extended in Iowa to negligence claims,[2] much less claims, such as strict product liability, where the culpability of defendant's conduct is not relevant to the underlying tort. Other states that have addressed this issue have rejected plaintiffs' attempts to couple a civil conspiracy claim to strict products liability.[3]

---

[1] See Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751 (Iowa 1999) (conspiracy to tortiously interfere with contract); Tubbs v. United Central Bank, N.A., 551 N.W.2d 177 (Iowa 1990) (conspiracy to commit fraud and other wrongs); Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994) (conspiracy to intentionally interfere with contractual rights, conversion of corporate assets); Adam v. Mt. Pleasant Bank and Trust Co., 387 N.W.2d 771 (Iowa 1986) (conspiracy to defraud); Countryman v. Mt. Pleasant Bank and Trust Co., 357 N.W.2d 599 (Iowa 1984) (conspiracy to defraud); Basic Chemicals, Inc. v. Benson, 251 N.W.2d 451 (Iowa 1983) (conspiracy to engage in "palming off" products or unfair competition); Murphy v. First National Bank of Chicago, 228 N.W.2d 372 (Iowa 1975) (conspiracy to induce the commission of a colorable act of bankruptcy justifying filing of involuntary petition in bankruptcy); Ducommun v. Johnson, 252 Iowa 1192, 110 N.W.2d 271 (1961) (conspiracy to deprive real estate broker of commission); Weber v. Paul, 241 Iowa 121, 40 N.W.2d 8 (1949) (conspiracy to commit assault and battery).

[2] Judge Bennett in his ruling on Defendants' Motion to Dismiss in this case correctly concluded that plaintiff's allegations in Robbins v. Heritage Acres, 578 N.W.2d 262 (Iowa Ct. App. 1998) were predicated not on negligence but on breach of contract or violations of professional standards. Wright v. Brooke Group Ltd., 114 F.Supp. 2d 797, 837 (N.D. Iowa 2000).

[3] See Campbell v. A. H. Robins Co., 615 F. Supp. 496, 500 (W.D. Wis. 1985)(applying Wisconsin law); Cresser v. American Tobacco Co., 662 N.Y.S.2d 374, 379 (1997)(applying New York law).

"The principal element of a conspiracy is an agreement or understanding to commit a wrong against another." Adam v. Mt. Pleasant Bank and Trust Co., 387 N.W.2d 771, 773 (Iowa 1986). "[A conspiracy] involves some mutual mental action coupled with an intent to commit the act which results in injury." Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220, 233 (Iowa 1977). It is not the conspiracy itself that is actionable but rather the underlying acts undertaken in furtherance of the conspiracy that give rise to the action. Id. See Roberts River Rides, Inc. v. Steamboat Development Corp., 520 N.W.2d 294, 302 (Iowa 1994).

The acts of a defendant, however, are immaterial in a strict products liability claim. The focus is on the product itself, not on the conduct of the manufacturer. Lovick v. Wil-Rich, 588 N.W.2d 688, 698-99 (Iowa 1999). Indeed, the manufacturer may be strictly liable for the condition of its product even when it has exercised all possible care in the manufacture and sale of the product. Aller v. Rodgers Machinery Mfg. Co., Inc., 368 N.W.2d 830, 834 (Iowa 1978). Significantly, one need not prove the manufacturer knew the product was unreasonably dangerous to recover under a theory of strict products liability. Neither the manufacturer's intent nor its pre-manufacture conduct is relevant.

Incongruously, Plaintiffs argue that one can be liable under a conspiracy theory for simply agreeing or combining to sell a product (whether or not its own) subsequently determined to be unreasonably dangerous.[4] Clearly, one cannot conspire to commit a wrong that is determined not by one's conduct but rather by the condition of a product lawfully sold.

[4] To the extent that Plaintiffs rely on the Defendants' intent or conduct as opposed to simply the condition of the product, they have undertaken to establish more than that the Defendants are strictly liable. In other words, their claim is no longer predicated upon a strict liability theory but rather on an intentional tort.

To hold otherwise would open a floodgate to civil conspiracy claims in every product liability action. Every company that belongs to a trade association, industry group, or product advisory group would face conspiracy charges predicated on nothing more than the fact that it manufactured a product that had characteristics of those within that industry. Component suppliers, as well as, conceivably, even the bank extending financing to the manufacturers, could be brought within the expanding web of a "conspiracy" theory based on nothing more than the condition of the product itself. Under Plaintiffs' misguided argument, liability could be imposed under a theory of civil conspiracy on nothing more than a simple agreement or understanding to participate in making a challenged product.

Indeed, recognizing a new tort of civil conspiracy to commit strict liability would allow plaintiffs to sue additional manufacturers even though they did not make or sell the specific brand used by plaintiffs, contrary to the well-established principle of Iowa law requiring plaintiffs to prove that he or she was injured by the product manufactured or supplied by the defendant. See Spaur v. Mullens-Corning Fiberglas Corp., 510 N.W.2d 854, 858 (Iowa 1994). Plaintiffs should not be allowed to evade that long-standing requirement through the artifice of a strict liability-based conspiracy theory extending liability to other manufacturers whose specific product the plaintiffs never used.

Furthermore, this Court has traditionally declined to recognize a new cause of action when there are existing remedies for the alleged injury. See, e.g., Meyn v. State, 594 N.W.2d 31, 33-34 (Iowa 1999) (declining to recognize a cause of action for negligent spoliation of evidence on the grounds that, *inter alia,* other remedies are available under Iowa law); Long v. McAllister, 319 N.W.2d 256, 262 (Iowa 1982) (declining to recognize a new tort claim against liability insurer by a third party tort victim for bad faith failure to settle, on grounds that Iowa law provided a remedy against the insured for the injury).

Recognition of a civil conspiracy claim for strict liability adds nothing to a products liability claim. It is a duplicative and unnecessary theory.

Judge Bennett correctly rejected Plaintiffs' claim that civil conspiracy could be predicated upon an underlying tort of negligence. Wright v. Brooke Group Ltd., 114 F.Supp 2d 797, 837 (N.D. Iowa 2000). Indeed, Judge Bennett found Plaintiffs' contention that one could conspire to act negligently to be a paradox. Id. Just as "there can hardly be a conspiracy to be negligent," id., there can hardly be a conspiracy to be strictly liable. As one court observed:

> The real problem with the plaintiffs' [conspiracy] theory is that it is incomprehensible. Precisely how the defendants, or anyone else, can conspire to cause negligent harm or conspire to cause damages under a strict product liability claim is inexplicable. The same must be said for the warranty claims. None of these claims are amendable to a conspiracy theory. There must be some manifestation of intent to conspire toward an unlawful end (or an unlawful means to a lawful end). [Citations omitted]

Campbell v. A. H. Robins Co., 615 F. Supp. 496, 500 (W.D. Wis. 1985). Indeed, it would be a paradox if one would not be liable where the underlying tort is negligence but could be found liable under a conspiracy theory when proof of negligence is not required but when only strict liability is imposed. There is quite simply no basis nor reason to expand the tort of civil conspiracy in Iowa to include the underlying tort of strict product liability.

(Certified Question 5)

> **A MANUFACTURER'S ALLEGED FAILURE TO WARN IN A PRODUCT LIABILITY CASE DOES NOT GIVE RISE TO A FRAUD CLAIM WHEN THE RELATIONSHIP BETWEEN A PLAINTIFF AND A DEFENDANT IS SOLELY THAT OF A CUSTOMER/BUYER AND MANUFACTURER.**

Cases involving injury allegedly resulting from the use of a product are product liability cases, not intentional tort cases, and should be judged by well-recognized and established product liability rules. Injecting intentional tort theories, such as "fraud" or

"intentional non-disclosure" into a product liability case is wholly unnecessary. Existing remedies, recognized by Iowa law, provided by failure to warn claims sufficiently protect the interests of plaintiffs.

The genesis of failure to warn claims in Iowa is found in Section 388 of the Restatement (Second) of Torts. Section 388 sets forth a negligence-based test for liability for failure to warn or instruct. See West v. Broderick & Bascom Rope Co., 197 N.W.2d 202 (Iowa 1970). The Iowa Supreme Court reaffirmed this well-established standard in Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994), and found specifically that all failure to warn claims in Iowa product liability cases were to be governed by a negligence standard and not a strict liability test. Clearly, this Court's well reasoned decision in Olson makes ultimate sense because the failure to warn standard applied by Iowa courts had always been based on Section 388 and its "reasonable care," negligence-based standard. A product liability "failure to warn or instruct" claim should not be permitted to be recharacterized as a "fraud" or "material non-disclosure" case by simply applying different descriptive language,[5] which thereby injects intentional tort principles into an area of law that has evolved exclusively around the fault-based concept of negligence.

Plaintiffs do not need a fraud allegation to make their product liability claim. If they present proper, sufficient evidence of willful and wanton conduct, they may be entitled to punitive damages for Defendants' alleged failure to warn without improperly incorporating intentional tort theories into their product liability action. The potential for punitive damages arises if, and only if, Plaintiffs can prove the requisite elements set forth in Section 668A.1

[5]Plaintiffs' attempt to change the fundamental nature of the cause of action by a few words artfully pleaded is contrary to the spirit and intent of the Iowa and Federal Rules of Civil Procedure. See, e.g., Iowa R. Civ. P. 69 ("no technical forms of pleading are required"); Fed. R. Civ. P. 8 ("a short and plain statement of the claim showing that the pleader is entitled to relief.")

of the Iowa Code governing punitive damages. Thus, Plaintiffs' attempt does not accomplish anything that is not provided by a properly stated failure to warn claim with a punitive damage allegation, yet it has the effect of unnecessarily and improperly complicating traditional product liability law.

Product liability law in Iowa concerns the risk of injury to a person or property through exposure to a dangerous product. American Fire & Cas. Co. v. Ford Motor Co., 588 N.W.2d 437 (Iowa 1999). Implicit in product liability law is a notion that a defective product caused physical harm to a plaintiff or his property. Cunningham v. Kartridg Pak Co., 332 N.W.2d 881 (Iowa 1983). Plaintiffs' efforts to commingle the elements of product liability law with the law of intentional torts make no sense and, in effect, merely inject confusion and uncertainty into the process.

No matter how the Plaintiffs attempt to characterize their claims, this is not a case of intentional tort, but instead a straightforward product liability case. "Product liability law" broadly refers to legal responsibility for injury resulting from the use of a product. Smith v. Air Feeds, Inc., 519 N.W.2d 827 (Iowa Ct. App. 1994), on subsequent appeal, 556 N.W.2d 160 (Iowa App. 1994). Comparative fault principles apply fully to product liability claims. See Iowa Code § 668.1 (2000). Fraud claims, however, are not subject to comparative fault in Iowa, representing perhaps another ground for the untenable position adopted by Plaintiffs in this case. This illustrates the problem of Plaintiffs' unfettered and illogical attempt to "mix and match" product liability concepts with inconsistent intentional tort theories

Failure to warn or instruct is an un-intentional tort based on merely negligent conduct. It is governed by the standard set forth in Section 388 of the Restatement (Second) of Torts. See Iowa Uniform Civil Jury Instruction No. 1000.7 (2000). Since it is a

negligence claim, a plaintiff's contributory negligence or comparative fault is a defense to the action. See Iowa Code § 668.1 (2000). Fraud, conversely, is an intentional tort that must be proven by a "clear, convincing and satisfactory preponderance of the evidence." "Failure to warn" in Iowa is governed by the Iowa Comparative Fault Act, Chapter 668 of the Iowa Code, while fraud is not. Iowa Code § 668.1 (2000). Inherently, failure to warn and fraud claims are distinct factually, legally and philosophically. Fraud requires intent while negligence is simply a deviation from reasonableness. The two causes of action are not equivalent and cannot both properly be used to describe the same conduct. A product liability claim for personal injury is subject to the strictures of the Iowa Comparative Fault Act, Iowa Code Chapter 668 (2000). Intentional misrepresentation or fraud is not subject to Iowa's comparative fault scheme. Tratchel v. Essex Corp., 452 N.W.2d 171, 181 (Iowa 1990); Iowa Code § 668.1 (2000). Plaintiffs' personal injury claims based on product liability theories are necessarily subject to comparative fault principles, yet "fraud" is not the type of conduct that meets the definition of "fault" within the meaning of Chapter 668.

The case of Tratchel v. Essex Corp., 452 N.W.2d 171 (Iowa 1990) is of no assistance to Plaintiffs. In Tratchel, the defendant-appellant never raised the issue on appeal which is being raised here: can a failure to warn claim be characterized as "fraud" in a product liability case between a manufacturer/seller and a user/consumer? Whether a product manufacturer has a legal duty to make any "disclosures" above and beyond what product liability failure to warn law would require was never addressed by the Tratchel court. Certainly the court in Tratchel never found the existence of the requisite special relationship of trust, confidence, fiduciary or privilege to have arisen in the context of a product sale. Finally, the court in Tratchel never considered the effect of either the Iowa Comparative Fault Act or the Iowa punitive damage statute, Chapter 668A, on this issue.

In this case, Plaintiffs have already alleged all three distinct theories of product defect. In addition, in a product liability case, a plaintiff may choose from among three legal theories of recovery: (a) strict liability in tort; (b) negligence; and (c) breach of warranty. Mercer v. Pittway, 616 N.W.2d 602 (2000). Moreover, upon satisfying the heightened requirements establishing the requisite quality and quantity of proof, a plaintiff in a product liability action can recover punitive damages. Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999). When the very stringent requirements of Chapter 668A are met, a plaintiff can recover punitive damages for a willful and wanton failure to warn or instruct in connection with the sale of a product that caused injury. Thus, there is no need to inject the confusion inherent in the intentional tort of "fraud" into a product liability case. Furthermore, asserting an intentional tort, such as fraud, in a product liability case is inimical to the purposes of the Iowa Comparative Fault Act, creates the likelihood of reversible error and unnecessarily complicates the trial of a standard product liability case. Finally, advancing a "fraud" claim in a product liability case is no different than alleging "failure to warn or instruct" with sufficiently egregious facts to establish willful and wanton misconduct, which would satisfy the punitive damage framework of Chapter 668A.

For the foregoing reasons, the *amicus curiae* maintain that this Court should answer Certified Question 5 by clearly, firmly and finally concluding that claims for "fraud" or "intentional non-disclosure" in the context of a failure to warn case are not legally cognizable under Iowa law.

(Certified Question 6)

NEITHER A PRODUCT MANUFACTURER'S ADVERTISEMENTS NOR STATEMENTS DIRECTED TO ITS CUSTOMERS CONSTITUTE AN "UNDERTAKING TO RENDER SERVICES" WITHIN THE MEANING OF RESTATEMENT (SECOND) OF TORTS § 323.

Having failed to articulate a viable claim of fraudulent misrepresentation or concealment, Plaintiffs seek to create a new cause of action purportedly under Restatement (Second) of Torts § 323. Plaintiffs seek to drastically and inappropriately expand the Restatement by extending the "undertaking to render services" that would subject one to liability under § 323 to include a manufacturer's advertisements or marketing statements to its customers. Specifically, Plaintiffs allege "Defendants through their own actions have voluntarily assumed the duty to report honestly and competently on all research regarding smoking and health regarding their tobacco products through their public pronouncements." (Petition, Para. 9.2.) No such duty exists under Iowa law, nor can it arise through statements made in a manufacturer's advertisements or marketing statements.

Restatement (Second) of Torts § 323 provides:

Negligent Performance of Undertaking to Render Services

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

While this section of the Restatement of Torts has been adopted by Iowa courts, it has never been applied to a manufacturer's advertisements in Iowa. See Jain v. State, 617 N.W.2d 293 (Iowa 2000) (rejecting claim against university that it had undertaken duty to inform student's parents of student's previous suicide attempt); American State Bank v. Enabnit, 471 N.W.2d 829 (Iowa 1991) (rejecting cause of action by bank against lawyer for alleged gratuitous undertaking with respect to escrow funds); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986) (recognizing section 323 encompasses cause of action for "lost chance of

survival"); Van Iperen v. Van Bramer, 392 N.W.2d 480 (Iowa 1986) (section 323 does not affect traditional proof of causation in medical malpractice cases). These decisions demonstrate that Plaintiffs' argument, that § 323 should be extended into the product liability arena, is neither supported by nor supportable under Iowa law.

Advertisements are not services. A person or business does not undertake to render services within the meaning of § 323 simply by advertising its products or making marketing statements directed to its customers. It is not the advertisement that creates liability under § 323 but rather the rendering of the actual services, whether advertised or not. A product is not a service. Even the manufacture and sale of a product is not a service. This is one reason that a wholly separate body of law developed for products. Here, even Plaintiffs must acknowledge that physical harm does not result from the advertisement but rather allegedly from use of the product advertised. Section 323 simply does not encompass claims of false advertisement, let alone provide a separate basis for imposing personal injury liability.

As noted, the Iowa Supreme Court most recently addressed the Restatement (Second) of Torts § 323 in Jain v. State, supra. Jain arose from the suicide of a University of Iowa student. Id. at 294. The student had a history of problems and had previously attempted to commit suicide. Id. at 295. Plaintiff alleged that the university had engaged in the requisite undertaking (by providing a service) through adoption of a policy to notify parents of self-destructive behavior of its students. Id. at 296. While university officials discussed the matter with the student, the university did not notify his parents of the previous attempt. Id. The parents alleged that the student's death resulted from the university's failure to notify them of the earlier suicide attempt. Id.

This court refused to apply § 323. The court quoted from the Ohio Court of Appeals' decision in Power v. Boles, 110 Ohio App.3d 29, 673 N.E.2d 617, 620 (1996), in summarizing what a plaintiff must prove to show assumption of a duty under § 323:

> Cases interpreting section 323(a) have made it clear that the increase in the risk of harm required is not simply that which occurs when a person fails to do something that he or she reasonably should have. Obviously, the risk of harm to the beneficiary of a service is always greater when the service is performed without due care. Rather, as the court stated in Turbe v. Government of Virgin Islands, Virgin Islands Water & Power Auth., 938 F.2d 427, 432 (3d Cir. 1991):
>
> > [Section] 323(a) applies only when the defendant's actions increased the risk of harm to plaintiff relative to the risk that would have existed had the defendant never provided the services initially. Put another way, the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun performance. . . . [T]o prevail under a theory of increased harm a plaintiff must "identify the sins of commission rather than sins of omission."

Id. at 299. The court found that no affirmative action by university employees increased the risk of self harm. Id. The court further found that the record was devoid of any proof the student had relied to his detriment on the services gratuitously offered by university personnel. Id. Here, because neither the product nor its advertisements are services, a critical element of Plaintiffs' claim is missing. Moreover, and perhaps most importantly, advertising a product by itself does not actually cause physical harm, much less increase the harm. Similarly, in this case, there is nothing about the alleged advertisements themselves that in any way increase the risk of harm alleged by the Plaintiffs.

Section 323 simply does not extend to the sale of a product. Iowa recognizes a multitude of causes of action that can arise in connection with the sale of a product, many of which have been asserted by the Plaintiffs in this case. There is simply no basis or need to expand Restatement (Second) of Torts § 323 to address a situation for which it was clearly

not intended and for which there are a multitude of other adequate causes of action available to the Plaintiffs.

(Certified Question 7)

MANUFACTURING DEFECT CLAIMS REQUIRE PROOF THAT A PRODUCT DEVIATED FROM IDENTICAL ITEMS PRODUCED BY A MANUFACTURER.

To be successful on a manufacturing defect claim, a plaintiff must establish that: 1) the product was defectively manufactured; 2) the defect existed when the product left the manufacturer's control; 3) the defect rendered the product unreasonably dangerous; and 4) the defect was a proximate cause of the plaintiff's injuries and resulting damages. See Burke v. Deere & Co., 6 F.3d 497, 503 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994). In Stoffel v. Thermogas Co., 998 F. Supp. 1021 (N.D. Iowa 1997), the court expressly recognized the distinction between manufacturing and design defect claims under Iowa law, as follows:

> [A] manufacturing defect . . . results when a mistake in manufacturing renders a product that is ordinarily safe dangerous so that it caused harm[.]
>
> [A] design defect . . . results when the product as designed is unreasonably dangerous for its intended use[.]

Id. at 1032-33 (citations omitted); see also Dobbs on Torts § 355 at 979-80 (1st ed. 2000) (discussing differences between manufacturing and design defects). To permit plaintiffs to proceed on a manufacturing defect theory where the product was made as intended improperly erases the distinction between design and manufacturing defect theories. There is no reason to do so.

Importantly, for the purposes of a manufacturing defect claim, a plaintiff must establish the existence of a manufacturing defect and that the manufacturing defect rendered the product unreasonably dangerous. E.g., Wheeler v. HO Sports, Inc., 232 F.3d 754, 757

(10th Cir. 2000); Momen v. U.S., 946 F. Supp. 196, 206 (N.D.N.Y. 1996); Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776, 783 (Tex. App. 1997). A manufacturing defect exists when a product, as sold, deviates from other similar products as established by the manufacturer's plans or specifications. E.g., Momen, 946 F. Supp. at 206; Willard v. Park Indus., Inc., 69 F. Supp.2d 268, 271 (D.N.H. 1999); In re TMJ Prod. Liab. Litig., 872 F. Supp. 1019, 1024 (D. Minn. 1995), aff'd, 97 F.3d 1050 (8th Cir. 1996); Rosburg v. Minnesota Mining & Mfg. Co., 226 Cal.Rptr. 299, 303 (Cal. App. 1986), aff'd, 97 F.3d 1050 (8th Cir. 1996); Lee v. Electric Motor Div., 215 Cal.Rptr. 195, 198 (Cal. App. 1985); Mitchell v. Wayne Corp., 536 N.E.2d 241, 246 (Ill. App.), appeal denied, 545 N.E.2d 114 (Ill. 1989); Rix v. General Motors Corp., 723 P.2d 195, 200 (Mont. 1986); Nerud v. Haybuster Mfg., Inc., 340 N.W.2d 369, 373 (Neb. 1983); Spectron Dev. Lab. v. American Hollow Boring Co., 936 P.2d 852, 856 (N.M. App. 1997); Lombard v. Centrico, Inc., 557 N.Y.S.2d 627, 628 (N.Y. App. 1990); Boudreau v. Baughman, 368 S.E.2d 849, 860 (N.C. 1988); Dico, 953 S.W.2d at 783; Sims v. Washex Mach. Corp., 932 S.W.2d 559, 562 (Tex. App. 1995); Torres v. Caterpillar, Inc., 928 S.W.2d 233, 239 (Tex. App. 1996).

> A product has a "manufacturing defect" if and only if the product caused a plaintiff's injury because it deviated from the manufacturer's intended result or from other ostensibly identical units of the same product line. . . . A manufacturing defect is one which results from an error in the production process.

Morris v. Parke, Davis & Co., 667 F. Supp. 1332, 1335 (C.D. Cal. 1987) (emphasis added).

> Manufacturing defects, by definition, are "imperfections that inevitably occur in a typically small percentage of products of a given design as a result of the fallibility of the manufacturing process. A defectively manufactured product does not conform in some significant aspect to the intended design, nor does it conform to the great majority of products manufactured in accordance with that design.

Rix, 723 P.2d at 200 (emphasis added). Consequently, the manufacturer's specifications and other correctly manufactured products establish the standard from which a manufacturing defect claim must be judged.

The crucial factor when evaluating a manufacturing defect claim is how the product compares to other identical items produced by the manufacturer. See Willard, 69 F. Supp.2d at 271; In re TMJ, 872 F. Supp. at 1024; Barker v. Lull Eng'g Co., Inc., 573 P.2d 443, 454 (Cal. 1978); Richcreek v. General Motors Corp., 908 S.W.2d 772, 776 (Mo. App. 1995); Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978). Manufacturing defect claims are premised on the "consumer expectancy that a mass-produced product will not differ from its counterparts in a manner that makes it more dangerous than the others." Dico, 953 S.W.2d at 783.

> [A] manufacturing defect . . . occurs when, "due to an accidental variation caused by a mistake in the manufacturing process," the product "does not conform to the great majority of products manufactured in accordance with that design."

Willard, 69 F. Supp.2d at 271; see also In re TMJ, 872 F. Supp. at 1024 (stating that "a manufacturing defect exists only where an item is substandard when compared to other identical units . . ") (emphasis added); Barker, 573 P.2d at 454 (manufacturing defect is easily discernible because product differs from identical units); Richcreek, 908 S.W.2d at 776 (manufacturing defect is determined by comparing product to identical items); Thibault, 395 A.2d at 846 (manufacturing defect is an "accidental variation" which is identified by an item's failure to conform to similar products).

Plaintiffs have failed to establish the existence of a manufacturing defect and have not alleged that the cigarettes at issue were not comparable to other cigarettes. In fact, they cannot do so. The Complaint alleges that all of the cigarettes smoked by Mr. Wright were

"substantially interchangeable." The failure to allege or establish that a product deviated from other identical products and did not comport with a manufacturer's specifications mandates dismissal of a manufacturing defect claim. See Momen, 946 F. Supp. at 207-08; Plenger v. Alza Corp., 13 Cal.Rptr.2d 811, 818 (Cal. App. 1992); Lee, 215 Cal.Rptr. at 198; Mitchell, 536 N.E.2d at 246-47; Lombard, 557 N.Y.S.2d at 628.

This Court should answer Certified Question 7 in the negative, finding that a manufacturing defect claim cannot be established when the product was in the condition intended and did not vary from other identical products produced by the manufacturer.

(Certified Question 8)

TO RECOVER UNDER AN IMPLIED WARRANTY OF MERCHANTABILITY THEORY, THE PLAINTIFF MUST DEMONSTRATE THAT THE PRODUCT DEVIATES FROM OTHER SIMILAR PRODUCTS.

Iowa law establishes a cause of action for breach of implied warranty of merchantability. See Iowa Code § 554.2314 (2001). The implied warranty of merchantability pledges that goods are acceptable, in other words "merchantable," for "their" ordinary purpose. Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 638 (Iowa 1988). To be successful on a breach of the implied warranty of merchantability claim, a plaintiff must establish that:

1. the goods were sold by a merchant;
2. the goods were not "merchantable" when they were sold;
3. the plaintiff was injured or sustained property damage;
4. a defect in or the defective nature of the goods proximately and legally caused the alleged damage; and
5. the seller received notice of the damage or injuries.

Renze, 418 N.W.2d at 638; Van Wyk v. Norden Lab., Inc., 345 N.W.2d 81, 87 (Iowa 1984). The implied warranty of merchantability is designed to advance a buyer's expectation that an item purchased will conform to other similar products.

> The warranty of merchantability, Iowa Code § 554.2314, is based on a purchaser's reasonable expectation that goods purchased from a "merchant with respect to goods of that kind" will be free of significant defects and will perform in the way goods of that kind should perform.

Van Wyk, 345 N.W.2d at 84 (emphasis added).

The focus of the implied warranty of merchantability, the purchaser's expectation that a good will conform to similar items, is established by the definition of "merchantable" goods.

> Goods to be merchantable must be at least such as:
>
> a. pass without objection in the trade under the contract description; and
>
> b. in the case of fungible goods, are of average quality within the description; and
>
> c. are fit for the ordinary purposes for which such goods are used; and
>
> d. run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> e. are adequately contained, packaged, and labeled as the agreement may require; and
>
> f. conform to the promises or affirmations of fact made on the container or label if any.

Iowa Code at § 554.2314(2) (emphasis added). This limitation on the scope of the implied warranty of merchantability to conformity with other similar products is further supported by the Uniform Commercial Code Official Comment to § 554.2314.

> Goods delivered . . . by a merchant in a given line of trade must be of quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement.

Iowa Code at § 554.2314 (UCC Comment ¶ 2) (emphasis added).

While no Iowa decisions have specifically considered a plaintiff's inability to prosecute an action for breach of the implied warranty of merchantability when the allegedly defective product conformed, in all pertinent respects, to similar products produced by the manufacturer or other manufacturers, numerous cases from other jurisdictions address this and related issues. As a general rule, a plaintiff cannot successfully prosecute a claim for an alleged breach of the implied warranty of merchantability when the goods in question conformed, in pertinent respects, to other similar goods. E.g., Spain v. Brown & Williamson Tobacco Corp., 230 F.3d 1300, 1310-11 (11th Cir. 2000); Rynders v. E.I. DuPont, de Nemours & Co., 21 F.3d 835, 841 (8th Cir. 1994); Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 107 (3rd Cir. 1991); Green v. American Tobacco Co., 391 F.2d 97, 110 (5th Cir. 1968) (Simpson, J. dissenting), aff'd, 409 F.2d 1166 (affirming trial court and adopting dissent as majority opinion); Standard Structural Steel Co. v. Bethlehem Steel Corp., 597 F. Supp. 164, 188 (D. Conn. 1984); Blockhead, Inc. v. Plastic Forming Co., Inc., 402 F. Supp. 1017, 1026 (D. Conn. 1975); Jones v. Abriani, 350 N.E.2d 635, 645 (Ind. App. 1976); Woodruff v. Clark County Farm Bur. Coop. Ass'n, 286 N.E.2d 188, 194 (Ind. App. 1972).

The determinative factor when evaluating a claim for breach of the implied warranty of merchantability is whether the product, as purchased by the plaintiff, conforms in all substantial respects to other similar products produced by the manufacturer or other manufacturers. Rynders, 21 F.3d at 841; Step-Saver, 939 F.2d at 107; Green, 391 F.2d at 110; Standard Structural Steel, 597 F. Supp. at 188; Blockhead, Inc., 402 F. Supp. at 1026 n.2.

> The warranty of merchantability generally promises that "the goods will conform to the ordinary standards and are of average grade, quality, and value of like goods which are generally sold in the stream of commerce."

Rynders, 21 F.3d at 841 (emphasis added).

> Under a warranty of merchantability, the seller warrants only that the goods are of acceptable quality "when compared to that generally acceptable in the trade for goods of the kind."

Step-Saver, 939 F.2d at 107 (emphasis added); see also Price Bros. Co. v. Philadelphia Gear Corp., 649 F.2d 416, 424 (6th Cir.), cert. denied, 454 U.S. 1099 (1981) (reciting same standard).

The ability to pursue an implied warranty of merchantability claim alleging the existence of defects in cigarettes has been addressed by two Circuit Courts of Appeal. See Spain, 230 F.3d at 1310; Green, 391 F.2d at 110. In each decision, the court found that the plaintiff, who essentially alleged that all cigarettes breached the implied warranty of merchantability, had failed to advance a proper claim. Spain, 230 F.3d at 1310-11; Green, 391 F.2d at 110. The following language from the dissent in Green, which was later adopted by the circuit *en banc*, is particularly applicable.

> We are not dealing with an obvious, harmful, foreign body in a product. Neither do we have an exploding or breaking bottle case wherein the defect is so obvious that it warrants no discussion. Instead, we have a product (cigarettes) that is in no way defective. They are exactly like all others of the particular brand and virtually the same as all other brands on the market.

Green, 391 F.2d at 110. Clearly, it is well established that a plaintiff cannot recover under a breach of warranty of merchantability theory when the allegedly defective product conforms, in all pertinent respects, to other similar products.

Permitting claimants to proceed under an implied warranty of merchantability theory also creates the danger of opening the courts to a multiplicity of claims involving known risks or dangers attending the use of every day products. This concern was addressed by noted commentators James J. White and Robert S. Summers when discussing the Green opinion in their definitive UCC treatise.

> To those who would reject the Fifth Circuit's conclusion out of hand, let us suggest the case of whiskey or butter. One might want to argue that butter is unmerchantable because it contains cholesterol, and cholesterol causes heart disease. Is whiskey or are automobiles not merchantable because they may cause injury or even death when they are used improperly and contribute to injury or death even when they are used properly?

James J. White and Robert S Summers, Uniform Commercial Code, § 9-8, at 364 (5th ed. 2000). White and Summers recognized, as should this Court, that permitting Plaintiffs to proceed with merchantability claims alleging defects in products which do not vary from similar products, which are not impure when judged in conjunction with similar products and where the risks are known is contrary to the purposes of an implied warranty of merchantability claim under the UCC. All of these factors pertain in this case.

Based on the foregoing, this Court should answer Certified Question 8 by finding that a plaintiff cannot recover under an implied warranty of merchantability when the alleged defective product is "substantially interchangeable" with similar products or does not deviate from similar products in any pertinent respect.

CONCLUSION

Iowa Defense Counsel and DRI respectfully request the Iowa Supreme Court to answer Certified Question Nos. 4, 5, 6, 7 and 8 in the negative, for the reasons set forth herein.

Respectfully submitted,

NYEMASTER, GOODE, VOIGTS,
WEST, HANSELL & O'BRIEN, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309-3899
Tel: (515) 283-3100
Fax: (515) 283-8045

By: _____
Richard J. Sapp PK0004841

By: _____
Michael W. Thrall PK0005603

ATTORNEYS FOR AMICUS CURIAE,
IOWA DEFENSE COUNSEL ASSOCIATION

WHITFIELD & EDDY, P.L.C.
317 Sixth Avenue, Suite 1200
Des Moines, IA 50309-4195
Tel: (515) 288-6041
Fax: (515) 246-1474

By: _____
Kevin M. Reynolds PK004634

By: _____
Richard J. Kirschman PK0013184

ATTORNEYS FOR AMICUS CURIAE,
THE DEFENSE RESEARCH INSTITUTE, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Amicus Curiae Parties was served upon the attorneys of record by mailing two copies thereof to their correct address on this 29th day of August, 2001.

E. Ralph Walker
David J. Darrell
Harley C. Erbe
WALKER LAW FIRM, P.C.
2501 Grand Avenue, Suite E
Des Moines, IA 50312

Steven P. Wandro
Megan A. Claypool
WANDRO & ASSOCIATES P.C.
2501 Grand Avenue, Suite B
Des Moines, IA 50312

Lex Hawkins
Glenn L. Norris
George F. Davison, Jr.
Carla T. Schemmel
HAWKINS & NORRIS
2501 Grand Avenue, Suite C
Des Moines, IA 50312

Norwood S. Wilner
SPOHRER, WILNER, et al.
44 E. Duvall Street
Jacksonville, FL 32202

Steven L. Nelson
Kris Holub Tilley
DAVIS, BROWN, KOEHN,
SHORS & ROBERTS
2500 The Financial Center
Des Moines, IA 50309-3993

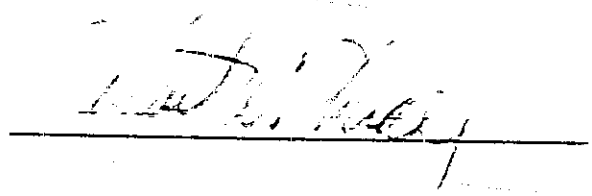
Jeffrey J. Jones
Scott C. Walker
Ivan Smith
J. Todd Kennard
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
Columbus, OH 43215

Aaron H. Marks
KASOWITZ, BENSON,
TORRES & FRIEDMAN
1301 Avenue of the Americas
New York, NY 10019-6022

Richard R. Chabot
SULLIVAN & WARD, P.C.
801 Grand Avenue, Suite 500
Des Moines, IA 50309-2719

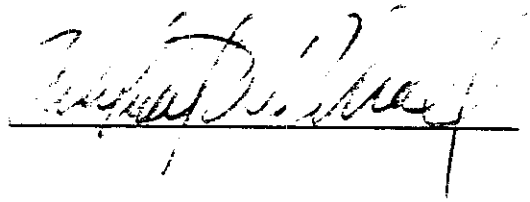
Billy R. Randles
J. Patrick Sullivan
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2118

Robert A. Van Vooren
Thomas D. Waterman
LANE & WATERMAN
220 North Main St., Suite 600
Davenport, IA 52801-1987



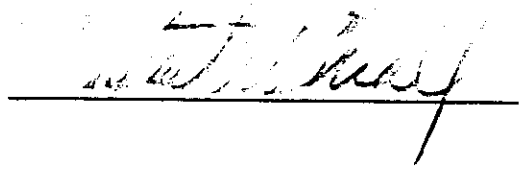
CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Brief of Amicus Curiae Parties was filed with the Supreme Court of Iowa by providing eighteen (18) copies to the Clerk of said Court at the Statehouse, State Capitol in Des Moines, Iowa, 50319, on this 29th day of August, 2001.



CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Amicus Curiae Brief is $ 184.76



Techniques to Limit Damage Awards

Aaron Abbott, Ph.D.
JURY BEHAVIOR RESEARCH INC

Iowa Defense Counsel Conference
Embassy Suites
Des Moines, Iowa

September 26-28, 2001

I. Common Topics in Deliberations That Inflate Awards

A. Taking care of the plaintiff
B. "Trickle-down" for the rest of the family
C. Padding
D. Insurance and collateral sources
E. Sending a message
F. Averaging
G. Redundant awards on the verdict form
H. No damages defense
I. Hardball vs. softball vs. lowball damages defenses

II. Techniques to Control Damages

A. Empirically assess exposure
B. How to present mock trial research results at mediation to leverage a more favorable settlement
C. Controlling juror anger, vulnerability, harm avoidance
D. How to use pretrial research to develop Persuasion Icons
E. Jury selection strategies
F. How to sell a damages defense without conceding liability
G. When all else fails, commission a post-verdict juror survey to uncover juror misconduct

NEW ETHICAL ISSUES FOR THE TRIAL LAWYER
September 28, 2001

DAVID L. BROWN
Hansen, McClintock & Riley
Eighth Floor - Fleming Building
218 Sixth Avenue
Des Moines, Iowa 50309

I. INTRODUCTION

A. Conflicts of interest is a topic that covers a wide variety of issues, most of which involve serious ethical and malpractice implications. Attorneys should be familiar with the disciplinary rules and ethical considerations about conflicts in order to be able to identify problems or potential problems in the practice of law.

The purpose of this outline is to highlight some of the basic rules about conflicts of interest, with an examination of the manner in which these rules have been applied and interpreted by the courts.

II. IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS

A. **Adoption.** The Iowa Code of Professional Responsibility for Lawyers was adopted by the Iowa Supreme Court in 1971. Committee on Prof'l Ethics & Conduct v. Bitter, 279 N.W.2d 521, 523 (Iowa 1979); Lee Gaudineer, Ethics: The Grievance Commission, 22 Drake L. Rev. 114 (1972).

B. **Historical Background and Perspective.** In In re Frerichs, 238 N.W.2d 764, 768-769 (Iowa 1976), the Iowa Supreme Court stated:

> Strong conflicting forces are often brought to bear on one pursuing the high calling of an attorney. In his professional role a lawyer has a duty to the court which he serves as an officer. He has a duty to his client. He has a duty to his own upright conscience. He has a necessary duty to the legitimate pursuit of his own professional career. The conflicts between these forces have long troubled even those most dedicated to the profession. Involvement in the various conflicts and possible conflicts in former times often led to agonizing confusion for an attorney caught in the uncertainty as to which duty should be predominant.

> The Code of Professional Responsibility for Lawyers was developed, not by judges, but by lawyers so as to mark the proper path for any attorney who senses a conflict between various duties. . . .
>
> The Iowa Code of Professional for Lawyers, binding by our order on all lawyers practicing before this court, is derived from the ABA Code of Professional Responsibility.

C. **Canons.** "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." [Preliminary Statement - Iowa Code of Professional Responsibility]

D. **Ethical Considerations.** "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." [Preliminary Statement - Iowa Code of Professional Responsibility]

E. **Disciplinary Rules.** "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." [Preliminary Statement - Iowa Code of Professional Responsibility]

III. **RECENT SUPREME COURT DIRECTIVE (Crookham v. Riley, 584 N.W.2d 258 (Iowa 1998)).**

A. **Representing Multiple Clients.** If there is a limited amount of money available for settlement of two clients' claims, an actual conflict of interest arises. At that time an attorney would have an obligation to advise both clients to get independent lawyers for their advice. The lawyer cannot choose which client he will represent. Failure to advise both clients of the potential problem, or failure to withdraw when an actual conflict exists without full and complete disclosure and consent by all clients, violates the Iowa Code of Professional Responsibility for Lawyers. Crookham, 584 N.W.2d at 266.

B. **Evidence of Negligence.** Violation of the disciplinary rules constitutes some evidence of negligence. In a legal malpractice action, expert testimony upon the standard of care is usually required. Crookham, 584 N.W.2d at 266.

C. **Damages - Conflict of Interest.** When a conflict of interest results in a lost settlement, the measure of damage is the difference between what the client would have received in settlement and what the client actually recovered. Crookham, 584 N.W.2d at 267.

D. **Attorney Fees.** Generally an attorney may not recover for services rendered to parties having opposing or adverse interests growing out of the same transaction unless the attorney acted with the consent of both parties. Crookham, 584 N.W.2d at 269.

IV. **CANON 5**

A. "A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT."

B. **Summary of Canon 5.** The Iowa Supreme Court stated the following in Committee on Prof'l Ethics & Conduct v. Oehler, 350 N.W.2d 195, 198-199 (Iowa 1984):

> Canon 5 is at once important and crystal clear: in the absence of client consent after full disclosure, a lawyer cannot represent a client whose business interests conflict with the lawyer's own. Neither can a lawyer represent clients whose interests conflict with each other. Indeed, any person seeking legal counsel can expect unfettered independence of professional judgment of a lawyer whose loyalty to that person is total.
>
> These rules are plainly in the public interest, are rigidly adhered to, and strictly enforced. They had their genesis in the profession itself, which urged them upon the courts. Nearly all lawyers look upon them as guides.

V. **CANON 9**

A. "A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF IMPROPRIETY."

VI. **GENERAL PRINCIPLES CONCERNING CONFLICTS**

A. **Loyalty to Client.** A party can expect unfettered independence of professional judgment of a lawyer whose loyalty to the person is total. In re J.C., 560 N.W.2d 33, 35 (Iowa App. 1996).

B. **General Requirements of the Code.** The Iowa Supreme Court stated the following in Cornell v. Wunschel, 408 N.W.2d 369, 378 (Iowa 1987):

It requires not only full disclosure of the facts but also of the conflict of interest between the attorney and client or between the clients. After this disclosure, it is then for the client to decide whether additional counsel should be retained.

It also requires the attorney to be sensitive to the ethical concerns that arise when the attorney has a financial stake in the transaction or when the attorney represents individuals with differing interests in a transaction.

C. **Rules are Strictly Enforced.** The conflict of interest rules are rigidly adhered to and are strictly enforced. Committee on Prof'l Ethics & Conduct v. Oehler, 350 N.W.2d 195, 199 (Iowa 1984).

D. **Conflict Disqualifies Entire Firm.** In evaluating conflicts of interest, it makes no difference if the attorney is in a firm or is a solo practitioner. When one attorney is disqualified, the entire firm is disqualified. Hoffmann v. Internal Med., P.C., 533 N.W.2d 834, 836 (Iowa App. 1995).

VII. **DUTY TO CHECK CONFLICTS BEFORE ESTABLISHING ATTORNEY-CLIENT RELATIONSHIP**

A. **General Rule.** "Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." [DR 5-101(A)]

B. **Responsibility on Attorney.** When a client retains an attorney, the responsibility is on the attorney to ascertain whether he or she has a conflict of interest or other ethical impediment to acceptance of the employment; the responsibility is not on the client to investigate and decide that question for the attorney. Heninger & Heninger, P.C. v. Davenport Bank & Trust Co., 341 N.W.2d 43, 49 (Iowa 1983).

VIII. **SEXUAL RELATIONS WITH CLIENT**

A. **General Rule.** "A lawyer shall not engage in sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the attorney-client relationship. . . ." [DR 5-101(B)]

B. **Harm to Client.** When a lawyer uses the unequal balance of power in the attorney-client relationship to initiate a sexual relationship with a client, it may result in actual harm to the client and/or the client's interest. EC 5-25; Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Hill, 540 N.W.2d 43, 44 (Iowa 1995).

IX. ATTORNEY AS WITNESS - BEFORE ACCEPTING EMPLOYMENT

A. **General Rule.** "A lawyer shall not accept employment in contemplated or pending litigation if it is known or it is obvious that a member of the lawyer's firm ought to be called as a witness, except that the employment may be undertaken and the lawyer or a member of the 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 the 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 the firm as counsel in the particular case." [DR 5-101(D)]

B. **Substantial Hardship Exception.** The exception in DR 5-101(D)(4) is narrowly construed. Standing alone, substantial hardship is insufficient to permit continued representation. State v. Vanover, 559 N.W.2d 618, 633 (Iowa 1997).

X. ATTORNEY AS WITNESS - AFTER ACCEPTING EMPLOYMENT

A. **General Rule.** "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and the firm, if any, shall not continue representation in the trial, except that the representation may continue and the lawyer or member of the firm may testify in the circumstances enumerated in DR 5-101(D)(1) through (4)." [DR 5-102(A)]

B. **Purpose of DR 5-102(A).** It prevents a party from choosing between the attorney's testimony and the attorney's representation. All doubt is resolved in favor of the attorney's testimony and against the attorney's representation. The client can get another attorney but cannot obtain substitute testimony for the attorney's relevant, personal knowledge. State v. Vanover, 559 N.W.2d 618, 632 (Iowa 1997).

An attorney must not be both a witness and an advocate because the roles are inconsistent; the function of a witness is to state facts objectively, while the function of an advocate is to advance or argue the cause of another. EC 5-9; State v. Vanover, 559 N.W.2d 618, 629 (Iowa 1997).

C. **Rule Cannot Be Waived by Client.** The rule makes no provision for allowing the client to waive the rule's protection by promising not to call the attorney as a witness. State v. Vanover, 559 N.W.2d 618, 632 (Iowa 1997).

XI. PREPARATION OF INSTRUMENT WHERE LAWYER IS NAMED BENEFICIALLY

A. **General Rule.** "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." [DR 5-101(C)]

B. **Seriousness of Violation.** A violation of this ethical rule is extremely serious. Lawyers who would enjoy the right to inherit property from persons disposed to favor them must take extreme pains to distance themselves from any professional activity incident to establishing the bequest. Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Winkel, 541 N.W.2d 862, 864 (Iowa 1995).

C. **Avoid Appearance of Impropriety.** An attorney may not influence a client to name the attorney as executor, trustee, or lawyer in an instrument. If a client wishes the attorney to be so nominated, the attorney must take care to avoid even the appearance of impropriety. Committee on Prof'l Ethics & Conduct v. Jackson, 492 N.W.2d 430, 434 (Iowa 1992).

XII. PRIOR REPRESENTATION OF PRESENT ADVERSARY

A. **General Rule.** An attorney is disqualified from

representing a party against a former client if the two representations bear a "substantial relationship" to each other. Richers v. Marsh & McLennan Group Assocs., 459 N.W.2d 478, 481 (Iowa 1990).

B. **Purpose of Rule.** This ensures that a client's confidential communications to his or her attorney will not be used against that client when the attorney-client relationship has ended and the lawyer later represents a party adverse to the former client. Hoffmann v. Internal Med., P.C., 533 N.W.2d 834, 836 (Iowa App. 1995).

The rule also protects the integrity of the attorney-client relationship from conflicts of interest and demands that attorneys serve each client with undivided loyalty. Hoffmann v. Internal Med., P.C., 533 N.W.2d 834, 836 (Iowa App. 1995).

C. **Burden on Movant.** The party moving for the attorney's disqualification must prove that the two representations are substantially related. The movant must produce evidence; a mere claim of conflict is insufficient. However, the movant need not divulge actual confidences and secrets. If a substantial relationship is established, the court will assume that the attorney obtained information in the first representation that is relevant to the subsequent litigation. Hoffmann v. Internal Med., P.C., 533 N.W.2d 834, 836-837 (Iowa App. 1995).

D. **Misuse of Motion.** There is not an absolute prohibition against representing a new client against a former client. Courts must be vigilant to prevent motions for disqualification from being used as weapons for harassment or misuse. Hoffmann v. Internal Med., P.C., 533 N.W.2d 834, 836 (Iowa App. 1995).

XIII. AVOIDING ACQUISITION OF INTEREST IN LITIGATION

A. **General Rule.** "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation being conducted for a client, except that a lawyer may:

(1) Acquire a lien granted by law to secure a fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case." [DR 5-103(A)]

B. **Advancements to Clients.** "While representing a client in connection with contemplated or pending litigation,

a lawyer shall not advance or guarantee financial assistance to a client, except that a lawyer may advance or guarantee the expenses of litigation . . . ." [DR 5-103(B)]

C. **No Exceptions to Rule Prohibiting Financial Assistance.** The ethical rule prohibiting financial assistance to a client applies even if an attorney is unaware of such rule. Committee on Prof'l Ethics & Conduct v. Bitter, 279 N.W.2d 521, 523 (Iowa 1979).

XIV. **LIMITING BUSINESS RELATIONS WITH CLIENT**

A. **General Rule.** "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless the client has consented after full disclosure." [DR 5-104(A)]

In the absence of client consent after full disclosure, a lawyer cannot represent a client whose business interests conflict with the lawyer's own. Committee on Prof'l Ethics & Conduct v. Oehler, 350 N.W.2d 195, 198 (Iowa 1984).

B. **Transactions Looked Upon with Disfavor.** All business transactions between an attorney and client are regarded with suspicion and disfavor. Committee on Prof'l Ethics & Conduct v. Mershon, 316 N.W.2d 895, 897 (Iowa 1982).

The burden is on the attorney to show that in any contract or settlement with a client or dealing with a client's property, the attorney has acted in fairness and good faith with a disclosure of all facts. Committee on Prof'l Ethics & Conduct v. Mershon, 316 N.W.2d 895, 898 (Iowa 1982).

C. **Purpose of DR 5-104(A).** The rule protects persons who regularly rely on an attorney for legal services that arise on an occasional and on-going basis. Committee on Prof'l Ethics & Conduct v. Carty, 515 N.W.2d 32, 35 (Iowa 1994).

D. **Requirement of Attorney-Client Relationship.** The existence of an attorney-client relationship is necessary for a violation of DR 5-104(A). Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Sikma, 533 N.W.2d 532, 536 (Iowa 1995).

E. **Applicability.** The rule is applicable as long as the attorney has influence arising from a previous or current attorney-client relationship, and the client

is looking to the attorney to protect the client's interests. Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Sikma, 533 N.W.2d 532, 537 (Iowa 1995).

F. **Full Disclosure.** This involves seeing to it that the client either has independent advice in the matter or else receives from the attorney such advice as the attorney would have been expected to give had the transaction been one between his or her client and a stranger. Committee on Prof'l Ethics & Conduct v. Jackson, 492 N.W.2d 430, 434 (Iowa 1992).

An attorney must faithfully discharge all of his or her duties to a client by refraining from any misrepresentation or concealment of any material fact. An attorney must also be diligent to insure that the client is fully informed of the nature and effect of the transaction proposed and of his or her own rights and interests in the subject matter involved. Committee on Prof'l Ethics & Conduct v. Oehler, 350 N.W.2d 195, 199 (Iowa 1984).

An attorney must disclose not only the attorney's adverse interest, but also the effect it will have on the exercise of his or her professional judgment. Committee on Prof'l Ethics & Conduct v. Humphreys, 524 N.W.2d 396, 399 (Iowa 1994).

Before making a contract with a client, an attorney must disclose every relevant fact and circumstance that the client should know to make an intelligent decision concerning the wisdom of entering the agreement. Committee on Prof'l Ethics & Conduct v. Mershon, 316 N.W.2d 895, 898 (Iowa 1982).

G. **Definition of Differing Interests.** This includes every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Committee on Prof'l Ethics & Conduct v. Jackson, 492 N.W.2d 430, 434 (Iowa 1992).

An attorney must disqualify himself or herself when there is a substantial, relevant relationship or overlap between the subject matters of the two representations. Committee on Prof'l Ethics & Conduct v. Jackson, 492 N.W.2d 430, 434 (Iowa 1992).

H. **Examples of Differing Interests.**

1. Where attorney is given corporate stock or other investments in exchange for legal services. Committee on Prof'l Ethics & Conduct v. Humphreys, 524 N.W.2d 396, 399 (Iowa 1994).

2. When the attorney is a creditor of the corporation. Committee on Prof'l Ethics & Conduct v. Humphreys, 524 N.W.2d 396, 399 (Iowa 1994).

I. **Definition of Business Transaction.** This involves any commercial activity engaged in for a profit. Committee on Prof'l Ethics & Conduct v. McCullough, 465 N.W.2d 878, 884 (Iowa 1991).

J. **Violations of DR 5-104(A).** An attorney can violate DR 5-104(A) even without acting dishonestly or making a profit on the transaction. Committee on Prof'l Ethics & Conduct v. Mershon, 316 N.W.2d 895, 900 (Iowa 1982).

A violation can also be established without showing the client suffered economic disadvantage from the misconduct. However, the violation is aggravated when economic disadvantage is shown. Committee on Prof'l Ethics & Conduct v. Baker, 269 N.W.2d 463, 466 (Iowa 1978).

k. A violation in probate proceedings is very serious. In Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Stamp, 590 N.W. 496 (Iowa 1999) failure to list stock in probate inventory for estate he represented, then purchasing stock for less than market value and then failing to obtain Court approval for sale of stock and ultimately concealing same in final report warranted suspension.

XV. **COURT INVOLVEMENT**

A. **Trial Court Authority/Duty.** A trial court has the authority and duty to inquire on its own into potential conflicts of interest when it is alerted to such possibility. State v. Vanover, 559 N.W.2d 618, 628 (Iowa 1997).

XVI. **REPRESENTING MULTIPLE CLIENTS**

A. **General Rule.** "[A] lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each." [DR 5-105(D)]

B. **Explaining Multiple Representation.** The attorney must explain to the client the possible effects of such multiple representations on the attorney's professional judgment on behalf of the client. Committee on Prof'l Ethics & Conduct v. Jackson, 492

N.W.2d 430, 434 (Iowa 1992).

C. **No Multiple Representation in Domestic Proceedings.** "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." [DR 5-105(A)]

D. A lawyer cannot, in the absence of client consent after full disclosure, represent clients whose interests conflict with each other. In re J.C., 560 N.W.2d 33, 35 (Iowa App. 1996).

XVII. **AVOIDING INFLUENCE BY OTHERS THAN THE CLIENT**

A. **Accepting Compensation or Items of Value.** "Except with the consent of a client after full disclosure, a lawyer shall not:

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

(2) Accept from one other than the client any thing of value related to representation of or employment by the client." [DR 5-107(A)]

B. **Influencing Professional Judgment.** "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." [DR 5-107(B)]

XVIII. **RESULT OF VIOLATIONS OF ETHICAL RULES**

A. **Sanctions.** Violations of ethical rules can result in sanctions ranging from reprimands to revocation of license, depending on the severity of the violation. Keep in mind that only the disciplinary rules are mandatory in nature; the ethical considerations are aspirational in character. [Preamble - Iowa Code of Professional Responsibility]

B. **Malpractice.** Violations of disciplinary rules, including those concerning conflicts of interest, can result in legal malpractice actions. See Crookham v. Riley, 584 N.W.2d 258 (Iowa 1998); Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. D.J.I., 545 N.W.2d 866, 869 (Iowa 1996) (discussing judgment against attorney for $152,000 based in part on violations of DR 5-104(A), 5-105(B), and DR 5-105(C)).

XIX. **FUTURE OF THE IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS**

A. **Generally.** Currently, less than 10 states, including Iowa, follow the Model Code of Professional Responsibility (Code). See Gregory C. Sisk, Iowa's Legal Ethics Rules - Time to Join the Crowd, Drake L. Rev. (forthcoming 1998 or 1999). The trend among states is to adopt and follow the Model Rules of Professional Conduct (Model Rules). The Model Rules consists of 54 black-letter and mandatory rules, each of which is followed by explanatory comments. The ABA continually updates the Model Rules, but it has not updated the Code since 1980. It is suggested that the Iowa bench and bar should explore the advantages and disadvantages of the Model Rules and consider the possibility of adopting the Model Rules for Iowa lawyers.

XX. BIBLIOGRAPHY

Cases

The cases listed below are the ones cited in this outline plus a few others that generally discuss conflicts of interest issues

Committee on Prof'l Ethics & Conduct v. Baker, 269 N.W.2d 463 (Iowa 1978)

Committee on Prof'l Ethics & Conduct v. Bitter, 279 N.W.2d 521 (Iowa 1979)

Committee on Prof'l Ethics & Conduct v. Carty, 515 N.W.2d 32 (Iowa 1994)

Committee on Prof'l Ethics & Conduct v. Humphreys, 524 N.W.2d 396 (Iowa 1994)

Committee on Prof'l Ethics & Conduct v. Jackson, 492 N.W.2d 430 (Iowa 1992)

Committee on Prof'l Ethics & Conduct v. McCullough, 465 N.W.2d 878 (Iowa 1991)

Committee on Prof'l Ethics & Conduct v. Mershon, 316 N.W.2d 895 (Iowa 1982)

Committee on Prof'l Ethics & Conduct v. Oehler, 350 N.W.2d 195 (Iowa 1984)

Committee on Prof'l Ethics & Conduct v. Randall, 285 N.W.2d 161 (Iowa 1979)

Committee on Prof'l Ethics & Conduct v. Schooler, 482 N.W.2d 426 (Iowa 1992)

Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)

Crookham v. Riley, 584 N.W.2d 258 (Iowa 1998)

In re Frerichs, 238 N.W.2d 764 (Iowa 1976)

Heninger & Heninger, P.C. v. Davenport Bank & Trust Co., 341 N.W.2d 43 (Iowa 1983)

Hoffmann v. Internal Med., P.C., 533 N.W.2d 834 (Iowa App. 1995)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. D.J.I., 545 N.W.2d 866 (Iowa 1996)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Hill, 540 N.W.2d 43 (Iowa 1995)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Isaacson, 565 N.W.2d 315 (Iowa 1997)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Sikma, 533 N.W.2d 532 (Iowa 1995)

In Iowa Bd. of Prof. Ethics v. Stamp, 590 N.W. 496 (Iowa 1999) failure to list stock in probate inventory

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Winkel, 541 N.W.2d 862 (Iowa 1995).

In re J.C., 560 N.W.2d 33 (Iowa App. 1996)

Richers v. Marsh & McLennan Group Assocs., 459 N.W.2d 478 (Iowa 1990)

State v. Vanover, 559 N.W.2d 618 (Iowa 1997)

Other Authorities

Lee Gaudineer, Ethics: The Grievance Commission, 22 Drake L. Rev. 114 (1972)

W.R. Habeeb, Annotation, Malpractice: Liability of Attorney Representing Conflicting Interests, 28 A.L.R.3d 389 (1969)

Gregory C. Sisk, Iowa's Legal Ethics Rules - Time to Join the Crowd, Drake L. Rev. (forthcoming 1998 or 1999)

TEN WAYS TO SUCCESSFULLY DEFEND A LAWSUIT IN FEDERAL COURT

Judge Mark W. Bennett
Sioux City, IA

Annual Meeting of the Iowa Defense Counsel

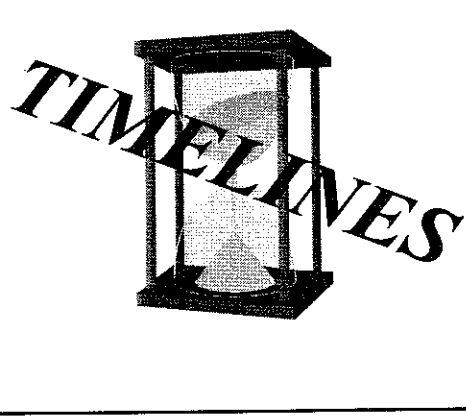
"Ten Ways to Successfully Defend a Lawsuit in Federal Court"

September 26-28, 2001
Des Moines, Iowa

Mark W. Bennett
Chief Judge
United States District Court
Northern District of Iowa

I. Use More Graphics and Visuals

WHY USE GRAPHICS ?



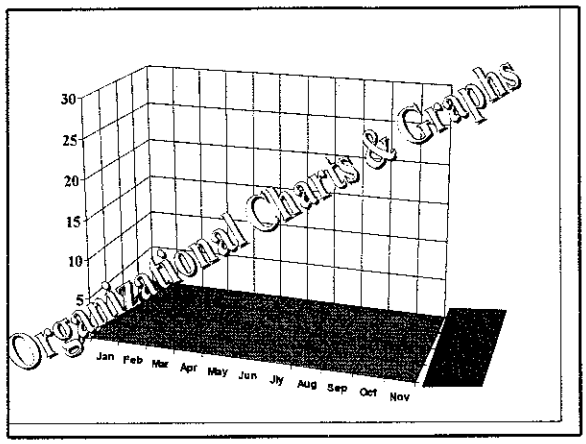
WHY USE A TIMELINE?

- ✓ Every case has a timeline – you will NEVER have a case without one
- ✓ It gives the jury (and judge) a simple structure to understand the facts
- ✓ It is a one image snapshot to [illegible] understanding the case

WHEN TO USE A TIMELINE

✓Every case

✓As early as possible in the case



IMPORTANT DOCUMENTS

Scan into computer

II. Rethink and Improve Your Jury Selection

JURY SELECTION
Common Pitfalls:

- ▼Fear of Voir Dire
- ▼Forgetting that the potential jurors are nervous too
- ▼Underestimating the importance of voir dire
- ▼Conducting voir dire off the cuff
- ▼Stereotyping potential jurors
- ▼Cross-examining a potential juror
- ▼Forgetting to observe body language

JURY SELECTION
Common Pitfalls (Cont.):

- ▼Asking the same questions to each potential juror
- ▼Asking yes or no questions
- ▼Trying to talk a potential juror into an opinion or belief
- ▼Being boring
- ▼Ignoring your theme in voir dire

JURY SELECTION
Common Pitfalls (Cont.):

- **Showing disrespect to any potential juror**
- **Forgetting to educate the jury**
- **Ignoring a problem area of your case**
- **Ignoring the potential juror's answers to your questions**

JURY SELECTION
Cures:

- **Listen**
- **Ask open-ended questions---**
  - **"What" questions - get the facts**
  - **"Why" questions - get the explanations**
  - **"How" questions - get the feelings**
- **Ask questions that go to the core of the case**
- **Ask questions to expose and minimize weaknesses**

III. Give More Thought to How and When to Disclose Your Weaknesses

How and When to Disclose Your Weaknesses

S. Asch, *Forming Impressions of Personality,* 41 J. ABNORMAL & SOC. PSYCHOL. 258-280 (1946).

How and When to Disclose Your Weaknesses

The eminent social psychologist Solomon Asch demonstrated this point in an experiment he conducted in 1946 In this study, the subjects received the following statements and were asked to rate the person

Person A	Person B
Intelligent	Envious
Industrious	Stubborn
Impulsive	Critical
Critical	Impulsive
Stubborn	Industrious
Envious	Intelligent

IV. Spend Time and Thought on Your Opening Statement

OPENING STATEMENT
Common Pitfalls:

- Lack a theme
- Lack structure for receiving vast quantities of new information
- Bogged down with too much information
- Fail to paint a persuasive big picture
- Too long

OPENING STATEMENT
Cures:

- Short, dynamic, easily understood theme
- Simple structure for explaining case
  - timeline
  - brief vignettes (beginning, middle, end)
  - cast of characters
- Warn of possible conflicts in testimony
- Use visual aids wherever possible
- Sensitize jury to weaknesses (and experts)
- Remember: It's not the movie, it's the coming attraction

V. Prepare and Anticipate Your Witnesses Being Called Adverse by the Plaintiff

VI. Listen to Witnesses' Answers on Direct – Rather than Being Preoccupied With Your Next Question

VII. Start and End Cross Examination on a High Note

VIII. Streamline Your Closing Argument

IX. Enhance Your Automation Arsenal

- Learn Presentation Software
  - ✓Powerpoint
  - ✓Corel Presentation
  - ✓Harvard Graphics
- Learn Trial Presentation Software
  - ✓Trial Director
  - ✓Verdict Systems Sanctions
  - ✓Trial Pro

X. Improve Your Storytelling

SOLE PROXIMATE CAUSE
AND
SUPERSEDING AND INTERVENING CAUSES

By Mark W. Thomas

The defenses of sole proximate cause and superceding and intervening causes are, by today's standards, relics of a bygone era. Each long pre-dates comparative fault and both are often overlooked by defense counsel. Each is still viable and in the right case can be effective weapons in defending a lawsuit.

A. Sole Proximate Cause

1 The sole proximate cause defense has been around for more than a century. See, e.g. Johnson v. McVicker, 216 Iowa 654, 658, 247 N.W.2d 488, 490 (1983)

2 The standard instruction on sole proximate cause reads:

> **700.5 Sole Proximate Cause.** The defendant claims the sole proximate cause of the plaintiff's damages was [an act of God][the conduct of another party][a condition not under the control of any party] Sole proximate cause means the only proximate cause The defendant must prove both of the following propositions:
>
> 1 The [Act of God][conduct of another person][condition not under the control of any party] occurred.
>
> 2 The [Act of God][conduct of another person][condition not under the control of any party] was the only proximate cause of plaintiff's damage.
>
> If the defendant has failed to prove either of these propositions, the defendant has failed to prove the defense of sole proximate cause. If the defendant has proved both of these propositions, the defendant has proved the defense of sole proximate

cause and you must find the fault of the defendant, was not a proximate cause of plaintiff's damages when you answer the special verdicts

3. As with any affirmative defense[1], the burden of proof rests on the defense. See, McMaster v. Hutchins, 255 Iowa 39, 43 120 N.W 2d 509, 511 (1963) However, the defendant does not have to join the alleged possibly party as a third-party defendant. See, Six v. Freshour, 231 N.W.2d 588, 593 (Iowa 1975). The sole proximate cause is not limited to allegations of conduct by other entities. Any event that isn't chargeable to the defendant, that constitutes the only cause of the event, will insulate the defendant from liability. The doctrine of "Act of God"[2] is in fact an example of a sole proximate cause defense. *See* Dickman v. Truck Transport Inc., 224 N W 2d 459, 465 (Iowa 1974).

4. The Iowa Supreme Court has declined to abolish the doctrine of sole proximate cause finding it not inconsistent with the comparative fault statute. The Supreme Court has noted:

> The defense does not totally inhere in the plaintiff's burden to prove proximate cause. It introduces an issue of a third party's conduct or a separate event into the

---

[1] Affirmative defenses normally must be plead to be raised. There is, however, a considerable authority for the proposition that the sole proximate cause defense, specifically, does not have to be plead. *See*, Kuhen v. Jenkins, 251 Iowa 557 100 N.W 2d 604 (1960); Adams v. T.I.P. Rural Electric Co-Op, 271 N W.2d 896, 902 (Iowa 1978).

[2] The Iowa Supreme Court in Staples v. City of Spencer, 221 Iowa 1241, 1244, 271 N W.2d 200, 202 (1937) referred to the Act of God Defense as follows: "The feebliness of human agencies and efforts in attempting to cope with power of the elements is recognized by all Courts and it apply described by the late Justice Evans' in his inimitable style in the Ritchie v. City of Des Moines case, *supra*, 211 Iowa 1026 at page 1035, 233 N W.2d 433, 447 [1930] in these words, "Extreme weather conditions in this climate are inevitable . they may overcome municipalities and render puny the highest efforts at due care. When such natural conditions operate to foil human obligations of duty they are usually deemed in the law [as] acts of God. All that human effort can do is to follow the wake of the store and mend the wreckage where it may. *See, also*, Folks v. Peter Pan Bakers, Inc., 138 N W.2d 93, 98 (Iowa 1965) Kline v. City of Keokuk, 438 N.W.2d 22 (Iowa App. 1989).

> case This is why the defendant bears the burden of proof on the defense. This is also why cases in which the defense is based in the plaintiff's conduct are distinguishable. *See* Teling v. Helez, 195 N W 2d 704 (Iowa 1972); Lang v. Ciddall, 218 Iowa 263, 254 N W 2d 783 (1934) Because the sole proximate cause defense is not subsumed in the plaintiff's burden to prove proximate causation we adhere to our cases holding that a defendant is entitled to have the jury instructed on it when substantial evidence supports it

See, Sponsler v. Clarke Electric Cooperative, Inc., 329 N W 2d 663 (Iowa 1983).

5 The sole proximate cause defense can even be used by a defendant to blame a party that cannot be, by law, brought in to the lawsuit. For example, in both Sponsler, *supra* and Chumbley v. Dreiz and Krump Manufacturing Company, 521 N W 2d (Iowa App. 1993), the defendant blamed the injured plaintiff's employer, under the sole proximate cause defense, for the injuries sustained. Both parties were precluded by operation of Iowa Workers Compensation statutes from bringing the employer directly into the civil action. In each case the appellate court found that the doctrine was appropriately as part of the case.

6. The defense is not available to a defendant who is at least partially responsible for the situation. *See* Kuta v. Newburg, 600 N W 2d 280, 286 (Iowa 1999). This result obtains because the defense of sole proximate cause is properly given only when a fact finder could not conclude that the cause of the defendant's negligence was a sole cause of the damage. *See*, Johnson v. Interstate Power Company, 481 N W 2d 310, 323 (Iowa 1992)(sole proximate cause means the only proximate cause)

7. In the recently decided Hartzer v. Super One Foods, 627 N W 2d 925 (Iowa 2001) the Supreme Court briefly visited the issue yet again. That case grew out of a slip and fall that occurred at a grocery store The evidence presented at trial suggested that shortly before the plaintiff went into the grocery store restroom and slipped on the floor, two young boys were seen running from the restroom. The defendant argued that, given the inspection schedule and the

condition of the bathroom when Mr. Hartzer arrived (the liquid had been sprayed all over the stalls, the walls, and the floor and an empty bottle left in the middle of the floor) it was clear that the bathroom had been vandalized and that the sole proximate cause of the plaintiff's injury was the action of these two unknown boys. The defendant objected to this defense arguing that under these facts it gave the defendant two bites of the apple: both comparative fault (for plaintiff's failure to watch where he was walking) and sole proximate cause. The trial Court disagreed and the Supreme Court affirmed, finding that there was no inconsistency under the facts.

B. Superseding and Intervening Cause

1. Superceding Cause has been defined as follows:

> An act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

Black's Law Dictionary, (West 1964).

2. The Iowa Civil Jury Instructions provide the following information to the jury:

SUPERSEDING - INTERVENING CAUSE

The Defendants claim the conduct of [third person] [other active force] was the proximate cause of Plaintiff's damages.

In order to establish this defense, the Defendants must prove all of the following propositions:

1. The conduct of [third person] [other active force] caused plaintiff's damages and occurred after the conduct of the Defendants which you have found to constitute negligence.

2. The conduct of the Defendants did not create or substantially increase the risk that the Plaintiff would sustain damage through the conduct of [third person] [other active force].

3. The conduct of [third person] [other active force] was not reasonably foreseeable to someone in Defendants' position

If the Defendants have proven all of these propositions, then the Plaintiff cannot recover damages

3. The theory behind superceding cause is that while a defendant have in fact been negligent, some other later event broke the chain between the defendant's conduct and the plaintiff's injuries so as to absolve the defendant from responsibility In practice, this defense is much more difficult to explain to a jury than the sole proximate cause defense.

4. The Restatement of Torts, Second, Section 440 defines superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which is antecedent negligence is a substantial factor in bringing about "

5 As noted above, the defendant must prove that the following occurred:

1. An intervention occurred which brings about harm different and kind in that which would have otherwise resulted;

2. The main intervention and the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing;

3 The fact that the intervention operated independently of any situation created by the defendant and/or was not the normal result of defendant's conduct;

4. The fact that the intervening forces were due to a third person's act or failure to act.

6. The fact that the intervening forces were due to the act of the third person which is wrongful toward the other.

See, generally, Hollingsworth v. Schminkey, 553 N W 2d 591, 597 (Iowa 1996); Iowa Electric

Light and Power Company v. General Electric Company, 352 N W 2d 231, 235 (Iowa 1984).

7 A very tragic example of application of this defense is provided in the recent case of Hayward v. PDA Inc., 573 N.W 2d 29, Iowa 1997). The plaintiff was executor of the estate of Tipton Hayward, a Polk County deputy sheriff killed on duty while investigating a collision on Interstate 80 north of Des Moines. The unfortunate events began when Julie Ann Christensen, drunk from alcohol sold by defendant, was killed when her vehicle collided with another while she was driving the wrong way down Interstate 80. Christensen was clearly intoxicated. Deputy Hayward was called to investigate. While investigating the accident Mr. Hayward was killed by a passing drunk driver, James Smith. Smith was not connected in any fashion to the defendant. The Supreme Court found that the negligence of Smith was a superseding and intervening act which broke the chain of causation between defendant's negligent serving of Christensen and Deputy Hayward's death.

8. Not every subsequent act, even criminal, breaks the chain of causation. For example, in Stevens v. Des Moines Independent Community School District, 528 N W.2d 117, (Iowa 1995) the Supreme Court reversed a defense verdict finding that the superseding and intervening cause instruction should not have been given in a case where the parent's of a middle-schooler sued the school after their son was beaten by another student. The Supreme Court noted as follows:

> The defendant argues that the superseding cause instruction was proper. In any event, because it would have been impossible for the school authorities to intervene in time to avoid the assault. This begs the questions. The negligence alleged was the school's allowing an atmosphere to exist in which the confrontation could occur.

INDEX

Iowa Defense Counsel Association

1965 through 2000 Annual Meetings

This Index is supplied as a service to the members of 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
c/o Mr. James Pugh
5400 University Avenue
West Des Moines, IA 50265
515/225-5608

New Developments Under The Americans With Disabilities Act, 2000

Selected Problems Created by Passage of the Americans with Disabilities Act, 1992

APPEALS

Appellate Practice Suggestions, 1997

Appellate Procedure - New Rules and Some Often Asked Questions, 1993

Innovations in Appellate Review, 1968

New Appellate Court and Backlog, 1976

Rules (See RULES - Appellate)

APPELLATE DECISIONS REVIEW

(Reviews of Iowa Appellate Court Decisions have been presented in 1969 and 1975 through 2000)

Issues Presented to Supreme Court in Schmidt vs. Jenkins Truck Lines, Inc., 1969

Recent Tort Cases - 8th Circuit and Iowa Court of Appeals, 1978

BANKRUPTCY

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

Litigation in Bankruptcy Court, 1982

BANKS

Due Process and the Federal Banking System, 1985

FDIC Practices and Procedures in Closed Banks, 1987

BUSINESS INTERRUPTION

Discovery in the Business Interruption Case, 1989

CIVIL RIGHTS

Civil Rights Actions Under Section 1983, 1980

Defending Against Age Discrimination Claims, 1997

Evaluating the Employment Discrimination Case, 1987

CLASS ACTION

Iowa's New Class Action Law, 1980

CLOSING ARGUMENT

The Art Of Summation, 1991

Defending Punitive Damage Claims - Closing Argument, 1988

Law of Closing Argument, 1987

Opening Statements and Closing Arguments - The First Word and The Last Word, 1990

Voir Dire - Opening and Closing Arguments, 1985

COLLATERAL ESTOPPEL (See PRECLUSION)

COLLATERAL SOURCE

Collateral Source Rule - Is It Still Reasonable?, 1985

Evidentiary Issues Related to Collateral Source Payments, 1999

COLLECTION

What Does It Mean To Be Judgment Proof, 1998

COMMERCIAL LITIGATION

Commercial Litigation, 1994

Defending Commercial Litigation Claims, 1999

COMMUNICATION

Communication in Litigation - Intentions & $4 Will Get You A Microbrew, But It Won't Get You Understood, 1996

COMPARATIVE FAULT

Allocation Of Fault And Mitigation Of Damages, 1996

The Beat Goes On: Chapter 668 In Flux, 1993

Comparative Fault Update, 1989

Comparative Negligence, 1969

Comparative Negligence, 1980

Comparative Negligence and Comparative Fault: Review and Update, 1985

Comparative Negligence Update, 1981

Comparative Negligence Update, 1983

Defense Considerations Under Iowa's Comparative Fault, 1984

Defense Techniques Under Iowa's Comparative Fault Act, 1984

Effect of Comparative Fault on Consortium Claims, 1988

The Effect Of Comparative Fault On The Trial, 1991

Instructions - Comparative Negligence, 1983

Recent Developments Under the Iowa Comparative Fault Statute - Has Chapter 668 Reached Maturity?, 1992

Trial Strategy Under Comparative Negligence and Contribution - The Defense Perspective, 1984

COMPLEX LITIGATION

Handling of Complex Litigation as Viewed from the Bench, 1981

Individual and Group Defense of Complex Litigation, 1981

COMPUTERS

Computerized Legal Research - WESTLAW, 1980

Using Computerized Litigation Support -- Friend or Folly?, 1981

Using the Internet for Legal and Factual Research, 1999

CONFESSION OF JUDGMENT

Offers to Confess, 2000

CONFLICTS OF INTEREST

Conflicts of Interest, 1980

Conflicts of Interest - The Mushrooming Problem, 1985

Ethical Issues in Conflicts of Interest, 1999

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

CONSORTIUM

Consortium Claims, 1998

Effect of Comparative Fault on Consortium Claims, 1988

CONSTRUCTION CASES

Defending Construction Cases, 1988

CONTRIBUTION/INDEMNITY

Allocation Of Fault And Mitigation Of Damages, 1996

Allocating Contribution Among Tortfeasors, 1975

Contractual Indemnity, 1975

Contribution, 1980

Contribution and Indemnity After Goetzman v. Wichern, 1987

Indemnity and Contribution in Iowa, 1975

Procedural Questions Relating to Contribution and Indemnity, 1975

Trial Strategy Under Comparative Negligence and Contribution - The Defense Perspective, 1984

CORPORATIONS

Defending Corporate Clients and Officers in Criminal Cases, 1987

Directors' and Officers' Liability, 1986

Emerging Approach to Products Liability of Successor Corporations, 1979

When Corporations Choose Counsel, 1980

COUNTERCLAIMS

Permissive and Compulsory Counterclaims, 1978

COURTS

Charting the Future of Iowa's Courts, 1995

CRASHWORTHINESS

Crashworthiness, 1994

Enhanced Injury Claims, 1994

Preventing Negligent Plaintiffs from Having "A Second Bite at the Apple:" Defending Against Enhanced Injury Claims in Emergency Stop Devices Cases, 1994

CRIMINAL

Defending Corporate Clients and Officers in Criminal Cases, 1987

Protecting Your Client When The Civil Case Has Criminal Ramifications, 1997

CROP DAMAGE

Strategy and Discovery in Crop Damage Cases, 1994

CROSS EXAMINATION

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, 1990

Cross-Examination of the Chiropractor, 1984

Cross Examination Goes To The Movies, 1998

Testimonial Objections And Cross-examination, 1991

Undermining the Value of Plaintiff's Case by Cross-Examination - The Seventh Juror, 1987

DAMAGES

Chiropractic

Chiropractic Treatment - Critical Analysis, 1998

Cross Examination of the Chiropractor, 1984

Closed Head

Evaluation and Defense of Closed Head Injury Cases, 1988

Medicolegal Aspects of Head Injury, 1998

Consortium

Consortium Claims, 1998

Effect of Comparative Fault on Consortium Claims, 1988

Death

Elements of Damage in the Wrongful Death Case 1982

Evaluating Wrongful Death Claims, 1998

Preparing for the Plaintiff's Economist in a Death Case, 1968

A Trial: A New Technique in Proving Damages for the Death of a Wife and Mother, 1966

Economic

Defending Claims for Economic Damages - An Overview, 1999

Emotional Distress

Defending Against the Emotional Distress Claim, 1994

Emotional Distress, 1983

Employment

Evaluating Damages in Employment-Related Claims, 1998

General

Allocation Of Fault And Mitigation Of Damages, 1996

Damages From the Defendant's Point of View, 1979

Defending Claims for Economic Damages - An Overview, 1999

Pretrial Motions, A Growth Industry, 2000

The Question of Damages Resulting From Recent Iowa Legislative Changes, 1965

Undermining the Value of Plaintiff's Case by Cross-Examination - The Seventh Juror, 1987

Valuing Complex Plaintiff's Cases, 1999

Hedonic

Hedonic Damages: Pleasure or Pain, 1992

Low Impact Collisions

Analyzing Low Impact Collisions, 1998

Psychological

Traumatic Neurosis - The Zone of Danger, 1980

Punitive

Defending Punitive Damage Claims in Iowa, 2000

Product Liability: Status Of Restatement And Punitive Damages, 1996

Punitive Damages, 1978

Punitive Damages: The Doctrine of Just Enrichment, 1980

Punitive Damages in Strict Liability Claims, 1983

Selected Aspects of Punitive Damages, 1976

Rehabilitation

Use of Rehabilitation - In Theory and In Practice, 1978

Vocational

Vocational Disability Evaluations, 1984

DEFAMATION

Defamation and its Defenses in Iowa, 1995

DIRECTORS AND OFFICERS (See CORPORATIONS)

DISCOVERY

Artful Discovery, 1978

Defending Products Liability Cases Under OSHA and CPSA; Obtaining Information From Government Agencies, 1976

Deposition Dilemmas and the Ethics of Effective Objections, 1995

Deposition of Expert Witnesses, 1977

Discovery and Evidentiary Use of Journalistic Evidence, 1997

Discovery and Pretrial Procedures - Uses and Abuses, 1977

Discovery in the Business Interruption Case, 1989

Discovery As A Weapon And A Response - Part I, 1991

Discovery As A Weapon And A Response - Part II, 1991

Effective Use Of Video Technology in Litigation, 1997

The Failure To Let The Plaintiff Discover: Legal and Ethical Consequences, 1991

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

Pretrial Motions, A Growth Industry, 2000

Pretrial Motion Practice, 1991

Reminders and Suggestions on the Use and Nonuse of Depositions Under the Iowa Rules, 1989

Rule 125, Iowa Rules of Civil Procedure and Discovery Sanctions, 1989

Use of Request for Admissions in the No Liability Case, 1982

What is Work Product, 1982

DISCRIMINATION

Defending Against Age Discrimination Claims, 1997

Statistical Proof of Discrimination: An Overview, 1995

DRUNK DRIVING

Iowa's Drunk Driving Law, 1983

Iowa O.M.V.U.I. Law, 1986

DUTY

When the Violation of a Statute, Ordinance or Administrative Rule Will Not Support an Action For Damages -- Public Vis-A-Vis Private Duties, 1979

EMPLOYEES

Actions Between Co-Employees, 1978

Common Law Employee Termination Claims, 1988

Defending Against Age Discrimination Claims, 1997

Defending the Co-Employee Case -- Some Unanswered Questions, 1981

Defending the Employment Claim, 1999

The Developing Law of Wrongful Discharge in Iowa, 1993

Employment Termination: Traditional and Evolving Sources of Employer Liability, 1995

Evaluating Damages in Employment-Related Claims, 1998

Evaluating the Employment Discrimination Case, 1987

Family and Medical Leave Issues and Defenses, 1997

The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation, 1995

Moving On: Former Employment and Present Competitive Restraint, 1997

New Developments Under The Americans With Disabilities Act, 2000

Offensive Defenses: Turning the Table on the Plaintiff in Employment Litigation, 1994

Plaintiff's Theories in Employment Cases, 1999

Recent Developments and Emerging Issues in the Area of Employment Discrimination Law, 1993

Recent Developments in Employment Law, 2000

Settlement of Potential and Pending Employment Claims, 1995

Sexual Harassment, 1995

Sexual Harassment: Some Questions Answered; Some Questions Raised, 1998

Statistical Proof of Discrimination: An Overview, 1995

Statutory Limitations on an Employer's Right to Discharge Employees, 1989

Violence in the Workplace, 1995

ENHANCED INJURY

Enhanced Injury Claims, 1994

Preventing Negligent Plaintiffs from Having "A Second Bite at the Apple:" Defending Against Enhanced Injury Claims in Emergency Stop Devices Cases, 1994

ENTERPRISE

Enterprise Liability, 1981

ENVIRONMENT

Defending the Environmental Claim, 2000

Defense Issues For Environmental Damage to Real Estate, 1993

Environmental Decisions In Iowa, 1997

ERISA

Erisa: Some Basics, 1990

ETHICS (See PROFESSIONAL RESPONSIBILITY)

EVIDENCE

Admissibility of Evidence of Other Accidents and Subsequent Remedial Measures and Warnings in Products Liability Litigation, 1977

Daubert/Kumbo Update, 1999

Deposition Dilemmas and the Ethics of Effective Objections, 1995

Discovery and Evidentiary Use of Journalistic Evidence, 1997

Evidence Problems with Governmental Studies, Investigations and Reports, 1995

Evidentiary Issues Related to Collateral Source Payments, 1999

Expert Testimony in the Eighth Circuit After Daubert v. Merrell Dow Pharmaceuticals, Inc., 1994

Expert Testimony in Iowa State Courts after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1995

The Hearsay Objection, 1982

Hospital Records and Their Use in Court, 1969

Industry Codes as Evidence, 1983

Pretrial Motions, A Growth Industry, 2000

Rules (See RULES - Evidence)

Statistical Proof of Discrimination: An Overview, 1995

Thermography - Is It On The Way Out?, 1990

EXCLUSIVE REMEDY

The Exclusive Remedy Doctrine: Dead or Alive, 1980

EXEMPTIONS

What Does It Mean To Be Judgment Proof, 1998

EXPERTS

Accident Reconstruction

When and How to Use Accident Reconstruction, 1998

Chiropractor

Chiropractic Treatment - Critical Analysis, 1998

Cross-Examination of the Chiropractor, 1984

Economist

Preparing for the Plaintiff's Economist in a Death Case, 1968

General

Daubert/Kumbo Update, 1999

Defense Challenges to Expert Testimony, 1987

Deposition of Expert Witnesses, 1977

Effective Use Of Your Own Staff, Wordsmiths And Forensic Psychologists, 1991

Expert Testimony in the Eighth Circuit After Daubert v. Merrell Dow Pharmaceuticals, Inc., 1994

Expert Testimony in Iowa State Courts after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1995

Handling the Expert Witness, 1981

The Problem of Unreliable Expert Witness Testimony, 1989

The Selection, Care and Feeding Of Experts And Their Dismemberment, 1991

Thermography - Is It On The Way Out?, 1990

A Trial: A Trial Problem re Expert Proof or Physical Facts, 1967

Human Factors

Human Factors Experts, 1986

Low Impact Collisions

Analyzing Low Impact Collisions, 1998

Medical

Defending The Traumatic Brain Injury Claim, 1996

Independent Medical Experts, 1978

Medicolegal Aspects of Head Injury, 1998

Use of Experts: Preparation of Medical Witnesses; Medical Malpractice, Cross Examination - Experts, 1976

Product Liability

Handling Expert Witnesses in the Defense of Product Liability Cases, 1993

Radiology

Diagnostic Radiology - Interpreting Radiographs, 1984

Thermography

Thermography - Is It On The Way Out?, 1990

Toxic Torts

Perceptions of Toxic Hazards: The View From the Expert Witness Stand, 1980

FAMILY AND MEDICAL LEAVE

Family and Medical Leave Issues and Defenses, 1997

FEDERAL PRACTICE

Federal Jurisdiction, Removals, Procedures & The New Duties of the Federal Magistrate, 1976

Latest Information From U.S. District Court, 1988

Notes -- Report - U.S. Court of Appeals - 8th Circuit, 1985

Rules (See RULES - Federal Rules of Civil Procedure)

FIDUCIARY DUTY

Breach of Fiduciary Duty, 1986

A Survey of the Law of Fiduciary Relationships, 1992

GENDER BIAS

Women as Defense Counsel Fact & Fiction Relating to Gender Bias in the Profession, 1995

GENERAL INTEREST

Charting the Future of Iowa's Courts, 1995

Communication In Litigation - Intentions & $4 Will Get You A Microbrew, But It Won't Get You Understood, 1996

Evolution, Not Revolution, 1967

History Of IDCA, 1991

Long Range Planning Committee Report, 1999

Proposed Rule 122, with Advertising and Report on the Activities of the Iowa State Bar Association, 1992

Resources, 1979

The Role of the American Lawyer - Today, 1969

Women as Defense Counsel Fact & Fiction Relating to Gender bias in the Profession, 1995

HEALTH MAINTENANCE ORGANIZATIONS/HEALTH CARE PROVIDERS

Healthcare Provider Defense - A Critical Analysis - A Non-Traditional Analysis - A Non-Traditional Approach, 1999

Medical Malpractice Claims and Health Maintenance Organizations, 1998

IMMUNITIES

Immunities in Iowa, 1987

INDEMNITY (See CONTRIBUTION/INDEMNITY)

INSTRUCTIONS

Civil Jury Instructions - An Update, 1992

Iowa Jury Instructions - An Update, 1993

Instructions - Comparative Negligence, 1983

Overview of the Iowa Defense Counsel Task Force Report, 1990

INSURANCE

Agents

Defending Insurance Agents, 2000

Arson

Arson Investigation and Prosecution from the Insurance Company's Perspective, 1990

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, 1990

Investigation and Adjustment of Arson Claims, 1987

Investigation and Adjustment of Arson Claims, 1990

Audit

Ethical Issues Relating to Third-Party Audits of Defense Counsel, 1999

Bad Faith

Bad Faith and Excess Problems: Caveat to the Defense Attorney, 1977

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, 1990

Dealing with Bad Faith Claims, 1986

Ethical and Bad-Faith Considerations Regarding Cost Containment in Insurance Defense, 1994

First Party Claims, 1983

First and Third Party Bad Faith Theory and Issues, 1993

Good Faith Settlements and the Right to a Defense, 2000

Investigating Bad Faith Claims, 1999

Representing the Insurance Company - UM/UIM/Bad Faith/Dec Actions, 1999

Coverage

Analyzing Insurance Coverage Issues, 1998

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

"Claims Made" Policies, 1986

Controlling Defense Costs When Possible Policy Defenses are Available, 1987

Coverage and Liability of Architects, Engineers, and Accountants and Comments on New Comprehensive Policy, 1966

Insurance Coverage Issues in Sexual Abuse, Failure to Supervise or Prevent, Sex Discrimination, and Sexually Transmitted Diseases, 1993

"Intentional Acts" vs. "Accidents", 1979

The Intentional Acts Exclusion of Personal Liability Insurance Policies. Is it Still Viable?, 1992

A Practicing Lawyer's Approach to Automobile Coverage Problems, 1966

Declaratory Judgment

Representing the Insurance Company - UM/UIM/Bad Faith/Dec Actions, 1999

Duty to Defend

Good Faith Settlements and the Right to a Defense, 2000

Recent Developments in the Duty to Defend, 1999

Excess Liability/Extra Contractual Damages

Avoiding Insurers' Excess Liability, 1982

Bad Faith and Excess Problems: Caveat to the Defense Attorney, 1977

Extra Contractual Damages - Iowa Eases the Burden, 1989

Extra Contractual Liability, 1986

General

Attorney Liability - Excess Limits Case - Insurance Attorney vs. No Attorney for Insured - Conflicts - Errors & Omissions - Client Security, 1976

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

Client Relations: Imminent Pressure Points and the Resulting Ethical Problems, 1995

Conflicts of Interest - Inside Counsel's Perspective, 1990

Defending the Agent/Broker: Serving Two Masters, 1990

Defendant Insurance Agents, 2000

Ethical and Bad-Faith Considerations Regarding Cost Containment in Insurance Defense, 1994

Ethical Issues Relating to Third-Party Audits of Defense Counsel, 1999

Ethical Responsibilities Of The Attorney In Dealing With An Uncooperative Client, 1997

Expanding Liability, The Claim Executive; Defense Counsel, 1976

Good Faith Settlements and the Right to a Defense, 2000

Guidelines for Insurer-Defense Counsel Relations, 1994

Insurers Supervision, Rehabilitation and Liquidation Act, Chapter 507.C, 1987

The Labyrinth of Conflicts Between Primary and Excess Insurers, 1990

Navigating The Rapids In Communicating With The Insurance Carrier, 1996

The Past vs. Present vs. Future for the Insurance Defense Lawyer, 1981

Primary/Excess Carriers -- What Are Their Rights and Duties?, 1981

Recent Developments in Iowa Insurance Law, 1993

Relations with Outside Counsel, 1990

Reservation of Rights and Tenders of Defense, 1977

Retaining and Working with Outside Counsel, 1993

Rock and a Hard Place, Defense Counsel's Duty to Insured and Insurer, 1990

The Settlement Alternative - Some Peculiar Problems: What Happens When Your Carrier Will Not Accept Your Advice or When Your Client & Carrier Disagree, 1991

The Tripartite Relationship - Update on Ethical Issues, 1997

Mediation

The ABC's of Mediation, 2000

Effective Mediation - Meeting The Insurance Carrier Expectations, 1996

Property

Adjustment of Creditor Claims to Property Insurance Proceeds, 1987

Defense of Fraudulent Property Insurance Claims, 1985

Reserves

The Voodoo Of Claim Reserves, 1996

Settlement

Good Faith Settlements and the Right to a Defense, 2000

Subrogation

Selected Problems Involving Workers' Compensation Liens and Subrogation Rights Affecting Personal Injury Litigation, 1992

Subrogating Economic Loss, 1983

Subrogation Issues Arising Out of the Defense of Personal Injury Cases, 2000

Tripartite Relationship

The Tripartite Relationship - Update on Ethical Issues, 1997

Uninsured/Under Insured Motorist

Developments in the Area of Uninsured/Underinsured Motorist Law, 1994

Representing the Insurance Company - UM/UIM/Bad Faith/Dec Actions, 1999

Selected Issues in Handling Iowa Uninsured and Under Insured Motorist Claims, 1987

Underinsured Motorist Coverage - Where We've Been - Where We're Going, 1992

Uninsured Motorists Problems; Contribution By 3rd Parties; Policy Interpretation; Limitations, 1976

Uninsured and Under Insured Motorist Claims, 1987

Uninsured (UM)/Underinsured (UIM) Motorists--Insurance Issues, Voir Dire Demonstrations, 1998

INTENTIONAL INTERFERENCE

Intentional Interference Cases - A Defense Perspective, 1988

Tortious Interference: Elements and Defenses, 1995

INTERNET

Using the Internet for Legal and Factual Research, 1999

INTOXICATION

Intoxication Issues in Iowa Civil Litigation, 1998

JUDGES

The Iowa Judicial Selection Law -- How It Works, 1965

JUDGMENTS

Offers to Confess: Their Effective Use, 2000

What Does It Mean To Be Judgment Proof, 1998

LAW OFFICE MANAGEMENT

Closing the Communications Gaps, 1985

Economics of Defense Practice, 1982

Effective Use Of Your Own Staff, Wordsmiths And Forensic Psychologists, 1991

LEGISLATION

(Legislative Updates had been provided in meetings of 1979, 1981, 1982, 1983, 1984, 1985, 1988, 1990, and 1993-1999)

Analysis of House File 196 - The New Medical Privilege Act, 1967

Civil Rico Overview & Developments, 1995

The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation, 1995

Legislative Changes and Products Liability, 1980

Proposed and Pending Legislative Changes in Medical Malpractice and Products Liability, 1977

Proposed Uniform Product Liability Law 1, 1979

The Question of Contributory Negligence Resulting From Recent Iowa Legislative Changes, 1965

The Question of Damages Resulting From Recent Iowa Legislative Changes, 1965

Selected Problems Created by Passage of the Americans with Disabilities Act, 1992

LOCAL COUNSEL

Ethical and Other Considerations in Serving as Local Counsel, 1999

MALPRACTICE (See PROFESSIONAL LIABILITY)

MANAGED HEALTH CARE

Emerging Liability Issues in Managed Health Care, 1997

MEDIA

Pretrial Media Statements: Where Are The Ethical Safe Harbors, 1996

MEDIATION

The ABC's of Mediation, 2000

Effective Mediation - Meeting The Insurance Carrier Expectations, 1996

MEDICAL

Brain Injuries

Defending The Traumatic Brain Injury Claim, 1996

Experts (See EXPERTS - Medical)

Eye Injuries

The Medical Legal Aspects of Eye Injuries, 1967

General

Family and Medical Leave Issues and Defenses, 1997

Physicians in the Litigation Process, 1994

The Proposed Restatement (Third) and its Impact Upon Litigation Involving Prescription Drugs and Medical Devices, 1994

A Psychologist Looks at the Medical Profession, 1968

Legislation

Analysis of House File 196 - The New Medical Privilege Act, 1967

Managed Health Care

Emerging Liability Issues in Managed Health Care, 1997

Records

Access To Medical Records, 1979

Evaluation of Medical Records, The Search for Truth, 1990

Hospital Records and Their Use in Court, 1969

X-Rays

Diagnostic Radiology - Interpreting Radiographs, 1984

The Validity and Interpretation of X-Ray Reports of the Cervical Spine and Low Back, 1966

MOTIONS

Deposition Dilemmas and the Ethics of Effective Objections, 1995

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

Pretrial Motion Practice, 1991

Pretrial Motions, A Growth Industry, 2000

Summary Judgments or Shooting Yourself In The Foot, 1997

MUNICIPAL/STATE LIABILITY (See TORTS)

NEGLIGENCE

Comparative Negligence (See COMPARATIVE FAULT)

General

Plaintiff's Negligence Revisited and Significant Supreme Court Decisions in the Negligence Field, 1968

The Question of Contributory Negligence Resulting From Recent Iowa Legislative Changes, 1965

Recent Developments in Negligence Litigation, 1967

Sudden Emergency and Legal Excuse, 1969

NON-COMPETITION AGREEMENTS

Moving On: Former Employment and Present Competitive Restraint, 1997

NUISANCE

An Anatomy of a Nuisance, 1979

OPENING STATEMENT

Effective Opening Statement, 1986

Opening Statement, 1991

The Opening Statement, 1988

Opening Statements and Closing Arguments - The First Word and The Last Word, 1990

Voir Dire - Opening and Closing Arguments, 1985

PERSONAL INJURY

General

Law and Order and the Personal Injury Lawyer, 1968

PLEADINGS

Checklist for Affirmative Defenses, 1982

Permissive and Compulsory Counterclaims, 1978

PRECLUSION

Collateral Estoppel in the Multi-Plaintiff Products Case, 1980

Issue Preclusion, 1975

Preclusion, 1976

PREMISES LIABILITY

An Updated Look At Premises Liability Law In Iowa, 1996

Premises/Interloper Liability: The Duty of a Possessor of Land to Control or Protect Third Persons, 1994

Update on Premises Liability, 1999

PRETRIAL

Discovery and Pretrial Procedures - Uses and Abuses, 1977

Pretrial Motion Practice, 1991

Pretrial Practice - The Judicial Perspective, 1997

PRODUCTS LIABILITY

Admissibility of Evidence of Other Accidents and Subsequent Remedial Measures and Warnings in Products Liability Litigation, 1977

Collateral Estoppel in the Multi-Plaintiff Products Case, 1980

Coping with Multiple Defendants and Products Liability Cases, 1982

Crashworthiness, 1994

Defending Products Liability Cases Under OSHA and CPSA Obtaining Information from Government Agencies, 1976

Defending the Products Liability Claim, 1999

Emerging Approach to Products Liability of Successor Corporations, 1979

Enhanced Injury Claims, 1994

Handling Expert Witnesses in the Defense of Product Liability Cases, 1993

Legislative Changes and Products Liability, 1980

The Nuts and Bolts of Products Liability, 2000

Preventing Negligent Plaintiffs from Having "A Second Bite at the Apple:" Defending Against Enhanced Injury Claims in Emergency Stop Devices Cases, 1994

Product Liability -- Medical Appliances, 1986

Product Liability: Status Of Restatement and Punitive Damages, 1996

Product Warnings and Labeling, 1985

Products Liability, 1965

Products Liability Update, 1988

Proposed and Pending Legislative Changes in Medical Malpractice and Products Liability, 1977

The Proposed Restatement (Third) and its Impact Upon Litigation Involving Prescription Drugs and Medical Devices, 1994

Proposed Uniform Product Liability Law 1, 1979

Protecting Your "Middleman" Client In Product Liability Cases, 1997

Protection for the Middleman, 1992

The Restatement (Third) of Torts: Products Liability and Iowa Law, 1998

PROFESSIONAL LIABILITY

Attorney's Liability to Third Parties, 1977

A Defense Lawyer Looks at the Professional Liability of Trial Lawyers, 1977

Ethical Responsibilities and Legal Malpractice, 1997

Lawyer Malpractice - Iowa Grievance Commission, 1985

Legal Malpractice, 1978

Medical Malpractice Claims and Health Maintenance Organizations, 1998

Medical Malpractice Defense, 2000

Medical Malpractice Update, 1992

Medical Malpractice Update, 1994

Proposed and Pending Legislative Changes in Medical Malpractice and Products Liability, 1977

PROFESSIONAL RESPONSIBILITY

Attorney Advertising, 1995

Client Relations: Imminent Pressure Points and the Resulting Ethical Problems, 1995

Conflicts of Interest, 1980

Defense Practice Under ABA Model, 1984

Deposition Dilemmas and the Ethics of Effective Objections, 1995

Ethical Considerations in Adopting the Model Rules of Professional Conduct, 1999

Ethical Issues in Conflicts of Interest, 1999

Ethical Issues for the Iowa Defense Attorney, 2000

Ethical Issues Relating to Third-Party Audits of Defense Counsel, 1999

Ethical and Other Considerations in Serving as Local Counsel, 1999

Ethical Responsibilities Of The Attorney In Dealing With An Uncooperative Client, 1997

Ethical Responsibilities and Legal Malpractice, 1997

Ethics, 1991

You Be The Judge and Jury: What is Professional and Ethical When Under Fire?, 1998

Ethics and Alternative Billing, 1995

Ethics Problems from the Perspective of the Defense Attorney, 1993

Ethics In Settlement, 1998

Ethics Update: The Prosecutor's View, 1996

Ethics: What is a Conflict (Differing Interests), 1978

The Failure To Let The Plaintiff Discover: Legal and Ethical Consequences, 1991

Important Ethical Issues for Trial Lawyers, 1993

Judicial Ethics, Federal Rule 11 and Iowa Rule 80, 1990

Jury Selection, Method And Ethics, 1991

Lawyer Advertising in Telephone Directories, 1990

Legal Liability for Violation of Code of Professional Responsibility, 1990

New Developments for the Defense: Panel Discussion, 2000

New Model Rules of Professional Conduct, 2000

Officers of the Court: Compulsory Ethics?, 1989

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

Pretrial Media Statements: Where Are The Ethical Safe Harbors, 1996

Proposed Rule 122, with Advertising and Report on the Activities of the Iowa State Bar Association, 1992

The Tripartite Relationship - Update On Ethical Issues, 1997

The Tripartite Relationship: Who Is The Client And To Whom Does The Attorney Owe Ethical Duties, 1998

What Does The Grievance Commission Do And What Do Lawyers Do - Some Surprising Cases, 1996

You Be The Judge And Jury: What Is Professional And Ethical When Under Fire?, 1998

RELEASES (See SETTLEMENTS)

RESERVES

The Voodoo Of Claim Reserves, 1996

RESTATEMENTS

Torts

The Proposed Restatement (Third) and its Impact Upon Litigation Involving Prescription Drugs and Medical Devices, 1994

The Restatement (Third) of Torts Process, 1994

The Restatement (Third) of Torts: Products Liability and Iowa Law, 1998

RICO

Civil Rico Overview & Developments, 1995

Civil Conspiracy, RICO And The Common Law, 1996

RULES

Appellate

Appellate Practice Suggestions, 1997

Iowa Rules of Appellate Procedure Update, 1988

The New Rules of Appellate Procedure - Significant Changes, 1977

Evidence

Discovery and Evidentiary Use of Journalistic Evidence, 1997

Defensive Use of Federal Rules - Selected Exceptions to Hearsay Rule, 1984

Expert Testimony in the Eighth Circuit After Daubert v. Merrell Dow Pharmaceuticals, Inc., 1994

Expert Testimony in Iowa State Courts after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1995

The Iowa Rules of Evidence, 1983

Observations on the Proposed Rules of Evidence for the U.S. District Courts and Magistrates, 1969

Rules of Evidence - Federal and Iowa Update, 1985

Federal Rules of Civil Procedure

Changes to the Federal Rules of Civil Procedure, 1993

Defense Attorney Perspective of Proposed Amendments to the Federal Rules of Civil Procedure, 1993

Federal Rules of Civil Procedure - Amended Rules - The Court's Requirements, 1984

Federal Rules Review and New Developments, 1983

Recent Changes in Federal Rules of Civil Procedure and Local Rules of the Northern and Southern Districts of Iowa, 1994

Rule 16(b) - A Defense Perspective, 1984

Summary Judgments or Shooting Yourself In The Foot, 1997

Working with the Federal Rules, 1971

Iowa Rules of Civil Procedure

Amendments to Rules of Civil Procedure - Defense Alert, 1984

Application of the Iowa Rules, 1971

Iowa's New Class Action Law, 1980

Pretrial Motion Practice, 1991

Pretrial Practice - The Judicial Perspective, 1997

Recent Amendments & Changes to Iowa Rules of Civil Procedure, 1976

Recent Changes in Rules Relating to Iowa Civil Practice, 1987

Reminders and Suggestions on the Use and Nonuse of Depositions Under the Iowa Rules, 1989

Rule 125, Iowa Rules of Civil Procedure and Discovery Sanctions, 1989

Summary Judgments or Shooting Yourself In The Foot, 1997

Professional Conduct

Ethical Considerations in Adopting the Model Rules of Professional Conduct, 1999

Supreme Court Rules

Proposed Rule 122, with Advertising and Report on the Activities of the Iowa State Bar Association, 1992

SETTLEMENTS

Estimating Settlement Values, 1985

Ethics In Settlement, 1998

Monthly Income Settlement of Personal Injury Claims, 1976

Good Faith Settlements and the Right to a Defense, 2000

Recent Developments with Settlement Annuities, 1984

Releases of Fewer Than All Parties and Fewer Than All Claims, 1989

Releases from the Defense Point of View, 1990

Releases in Multi-Party Litigation, 1983

The Settlement Alternative - Some Peculiar Problems: What Happens When Your Carrier Will Not Accept Your Advice or When Your Client & Carrier Disagree, 1991

Settlement Annuities - An Update on New Products, Ideas and Techniques, 1995

Settlements and Commutations, 1978

Settlement of Potential and Pending Employment Claims, 1995

Structured Settlements, 1981

Structured Settlements, 1986

SEXUAL HARASSMENT

Sexual Harassment, 1995

Sexual Harassment: Some Questions Answered; Some Questions Raised, 1998

SUMMARY JUDGMENT

Pretrial Motions, A Growth Industry, 2000

Summary Judgments or Shooting Yourself In The Foot, 1997

TORTS

Analyzing Low Impact Collisions, 1998

Defending A Governmental Entity, 1997

Defending Municipal or State Highway Torts, 1988

Defending the School District and the Municipality, 1999

Defending Truckers, 1992

Defense of Toxic Tort Cases, 1989

Modern Trends in Tort Responsibility, 1971

Municipal Tort Liability in Iowa, 1981

Perceptions of Toxic Hazards: The View from the Expert Witness Stand, 1980

Premises/Interloper Liability: The Duty of a Possessor of Land to Control or Protect Third Persons, 1994

The Proposed Restatement (Third) and its Impact Upon Litigation Involving Prescription Drugs and Medical Devices, 1994

The Restatement (Third) of Torts Process, 1994

The Restatement (Third) of Torts: Products Liability and Iowa Law, 1998

Road Hazards -- Tort Liability & Responsibilities, 1976

Tortious Interference: Elements and Defenses, 1995

Traumatic Neurosis - The Zone of Danger, 1980

TORT CLAIMS ACT

Operation of the Iowa Tort Claims Act, 1968

TRADE NAME/TRADEMARK

Defense of Trade Name and Trademark Suits, 2000

TRADE PRACTICES

Iowa Competition Law, 1978

Moving On: Former Employment and Present Competitive Restraint, 1997

TRIAL TECHNIQUE AND PRACTICE

Analyzing Low Impact Collisions, 1998

The Art of Jury Selection, 1999

The Art of Summation, 1991

Back to Basics, 1979

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, 1990

Case Concept Development - "The Jury: Is What You Say What They Hear?", 1990

Comments From the Other Side of the Counsel Table, 1988

Communication In Litigation - Intentions & $4 Will Get You A Microbrew, But It Won't Get You Understood, 1996

Coping with Multiple Defendants and Products Liability Cases, 1982

Cross-Examination of the Chiropractor, 1984

Cross Examination Goes to the Movies, 1998

Defending Against the Emotional Distress Claim, 1994

Defending Punitive Damage Claims - Closing Argument, 1988

Defending The Traumatic Brain Injury Claim, 1996

Defending Truckers, 1992

Defense Techniques under Iowa's Comparative Fault Act, 1984

Demonstrative Aids in the Courtroom, 1984

Effective Courtroom Tactics with Computer Animation, 1992

Effective Opening Statement, 1986

Effective Use of Video Technology in Litigations, 1997

A Fresh Look at Voir Dire, 1989

God, Red Light Districts and Changing the Defense Posture to Where the Sun Does Shine, 1992

Handling of Complex Litigation as Viewed From the Bench, 1981

How to Try a Case When You Are Unprepared, 1990

Individual and Group Defense of Complex Litigation, 1981

Joint Trial Advocacy College Schedule, 1995

Jury Communication and Selection, 1984

Jury Selection, Method And Ethics, 1991

Law of Closing Argument, 1987

Maximizing Juror Effectiveness: Applying Adult Education Theory To Litigation Practice, 1997

New Court Room Technique & Aids -- New Drake Court Room, 1976

Opening Statement, 1991

The Opening Statement, 1988

Opening Statements and Closing Arguments - The First Word and The Last Word, 1990

Operator's Manual for a Witness Chair, 1989

Physicians in the Litigation Process, 1994

Post Trial Jury Visits, 1978

Pretrial Practice - The Judicial Perspective, 1997

Problems of the Defense: A Judicial Perspective, 1992

Psychological Strategies in the Courtroom, 1985

A Psychologist's Voir Dire, 1983

The Psychology of Selecting a Defense Jury, 1988

The Selection, Care and Feeding Of Experts And Their Dismemberment, 1991

Testimonial Objections And Cross-examination, 1991

Trial by Overhead Projector, 1994

Trial Demonstration: Daniel Smith v. Light and Power Company, 1988

A Trial: A New Technique in Proving Damages for the Death of a Wife and Mother, 1966

Trial Strategy Under Comparative Negligence and Contribution - The Defense Perspective, 1984

A Trial: A Trial Problem re Expert Proof or Physical Facts, 1967

Undermining the Value of Plaintiff's Case by Cross-Examination - The Seventh Juror, 1987

Uninsured (UM)/Underinsured (UIM) Motorists, Insurance Issues, Voir Dire Demonstration, 1998

The Value of Effective Voir Dire, 1994

Voir Dire - Opening and Closing Arguments, 1985

UNIFORM COMMERCIAL CODE

Avoiding Liability When Repossessing and Disposing of Collateral Under Article IX, 1984

VOIR DIRE

The Art of Jury Selection, 1999

A Fresh Look at Voir Dire, 1989

Jury Communication and Selection, 1984

Jury Selection, Method And Ethics, 1991

Maximizing Juror Effectiveness: Applying Adult Education Theory To Litigation Practice, 1997

Post Trial Jury Visits, 1978

A Psychologist's Voir Dire, 1983

The Psychology of Selecting a Defense Jury, 1988

Uninsured (UM)/Underinsured (UIM) Motorists--Insurance Issues, Voir Dire Demonstration, 1998

The Value of Effective Voir Dire, 1994

Voir Dire - Opening and Closing Arguments, 1985

WORKERS COMPENSATION

The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation, 1995

Penalty Benefits, Interest, Attorney Fees and Liens in Workers' Compensation Cases, 1997

Selected Industrial Commissioner Final Agency Action/Appeal Decisions and Legislative Summary, 1997

Selected Problems Involving Workers' Compensation Liens and Subrogation Rights Affecting Personal Injury Litigation, 1992

Settlements and Commutations, 1978

Use of Rehabilitation - In Theory and In Practice, 1978

Vocational Disability Evaluations, 1984

(Workers Compensation Updates and Reviews were presented in 1976, 1977, 1979, 1981 through 1994, 1996, and 1998 through 2000)