VOLUME I

IOWA DEFENSE COUNSEL ASSOCIATION

2002 Annual Meeting & Seminar

September 25-27, 2002

Embassy Suites Hotel
101 East Locust Street
Des Moines, Iowa 50309

IOWA
DEFENSE
COUNSEL
ASSOCIATION

2002 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR SCHEDULE

Wednesday, September 25, 2002

10:00 a.m. **Registration Open**

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

12:50 - 1:00 p.m. **Welcome and Report of the Association**
IDCA Pres.-Elect, J. Michael Weston, Esq.

1:00 - 1:30 p.m. **Recent Developments in the Iowa Court of Appeals**
Honorable Van D. Zimmer
Judge, Iowa Court of Appeals
Des Moines, IA

1:30 - 2:00 p.m. **The Law of Expert Witnesses: Daubert and Beyond**
Sarah Gayer, Esq.
Shuttleworth & Ingersoll, P.L.C.
Cedar Rapids, IA

2:00 - 2:30 p.m. **Moving to the Model Rules of Ethics: The Change to Come**
Sharon Soorholtz Greer, Esq.
IDCA Board Member
Cartwright, Druker & Ryden
Marshalltown, IA

2:30 – 3:15 p.m. **Annual Case Update #1**
Christine L. Conover, Esq.
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, IA
Matthew J. Haindfield, Esq.
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, IA
Stephen E. Doohen, Esq.
Whitfield & Eddy, P.L.C.
Des Moines, IA

3:15 - 3:30 p.m. **BREAK**

3:30 - 4:15 p.m. **Employment Law Update**
Thomas D. Wolle, Esq.
Cedar Rapids, IA

4:15 - 5:00 p.m. **Interventional Treatments in Chronic Pain: Separating the Wheat from the Chaff (Or the Kernel from the Cob)**
Dr. George A. Lederhaas
Department of Anesthesiology
Iowa Methodist Medical Ctr., Des Moines, IA

5:15 - 7:00 p.m. **Tour of the New Justice Building**
Shuttle will leave every 15 minutes from the front lobby area to take individuals to the new Justice Building for a tour.
Tour will rake 20-30 minutes.

Thursday, September 26, 2002

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

7:30 - 8:00 a.m. **Continental Breakfast**

8:00 - 8:15 a.m. **Legislative Update**
Robert Kreamer, Esq.
IDCA Executive Director
Des Moines, IA

8:15 - 9:00 a.m. **Defending Post Traumatic Stress Disorder Claims**
Dr. Steven Carter
MEDPsych Corporation
Virginia, MN

9:00 - 9:30 a.m. **Improving Professionalism and Ehics in the Courtroom**
Honorable Arthur E. Gamble
Chief Judge of the Fifth Judicial District Iowa
Des Moines, IA

9:30 – 10:30 a.m. **Practical Issues in Working with Experts in Product Liability Cases**
Kevin M. Reynolds, Esq.
Chair, DRI and IDCA Product Liability Committees
Whitfield & Eddy, P.L.C.
Des Moines, IA

John Trimble, P.E.
Exponent Failure Analysis Associates
Chicago, IL

10:30 - 10:45 a.m. **BREAK**

10:45 - 11:15 a.m. **Bad Faith in Iowa: An Update**
Brenda K. Wallrichs, Esq.
Moyer & Bergman, P.L.C.
Cedar Rapids, IA

11:15 - 12:00 noon **Lawyers and the Ethics Enforcement Process**
Roger Stetson, Esq.
Belin, Lamson, McCormick, Zumbach & Flynn, P.C.
Des Moines, IA

12:00 – 12:30 p.m. **LUNCH**

12:30 – 12:40 p.m. **Annual Meeting of IDCA**

12:40 – 1:10 p.m. State of the Judiciary
Honorable Louis A. Lavarato
Chief Justice, Iowa Supreme Court
Des Moines, IA

1:15 - 1:45 p.m. **Workers Compensation Update**
Iris Post, Esq.
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, IA

1:45 - 2:30 p.m. **Storytelling in Oral Argument: A Plaintiff's Prospective**
Bruce A. Braley, Esq.
Dutton, Braun, Staack & Hellman, P.L.C.
Waterloo, IA

2:30 - 3:15 p.m. **Annual Case Update #2**

3:15 - 3:30 p.m. **BREAK**

3:30 - 4:00 p.m. **Practical Tips for Better Trial Practice**
Honorable John A. Jarvey
Chief Magistrate Judge
U.S. District Court for Northern District Iowa
Cedar Rapids, IA

4:00 - 4:30 p.m. **Challenges for the Iowa Lawyer**
Alan E. Fredregill, Esq.
Past President IDCA, President Iowa State Bar Association
Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P.
Sioux City, IA

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 27, 2002

7:30	**Registration Open**
7:30 – 8:00 a.m.	**Continental Breakfast**
8:00 – 9:00 a.m.	**Better Computer Research Skills** Mary B. Walsh, Esq. The West Group Des Moines, IA
9:00 - 9:30 a.m.	**Current National Issues on the Defense Practice** Gregory M. Lederer, Esq. Past President IDCA, Regional Director DRI Simmons, Perrine, Albright & Ellwood, P.L.C. Cedar Rapids, IA
9:30 - 10:15 a.m.	**Annual Case Update #3**
10:15 – 10:45 a.m.	**Brain Scanning: Defense of a Brain Injury** Lyle A. Ditmars, Esq. IDCA Board Member Peters Law Firm, P.C. Council Bluffs, IA
10:45 - 11:00 a.m.	**BREAK**
11:00 - 12:00 noon	**Effective Defense of Damages** Christy D. Jones, Esq. Butler, Snow, O'Mara, Stevens & Cannada Jackson, MS David E. Dukes, Esq. Nelson, Mullins, Riley & Scarborough Columbia, SC
12:00 - 12:30 p.m.	**LUNCH**
12:30 - 1:00 p.m.	**Current Developments in the Federal Courts** Honorable Ronald E. Longstaff Chief Judge US District Court for the Southern District of Iowa Des Moines, IA
1:00 - 2:30 p.m.	**Winning: A Survey of Successful Trial Techniques** Christy D. Jones, Esq. Butler, Snow, O'Mara, Stevens & Cannada Jackson, MS David E. Dukes, Esq. Nelson, Mullins, Riley & Scarborough Columbia, SC Stephen V. Powell, Esq. Swisher & Cohrt, P.L.C. Waterloo, IA Patrick M. Roby, Esq. Past President IDCA Elderkin & Pirnie, P.L.C. Cedar Rapids, IA
2:30 p.m.	**Adjourn**

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J. Michael Weston

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association from September 2001 through August 2002.

Philip A. Burian, Cedar Rapids, IA

Nicole Claussen, Cedar Rapids, IA

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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
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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
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STANDING COMMITTEES

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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
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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
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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

2002 ANNUAL MEETING & SEMINAR

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IOWA APPELLATE COURT UPDATE

NEGLIGENCE,

TORTS,

& INDEMNITY

CHRISTINE L. CONOVER
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids and Iowa City, Iowa
cconove@simmonsperrine.com

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I. NEGLIGENCE
A. Duty-Possessor of Land

Wiedmeyer v. Equitable Life Assurance Society, 644 N.W.2d 31
(Iowa May 8, 2002)

FACTS

Marcia Wiedmeyer visited Duck Creek Plaza, a shopping mall in Bettendorf, Iowa, on December 7, 1996. Wiedmeyer alleged that she slipped and fell on a patch of ice, fracturing her ankle. Equitable Life Assurance Society of United States (Equitable) owned Duck Creek Plaza on the date of Wiedmeyer's alleged injury. Equitable had a real estate management agreement with General Growth Management Company (General Growth).

The management agreement provided that General Growth would arrange for cleaning and snow removal of the parking lot for Duck Creek. Pursuant to the management agreement, General Growth would, on behalf of Equitable, implement Equitable's decisions and conduct the "ordinary and usual business affairs" of Equitable. General Growth was to confirm to any policies or programs that Equitable established and the scope of its authority was limited to Equitable's policies.

Equitable filed a motion for summary judgment asserting that General Growth, rather than Equitable, was the possessor of the property. The district court sustained Equitable's summary judgment motion. The plaintiff appealed. The Supreme Court reversed and remanded with instructions to deny Equitable's motion for summary judgment.

HOLDING AND ANALYSIS

The court reviewed Sections 343, 328E, and 422 of the Restatement (Second) of Torts (1965). Under those provisions, a possessor of land may be subject to liability if he or she knew or should have known of a condition on the land that presents an unreasonable risk of harm to invitees, knew or should have known that the invitees would not discover the condition, and fails to reasonably protect them from the danger. A possessor of land is someone who occupies land with the intent to control it or a prior occupant if no other person subsequently occupied the land or someone who is entitled to immediate occupation of the land if no other person is in possession. The court has recognized, however, that an owner of land may loan its possession to another, which renders the other party the possessor of land.

Equitable argued that the absentee owner immunity takes precedence over the general principals of an agency relationship such as it had with General Growth. However, the court disagreed. Under Section 12 of the Restatement (Second) of Torts, the court held that General Growth's acts in possessing and controlling Duck Creek Plaza were to the same extent as if Equitable had acted to possess the property. Therefore, the court found Equitable to be a possessor of the property and subject to the duties recognized in Section 343 of the Restatement.

Alexander v. The Medical Assoc. Clinic, No. 00-1764 (Iowa June 12, 2002)

FACTS

Monty Alexander entered the defendant's open field late one night trying to retrieve his sister's dog. He fell in a ditch and injured his knee. Medical Associates filed a summary judgment motion alleging that the plaintiff was a trespasser and defendant did not breach its duty to Alexander to avoid willful and wanton injury to him. The

district court agreed and sustained judgment for the defendant. The supreme court affirmed.

HOLDING AND ANALYSIS

Alexander argued Iowa should abandon the common law rule that a possessor of land owes only a duty to avoid willful or wanton injury to a trespasser in favor of replacing it with a duty of reasonable care under the circumstances.

The court noted that six states use a negligence standard to govern trespasser liability, twenty-nine states use essentially the same standard as Iowa's, and two state legislatures have reinstated the common law trespasser liability rule after their courts changed it. The court declined to adopt Alexander's theory and affirmed the district court.

Special concurrence: Lavorato, C.J., and Larson, J.

Favor abolishing invitee – licensee distinction but retaining the trespasser distinction.

Special concurrence: Streit, J.

Favor plaintiff's position to adopt negligence standard for trespassers but found plaintiff failed to establish he was entitled to a trial even on this standard.

Trulsen v. Otto, 01-0524, (Iowa Ct. App. February 20, 2002)

Court affirmed a summary judgment motion in favor of landlord where tenant slipped on snowy steps on the ground that landlord had no duty to install a rain gutter to catch melting snow from roof. The court reversed and remanded on the other summary judgment issue, finding a genuine issue of material fact on whether the landlord, having voluntarily installed a handrail, did so in a safe manner.

Athey v. Speicher, Nos. 99-1598, 00-1666 (Iowa Ct. App. November 28 and December 28, 2001)

The court affirmed summary judgment in favor of the owner of property where individual defendant permitted to live on the property injured plaintiff's son with a BB gun. The court found the defendant did not know about the presence of the BB gun. The court also affirmed judgment for the pawn shop owner who sold the BB gun to a fourteen-year-old. The court found the pawn shop owner had no reason to know the

fourteen-year-old would use the gun in a negligent or reckless manner and thus was not the proximate cause of the plaintiff's injuries.

B. Duty – Co-Employee Negligence

Meade v. Ries, 642 N.W.2d 237 (Iowa February 27, 2002)

FACTS

Patrick Meade and Edward Ries were co-employees for Swiss Valley Ag Farms Co. in Hopkinton, Iowa as of April 18, 1998. Ries worked as a semi driver for the company and Meade was a mechanic in the company's internal maintenance shop. On April 18, 1998, Ries was not scheduled to work so he brought a tire off his personal farm equipment to the Swiss Valley maintenance shop to repair it. Swiss Valley had an unwritten policy permitting Ries' activity. Meade was working in his regular capacity as a mechanic on April 18, 1998. Ries deflated his tire, cleaned the rim, and took it to a tire cage to use an inflater ring to make the tire beads seal to the rim. He did not, however, put the tire inside the tire gauge. When he was finished with the inflater ring, Ries attached an air hose and chuck to the tire to finish inflating it.

While Ries was working on his tire, Jason Miles, another Swiss Valley mechanic, was working on the brakes of a semi tractor-trailer that Ries regularly drove for Swiss Valley. While doing his work, Miles needed someone to push the brake pedal on the semi. Ries, as a request of Miles, agreed to depress the brake pedal. Miles asked Ries to do so within one minute after Ries had attached the air hose to his tire. Ries depressed the brakes and Miles determined they were working properly. Ries came out of the cab of the semi and stood by Miles. As they discussed the brake repair, Meade entered the shop area to retrieve a tool. Less than a minute after Meade entered the shop, Ries' tire exploded and struck Meade.

Meade sued Ries, alleging he was negligent and caused Meade's damages. Ries denied the allegations and asserted an affirmative defense of co-employee immunity pursuant to Iowa Code Section 85.20(2). The district court sustained Ries' motion for summary judgment, agreeing that he was entitled to immunity under Section 85.20(2). The Supreme Court reversed and remanded.

HOLDING AND ANALYSIS

The court found that Ries did not meet the test for co-employee immunity. The court adopted the test of analyzing whether the uninjured co-employee could have recovered workers' compensation benefits if that employee had been the one to sustain an injury. An employee is immune from a common law suit if the injury resulting from his or her actions arises out of and in the course of employment. The test requires something more than the tortfeasor's status as a co-employee. First, the court

determined that if Ries had been injured in the same accident, his injury would not have arisen out of his employment because of the following factors: (1) the exploding tire caused the injury; (2) the incident was directly traceable to inflating the tire; (3) but for inflating the tire, the explosion and injury would not have occurred; (4) Ries was off duty while inflating the tire; (5) Ries inflated the tire voluntarily and not at the direction of his employer; and (6) Ries inflated the tire for his personal benefit, not for his employer's benefit.

Second, the court analyzed the same factors to determine that the injury did not happen in the course of the employment. For an injury to occur in the course of employment, the injury and the employment have to coincide as to time, place, and circumstances. Here, the court found that the time requirement was lacking because Ries inflated the tire while off duty. The other aspects of Ries' actions, including that he was inflating the tire for his own benefit and that the source of injury was the exploding tire supported the court's holding that the injury did not occur in the course of the employment. For these reasons, the court determined that if Ries had been injured in the same accident, he would not have been able to argue that his injury arose in the course of employment.

Simmons v. Acromark, 00-1625 (Iowa Ct. App. April 24, 2002)

Court affirmed directed verdicts in favor of defendant co-employees where plaintiff alleged gross negligence on the part of her co-employees in an industrial accident, finding that plaintiff failed to prove her co-employees had sufficient knowledge to prevent the accident.

C. Duty – Dram Shop

Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa February 27, 2002)

FACTS

Ricky Grovijohn and Julie Douglas had several drinks at J.D.'s Circle Inn (Virjon, Inc.). They left the bar together. Douglas drove Grovijohn's car. Douglas drove the car into another car, injuring Grovijohn. Thirteen months after the accident, Grovijohn notified the bar that he intended to file suit under the Iowa dram shop act.

The district court granted Virjon's summary judgment motion because Grovijohn failed to notify Virjon of his claim within six months of his injuries under Iowa Code Section 123.93. Further, Grovijohn failed to produce evidence that he met any of the exceptions to the notice requirement.

HOLDING AND ANALYSIS

Grovijohn appealed the district court's judgment, arguing Iowa Code Section 123.93 violates his state and federal rights to equal protection. He also argued on appeal that there were genuine issues of material fact as to whether he qualified for any of the exceptions.

First, the court held that Iowa's comparative fault act in Chapter 668 did not compel the conclusion that the Iowa dram shop notice requirement is unconstitutional. The court noted that Chapter 668 is not intended to apply to dram shop actions and thus does not nullify the procedural requirements of Iowa Code Section 123.93.

Second, the court found that Grovijohn did not belong to any protected class or class of similarly situated individuals singled out for different treatment. The court held that dram shop plaintiffs as a whole are treated differently from personal injury claimants generally, but this fact alone does not satisfy the first step of the equal protection analysis. The court declined to reach the question of whether the dram shop statute has a rational relationship to a legitimate government interest because Grovijohn could not prove that he was being treated differently under the dram shop statute.

Third, the court found that Grovijohn did not present any evidence to fall within one of the three exceptions to the dram shop act's six-month notice requirement: (1) incapacitation of the injured party at the end of six months; (2) the inability of the injured party, through reasonable diligence, to discover the name of the potential defendant; or (3) the inability of the injured party, through reasonable diligence, to discover the identity of the person who caused the injury.

The court affirmed the district court's judgment in favor of defendant Virjon.

Horak v. Argosy Gaming Co., No. 99-1941, ___ N.W.2d ___ (Iowa July 17, 2002)

FACTS

Letecia Morales and two friends, Juan Jurado and Gerardo Graciano, spent an evening at the Belle, a Sioux City riverboat and gambling casino, after Morales dropped her daughter off at a birthday party. Argosy Gaming Company owns the casino. Morales was not intoxicated at the time she entered the casino, although she may have drunk some beer prior to arriving at the casino. Over the course of three or four hours, witnesses described Morales as becoming very inebriated. She was drinking cocktails while playing the slot machines. Eventually, security officers forcibly removed her from the boat due to her obnoxious behavior. Her friends, who had not been drinking, convinced the police officers called to the scene to allow them to get her home. The three left. Graciano drove Morales' car.

At some point Graciano stalled Morales' car because he was unfamiliar with driving a manual transmission. Morales became angry and demanded that she be allowed to drive. There was some dispute about whether both Jurado and Graciano got out of the car at the same time, but at some point Morales was alone driving the car. Jurado and Graciano walked to a convenience store where they found Morales' car sitting on its top close by. Morales died in the one-car accident. Tests revealed Morales' blood alcohol count was .250.

Shelley Horak, the administrator of Morales' estate, brought suit against Argosy Gaming on behalf of Morales' three minor children. Horak alleged that the defendant sold and served alcohol to Morales on the riverboat casino. A jury awarded a total of $1,250,000 to the three children.

Prior to trial, Argosy filed an application to adjudicate law points, asserting that federal admiralty law applied and preempted the plaintiffs' state dram shop claim. The district court disagreed and allowed plaintiffs' dram shop claim to proceed. The Supreme Court agreed with the district court and affirmed the judgment in favor of the plaintiffs.

HOLDING AND ANALYSIS

The court acknowledged that the incident at the casino arguably satisfied two prongs of the test for whether admiralty law should apply. First, the sale and service of alcohol to an intoxicated adult occurred on a vessel capable of transporting passengers on a navigable waterway. Second, the incident had a "potentially disruptive impact on maritime commerce" and had a substantial relationship to traditional maritime activity.

The court held, however, that in the absence of a comprehensive federal scheme to preempt the field federal law did not preempt Iowa's dram shop act. The court noted that to allow Argosy to carry dram shop insurance, obtain its gaming and liquor licenses, and then to allow Argosy to circumvent Iowa law by claiming federal preemption, would be an inconsistent result.

The court further found that the testimony of Juardo, Graciano, a casino waitress and the security officers was sufficient to support the jury's verdict that Morales was severely intoxicated at the casino.

The court also dismissed Argosy's contention that the plaintiffs had to produce eyewitness testimony that Morales was driving the vehicle during its fatal crash. The court held that an off-duty police officer's testimony, who happened to witness the crash from start to finish, was sufficient to satisfy the proximate cause element. Further, the blood alcohol test result of 0.250, blood alcohol count, combined with Morales'

patronage of the casino prior to the crash was sufficient evidence to meet the proximate cause element.

DISSENT, JUSTICES CADY, CARTER AND TERNUS

The dissent disagreed with the majority's ruling on the evidentiary issue, discussed elsewhere in this outline.

D. Proper Lookout

Little v. Liston, 01-0490 (Iowa Ct. App. April 10, 2002)

Luke Little contacted William Liston to weld a drive shaft on a truck stranded in Little's cornhusk covered field. The parties disputed whether they discussed the danger of a fire if Liston welded. A fire erupted and caused damage to the field, grain truck and the cargo. The court remanded for new trial, ordering that the jury instruction should have provided that the jury could find the plaintiff was responsible for his own damage only if he was obligated to perform certain duties pursuant to his contract with the defendant.

E. Professional Negligence – Expert Testimony Required

Ferguson v. Neiman, 00-1185 (Iowa Ct. App. March 27, 2002)

Court affirmed district court's grant of a judgment notwithstanding the verdict in favor of the defendant in a legal malpractice claim. Plaintiffs did not designate an expert but relied on alleged admissions from the defendant. The court found that as a matter of law the defendant attorney's statements did not rise to the level of establishing he had acted negligently and thus plaintiffs could not prove their case without expert testimony.

Karnes v. Keffer-Overton Assoc., 00-0191 (Iowa Ct. App. November 16, 2001)

The court affirmed summary judgment for defendants in an engineering malpractice case where plaintiffs failed to designate an expert witness to prove a claim that the failure to use joist hangers would have prevented a stairway from collapsing.

F. Pedestrian Duty

Johnson v. Hadenfeldt, 01-0244 (Iowa Ct. App. December 28, 2001)

Court held that the jury instructions describing plaintiff-jogger's duty as a pedestrian were proper where plaintiff filed suit against the driver of a car who struck him while jogging.

G. Other proximate cause of injuries

Butts v. Lay, 00-2011 (Iowa Ct. App. November 16, 2001)

The court affirmed a jury verdict in favor of the defendant in an auto accident case where the medical evidence established substantial evidence that the plaintiff's damages were caused by another accident and natural, degenerative changes in her health.

H. Excuse- Sudden Emergency

Foster v. Strutz, 636 N.W.2d 104 (Iowa November 15, 2001)

FACTS

Valerie Foster stood outside her pickup in a parking lot. At least two other vehicles were in the lot. One vehicle, the "Ruggles" vehicle, had several young men as its passengers. Vince Ankrum owned the third vehicle in the parking lot. Cassandra Strutz operated it.

Three to five men from the Ruggles vehicle approached Ankrum while he sat in the passenger seat of his car. The young men struck him through the open window and attempted to pull him out of the car. Ankrum shielded Strutz by pulling her down into his lap. Ankrum saw another fist and hit the gear shift. Although he did not realize it at the time, he had placed the car in reverse. Strutz, seated in the driver's seat but laying across Ankrum's lap, stepped on the accelerator, thinking the car was in drive and would exit the parking lot. Because the vehicle was actually in reverse, the vehicle proceeded toward Foster's pickup. Foster attempted pull herself over the side and into the bed of the pickup but Ankrum's car crushed her foot. Approximately 10-15 seconds passed between the time the altercation began and when Strutz stepped on the accelerator.

Foster sued both Ankrum and Strutz. Ankrum and Strutz filed third-party petition against one of the assailants.

The district court refused to give sudden emergency instruction that Ankrum and Strutz requested. The court also refused to instruct on comparative fault.

The jury found the third-party defendant without negligence and attributed 55% of the fault to Ankrum and 45% to Strutz. The jury awarded damages to Foster in the amount of $289,576. The court of appeal reversed and remanded for a new trial on the ground that a sudden emergency instruction should have been given. On Foster's petition for further review, the supreme court vacated the court of appeals' decision and affirmed the jury's verdict.

HOLDING AND ANALYSIS

The Supreme Court held that the defendants had 10-15 seconds to think and react to the assault from the Ruggles vehicle. The court noted that the sudden emergency doctrine has fallen into disfavor in many jurisdictions. While the court has not abandoned the doctrine, it refused to unnecessarily expand the doctrine in this case.

The court rejected the defendants' argument that a pedestrian who knows of a great potential for conflict and remains to observe should bear some fault. The court noted that the defendants cited no authority for that proposition and determined that Foster's conduct in this case did not rise to the level of negligence.

The court also found the amount of damages reasonable.

I. Owners' Vicarious Liability for Dog Bite

Rodgers v. Dittman, 00-1898 (Iowa Ct. App. March 13, 2002)

Court affirmed a jury verdict in favor of the defendant in a dog-bite case, allowing expert testimony about the dog's behavior and allowing a comparative fault instruction where plaintiff failed to use mace against the dog.

Hower v. Hall, 00-0353 (Iowa Ct. App. November 28, 2001)

The court affirmed a jury verdict in favor of plaintiff who sustained injuries when three puppies jumped on her and she fell. Defendant Johnson defaulted. Defendant Hall alleged she did not own the dogs. The court found that Hall's conduct in caring for and keeping the dogs on her property could render her an owner of the dogs.

II. DEFENSES TO TORTS – STATE ACTORS

A. Sovereign Immunity – Discretionary Function Exception

Shelton v. State, 644 N.W.2d 27 (Iowa May 8, 2002)

FACTS

Robert Shelton injured himself at the Wild Cat Den State Park in Muscatine County, Iowa, on a family outing. The park is owned and operated by the State through the Department of Natural Resources. The park has a trail system from the base of Sandstone Bluffs to the top of the bluffs. The United States Conservation Corps first constructed the trails in 1930; park authorities renovated the trails between 1986 and 1996. Shelton slipped on loose gravel at a point on the trail where the trail passed along the edge of the cliff. He fell 40 feet into some trees and finally landed on a lower bluff. As a result, he is paralyzed from the waist down and incurred medical expenses over $100,000. The park has signs prohibiting repelling or rock climbing but does not have guardrails along all parts of the trail.

In his petition, Shelton alleged that the State wrongly located the trails, failed to maintain the trails, and failed to protect the public by placing guardrails or warning signs. The State filed a motion for summary judgment arguing that its actions fell within the discretionary function exception in the State Tort Claims Act. See Iowa Code § 669.4. The trial court granted the State's motion and Shelton appealed. The Supreme Court affirmed.

HOLDING AND ANALYSIS

The court employed a two-step test to determine whether the State's actions fell within the discretionary function exception to the State Tort Claims Act. First, Iowa Code Section 308.7(3) provides that, "[t]he Department of Natural Resources … shall: [m]aintain, improve, and beautify according to plans made … all conservation areas …." The court determined that this statute vests discretion the Department of Natural Resources to locate trails, maintain trails, and place guardrails or warning signs. Thus, the court found the State met the first step in the discretionary function test. The State met the second step because the choices about where to locate trails and how to maintain them are the sort of choices intended for protection under the discretionary function exception. The court noted that "[t]he substances used in forming the trails, the placement of the trails, the omission of guards or handrails, placement or omission of warning signs, and trail maintenance, were all matters for park professionals. These administrative choices driven as they were by economics and aesthetics, are clearly matters into which courts in general and judges in particular are ill-equipped to intrude."

B. Sovereign Immunity – No private cause of action

Donahue v. Washington County, 641 N.W.2d 848 (Iowa Ct. App. February 6, 2002)

FACTS

A dog attacked two-year-old Madison Donahue on January 21, 1998, near their home in Johnson County. The dog was temporarily chained in the neighbor's yard. Previously, he had attacked two people in Washington County. The reserve officer in the Washington County Sheriff's Department investigated the two previous attacks and did not report the dog or the incidents beyond filing a standard dispatch report. Plaintiff filed suit arguing Washington County breached its duty by failing to taking any action on the prior reports about the dog. The district court sustained Washington County's motion for summary judgment, finding Washington County did not have a duty to the plaintiff. The supreme court affirmed the district court's ruling.

HOLDING AND ANALYSIS

Iowa Code Section 351.26 provides that peace officers shall impound and kill any dog for which a rabies vaccination tag is required when the dog is not wearing such a tag. The Court of Appeals found that Iowa Code Section 351.26 does not create a private cause of action. The statute is intended to provide for the protection of the public at large and plaintiffs are members of the public. However, the court found that there is no special relationship between municipality and the plaintiffs to create a private cause of action based on the statute. The court also found that the applicable Washington County ordinances did not create a special relationship between Washington County and the plaintiffs and thus no cause of action arose under the Washington County ordinances, either.

III. DEFENSES TO TORTS – NON-STATE ACTORS

A. Comparative Fault – Medical Malpractice

DeMoss v. Hamilton, No. 99-1887 (Iowa May 8, 2002)

FACTS

Brian DeMoss experienced chest pains on May 1, 1996, that prompted him to seek medical care in the emergency room at the Jackson County Public Hospital. DeMoss was 32 years old at the time. His physician, Dr. Hamilton, observed DeMoss had recurrent bronchitis with a low-grade fever and productive sputum. Hamilton ordered an electrocardiogram after noting that Brian had discomfort in his lower right

sternal and rib region. The test showed no acute changes. Further testing for blood pressure and cardiac enzyme screens were within normal limits. Dr. Hamilton discharged DeMoss with a prescription for antibiotics and instructions to recheck if he was not improved by Friday.

The following morning, DeMoss suffered a heart attack at his home and died. His wife brought a wrongful death claim and sought consortium damages on behalf of herself and her children. DeMoss had a history of heart disease in his family, losing both of his parents to a myocardial infarction in their mid 40s. DeMoss himself suffered a heart attack two years before his death. Doctors successfully treated him with angioplasty and thrombolytics. His physician warned him to stop smoking, exercise, and lower his weight and cholesterol. DeMoss apparently did not implement these lifestyle changes. The trial judge allowed evidence of DeMoss' lifestyle habits on the issues of life expectancy and lost chance. The trial court also permitted a jury instruction to consider DeMoss' fault if the jury found that DeMoss was at fault "by failing to follow recommendations of the previous physicians." The jury found Dr. Hamilton without fault. DeMoss appealed arguing the comparative fault instruction was improper. The Supreme Court agreed the instruction was improper under these facts, but nonetheless affirmed the verdict because the jury found Dr. Hamilton bore no fault.

HOLDING AND ANALYSIS

The court noted the majority rule in other states that, "to be considered as and constitute contributory negligence in a medical malpractice action, a patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with negligence of the malpractitioner, must have entered into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based." The Supreme Court agreed that when the patient's conduct necessitates medical care, the patient's conduct cannot be the basis of a comparative fault instruction. In other words, no matter what the patient did to necessitate the medical care, the physician still has a duty to properly treat the patient's condition.

Arguably, the court's discussion of the comparative fault instruction is *dicta* because it affirmed the jury verdict that the physician was not at fault. The court distinguished the comparative fault instruction given in DeMoss' case with cases where the plaintiff fails to mitigate damages. See Greenwood v. Mitchell, 621 N.W.2d 200, 207-08 (Iowa 2001).

B. Failure to mitigate

Mathieson v. Vanderlinden, 00-361 (Iowa Ct. App. November 16, 2001)

The court affirmed the district court's refusal to submit a failure to mitigate damages instruction in a personal injury suit where the plaintiff continued to smoke and take non-prescription Tylenol with codeine. The court concluded defendants failed to introduce evidence that the plaintiff's activities were a proximate cause of his damages because the physicians did not testify that the plaintiff's damages would have been reduced if he had stopped smoking or stopped the Tylenol use.

IV. STRICT LIABILITY – Electricity

Martins v. Interstate Power Co., 00-0791, (Iowa Ct. App. April 10, 2002)

The court affirmed a $700,000 jury verdict in favor of dairy farmer who alleged damages to their dairy herd from stray voltage caused by Interstate Power Company's substation. The plaintiffs' alleged the power company's conduct constituted a nuisance. The court agreed over Interstate's argument that the court was essentially imposing a strict liability standard on it.

V. PRODUCTS LIABILITY

A. Defective Design

Falada v. Trinity Industries, Inc., 642 N.W.2d 249 (Iowa February 27, 2002)

FACTS

James Falada was killed when an anhydrous ammonia tank he was pulling behind his truck rolled over, rupturing the tank and allowing ammonia to escape. Falada died of ammonia inhalation. His estate filed suit claiming the tank was defectively manufactured. Trinity moved to dismiss, arguing that the plaintiff did not serve an original notice within ninety days of filing its petition. The district court denied that motion. Trinity later moved for summary judgment, arguing that (1) the tank had been in a prior accident, thus weakening its structure, and (2) the tank was manufactured in compliance with the state of the art as it was in 1971. The district court granted Trinity's summary judgment motion on the state of the art defense. The supreme court reversed and remanded.

The plaintiff's expert concluded that Trinity's welding of the steel tank sections together was defective. Plaintiff conceded that the general design of the tank was

consistent with the state of the art in 1971 but did not concede that this particular tank had been manufactured in accordance with the state of the art technology.

Trinity argued that if the design of the tank was consistent with the state of the art, any workmanship defects in assembling the tank was subject to the state of the art defense.

HOLDING AND ANALYSIS

First, the supreme court affirmed the district court's ruling that Trinity was properly served. The court found that the plaintiff had good cause for serving Trinity outside the ninety-day window because the plaintiff first made service on the wrong Trinity Industries, Inc. As soon as the plaintiff learned that it had the wrong defendant, the plaintiff properly served the correct Trinity Industries.

Second, the supreme court found that there was a genuine issue of material fact on the state of the art defense that Trinity asserted in its summary judgment motion. The court disagreed with Trinity's argument, holding that defective design and defective workmanship claims are separate concepts. The court found that the plaintiff had presented sufficient evidence to generate an issue of material fact on Trinity's state of the art defense that the workmanship and welding of steel parts was adequate. The court noted that Trinity did not contend that adequate welding techniques were impossible in 1971. The court further noted that Trinity's argument led to an absurd result: if negligent welding of the tank parts could not be the basis of liability because Trinity's design was state of the art, this would mean Trinity could attach the sections of the tank together with putty and avoid liability.

B. Strict Liability – Failure of Evidence

Burgmaeir v. Kentucky Fried Chicken, 00-0186 (Iowa Ct. App. September 26, 2001)

The court affirmed summary judgment in favor of Kentucky Fried Chicken (KFC) on plaintiff's strict liability and negligence claims filed when he bit into a chicken breast and cracked a tooth. The plaintiff produced no evidence to dispute KFC's contention in its summary judgment motion that plaintiff bit into a bone and not a foreign object in the chicken breast.

VI. OTHER SPECIFIC TORTS

A. Tortious Interference Claims

1. Interference with Contractual Relationship

Grimm v. US West Communications, 644 N.W.2d 8
(Iowa May 8, 2001)

FACTS

US West discharged Kristin Grimm, a directory assistance operator, in March 1997. Grimm, a homosexual, alleged US West subjected her to a hostile work environment. Grimm initially filed suit under the Labor Management Relations Act in federal court and added state tort claims of interference with contractual relationship and intentional infliction of emotional distress (IIED). Grimm failed to file her LMRA complaint within the required six month time period so the federal court dismissed Grimm's state claims without prejudice. When Grimm filed her state tort claims in state court, US West removed the case to federal court, alleging the LMRA preempted the state claims. The federal court remanded the case back to state court. The state court granted US West's motion to dismiss and the supreme court reversed and remanded.

HOLDING AND ANALYSIS

The court held that although Grimm's claim that her supervisor interfered with a contractual relationship might not survive on the merits, it was enough to survive a motion to dismiss. Further, the court held that the LMRA did not preempt the tortious interference claim. The plaintiff, as a master of the petition, can choose state law claims and the defendant cannot remove the case to federal court or dismiss the state law claims based solely on a federal defense.

The court also found that Grimm's IIED claim survived defendant's motion to dismiss. The LMRA does not preempt this claim as a matter of law. The court also held that neither the Iowa Civil Rights Statute and the workers' compensation statute preempted the IIED claim as a matter of law.

The statute of limitations and contract issues are discussed elsewhere in this outline.

Farmers Coop v. Stanley & Elwood, 00-0278
(Iowa Ct. App. December 12, 2001)

Plaintiffs filed suit against their lending institution alleging negligent supervision, breach of fiduciary duty and intentional interference with contracts when the lending officer embezzled funds from plaintiffs and the plaintiffs and lending institution subsequently could not reach an agreement to continue financing plaintiffs' farming operation. The court affirmed the district court's dismissal of all plaintiffs' claims but reversed and remanded for a new trial on the contractual interference claim.

B. Interference with Prospective Business Relationships

Graves v. Iowa Lakes Comm. College, 639 N.W.2d 22
(Iowa January 24, 2002)

FACTS

Kathy Graves started working for Iowa Lakes Community College in September 1994 as a coordinator for the Women Work project. The project was designed to provide low-income women with the skills necessary to return to the workforce. Graves was responsible for all aspects of the program under the supervision of Linda Wiegman. Wiegman reported to Dale Simon, dean of the Estherville campus. Tom Herbst was the human resources director.

Graves was initially successful with the program. Wiegman, however, was not satisfied with Graves work. Apparently Graves was not aware of Wiegman's negative evaluations until Graves learned that the college would not renew her contract. Graves pursued a grievance pursuant to the college's handbook. When that process finished, Graves sued for negligent supervision, defamation, tortious breach of contract, interference with prospective business advantage and breach of contract.

A jury found the college liable for $1200.00 in nominal damages. Jury awarded punitive damages against the individual defendants. The district court vacated the punitive damages award and ordered a new trial. Graves appealed and defendants cross-appealed. The Iowa Supreme Court affirmed the trial court.

HOLDING AND ANALYSIS

First, the court held Graves' negligent supervision claim could not go forward because she did not allege any physical harm. A third party claim against an employer who breached a duty of reasonable care in supervising an employee only extends to circumstances where the employee posed a physical threat to the public.

Second, the court affirmed dismissal of Graves' claim for interference with prospective business relationships because Graves' evidence did not show that defendants had an improper purpose to financially injure or destroy her.

Third, the court determined the trial court did not err in submitting the uniform defamation jury instruction that requires a showing that the statements "injury the plaintiff in the maintenance of her occupation." Graves argued that in *Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994), the court used the word "affect" instead of "injure," and the trial court should have substituted "affect." The court held that using the word "affect" in *Lara* was not intended to allow recovery in a defamation action where the plaintiff suffered no injury. The court noted that the use of the word "affect" after *Lara* should connote "adverse affect."

The breach of contract and damages issues are addressed elsewhere in this outline.

C. False Imprisonment

Rife v. D.T. Corner, 6412 N.W.2d 761 (Iowa February 27, 2002)

FACTS

Gene Rife and Steven Johnson met at a bar after work on August 13, 1998. They shared three pitchers of beer then went to the Court Avenue district in downtown Des Moines. They chose to visit a night club called Papa's Planet owned by D.T. Corner, Inc. Rife and Johnson entered the club without paying the five dollar cover charge. A bouncer approached the pair, asking them to return to the entrance to pay the cover charge. The bouncer also summoned security personnel from Centurion Security Services, Inc., with whom Papa's Planet contracted for additional security.

Rife and Johnson returned to the entrance of Papa's Planet where two Centurion security officers met them and three Papa's Planet employees met them. As Rife walked out, he allegedly lowered his shoulder into an employee's back. Rife also complained about the manner in which he was being treated, pointing a finger and shouting profanities. A scuffle ensued among the Papa's Planet employees, security officers and Rife. Eventually one of the security officers sprayed pepper spray on Rife. Afterwards, Rife ran from Papa's Planet. Several night club employees and two security officers pursued Rife. Matt Wharff, a Papa's Planet employee, caught up with Rife and a security officer placed handcuffs on him. They detained Rife until law enforcement officers arrived. Rife was never charged with a crime.

Rife sued Papa's Planet and Centurion for assault, battery and false imprisonment. Papa's Planet claimed affirmative defenses of acquiescence, assumption

of the risk, defense of property and business invitees. One week prior to the trial, defendants filed motions for leave to amend their answers to add citizens' arrest and self-defense as affirmative defenses. The district court granted motion for leave to amend.

At the close of evidence, Rife moved for a directed verdict on the false imprisonment claim, arguing that defendants failed to show that Wharff witnessed Rife committing a public offense, a predicate for a citizen's arrest defense. Rife also moved for a directed verdict on the assault and battery claim, arguing that the affirmative defense of self-defense was not available to the defendants because Rife retreated after his alleged assault. The district court overruled Rife's directed verdict motions. The court instructed on false imprisonment and the affirmative defense of citizen's arrest. The jury found in favor of both defendants. Rife filed a motion for judgment notwithstanding the verdict on the false imprisonment theory but did not raise his claim for directed verdict on the assault and battery theories. The district court denied Rife's post-trial motion. On appeal, Rife claimed the district court abused its discretion in allowing the defendants to amend their answers. Rife also alleged error in the district court's denial of his motion for directed verdict and motion for judgment notwithstanding the verdict.

The Court of Appeals reversed and remanded for a new trial against Papa's Planet on the false imprisonment claim. The Court of Appeals found Papa's Planet did not introduce evidence on each element of the citizen's arrest affirmative defense. In particular, the Court of Appeals found there was insufficient evidence to show that Wharff observed Rife commit a public offense.

Papa's Planet petitioned for further review. The Supreme Court vacated the Court of Appeals' decision and affirmed the district court's judgment.

HOLDING AND ANALYSIS

First, the supreme court determined the trial court was within its discretion to allow the defendants to amend their answers to include the defense of citizen's arrest. The facts giving rise to the citizen's arrest defense were identical to those for the plaintiff to establish his theory of false arrest. The court also found that the plaintiff was on notice of this defense from testimony in a pretrial deposition. Further, Rife failed to request a continuance of the trial; the court found that the failure to request a continuance mitigates the claim that the amendment deprived the plaintiff of the opportunity to adequately prepare for trial.

Second, the court found that the defendants submitted enough evidence on the citizen's arrest defense. The court found that although the record did not have facts to show whether Wharff witnessed a public offense, the record did include sufficient evidence to support a finding that Rife committed one or more public offenses. At trial,

the defendants introduced evidence that Wharff was an employee of Papa's Planet and worked in the area where the fight broke out. The defendants also had evidence that Wharff joined in the chase along with other employees and security personnel. Most importantly, Rife acknowledged that the employees and security officers were acting in concert. Thus, the court found that the defendants met the test that the public offense must be committed in the citizen's presence.

Rife also argued that the defendants failed to produce enough evidence that they informed him of their intent to arrest him and the reasons for their arrest. The court found that the defendants were excused from this requirement because Rife was actually engaged in the commission of an offense at the time. Further, Rife ran from the premises, which took away the defendants' time or opportunity to announce their intentions.

The court affirmed the jury's verdict and the district court's judgment.

Turner v. Holbrook, 278 F.3d 754 (8th Cir. February 1, 2002)

FACTS

Ginger Turner is a United States postal service employee in Coralville and Iowa City, Iowa. On August 13, 1998, Turner sustained a lower back injury in a work-related incident. Five days later she reported the injury to her employer. The day after her report, she visited the doctor. The doctor diagnosed her with a low back sprain. The doctor instructed Turner not to return to work until after August 31, 1998. Prior to the incident, Turner had planned vacation for August 22 through 30. After the accident, Turner's supervisor, Jeri Holbrook, sent Turner a workers' compensation form to fill out and return. Turner did not respond to Holbrook nor return the form.

Suspicious that Turner faked the injury in order to leave early for vacation, Holbrook requested an internal investigation of Turner's claim. During the first interview, Turner said she did not go on vacation because of the injury. Turner had, in fact, been in Arkansas during the time she was off work. At a second interview, Turner brought a union steward and refused to answer any questions.

The Postal Service terminated Turner. She later regained her position through administrative procedures.

Turner brought a Bivens claim against the investigators, false arrest, malicious prosecution and abuse of process claims against the United States, and a promissory estoppel claim against Holbrook. Turner based her promissory estoppel claim on the ground that Holbrook promised Turner she would have no additional problems with the time off work if she changed her August leave request to workers' compensation leave instead of annual leave.

The district court granted the defendants' motion to dismiss on the constitutional tort and promissory estoppel claims. Turner appealed and the eighth circuit affirmed.

HOLDING AND ANALYSIS

First, the court determined that Turner's access to a comprehensive administrative scheme to remedy her grievance precluded her Bivens claims alleging a violation of her Fourth Amendment rights.

Similarly, the court found Iowa's comprehensive grievance proceedings under Iowa Code chapter 400 precluded Turner's promissory estoppel claim against Holbrook.

Finally, the court held that Turner's false arrest and false imprisonment claims pursuant to the Federal Tort Claims Act were not actionable as a matter of law. The court noted that Turner was involved in a five-minute interview and a twenty-minute interview. The possibility of workers' compensation fraud was a sufficient basis for her employer to question Turner. Turner was free to terminate either interview at any time and she exercised her option not to speak during the second interview.

Winckel v. Von Maur, Inc., 00-1272 (Iowa Ct. App. December 28, 2001)

The Linn County Attorney's office dismissed Von Maur's shoplifting allegations against Winckel. Winckel filed a civil suit against Von Maur for false imprisonment, defamation and malicious prosecution. The jury found for Winckel. The court of appeals affirmed in part and reversed in part, finding (1) Von Maur failed to preserve error on its challenge to the false imprisonment instruction; (2) the jury's finding of actual malice on the defamation claim made the district court's failure to give a qualified privilege instruction harmless; (3) finding insufficient evidence that Von Maur induced the criminal charges and dismissing the malicious prosecution claim; and (4) finding sufficient evidence to submit the punitive damages claim.

D. Breach of Fiduciary Duty

Weltzin v. Cobank, 633 N.W.2d 290 (Iowa September 6, 2001)

FACTS

A shareholder class, including Roger Weltzin, Arnold Noe, and Roland Riensche of the La Porte City Cooperative Elevator (Co-op), sued Cobank, ACB ("Cobank"), a federally chartered lending institution, and Kenneth Grant, a loan officer of Cobank. The

shareholders alleged defendants were negligent and breached their fiduciary duty in dealings with the Co-op.

On July 6, 1995, Cobank entered into a master loan agreement with the Co-op. Approximately one year later, Grant wrote to the Co-op regarding the Co-op's failure to comply with loan covenants regarding fixed asset purchases and working capital. Grant discussed the Co-op's financial position with its manager, Michael Nail, and the Co-op's directors. Grant offered the Co-op an opportunity to rebuild its working capital through a term revolving loan. Later in 1996 and into 1997, Nale made a series of speculative trades in the Chicago Board of Trade on behalf of the Co-op. The trades left the Co-op with serious financial problems and violated the Co-op's grain merchandising risk management policy. On the advice of Grant and Cobank, the Co-op elected to sell its assets to East Central Iowa Cooperative.

The shareholders filed a shareholder-derivative action against Cobank and Grant. The district court granted the defendants' summary judgment motion on the basis that the defendants had no duty to the Co-op regarding the alleged acts of misfeasance and nonfeasance. The Supreme Court affirmed.

HOLDING AND ANALYSIS

Initially, the court rejected the plaintiff's arguments that the district court did not adhere to the applicable rules of law and procedure and ruling on the defendants' summary judgment motion. The Supreme Court dismissed that contention.

With regard to the substantive issue of whether a fiduciary duty existed, the court concluded that a fiduciary duty did not exist between the defendants and the Co-op. The court noted that while a fiduciary relationship may exist between banks and borrowers, the court will not automatically impose a fiduciary duty on such a relationship.

The specific allegations against the defendants were that they: (1) failed to analyze the records received from the Co-op; (2) failed to note discrepancies regarding grain transactions and the Co-op's quarterly reports; (3) failed to seek additional financial information that was required to evaluate the Co-op's financial condition; and (4) failed to notify the officers and directors of the Co-op of its true financial situation. Without further explanation, the court concluded that no fiduciary relationship existed between the bank and the Co-op. Further, the court concluded that under the Restatement (Second) of Torts § 315 (1965), the defendants had no special relationship with the Co-op so as to create a duty to prevent a third person to cause harm to the Co-op. The Co-op suffered harm from the acts of its manager, not Cobank.

The plaintiffs also asserted an act of positive of misfeasance on the defendants' part. Plaintiffs asserted that the defendants unduly pressured and influenced the Co-op to sell its assets to East Central Iowa Cooperative. The court noted that the lack of a

fiduciary relationship would not excuse the defendants' positive misfeasance; defendants had a duty not to exert improper pressure on the Co-op. The court concluded from a review of the pleadings, depositions, answers to interrogatories, and admissions, and affidavits, that the decision to sell assets to East Central Iowa Cooperative was a voluntary act on the Co-op's part prompted by the poor financial situation the Co-op found itself in. Thus, summary judgment was proper for the defendants.

Farmers Coop v. Stanley & Elwood, 00-0278
(Iowa Ct. App. December 12, 2001)

Plaintiffs filed suit against their lending institution alleging negligent supervision, breach of fiduciary duty and intentional interference with contracts when the lending officer embezzled funds from plaintiffs and the plaintiffs and lending institution subsequently could not reach an agreement to continue financing plaintiffs' farming operation. The court affirmed the district court's dismissal of all plaintiffs' claims but reversed and remanded for a new trial on the contractual interference claim.

E. Defamation

Caveman Adventures UN v. Press-Citizen, 633 N.W.2d 757
(Iowa September 5, 2001)

FACTS

This defamation action arose out of competing advertisements in the Iowa City Press-Citizen. Initially, Caveman Adventures UN, the Electronics Cave, ran an ad in the Press-Citizen featuring 8 mm camcorders. The advertisement asserted that the 8 mm camcorders were much more desirable, for a variety of reasons, than camcorders using a VHS technology. A competing store, Woodburn Electronics, Inc., responded to the Electronics Cave advertisement with its own ad in the Press-Citizen. The Woodburn ad referred to the Electronics Cave by name and alleged that the Electronics Cave advertisement regarding the 8 mm camcorders was misleading. The Press-Citizen employee who received the ad sought approval for it; the newspaper publisher ultimately approved the Woodburn ad for publication.

In its opinion, the Supreme Court reprinted the text of the Woodburn ad. Essentially, the ad pointed out numerous positive features of the VHS camcorders and characterized these features as "truths" that the Electronics Cave "forgot" to include in its earlier advertisement. The ad ended with the following statements: "The more misinformed and confused a consumer is, the more units [the Electronics Cave] sell[s]. *Come to the store that will give you the facts!!*"

The Press-Citizen refused to print a retraction at Electronics Cave's request. In a separate action, Electronics Cave obtained a judgment for $30,000 in actual damages against Woodburn Electronics. In the action against the Press-Citizen, the Electronics Cave did not assert any additional actual damages but sought punitive damages. The jury awarded the Electronics Cave $240,000 in punitive damages. The Supreme Court reversed the jury's verdict.

HOLDING AND ANALYSIS

The court first discussed the definition of actual malice, which the plaintiff is required to prove against a media defendant. The United States Supreme Court has held that actual malice means knowledge of falsity or reckless disregard for the truth. The Iowa Supreme Court defined actual malice as "ill-will, hatred or desire to do another harm." The trial court in the Press-Citizen case instructed the jury based on the definition from the United States Supreme Court. Because neither party challenged the jury instructions in that regard, the Iowa Supreme Court did not resolve this discrepancy and evaluated the case based on the federal definition.

The court disagreed with the plaintiff's three arguments for finding the Press-Citizen acted with actual malice: (1) the newspaper's advertising manager testified that she believed Woodburn's advertisement accused the Electronics Cave of trying to defraud the public; (2) the Press-Citizen ran the advertisement despite its established policy of not printing "attack advertisements;" and (3) the Press-Citizen intended that running the Woodburn ad would cause Electronics Cave to run a responsive advertisement. The court extrapolated from the principal that a seller is not accountable for a certain amount of "puffery." The court held that the Press-Citizen had not evaluated the ads from either the Electronics Cave or Woodburn Electronics to know which was closer to the truth. Thus, printing Woodburn's attempts to counter the puffery of the Electronics Cave did not rise to the level of reckless conduct or actual malice. In its holding, the court noted that the actual malice standard is purely subjective.

Graves v. Iowa Lakes Comm. College, 639 N.W.2d 22 (Iowa January 24, 2002)

FACTS

Kathy Graves started working for Iowa Lakes Community College in September 1994 as a coordinator for the Women Work project. The project was designed to provide low-income women with the skills necessary to return to the workforce. Graves was responsible for all aspects of the program under the supervision of Linda Wiegman. Wiegman reported to Dale Simon, dean of the Estherville campus. Tom Herbst was the human resources director.

Graves was initially successful with the program. Wiegman, however, was not satisfied with Graves work. Apparently Graves was not aware of Wiegman's negative evaluations until Graves learned that the college would not renew her contract. Graves pursued a grievance pursuant to the college's handbook. When that process finished, Graves sued for negligent supervision, defamation, tortious breach of contract, interference with prospective business advantage and breach of contract.

A jury found the college liable for $1200.00 in nominal damages. Jury awarded punitive damages against the individual defendants. The district court vacated the punitive damages award and ordered a new trial. Graves appealed and defendants cross-appealed. The Iowa Supreme Court affirmed the trial court.

HOLDING AND ANALYSIS

Third, the court determined the trial court did not err in submitting the uniform defamation jury instruction that requires a showing that the statements "injury the plaintiff in the maintenance of her occupation." Graves argued that in *Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994), the court used the word "affect" instead of "injure," and the trial court should have substituted "affect." The court held that using the word "affect" in *Lara* was not intended to allow recovery in a defamation action where the plaintiff suffered no injury. The court noted that the use of the word "affect" after *Lara* should connote "adverse affect."

Winckel v. Von Maur, Inc., 00-1272 (Iowa Ct. App. December 28, 2001)

The Linn County Attorney's office dismissed Von Maur's shoplifting allegations against Winckel. Winckel filed a civil suit against Von Maur for false imprisonment, defamation and malicious prosecution. The jury found for Winckel. The court of appeals affirmed in part and reversed in part, finding (1) Von Maur failed to preserve error on its challenge to the false imprisonment instruction; (2) the jury's finding of actual malice on the defamation claim made the district court's failure to give a qualified privilege instruction harmless; (3) finding insufficient evidence that Von Maur induced the criminal charges and dismissing the malicious prosecution claim; and (4) finding sufficient evidence to submit the punitive damages claim.

F. False Information in Business Transaction

Vogel v. Foth & Van Dyke Associates, Inc., 266 F.3d 838
(8th Cir. September 17, 2001)

FACTS

Kenneth and Lea Vogel own land in Iowa which they wanted to convert to a residential subdivision. Bluestem Solid Waste Management Agency hired Foth and Van Dyke, an engineering and consulting firm, to conduct a search for a new landfill site in Linn County, Iowa. Foth and Van Dyke selected a parcel of real estate abutting the Vogels' property as a finalist for the new landfill. The Vogels alleged Foth and Van Dyke negligently conducted the search for the landfill site. They alleged their property value immediately declined after Foth and Van Dyke's announcement. The Vogels allege that under Iowa law, the suggested landfill site was prime farm land, which could not be used for a landfill.

Foth and Van Dyke removed the action to federal court on the basis of diversity jurisdiction. Foth and Van Dyke moved to dismiss the Vogels' action for failure to state a claim upon which relief could be granted and lack of ripeness. The court granted the motion.

HOLDING AND ANALYSIS

First, the court disposed of the defendant's claim that the plaintiffs' lawsuit was not ripe. The court found that the announcement of the neighboring land as a potential site immediately made their property less valuable and drove away potential purchasers.

Second, the court found that Foth and Van Dyke did not owe a duty to the plaintiffs under Restatement (Second) of Torts § 552 (1977). The court found that although Foth and Van Dyke may have provided false information to Bluestem regarding the proposed landfill, that action did not create a duty to the Vogels. Under section 552, the duty to refrain from supplying false information in business transactions only applies to the person or group of persons for whose benefit the information is supplied. Foth and Van Dyke never supplied information to the plaintiffs, nor did the plaintiffs rely on any information Foth and Van Dyke supplied. Thus, the court affirmed the district court's dismissal of the plaintiffs' claim against Foth and Van Dyke.

G. Negligent Supervision

Graves v. Iowa Lakes Comm. College, 639 N.W.2d 22 (Iowa January 24, 2002)

FACTS

Kathy Graves started working for Iowa Lakes Community College in September 1994 as a coordinator for the Women Work project. The project was designed to provide low-income women with the skills necessary to return to the workforce. Graves was responsible for all aspects of the program under the supervision of Linda Wiegman. Wiegman reported to Dale Simon, dean of the Estherville campus. Tom Herbst was the human resources director.

Graves was initially successful with the program. Wiegman, however, was not satisfied with Graves work. Apparently Graves was not aware of Wiegman's negative evaluations until Graves learned that the college would not renew her contract. Graves pursued a grievance pursuant to the college's handbook. When that process finished, Graves sued for negligent supervision, defamation, tortious breach of contract, interference with prospective business advantage and breach of contract.

A jury found the college liable for $1200.00 in nominal damages. Jury awarded punitive damages against the individual defendants. The district court vacated the punitive damages award and ordered a new trial. Graves appealed and defendants cross-appealed. The Iowa Supreme Court affirmed the trial court.

HOLDING AND ANALYSIS

First, the court held Graves' negligent supervision claim could not go forward because she did not allege any physical harm. A third party claim against an employer who breached a duty of reasonable care in supervising an employee only extends to circumstances where the employee posed a physical threat to the public.

Farmers Coop v. Stanley & Elwood, 00-0278 (Iowa Ct. App. December 12, 2001)

Plaintiffs filed suit against their lending institution alleging negligent supervision, breach of fiduciary duty and intentional interference with contracts when the lending officer embezzled funds from plaintiffs and the plaintiffs and lending institution subsequently could not reach an agreement to continue financing plaintiffs' farming operation. The court affirmed the district court's dismissal of all plaintiffs' claims but reversed and remanded for a new trial on the contractual interference claim.

H. False Arrest

Turner v. Holbrook, 278 F.3d 754 (8th Cir. February 1, 2002)

FACTS

Ginger Turner is a United States postal service employee in Coralville and Iowa City, Iowa. On August 13, 1998, Turner sustained a lower back injury in a work-related incident. Five days later she reported the injury to her employer. The day after her report, she visited the doctor. The doctor diagnosed her with a low back sprain. The doctor instructed Turner not to return to work until after August 31, 1998. Prior to the incident, Turner had planned vacation for August 22 through 30. After the accident, Turner's supervisor, Jeri Holbrook, sent Turner a workers' compensation form to fill out and return. Turner did not respond to Holbrook nor return the form.

Suspicious that Turner faked the injury in order to leave early for vacation, Holbrook requested an internal investigation of Turner's claim. During the first interview, Turner said she did not go on vacation because of the injury. Turner had, in fact, been in Arkansas during the time she was off work. At a second interview, Turner brought a union steward and refused to answer any questions.

The Postal Service terminated Turner. She later regained her position through administrative procedures.

Turner brought a Bivens claim against the investigators, false arrest, malicious prosecution and abuse of process claims against the United States, and a promissory estoppel claim against Holbrook. Turner based her promissory estoppel claim on the ground that Holbrook promised Turner she would have no additional problems with the time off work if she changed her August leave request to workers' compensation leave instead of annual leave.

The district court granted the defendants' motion to dismiss on the constitutional tort and promissory estoppel claims. Turner appealed and the eighth circuit affirmed.

HOLDING AND ANALYSIS

Finally, the court held that Turner's false arrest and false imprisonment claims pursuant to the Federal Tort Claims Act were not actionable as a matter of law. The court noted that Turner was involved in a five-minute interview and a twenty-minute interview. The possibility of workers' compensation fraud was a sufficient basis for her employer to question Turner. Turner was free to terminate either interview at any time and she exercised her option not to speak during the second interview.

I. Intentional Infliction of Emotional Distress

Grimm v. US West Communications, 644 N.W.2d 8 (Iowa May 8, 2001)

FACTS

US West discharged Kristin Grimm, a directory assistance operator, in March 1997. Grimm, a homosexual, alleged US West subjected her to a hostile work environment. Grimm initially filed suit under the Labor Management Relations Act in federal court and added state tort claims of interference with contractual relationship and intentional infliction of emotional distress (IIED). Grimm failed to file her LMRA complaint within the required six month time period so the federal court dismissed Grimm's state claims without prejudice. When Grimm filed her state tort claims in state court, US West removed the case to federal court, alleging the LMRA preempted the state claims. The federal court remanded the case back to state court. The state court granted US West's motion to dismiss and the supreme court reversed and remanded.

HOLDING AND ANALYSIS

The court also found that Grimm's IIED claim survived defendant's motion to dismiss. The LMRA does not preempt this claim as a matter of law. The court also held that neither the Iowa Civil Rights Statute and the workers' compensation statute preempted the IIED claim as a matter of law.

J. Nuisance

Martins v. Interstate Power Co., 00-0791, (Iowa Ct. App. April 10, 2002)

The court affirmed a $700,000 jury verdict in favor of dairy farmer who alleged damages to their dairy herd from stray voltage caused by Interstate Power Company's substation. The plaintiffs' alleged the power company's conduct constituted a nuisance. The court agreed over Interstate's argument that the court was essentially imposing a strict liability standard on it.

K. Malicious Prosecution

Winckel v. Von Maur, Inc., 00-1272 (Iowa Ct. App. December 28, 2001)

The Linn County Attorney's office dismissed Von Maur's shoplifting allegations against Winckel. Winckel filed a civil suit against Von Maur for false imprisonment, defamation and malicious prosecution. The jury found for Winckel. The court of appeals affirmed in part and reversed in part, finding (1) Von Maur failed to preserve error on its challenge

to the false imprisonment instruction; (2) the jury's finding of actual malice on the defamation claim made the district court's failure to give a qualified privilege instruction harmless; (3) finding insufficient evidence that Von Maur induced the criminal charges and dismissing the malicious prosecution claim; and (4) finding sufficient evidence to submit the punitive damages claim.

VII. MISCELLANEOUS CASES OF INTEREST

A. Preemption – Comprehensive Remedial Schemes

Turner v. Holbrook, 278 F.3d 754 (8th Cir. February 1, 2002)

FACTS

Ginger Turner is a United States postal service employee in Coralville and Iowa City, Iowa. On August 13, 1998, Turner sustained a lower back injury in a work-related incident. Five days later she reported the injury to her employer. The day after her report, she visited the doctor. The doctor diagnosed her with a low back sprain. The doctor instructed Turner not to return to work until after August 31, 1998. Prior to the incident, Turner had planned vacation for August 22 through 30. After the accident, Turner's supervisor, Jeri Holbrook, sent Turner a workers' compensation form to fill out and return. Turner did not respond to Holbrook nor return the form.

Suspicious that Turner faked the injury in order to leave early for vacation, Holbrook requested an internal investigation of Turner's claim. During the first interview, Turner said she did not go on vacation because of the injury. Turner had, in fact, been in Arkansas during the time she was off work. At a second interview, Turner brought a union steward and refused to answer any questions.

The Postal Service terminated Turner. She later regained her position through administrative procedures.

Turner brought a Bivens claim against the investigators, false arrest, malicious prosecution and abuse of process claims against the United States, and a promissory estoppel claim against Holbrook. Turner based her promissory estoppel claim on the ground that Holbrook promised Turner she would have no additional problems with the time off work if she changed her August leave request to workers' compensation leave instead of annual leave.

The district court granted the defendants' motion to dismiss on the constitutional tort and promissory estoppel claims. Turner appealed and the eighth circuit affirmed.

HOLDING AND ANALYSIS

First, the court determined that Turner's access to a comprehensive administrative scheme to remedy her grievance precluded her Bivens claims alleging a violation of her Fourth Amendment rights.

Similarly, the court found Iowa's comprehensive grievance proceedings under Iowa Code chapter 400 precluded Turner's promissory estoppel claim against Holbrook.

B. Substantial Evidence

Brown v. United Presbyterian Home, 00-1663 (Iowa Ct. App. January 28, 2002)

Court concluded substantial evidence supported ruling in favor of defendant where two-year-old broke her leg when she fell out of a swing at a day care center. The fact that the court's ruling did not refer to alleged admissions of inadequate supervision on the part of the day care center's director did not undermine other substantial evidence in support of the court's ruling.

Jordan v. Neff, 01-0310 (Iowa Ct. App. December 28, 2001)

The court affirmed a verdict in favor of a defendant motorist, Neff. The defendant had moved into the right-hand lane from the left and forced the car Steve Warner was driving in the right-hand lane onto the curb. The plaintiff, Jordan, was following Warner and subsequently collided with Neff's car once he was in the right lane. The court found substantial evidence supported the jury's verdict that Neff was not negligent with respect to Jordan's collision.

C. Return of Service, Rule 252

Gutierrez v. WAL-MART Stores, Inc., 638 N.W.2d 702 (Iowa January 24, 2002)

FACTS

Sylvia Gutierrez brought suit against Wal-Mart Stores, Inc. for injuries she claimed she suffered when a display box of rugs toppled over onto her. Gutierrez actually filed suit against "WALMART" instead of "Wal-Mart Stores, Inc." The return of service affidavit filed by Bi-State Legal and Court Service indicated it had served "WALMART" by serving a copy of the petition and original notice on "Dan Ellis (Asst. Mgr.)" on July 30, 1997.

Wal-Mart Stores, Inc. (WMSI) answered and raised the statute of limitations affirmative defense because Gutierrez sued neither the defendant in its correct corporate name, nor served its registered agent before the statute of limitations expired. Prior to trial, Gutierrez did not amend her petition to name Wal-Mart Stores, Inc. At the close of evidence, WMSI moved for directed verdict, arguing that the proper party had not been served within the limitations period. Gutierrez then moved to amend her petition to conform to the proof concerning the corporation's correct name.

The district court found that the corporation could be sued under its trade name and no prejudice had resulted to WMSI. In a former rule 179(b) motion, WMSI challenged the court's ruling, arguing that Gutierrez failed to prove she served anyone, let alone WMSI or its authorized representative.

The Court of Appeals handled the initial appeal. That court determined that the district court abused its discretion by permitting Gutierrez's amendment to conform to the proof. It remanded the case for further findings on the record that service on "Dan Ellis (Asst. Mgr.)" was sufficient to give WMSI notice.

On remand, WMSI argued there was no evidence in the record from which the court could conclude Dan Ellis was a general or managing agent of WMSI. The district court found that the return of service affidavit was *prima facie* evidence of Dan Ellis' position within WMSI and that WMSI had the burden to disprove that *prima facie* evidence. The district court relied on evidence from other WMSI employees and their familiarity with the lawsuit to conclude that Ellis, as an assistant manager, met the definition of managing agent in Rule 56.1(f). The supreme court affirmed.

In a companion appeal, WMSI challenged the trial court's dismissal of its petition to vacate judgment under Iowa Rule of Civil Procedure 252. While the case was on appeal to the Iowa Court of Appeals, WMSI discovered Gutierrez had submitted medical evidence after the case had been submitted to the court. WMSI discovered the additional evidence while it was preparing the appendix for the appeal. WMSI filed a petition to vacate the judgment based on the ex parte evidence.

Gutierrez resisted the petition, claiming the district court was without jurisdiction to consider the petition while the judgment was on appeal. The district court agreed and dismissed the petition. The supreme court reversed and remanded on this issue.

HOLDING AND ANALYSIS

With regard to the return of service issue, the supreme court noted that Iowa Rule of Civil Procedure 59(a) provides that proof of service may be made by affidavit if the process server is someone other than a sheriff or deputy sheriff. The court cited a number of old cases for the principal that return of service affidavits have presumptive

validity and can only be disproved upon clear and convincing evidence. Thus, the supreme court found that it was WMSI's burden to disprove Gutierrez's return of service affidavit on "WALMART." The court concluded that WMSI's hearsay objections to the court's reliance and the return of service affidavit was contrary to Rule 59(a) which provides that return of service shall be proved by affidavit.

The court also found that there was sufficient evidence in the record to show that an assistant manager could serve as a managing agent for purposes of service under Rule 56.1(f). In particular, the court noted that a WMSI employee stated an assistant manager's duty is "to walk in the shadow of the store manager's shoes … just learn what he's doing and basically do his job." The court concluded that it was reasonable to infer an assistant manager's position with WMSI was of sufficient character and rank to place the service of notice in the proper corporate hands.

As to the second issue, the court held that a petition to vacate under Rule 252 is an independent action from the right to appeal. Despite the fact that WMSI's petition to vacate went to the heart of the matter on appeal, the district court should have considered WMSI's petition. The court reversed and remanded for WMSI's petition to be heard.

IOWA APPELLATE COURT UPDATE

2001-2002

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•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

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APPELLATE AND CIVIL PROCEDURE

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1. APPELLATE PROCEDURE - CITING UNPUBLISHED OPINIONS IN BRIEFS

Iowa R. App. P. 6.14(5) (2002).

Old Rule: Unpublished decisions were not to be cited in appellate briefs.

New Rule: Now, "[a]n unpublished opinion of the Iowa appellate courts or of any other appellate courts may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority." An unpublished opinion is a decision that is not reported in the West National Reporter System.

Analysis: Rule requires:

(1) A copy of the unpublished opinion to be attached to the brief.

(2) An affidavit by counsel certifying that he/she has conducted diligent research, and fully disclosed any subsequent disposition of the unpublished decision.

(3) An electronic citation indicating where the opinion may be readily accessed.

2. APPELLATE PROCEDURE - ROUTING STATEMENT

Iowa R. App. P. 6.14(1)(e) (2002).

Old Rule: Prior to the adoption of this rule, there was no requirement to include a routing statement in an appellate brief.

New Rule: Under the new rule, a routing statement must be included in all appellate briefs.

Analysis: The routing statement must indicate whether the case should be retained by the supreme court or be transferred to the court of appeals using the criteria in Iowa R. App. P. 6.401 offering guidelines for the transfer of cases to the court of appeals.

3. APPELLATE PROCEDURE - CITATION OF COURT RULES IN BRIEFS

Iowa R. App. P. 6.14(5) (2002).

Old Rule: Prior to the adoption of this rule, there were no specific criteria concerning the citation of Iowa court rules in appellate briefs.

New Rule: Under the new rule, when citing the Iowa Court Rules, parties must use:

- "Iowa R. Civ. P." when citing the Iowa Rules of Civil Procedure;

- "Iowa R. Crim. P." when citing the Iowa Rules of Criminal Procedure;

- "Iowa R. Evid." when citing the Iowa Rules of Evidence;

- "Iowa R. App. P." when citing the Iowa Rules of Appellate Procedure;

- "Iowa Code of Prof'l Responsibility" when citing the Iowa Code of Professional Responsibility; and

- "Iowa Code of Judicial Conduct" when citing the Iowa Code of Judicial Conduct;

- "Iowa Ct. R." when citing all other Iowa Court Rules.

4. APPELLATE PROCEDURE - TYPE OF FONT TO BE USED IN APPELLATE BRIEFS

Iowa R. App. P. 6.16(1) (2002).

Old Rule: Each line of an appellate brief could not contain more than 60 characters on average, including spaces.

New Rule: Type must be no smaller than pica type (averaging no more than ten characters per inch) OR in a 12 point Arrus BT, 12 point Arial, 12 point Courier New, 13 point Times New Roman, or substantially equivalent typeface.

5. APPELLATE PROCEDURE - DISMISSALS FOR FAILURE TO PROSECUTE APPEAL WILL NOW BE AUTOMATICALLY SENT TO THE BOARD OF PROFESSIONAL ETHICS

Iowa R. App. P. 6.19(3) (2002).

Old Rule: Prior to the adoption of this rule, there was no requirement for the court to provide notice to the Iowa Supreme Court Board of Professional Ethics or to the State Public Defender's office that an appeal had been dismissed for want of prosecution.

New Rule: Under the new rule, following an appeal's dismissal for want of prosecution, the clerk of the supreme court will forward certified copies of the docket, the notice of default which resulted in dismissal, and the order of dismissal to the Iowa Supreme Court Board of Professional Ethics and, in criminal cases, to the State Public Defender.

6. CIVIL PROCEDURE - RENMBERING OF THE IOWA RULES OF CIVIL PROCEDURE

In 1995, the Legislative Service Bureau made a suggestion to the Iowa Supreme Court to renumber all of the Iowa Rules. According to the Legislative Service

Bureau, the old rule numbering system was outdated and difficult to format for incorporation into an electronic format. Under the old renumbering system, it was very hard to link the rules together using hyperlinks over the Internet.

On November 9, 2001, the Supreme Court renumbered many of the Iowa Rules of Court. This was done without any recommendations or oversight by the Supreme Court Advisory Committee on Rules of Civil Procedure. The Rule renumbering became effective on February 15, 2002. The Iowa Rules of Evidence were not renumbered in an effort to keep those rule numbers the same as the federal rules.

7. FEDERAL CIVIL PROCEDURE - REMOVAL OF CASES

Brown v. Tokio Marine & Fire Ins. Co., Ltd., 284 F.3d 871 (8th Cir. March 25, 2002).

Facts: Brown was involved in an automobile accident with an underinsured motorist. Brown sued Tokio as her underinsured motorist carrier in state court even though she could have filed a diversity action in federal court pursuant to 28 U.S.C. § 1332. Tokio then filed a third-party claim in the state court action against Toyota for breach of contract. Although more than a year had passed since the commencement of Brown's action against Tokio, Toyota filed a notice of removal of the case to federal court.

Brown claimed removal was improper following the expiration of the one-year deadline prescribed by 28 U.S.C. §1446(b).

Holding: Under 28 U.S.C. §1446(b), the one year deadline for removing a case to federal court applies only to cases that were not removable to federal court when originally filed in a state court.

Analysis: The court based its decision on principles of statutory construction, along with decisions from other circuits applying the deadline only to cases not removable to federal court when originally filed in state court.

8. CIVIL PROCEDURE - MAILING NOTICE OF APPEAL GOVERNED BY STATUTE

George v. Keokuk County Bd. of Supervisors, 644 N.W.2d 307 (Iowa May 8, 2002).

Facts: George, a Vietnam veteran, applied unsuccessfully for a position with Keokuk County. George claimed Iowa Code Chapter 35C entitled him to a hiring preference as a military veteran. George sought to appeal his unsuccessful application in Iowa District Court. However, in doing so, George's counsel merely mailed George's notice of appeal to the county board of supervisors without having it formally served in the manner of service prescribed for an original notice. Iowa Code § 35C.5 states in part: "[t]he appeal shall be made by serving upon the appointing board… written notice of the such appeal." The district court dismissed the appeal because it was simply mailed, as opposed to being formally served. George appealed the district court's decision.

Holding: Mailing a notice of appeal of a military preference under Iowa Code Chapter 35C is insufficient if sent by mail. Instead, it must be formally served in the same manner prescribed for the service of original notices.

Analysis: George argued that, since the statute is silent about how the to serve a notice of appeal under Chapter 35C, service by mail should suffice. The district and supreme courts disagreed with George's analysis. Rule 1.442 does not apply to Chapter 35C since the Rule only applies to notices and other papers "required by these rules [of civil procedure]." The court determined that service of a notice of appeal filed under Chapter 35C are not governed by Rule 1.442. Instead, service of a notice of appeal under Chapter 35C is governed by statute.

Note: Although George's Notice of Appeal was merely sent by mail, the Board responded to the Notice in writing following its receipt. George never contended that the Board waived any objection it had to the defective service by responding to his written notice. This suggests the outcome of George's appeal may have been different if he had made a waiver argument on appeal.

9. CIVIL PROCEDURE - DEFINITION OF EXCUSABLE NEGLECT

McElroy v. State of Iowa, 637 N.W.2d 488 (Iowa Dec. 19, 2001).

Facts: McElroy was a graduate assistant at Iowa State University. While on a job-related trip to Russia with her supervisor, Dr. Glass, Glass allegedly sexually harassed McElroy. McElroy filed an action against the State of Iowa and ISU. The Defendants did not file an answer because they were granted a motion for extension of time to move or plead in order that they could prepare a motion to dismiss. McElroy voluntarily dismissed some of her claims, and Defendants subsequently withdrew their motion to dismiss. Following Defendants' withdrawal of their Motion to Dismiss, no Answer or Affirmative Defenses were filed on Defendants' behalf.

On the morning of trial, McElroy's counsel notified Defendants that they had not filed an Answer or affirmative defenses. The Defendants immediately filed a motion for leave to file an Answer and affirmative defenses. McElroy resisted, claiming prejudice and lack of good cause. The trial court allowed the Defendants to file their Answer, including most of the affirmative defenses offered by the Defendants.

Holding: If a defendant can assert reasonable grounds for failing to comply with the applicable time requirements for filing an answer, excusable neglect is satisfied, even if the answer was filed the day of the trial.

Analysis: The court found Defendants' oversight constituted excusable neglect due to several factors, including:

(1) changing of Defendants' counsel several times throughout case,

(2) no motion for default had been filed by McElroy;

(3) Defendants immediately filed an answer to remedy their mistake upon its discovery;

(4) Defendants were not employing a deliberate tactic to delay the litigation;

(5) the case had been fully litigated as if an answer had been on file; and

(6) extensive discovery had been conducted to address most of the affirmative defenses offered by the Defendants.

10. CIVIL PROCEDURE - ATTORNEY-CLIENT PRIVILEGE IN DISCOVERY

City of Coralville v. Iowa Dist. Ct. for Johnson County, 634 N.W.2d 675 (Iowa Oct 10, 2001).

Facts: Brittain Johnson was a police officer for the City of Coralville. In the course of his duties with the city, Johnson arrested a man named Michael Constantino. Constantino sued Johnson and the City of Coralville, claiming Johnson violated Constantino's rights during the arrest. Coralville's insurance carrier, EMC, carried an insurance policy to indemnify Coralville and Johnson. Two meetings were held to discuss the merits of Constantino's case against Johnson and Coralville.

Following the meetings, EMC settled Constantino's case against Coralville and Johnson for the sum of $55,000. Johnson was upset that the case was settled, claiming it had no merit and that it made it appear as though Johnson was admitting wrongdoing. Johnson further claimed the settlement suggested Constantino's case had merit and, had it proceeded to trial, Johnson would have been exonerated. Johnson sued Coralville and EMC for settling Constantino's underlying tort action.

As part of Johnson's discovery in his case against Coralville and EMC, Johnson deposed the individuals present during the two meetings held to discuss the merits of Constantino's case against Coralville and Johnson. Coralville's counsel objected to discovery of those conversations on the grounds that they were protected from by the attorney-client privilege. Johnson obtained an order compelling discovery of Coralville's conversations concerning the merits of Constantino's case against Johnson and Coralville. Coralville's certiorari action to the Iowa Supreme Court followed.

Holding: The sole question was whether the discussions concerning the merits of Constantino's underlying case were protected from discovery by the attorney-client privilege. The court adopted the joint-client exception to the attorney-client privilege and determined the conversations from only one of the two meetings was discoverable.

Analysis: This court adopted the joint-client exception to the attorney-client privilege. That is, when two or more persons (such as an insurer and an insured), each having an interest in some problem, jointly consult an attorney, and later have a fallout, it is clear that the attorney-client privilege is inapplicable.

Since there was no contract of employment between the attorneys and Johnson at the first meeting, and because the attorney had neither filed his appearance yet, nor told the Johnson his communications were protected by the attorney-client privilege, no privilege existed as to this first meeting. The communications at the second meeting in which an appearance had been filed by the attorneys, an attorney-client privilege did apply.

11. CIVIL PROCEDURE - DISMISSAL FOR UNTIMELY SERVICE OF ORIGINAL NOTICE

Meier v. Senecaut III, 641 N.W.2d 532 (Iowa Feb. 27, 2002).

Facts: Meier filed an action arising out of an automobile accident, that initially incorrectly named the Defendant's grandfather as the defendant (The grandfather was named Voltaire Senecaut, and the true Defendant was named Voltaire Senecaut III). Meier tried to serve the Defendant's grandfather on thirteen occasions within 2½ months of filing his petition. After finally locating the Defendant's grandfather in Florida, a sheriff in Florida served process on the grandfather only to determine Meier had named and served the grandfather as the wrong defendant. Meier again tried to serve Defendant's grandfather in Iowa. Defendant's grandfather again notified Meier that he was serving the wrong person. Meier's action naming Defendant's grandfather was ultimately voluntarily dismissed. Then, having discovered he had dismissed a case which, if re-filed, would be beyond the two-year statute of limitations, Meier sought to amend his dismissal and have the case caption clarified to reflect Senecaut III as the proper party. Meier obtained an ex parte order reinstating the case as to Senecaut III.

Meier used white-out to change the address on his first Original Notice and it was finally served upon the proper Defendant nearly 8 months after the Petition was filed. The trial court denied Senecaut III's motions to quash service and to dismiss. Senecaut III sought interlocutory review.

Holding: Good cause was not shown for the delay in service. Meier's action was dismissed.

Analysis: Meier's delay in serving his lawsuit was presumptively abusive under Iowa R. Civ. P. 1.302 providing a party 90 days to serve process or face dismissal. Good cause did not exist for the delay. Meier's repeated efforts to locate the proper Defendant could support some delay in the service of process. However, once Plaintiff's counsel discovered the identity of the proper defendant, there was sufficient delay in his service of the proper defendant to negate any "good cause" that might have otherwise existed.

12. CIVIL PROCEDURE - TIMELINESS OF AFFIRMATIVE DEFENSES

Smith v. Smith, --- N.W.2d ---, 2002 WL 1285888 (Iowa June 12, 2002).

Facts: Shirley Smith, on behalf of her minor child, Levi Smith, sued the child's father, defendant Raymond Smith, for negligent infliction of emotional distress when the child witnessed the death of his younger brother, Eli. Eli died as a result of the defendant backing over him with a van. Throughout a lengthy pretrial process, the plaintiff amended her petition on two occasions. At no time did the defendant raise the issues of subject matter jurisdiction or parental immunity. However, just five days before trial was set to commence, the defendant's attorney filed a brief in which he argued, for the first time, that defendant was entitled to parental immunity. On the first day of trial, while discussing defendant's recently filed brief, the district court granted defendant's oral motion to dismiss. The court rationalized its dismissal on the basis that "it was a matter of subject matter jurisdiction, which may be raised at any time."

Holding: The Supreme Court reversed and remanded, finding that defendant's parental immunity claim was not a matter of subject matter jurisdiction, and consequently procedural rules must be adhered to. Because defendant failed to adhere to those rules, his parental immunity defense was waived, the dismissal was improper, and the case was reinstated for trial.

Analysis: The district court's dismissal for lack of subject matter jurisdiction incorrectly framed this issue in terms of a jurisdictional issue. Defendant did not file his parental immunity defense within the prescribed time period and the affirmative defense was therefore waived.

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COURTS, JURISDICTION AND TRIAL

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1. COURTS/JURISDICTION - PERSONAL JURISDICTION NOT REQUIRED FOR ENTRY OF PROTECTIVE ORDER

Bartsch v. Bartsch, 636 N.W.2d 3 (Iowa Nov. 15, 2001).

Facts: Tara Bartsch filed an application for a protective order against Nathan Bartsch in Jones County District Court in November, 1999. At the time of filing, Tara lived in Iowa and Nathan was a resident of Colorado. The couple was married but separated. Upon receiving Tara's application, the court entered a temporary protective order, and Nathan received notice of the protective order in Colorado. Nathan immediately challenged the order by a motion to dismiss, arguing that he lacked sufficient minimum contacts for personal jurisdiction in Iowa. The court denied his motion to dismiss. Nathan appealed.

Holding: The Iowa Supreme Court affirmed the district court's decision. The Court determined that, although there were insufficient minimum contacts for personal jurisdiction, personal jurisdiction is not required for a court to enter an order preserving the protected status of Iowa residents under Iowa Code §236.

A two Justice dissent voiced strong disagreement with the majority's conclusion that a domestic-abuse order under chapter 236 is merely a status determination. They contend that such an order involves substantial rights of one like Nathan Bartsch and therefore personal jurisdiction is necessary.

Analysis: The court explains that the protective order does not attempt to impose a personal judgment against Nathan, but instead merely preserves the protected status accorded Tara under Iowa's domestic abuse laws. Furthermore, a family relationship "may be among those matters concerning which the forum state may have such an interest that its courts may make an adjudication affecting that relationship, even though one of the parties to that relationship has no personal contact with the forum state." Finally, the court notes that personal jurisdiction is not always required in other like circumstances, including custody and dissolution proceedings.

2. COURTS / JURISDICTION - AFFIRMATIVE DEFENSES AND SUBJECT MATTER JURISDICTION

Smith v. Smith, --- N.W.2d ---, 2002 WL 1285888 (Iowa June 12, 2002).

Facts: Shirley Smith, on behalf of her minor child, Levi Smith, sued the child's father, defendant Raymond Smith, for negligent infliction of emotional distress when the child witnessed the death of his younger brother, Eli. Eli died as a result of the defendant backing over him with a van. Throughout a lengthy pretrial process, the plaintiff amended her petition on two occasions. At no time did the defendant raise the issues of subject matter jurisdiction or parental immunity. However, just five days before trial was set to commence, the defendant's attorney filed a brief in which he argued, for the first time, that defendant was entitled to parental immunity. On the first day of trial, while discussing defendant's recently filed brief, the district court granted defendant's oral motion to dismiss. The court rationalized its dismissal on the basis that "it was a matter of subject matter jurisdiction, which may be raised at any time."

Holding: The Supreme Court reversed and remanded, finding that defendant's parental immunity claim was not a matter of subject matter jurisdiction, and consequently procedural rules must be adhered to. Because defendant failed to adhere to those rules, his parental immunity defense was waived, the dismissal was improper, and the case was reinstated for trial.

Analysis: The district court's dismissal for lack of subject matter jurisdiction incorrectly framed this issue in terms of a jurisdictional issue. Defendant did not file his parental

immunity defense within the prescribed time period and the affirmative defense was therefore waived.

3. TRIAL - NO TESTIMONY BY TELEPHONE

In the Matter of the Estate of P. Rutter, 633 N.W.2d 740 (Iowa Sept. 6, 2001).

Facts: Executor of an estate filed a final report, proposed distribution, and application for discharge. One beneficiary, the executor's brother, filed objections to the report and moved for sanctions against the executor. Two other beneficiaries, also siblings of the executor, waived notice of hearing, and another, their sister, filed no response. After much wrangling over discovery issues, a hearing on the final report and objections was held. All three brothers testified at the hearing, and the sister, over the executor's objection, testified by telephone. Based on her testimony by phone, and all the other evidence, the court ruled that the executor must file an amended report, accounting, and proposed distribution in accordance with the court's findings. Both the executor and objecting beneficiary appealed.

Holding: The Supreme Court held that the trial court had no authority to permit the sister to testify by telephone over the executor's objection. (However, the Court explains that there is no rule or statute that would prohibit, by *mutual agreement*, the parties from submitting testimony by telephone.)

Analysis: In actions at law, the case must be tried upon oral evidence taken in open court. And, while there are circumstances under which the rules are relaxed and testimony by telephone may be allowed, there is no rule or statutory provision that would allow witnesses to testify by telephone in equitable proceedings in general. It is important that the trier of fact be able to observe the demeanor of the witness, and absent established legislative exceptions, testimony by telephone is not allowed.

EVIDENCE

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1. BUSINESS OWNER, UPON DEMONSTRATING PERSONAL KNOWLEDGE OF COMPANY, MAY PROVIDE OPINION AS TO BUSINESS'S VALUE

Lake Panorama Servicing Corporation v. Central Iowa Energy Cooperative, 636 N.W.2d 747 (Iowa Sept. 6, 2001).

Facts: LPCS and CIECO acquired interests in a resort development surrounding Lake Panorama. CIECO purchased the resort's conference center and the right to operate the golf course, while LPCS purchased the timeshare operation located near the conference center. After two unsuccessful years, CIECO approached LPCS about taking over control of the conference center. After reaching an agreement in which several issues were addressed, LPSC began operating the conference center. Things between LPSC and CIECO, which was still operating the golf course, were rocky from the start. Facing a turbulent working relationship with CIECO, LPCS exercised

its option to terminate its lease of the conference center. Shortly thereafter, LPCS brought suit against CIECO, alleging breach of contract, fraudulent misrepresentation, and intentional interference with prospective business advantage. These allegations were based on repeated violations by CIECO of the lease agreement it had entered with LPCS. The district court, after hearing testimony from LPCS's directors and shareholders on the issue of damages, entered judgment in favor of LPSC. CIECO strongly objected to the admission of that testimony, and raised that issue on appeal.

Holding: The Supreme Court affirmed the district court's decision regarding the admissibility of the opinion testimony of LPSC directors and shareholders.

Analysis: In upholding the decision to admit the opinion testimony of LPSC directors and shareholders, the Court relied on Iowa Rule of Evidence 701. Lay witnesses may testify if such testimony is rationally based on the witness's perceptions and helpful to the determination of a fact at issue. Construed liberally, the rules of evidence do not prohibit testimony like that offered by LPSC's directors and shareholders.

Additionally, the Court explained that property owners are presumed qualified to provide opinions as to their property's value based on the assumption that those who own property know something about it. And, while this presumption does not automatically apply to business owners, one must simply demonstrate personal knowledge of the company in order to testify. In this case, both directors and shareholders who testified had the requisite knowledge.

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INSURANCE

* * *

1. PASSENGER AS AN "INSURED" UNDER UIM CLAIM

Lee v. Grinnell Mut. Reinsurance Co., ___ N.W.2d ___, 2002 WL 1285673 (Iowa Jun. 12, 2002).

Facts: Lee was a passenger in a car driven by Owner when an underinsured motorist ran a stop sign and collided with the car occupied by the Lee. Lee sued the Owner's insurance company for underinsured motorist (UIM) benefits. The district court granted summary judgment under the policy definition of that term contained in the UIM coverage. Plaintiff appealed.

Holding: A passenger in an automobile which collides with an underinsured motorist may be considered an insured under the Owner's UIM policy.

Analysis: Iowa's UIM statute requires insurers to provide financial liability coverage to "any person using an insured vehicle" which, according to the court, includes passengers of a vehicle. Iowa's UIM statute requires that persons insured under the liability

coverage of a policy be afforded UIM coverage under the policy as well. Construing the language of the policy together with Iowa UIM statute, the court determined a passenger of a vehicle is an insured person who is eligible for UIM benefits.

2. DECLINATION OF UIM COVERAGE UNDER 516A.1

Preferred Risk Ins. Co. v. Cooper, 638 N.W.2d 717 (Iowa Jan. 24, 2002).

Facts: Husband and Wife had five (5) cars insured with Preferred Risk. In order to lower the premiums on their five (5) cars, Husband signed a written declination in compliance with Iowa Code §516A.1. Wife was subsequently in an automobile accident with an underinsured motorist. Wife sued the Preferred Risk on a UIM claim. The district court held that the underinsured motorist benefits of the policy continued to be available to the Wife because she had not executed a declination in compliance with 516A.1; only the Husband had. The insurer appealed.

Holding: If there are two named insureds on an auto insurance policy, and one of the insureds signs a declination of UIM benefits under Iowa Code §516A.1, then UIM benefits still apply to the other insured who did not sign the declination.

Analysis: The court states that if the insurance being acquired is subject to a statute mandating the insurer to cover certain events (such as UIM), a person relying on another to make him or her a named insured may reasonably expect that the coverages obtained will be those mandated by law. The court also states that at the time the Husband attempted to delete the UIM coverage on the polices, a lack of involvement on the Wife's part aids rather than detracts from her claim. If there was evidence that the wife knew about the deletion of the UIM benefits, or assisted in deleting the benefits, she may not have been covered under UIM coverage. The court goes on to hold that the coverage limits are those the policy provided, and not the statutory minimum.

3. PRIVATE DISABILITY BENEFITS - NOT AN OFFSET TO UIM COVERAGE

Shatzer v. Globe American Cas. Co., 639 N.W.2d 1 (Iowa Dec. 19, 2001).

Facts: Shatzer was seriously injured in an automobile collision. He sued the owner of the other car involved for his injuries. After he settled with the owner's insurance company, Shatzer sued Globe American for UIM coverage. The district court denied Globe American's motion for partial summary judgment seeking an offset for the amount of private disability benefits the insured received from his employer's private disability insurance plan. Globe American appealed.

Holding: Private disability benefits an insured receives from his employer do not entitle the UIM insurer to an offset unless the policy clearly and unambiguously provides they are to be considered as such.

Analysis: In its holding, the court states the language of the policy provision did not clearly and unambiguously provide UIM benefits to be reduced by the amount of disability

benefits received by the insured from the employer. The contract "clearly does not count private disability benefits as a reduction" in UIM benefits.

4. VEHICLE CANNOT BE BOTH UNINSURED AND UNDERINSURED

Pudil v. State Farm Mutual Auto. Ins. Co., 633 N.W.2d 809 (Iowa Sept. 6, 2001).

Facts: Pudil was injured while a passenger in a single car accident caused by the Driver. The car was owned by the Driver's Employer. Driver was uninsured, but Driver's Employer had a UM policy on the car. Pudil sued the Employer, the Employer's UM carrier, and Pudil's UIM carrier. Employer's UM carrier settled with Pudil, but the case against Pudil's UIM carrier continued. The trial court held that the vehicle could not be both uninsured and underinsured, noting that these coverages are "separate, distinct, and mutually exclusive." Pudil appealed.

Holding: An automobile cannot be both uninsured and underinsured at the same time regardless of the insurance standing of the parties involved. UM and UIM benefits are mutually exclusive.

Analysis: The court held that the settlement with the Employer's insurance company did not transform the vehicle into an underinsured vehicle. The court held that this rationale applies whether the UM and UIM coverages are found in a single policy or, as in this case, in separate policies.

5. OWNED BUT NOT INSURED EXCLUSIONS - FARM TRACTORS

Welchans v. United Serv. Auto. Assn., --- N.W.2d ---, 2002 WL 570896 (Iowa March 13, 2002).

Facts: Welchans was driving his tractor on a country road when he was struck from behind by an automobile and seriously injured. Welchans settled with the other driver and then sued both his own automobile insurer and the farm automobile insurer for UIM benefits. The district court held there was UIM coverage on the tractor. The insurers appealed.

Holding: The "owned but not insured" UIM exclusions in the insurers' policies were designed to prevent potential duplication of benefits. Therefore, they applied to preclude coverage.

Analysis: The district court correctly found that the farm tractor was not a covered "auto" under the UIM policy. However, the district court erred in concluding that the exclusion of farm machinery from the definition of "auto" removes farm machinery from the UIM exclusionary language. The "owned but not insured" UIM exclusions in the insurers' policies were designed to prevent potential duplication of benefits. Therefore, they applied to preclude coverage.

6. NO COVERAGE TO CHILD AFTER NAMED INSURED'S DEATH

Grinnell Select Ins. Co. v. Continental Western Ins. Co., 639 N.W.2d 31 (Iowa Jan. 24, 2002).

Facts: Continental Western insured Darlene Kapping. Darlene's daughter, Darcy, lived with Darlene and drove the car from time-to-time. Darlene died, and Darcy continued to drive the car throughout the remainder of the policy term. One night, Darcy let her friend Jason drive the car while she was a passenger. Jason struck a another car in which Amy was a passenger. Amy sued Jason and Continental who denied coverage under Darlene's policy because of Darlene's prior unrelated death. Amy then sued her own insurer, Grinnell, for UM benefits which resulted in a $135,700 judgment. Grinnell then sued Continental in a subrogation action.

Holding: If a named insured dies, the policy covering her family members is terminated, and the family members are thereafter uninsured.

Analysis: It is the general rule that, in the absence of language to the contrary, an automobile liability policy terminates with the death of the named insured. There is no evidence concerning Darlene's expectations that her daughter would be covered in the event of her death, so the reasonable expectations doctrine argument failed. The court also states that just because the premium had been paid for the entire term does not permit extension of coverage beyond the insured's death.

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JUDGMENT AND LIMITATION OF ACTIONS

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1. JUDGMENT - DEFAULT JUDGMENT - MAILBOX RULE INAPPLICABLE FOLLOWING ISSUANCE OF NOTICE OF INTENT TO FILE WRITTEN APPLICATION FOR DEFAULT

Baltzley v. Sullins, 641 N.W.2d 791 (Iowa April 3, 2002).

Facts: Plaintiffs filed a legal malpractice action against Sullins on December 11, 1998. Sullins was personally served with the Petition and Original Notice on December 16, 1998. He did not immediately file an Answer and, on January 12, 1999, Plaintiffs served a "Notice of Intent to File Written Application for Default," in compliance with Iowa Rule of Civil Procedure 231(b). Thirteen days later, on January 25, 1999, Plaintiffs' request for entry of default was granted, and an evidentiary hearing was scheduled to determine damages. Later that day, Sullins filed his Answer. On March 4, Sullins filed a Motion to Set Aside the Default. Plaintiffs resisted, and the court set a hearing date of May 18. Sullins failed to appear at the hearing, and, on June 7, judgment was entered against him. On appeal, Sullins contends that Rule of Procedure 107(b) extended the ten-day grace period afforded to defaulting parties under rule 231(b), and that only the clerk may enter the default.

Holding: The Supreme Court held that the ten day grace period accorded defaulting parties is not extended by the so-called "mailbox rule" of 107(b). And, according to rule 231, both the clerk and the judge can enter the default.

Analysis: First, rule 107(b) does not apply where a court has prescribed the method of service of notice and the number of days to be given. Rule 231 provides not only a starting point for the running of the ten-day period, but 231(c)(3) provides a total duration of days as well. Consequently, rule 107(b) does not extend the ten-day grace period accorded under rule 231.

Second, rule 231(a) was written to allow the Clerk of Court to enter defaults because only a few counties in the state have a District Court judge continuously present that could do so. However, the fact that the Clerk is given authority to enter defaults is not a limitation on the power of the court to do so. For reasons of efficiency and expedience, either the Clerk or the court may enter default judgments.

2. JUDGMENT - ALTERNATIVE RECOVERY THEORY BARRED BY CLAIM PRECLUSION DEFENSE

Arnevik v. University of Minnesota Board of Regents, 642 N.W.2d 315 (Iowa April 3, 2002).

Facts: Arnevik, an employee of the University of Minnesota, was involved in a car accident causing serious injury to the driver of another car. After the driver of the other car sued and recovered damages from Arnevik, Arnevik sued her employer for indemnification, alleging the she was acting within the scope of her employment when the accident occurred. Her employer, the University, filed a motion for summary judgment which was granted by the district court. The court explained that it could find no authority to allow an employee to bring an indemnification suit against the employer for damages to a third party caused by the employee's negligence. Arnevik did not appeal this ruling. However, after she lost, she researched the University's policies on legal defense of employees. On June 5, 1997, three months after the summary judgment was granted, Arnevik's new attorney demanded the University indemnify Arnevik based on its legal defense policies. The University informed Arnevik that she was not eligible for defense or indemnification under its policies. After settling with the driver she injured, Arnevik brought a second suit against the University for indemnification under its legal defense policy. The district court dismissed Arnevik's petition, finding her contract claim to be barred by the doctrine of claim preclusion. Arnevik appealed.

Holding: The Supreme Court affirmed. Arnevik's contract-based indemnification action against the University was barred by claim preclusion after she had a full and fair opportunity to litigate her contract claim in the first, respondeat superior-based indemnification action against the school.

Analysis: Arnevik's assertion that she was entitled to bring her second suit because she was unaware of the legal defense policy at the time of the first action does not provide for her a second bite of the apple. The court explained that a party is not entitled to a second day in court by alleging a new ground of recovery for the same wrong, even if that person cites mistake, ignorance, or a change in the law as the reason why all claims were not brought together in the first suit.

3. LIMITATION OF ACTIONS - CONTINUOUS TREATMENT DOCTRINE

Phillips v. Gehrke, --- N.W.2d ---, 2002 WL 531503 (Iowa App. March 27, 2002).

Facts: Dr. Jon Gherke, an orthopedic surgeon, performed ankle surgery on Phillips on June 18, 1996. Dr. Fellows was assigned to provide follow up care, and Phillips saw Fellows on September 10, 1996 before attending a National Outdoor Leadership School. Phillips left for the school a couple of weeks later, and while there experienced problems with her ankle. She again saw Dr. Fellows on October 10, 1996, and he informed her that her ankle was more unstable than it had been prior to surgery. However, she could do no more damage to the ankle, and Fellows advised her that she could return to the School. After returning from the School a second time, Phillips saw Dr. Silver, a doctor from another practice, on October 25. Silver diagnosed Phillips's problem as a failed repair by Dr. Gherke. Phillips then returned to Dr. Fellows on October 29, and Fellows expressed regret, explaining that he wished he had done the surgery, and that it was a terrible failure that never should have happened. Sometime prior to this visit with Fellows, Phillips scheduled an appointment with Dr. Saltzman of Iowa City. On November 7, 1996, Saltzman operated on Phillips's ankle.

Phillips attempted to bring suit against Gherke, arguing that, because of the continuous treatment doctrine, the two-year statute of limitations did not begin to run until either November 6, 1996, when she officially left Gherke's care, or on November 7, 1996, when she learned from Dr. Saltzman that she suffered harm. However, the district court granted Gherke's motion for summary judgment and dismissed the case, finding that Phillips had enough information by October 10, 1996 to trigger her duty to investigate the problem and start the two-year statute of limitations running. Phillips appealed.

Holding: Given the facts of this case, the Supreme Court declined to apply the continuous treatment doctrine and affirmed the district court's decision dismissing Phillips's claim on the grounds that she was on inquiry notice of her claim more than two years prior to the filing of her suit.

Analysis: The court concluded that the circumstances were not appropriate for the adoption of the continuous treatment doctrine. The doctrine is based on a patient receiving continuous care from the doctor, and Phillips' treatment was not continuous as defined under the doctrine. However, the court's analysis suggests a willingness to abide by the doctrine if presented with the appropriate circumstances.

4. LIMITATION OF ACTIONS - EFFECT OF STATUTE OF REPOSE ON MINOR'S ACTION

Albrecht v. General Motors Corporation, --- N.W.2d ---, 2002 WL 1558501 (Iowa July 17, 2002).

Facts: On December 15, 1999, seventeen year-old Sara Albrecht was injured when the car she was driving collided with another vehicle. Her father, as conservator and guardian, filed suit against the manufacturer of the car, GM. The petition asserted that GM was liable for Sara's injuries because the seat belt she was wearing at the time of the accident allegedly failed. In its Answer, GM raised Iowa Code Section 614.1(2A) as an affirmative defense. Essentially, this statute requires that any products liability claim be brought within fifteen (15) years of the product's initial purchase. Although Albrecht did not dispute that more than fifteen years had passed since the car was purchased, Albrecht claimed that Section 614.1(2A) did not apply to minors. Albrecht relied on Section 614.8(2), which extends limitations periods for minors until one year after they attain the age of majority. (Suit was filed within one year of Sara turning eighteen.) GM responded that the extension provision applied only to the two-year statute of limitation for personal injuries, and not to Section 614.1(2A)'s statute of repose. The district court granted GM's motion to dismiss, holding that Section 614.8(2) did not apply to statutes of repose. Albrecht appealed.

Holding: The Supreme Court affirmed, holding that Section 614.8(2) does not extend the statute of repose found in Section 614.1(2A) and Albrecht's claim is therefore barred.

Analysis: The court goes to great lengths to distinguish statutes of repose, which operate to prevent a cause of action from even accruing, from statutes of limitations, which set forth the time within which an accrued claim must be asserted in court. In this case, the fifteen year statute of repose was not extended because to do so would be inconsistent with the very purpose of such statutes. Furthermore, an extension statute, such as Section 614.8(2), is designed to place a minor on equal footing with an adult, something that is unnecessary in the context of a statute of repose. When a period of repose expires and bars a claim before it accrues, there is nothing a potential claimant, adult or minor, can do to avoid the bar.

5. LIMITATION OF ACTIONS - DISCOVERY RULE

Perkins v. HEA of Iowa, Inc., --- N.W.2d ---, 2002 WL 180329 (Iowa App. Feb. 6, 2002).

Facts: Diane Perkins worked as a medication assistant for HEA, a residential care facility. On October 2, 1990, a shunt in a patient's leg ruptured, covering Perkins in blood. Perkins was informed that the patient had hepatitis C and was sent for initial testing. The test result was negative, but the tester advised Perkins that she would have to retest again at six months and a full year later. Despite telling Perkins that it would notify her of these future test dates, the employer did not follow through, and Perkins was not tested at those times. Perkins did not experience any health problems until 1995, when she contracted pneumonia and suffered fatigue and muscle pain. Tests

conducted in November of 1995 revealed high liver enzymes, and in April, 1996, Perkins tested positive for hepatitis C. Perkins filed a workers' compensation claim in October, 1996, and a deputy commissioner awarded her healing period and disability benefits. On intra-agency appeal, the industrial commissioner reversed the award. The parties sought judicial review. The district court held that hepatitis C was not an occupational disease as defined under Iowa Code Section 85A.8, and consequently the statute of repose set forth in Section 85A.12 was not triggered. Additionally, the court determined that, because Perkins only learned of the nature, seriousness, and probable compensable character of her injury when she tested for hepatitis C in April, 1996, she had two years from that date to file her workers' compensation claim. As she filed well within that time frame, her claim was not time-barred by the statute of limitations set forth in Section 85.26(1). The employer appealed.

Holding: The Court of Appeals affirmed. Perkins did not contract an occupational disease as defined under Section 85A.8, therefore the statute of repose set forth in Section 85.12 was not triggered. However, Perkins did sustain a compensible injury, and because she did not learn of the nature and seriousness of her condition until April, 1996, the statute did not begin to run until that date. As a result, her claim was not time-barred by Section 85.26.

Analysis: First, the court explained that hepatitis C is not an occupational disease under Iowa's workers' compensation laws because the requisite causal links between employment and disease did not exist. Perkins did not contract hepatitis C as a result of static exposure to workplace conditions, but through a specific, physical occurrence. And, although Perkins may have contracted the disease while at work, hepatitis C is prevalent within the general population; the most common forms are not associated with work in the healthcare field. Since it was not considered an occupational disease, the statute of repose did not apply.

Concerning the statute of limitations, the court reasoned that, in light of the discovery rule, the two-year limitations period set forth in Section 85.26(1) does not begin to run until the claimant discovers or with reasonable diligence should discover, the nature, seriousness, and probable compensible character of the injury or disease. So, although six years elapsed between the date on which Perkins was exposed to hepatitis C and the date on which she filed her claim, the discovery rule tolled the statute of limitations until she gained the requisite knowledge of her condition. Such knowledge was gained in April, 1996, and her claim was brought well within two years of that date.

6. LIMITATION OF ACTIONS - CLAIMS PROTECTED BY SAVINGS STATUTE

Grimm v. US West Communications, Inc., 644 N.W.2d 8 (Iowa May 8, 2002).

Facts: Kristin Grimm was employed by US West as an operator from 1988 until she was discharged in March, 1997. After discharge, Grimm brought claims against US West

for interference with the contractual relationship, breach of contract, and intentional infliction of emotional distress. Initially, Grimm brought her suit in federal district court, alleging a federal claim under the Labor Management Relations Act. That claim was dismissed, however, because it was not filed within the required six-month period. Because her federal claim was dismissed, the federal court also dismissed Grimm's independent state law claims as there was no longer supplemental jurisdiction of the state claims. Following dismissal in federal court, Grimm filed her suit in state court based solely on the remaining independent state law claims. US West removed the case to federal court, claiming all of the state claims were preempted. In response, Grimm moved to remand to the state court, and the motion was granted. The state court granted US West's motion for dismissal on a number of grounds, including the finding that all of Grimm's claims are untimely under Iowa's two-year statute of limitations. Grimm appealed.

Holding: The Supreme Court held that, as a matter of law, it could not say on a motion to dismiss that Grimm acted negligently in failing to bring her claims within the two-year statutory period. Consequently, the district court's motion to dismiss because of Grimm's untimely filing of claims was reversed and remanded.

Analysis: According to Iowa Code Section 614.10, the savings statute, if after the commencement of an action, the plaintiff, for any reason other than negligence, fails in that action, a new one may be brought within six months, and the second shall be considered a continuation of the first. Grimm contends she was not negligent because she had a reasonable belief that her suit in federal court was proper. Analyzing the facts, the court concluded that the district court erred in granting the motion to dismiss, because it could not be said that Grimm was negligent for commencing her case in federal court as a matter of law.

7. LIMITATION OF ACTIONS - DRAM SHOP ACT NOTICE PROVISION

Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa February 27, 2002).

Facts: Ricky Grovijohn and Julie Douglas were drinking at J.D.'s Circle Inn (Virjon, Inc.). After several cocktails, they left the tavern together with Douglas driving Grovijohn's car. Douglas collided with another car, injuring Grovijohn. Thirteen months later, Grovijohn notified the tavern that he intended to file suit under the Iowa dram shop act. Suit was filed in June of 1999. The district court granted Virjon, Inc.'s motion for summary judgment, because Grovijohn failed to notify the tavern of his dram shop claim within six months of the incident as required by Iowa Code Section 123.93. Grovijohn appealed, contending that the notice provision violates his right to equal protection, and that there were genuine issues of material fact preventing summary judgment.

Holding: The Supreme Court affirmed, finding that the six-month notice requirement was not a violation of Grovijohn's right to equal protection.

Analysis: The Iowa dram shop act created liability where none existed at common law. Consequently, the Court reasoned that, because the legislature created the cause of action, it may affix the conditions under which it is to be allowed as well. Since no fundamental right or suspect class is at issue, the Court applied mere rational basis and upheld the statutory notice provision as rationally related to a legitimate government interest.

Concerning Grovijohn's argument that the principles of comparative fault require a finding that the notice provision is unconstitutional, the Court concluded that comparative fault chapter 668 was not intended to apply to dramshop actions. More specifically, comparative fault is not a defense to a dramshop action.

* * *

WORKERS' COMPENSATION[1]

* * *

1. STATUTE OF LIMITATIONS - CUMULATIVE INJURIES / DISCOVERY RULE

Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

Facts: Herrera began work for IBP, Inc., in 1988. In 1990, Herrera began to experience intermittent arm, neck, and shoulder complaints, and received medical treatment on numerous occasions with company doctors. Herrera also missed work at various times, and was placed on light duty at other times. On March 31, 1993, Dr. Dean informed Herrera that her problems were related to her employment duties. Herrera continued to treat medically, and to require intermittent work restrictions until she was terminated on January 4, 1995. On May 5, 1995, Herrera filed a petition for workers' compensation benefits, alleging a cumulative injury manifesting itself on January 4, 1995. A deputy commissioner awarded Herrera benefits based on that date of injury.

IBP appealed to the workers' compensation commissioner, arguing that Herrera's cumulative injury manifested itself on March 31, 1993, and therefore was barred by the statute of limitations in Iowa Code § 85.26. The commissioner agreed, and entered an Appeal Decision finding that Herrera's claims were time-barred. Herrera sought judicial review, and the district court reversed the commissioner's decision, holding that the proper date of injury was March 9, 1994, the date Herrera was unable to return to her prior employment. Consequently, the district court found that the petition was timely filed and reversed the commissioner's decision. IBP appealed to the supreme court.

Holding: Affirmed and remanded. The supreme court first applied the Jordan principles to determine the proper date of the cumulative injury: the date a reasonable person

[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. The author would also like to thank law clerks Brian Kohlwes and Andy Johnson for their valuable assistance in preparing this outline.

would realize both (1) that she has a condition or injury, and (2) that the condition or injury is work-related. Based on these principles, the court found the commissioner's finding of a March 31, 1993 injury date was supported by substantial evidence. However, the court then applied the "discovery rule" to determine the date Herrera knew or should have known, "the nature, seriousness and probable compensible nature of the injury." Here, the court found that her medical problems had always resolved on prior occasions, and that she had returned to full duty employment following the prior episodes. Consequently, the court held that Herrera would not have realized that her problems in 1993 were more significant or permanent in nature than her prior injuries, and thus, she did not "discover" the cumulative injury until sometime after May 5, 1993. Therefore, Herrera's petition was timely filed, and the case was remanded to the commissioner for a determination of entitlement to benefits.

2. ENTITLEMENT TO CONDUCT INDEPENDENT MEDICAL EXAMINATIONS

IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001).

Facts: In 1997, Harker was injured in an IBP plant in Nebraska. Under Nebraska workers' compensation law, Harker was allowed to direct his own medical care at IBP's expense. Harker selected Drs. Muller, Sherman, and Herrera for treatment, and IBP acquiesced in those selections. Drs. Sherman and Herrera eventually released Harker from care, and stated he had sustained no permanent impairment. Harker then filed a petition with the Iowa workers' compensation commissioner, requesting an independent medical examination (IME) at IBP's expense (pursuant to Iowa Code § 85.39). IBP resisted the petition, asserting that it had not retained the physicians whose opinions Harker claimed triggered entitlement to an IME at IBP's expense. A deputy commissioner agreed with IBP and held that Harker was not entitled to an IME. The commissioner reversed this finding on appeal, holding that IBP's acquiescence in Harker's selection of the physicians, as well as IBP's payment for those physicians' services, meant that the physicians were "retained" by IBP, and thus triggered Harker's entitlement to an IME under Iowa Code § 85.39. This finding was also affirmed on judicial review by the district court, and IBP appealed to the Iowa supreme court.

Holding: Reversed and remanded. The supreme court held that "retained" for purposes of Iowa Code § 85.39 turned on the issue of "choice" of the physician. Here, Harker chose the doctors at issue, so consequently, those doctors' opinions as to permanent impairment could not be used to trigger entitlement to an IME at employer expense under Iowa Code § 85.39.

3. PENALTY BENEFITS - REASONABLE DISPUTE / FAIRLY DEBATABLE ISSUES

Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Facts: On June 4, 1997, Gilbert injured his back and neck, allegedly while attempting to lift a "dock plate" in the course of his duties as a delivery driver. However, Gilbert

reported on an injury report that the injury occurred when he bent over to sign some forms, a history he repeated to his initial treating physician and his physical therapist. None of these records reflected any history of Gilbert lifting the dock plate. Consequently, the claim was denied as being "idiopathic" and not related to his employment. Gilbert then attempted to "clarify" the history of his injury, but the insurance carrier continued to deny the claim. Gilbert then obtained a statement from an alleged witness to the "dock plate" incident, as well as a report from a treating physician who related Gilbert's complaints to the "dock plate" incident. The insurance carrier continued to deny the claim, and Gilbert filed a petition with the workers' compensation commissioner. A deputy workers' compensation commissioner found Gilbert to be credible, and awarded benefits, including penalty benefits for unreasonable denial of the claim. The penalty benefits, however, were assessed only against healing period (temporary disability) benefits because a physician had opined that Gilbert had no permanent disability, rendering that issue fairly debatable.

The penalty benefit award was affirmed on appeal to the commissioner. USF Holland sought judicial review, and the district court reversed the award of penalty benefits, holding the claim was fairly debatable because of the inconsistent initial histories given by Gilbert. Gilbert appealed to the Iowa court of appeals, which reversed the district court decision and reinstated the commissioner's penalty benefit award. USF Holland then sought further review by the Iowa supreme court.

Holding: The court of appeals decision was vacated and the district court judgment affirmed. The supreme court determined that there was a fairly debatable issue as to how Gilbert's injury occurred. Gilbert's subsequent revised history, as well as the doctor's opinion based upon that revised history, although ultimately accepted by the commissioner, were still inconsistent with the initial history. USF Holland was entitled to dispute the credibility of Gilbert's changed history of his injury, and consequently, penalty benefits were not appropriate. The supreme court specifically noted that USF Holland did not need to produce a rebuttal medical opinion insofar as its denial was based on Gilbert's history of the injury, rather than on an issue of medical causation.

4. INDUSTRIAL DISABILITY - APPORTIONMENT OF PRIOR WORK INJURIES / FULL RESPONSIBILITY RULE

Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002).

Facts: Venegas initially injured his low back in 1991 while employed in a bagel factory in California. As a result of that injury, he was given a permanent impairment rating of 35% to the body as a whole, and also given permanent work restrictions. Venegas subsequently began work at IBP in 1993. In 1996, Venegas injured his low back while handling carcasses. Venegas was unable to return to his work at IBP despite attempted accommodations, and he eventually quit work at IBP in late 1997. After an arbitration hearing, a deputy worker's compensation commissioner found that

Venegas had a 55% industrial disability, but further held that IBP was only responsible for the portion of the disability related to the IBP injury. Consequently, the deputy commissioner "apportioned" out the prior 35% permanent disability awarded in California (essentially reducing the award by that 35% prior disability).

Venegas appealed to the workers' compensation commissioner who affirmed the deputy's decision, holding that apportionment of prior work injuries with different employers was not prohibited by the "full responsibility rule" (a prior Iowa supreme court ruling had held that industrial disability from a prior work injury with the same employer could not be apportioned) . On judicial review, however, the district court reversed the commissioner's decision, holding that apportionment of prior work injuries was prohibited by the "full responsibility rule" regardless of whether the prior injury was incurred with the same employer or a different employer. IBP appealed to the Iowa supreme court.

Holding: Affirmed. The Iowa supreme court agreed with the district court's interpretation of the "full responsibility rule", finding there was no statutory authority to permit apportionment of prior work-related disability. This analysis remained the same regardless of whether the prior injury and disability were incurred with the same employer or a different employer.

NOTE: The Iowa supreme court's prior decisions establishing the "full responsibility rule" are: Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995), and Celotex Corp. v. Auten, 541 N.W.2d 252 (Iowa 1995).

5. SUBJECT MATTER JURISDICTION - MARITIME LAW / JONES ACT

Hayden v. Ameristar Casino Council Bluffs, Inc., 641 N.W.2d 723 (Iowa 2002).

Facts: Hayden was employed as a casino supervisor on a riverboat casino. In January 1996, she slipped and fell while at work, sustaining leg and back injuries. Hayden subsequently filed a petition in arbitration with the Iowa workers' compensation commissioner, seeking benefits under state law. Ameristar Casino filed a motion to dismiss, asserting that Hayden was a "seaman" under federal maritime law, and consequently her exclusive remedy for her injury was under the Jones Act. Hayden resisted, asserting that the Ameristar Casino has gambling as its primary purpose, and consequently failed the "primary purpose" test of the Jones Act. Hayden further claimed that her work duties were not a "traditional maritime activity" as required by the Jones Act. The deputy commissioner found that the casino was capable of navigation, and that Hayden's employment as a casino supervisor on a navigable vessel was sufficient to qualify her as a seaman under the Jones Act. Consequently, the deputy granted the motion to dismiss. The ruling was affirmed by the commissioner on appeal, and by the district court on judicial review. Hayden then appealed to the Iowa supreme court.

Holding: Reversed and remanded. The supreme court held that Ameristar Casino had failed to provide affidavits or other evidentiary support for its factual contentions regarding Hayden's employment status and regarding the nature of the casino. Consequently, there was no evidence to support the commissioner's findings, and the case was remanded to the agency for further proceedings.

6. MENTAL STRESS INJURIES - LEGAL CAUSATION

Brown v. Quik Trip Corp., 641 N.W.2d 725 (Iowa 2002).

Facts: Brown was employed as a clerk at a Quik Trip. While working the night shift alone, Brown was involved in a gunfight by store customers and a robbery a few days apart. Although he was not physically injured, Brown began to suffer from mental stress and was eventually diagnosed with post-traumatic stress disorder. Brown filed a petition in arbitration asserting a "mental-mental" injury (a mental injury caused by a mental stress). At hearing, Quik Trip admitted medical causation, but asserted Brown could not establish legal causation because he had not introduced any evidence that his stress was any greater than that faced by other Quik Trip employees. Although a deputy commissioner found that Brown had met his burden of proving legal causation because of the traumatic nature of the stressful events, this ruling was reversed on appeal to the workers' compensation commissioner. The commissioner's ruling was affirmed on judicial review to the district court, but was reversed on appeal to the Iowa court of appeals, and remanded for reconsideration of the legal causation test. The Iowa supreme court then granted further review of the case.

Holding: Court of appeals ruling vacated, district court ruling reversed, and remanded to the workers' compensation commissioner. The supreme court determined that legal causation can be established by a traumatic, unexpected, or unusual stressful event regardless of whether other employees are subject to similar stressors. The supreme court distinguished this type of traumatic stress claim from typical mental stress claims that are alleged to arise from a generally stressful work environment; in those cases, proof of exposure to greater stress than that faced by other employees will still be necessary to establish legal causation.

7. EXCLUSIVE REMEDY - COEMPLOYEE NEGLIGENCE ARISING OUT OF & IN THE COURSE OF EMPLOYMENT - OFF-DUTY WORK ON PREMISES

Meade v. Reis, 642 N.W.2d 237 (Iowa 2002).

Facts: Meade and Ries were coemployees at Swiss Valley Ag Farms, a company that sold agricultural supplies and services, and also ran a maintenance shop. Ries was a semi-truck driver who delivered Swiss Valley products (fertilizer, grain, etc.), while Meade was a mechanic in the maintenance shop. On April 18, 1998, Ries had brought a tire from a piece of his personal farm equipment to the maintenance shop for repair, which was permitted by an unwritten policy of Swiss Valley. Ries began to inflate the tire without using a tire cage, and then left the tire unattended while he went to assist a mechanic in the shop with testing the brakes of a Swiss Valley truck. Meade,

who was on duty at the time, then went into the tire repair area of the shop; the tire exploded, injuring Meade.

Meade filed suit against Ries, claiming Ries had been negligent in inflating the tire. Ries filed for summary judgment, claiming that, pursuant to Iowa Code § 85.20(2) (the exclusive remedy provision), he was entitled to absolute immunity for negligent acts injuring a coemployee. The district court held that Iowa Code § 85.20(2) provided immunity only for negligent acts arising out of and in the course of employment, but further held that Ries' actions in fact did arise out of and in the course of employment, and granted summary judgment. Meade appealed to the Iowa supreme court.

Holding: Reversed and remanded. The supreme court first held that Iowa Code § 85.20(2) does not grant absolute immunity to a coemployee for negligent acts, but instead requires the conduct of both the injured employee and the negligent coemployee to arise out of and in the course of their employment. The supreme court then determined that arising out of and in the course of employment had the same meaning as it did when applied to determining the compensibility of workers' compensation injuries. The court explained this test by stating that immunity would apply if the negligent coemployee would have been covered by workers' compensation had he rather than his fellow employee been injured. The supreme court then held that Ries' actions did not arise out of and in the course of his employment because he was off duty and engaged in personal business at the time of his negligence in inflating the tire; the mere fact he may have later voluntarily assisted a coemployee with work beneficial to his employer was insufficient to bring his actions within the scope of the workers' compensation system.

8. SCHEDULED INJURIES - APPORTIONMENT OF PRIOR WORK INJURIES / FULL RESPONSIBILITY RULE

Floyd v. Quaker Oats, --- N.W.2d ---, 2002 WL 1288773 (Iowa June 12, 2002).

Facts: Floyd sustained a work-related knee injury in 1993. In 1996, the treating physician, Dr. Coates, stated that Floyd had a 20% permanent impairment of the knee, of which three-fourths (or 15% of the leg) was attributable to the work injury, and the remainder (5% of the leg) was related to degenerative arthritis. Dr. Coates later opined in a letter to Floyd's attorney that, of the 15% impairment to the leg attributable to the work injury, three-fourths (or 11.25%) was related to the initial 1993 injury, while the remainder (or 3.75%).

Floyd filed two petitions in arbitration seeking benefits for the 1993 work injury and a subsequent cumulative injury. Floyd later dismissed the 1993 petition as it was barred by the statute of limitations. At hearing, the deputy commissioner held that Floyd had sustained a 3.75% permanent impairment to the leg, but that application of the full responsibility rule, see supra Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002), required Quaker Oats to be responsible for payment of the full 15% work-

related impairment to the leg. On intra-agency appeal, the commissioner reversed the deputy's decision, holding that the full responsibility rule applied only to industrial disability ("body as a whole") cases, and was not applicable to scheduled injuries. Floyd appealed to the district court, which reversed the commissioner and held that the full responsibility rule did in fact apply to scheduled member injuries. Quaker Oats then appealed to the Iowa supreme court.

Holding: Reversed and remanded. The supreme court first rejected Quaker Oats' contentions that Floyd had not established a cumulative injury, holding that Floyd was not required to show unusual stress or strain to support a cumulative injury, nor was a cumulative injury claim barred merely because the same body part had previously sustained a traumatic work-related injury. The court then determined that the full responsibility rule did not apply in cases where a scheduled member had a preexisting permanent disability which had not recovered or been restored to its prior condition. Consequently the court reversed and remanded the case to the district court for an order affirming the commissioner's appeal decision.

9. INTOXICATION DEFENSE - SUBSTANTIAL FACTOR TEST

Garcia v. Naylor Concrete Co., --- N.W.2d 2002 WL 1558630 (Iowa July 17, 2002).

Facts: Garcia was employed by Naylor Concrete as a welder. On September 30, 1997, Garcia was welding on a roof approximately an hour after arriving at work. He fell from the roof, sustaining significant injuries. Garcia was taken to the hospital where blood tests revealed his blood alcohol level was .094 approximately thirty minutes after the injury, and after receiving intravenous fluids. Naylor Concrete raised an intoxication defense under Iowa Code § 85.16(2). At hearing, Garcia testified he had consumed approximately 18 beers the prior evening, but had not drank alcohol after 10:45 p.m. Garcia blamed his fall on the metal roof bending while he was welding, along with a lack of safety harnesses and other safety equipment. A toxicologist retained by Naylor Concrete testified that the level of alcohol present in Garcia's blood would have impaired his balance, coordination, dexterity, and other motor skills. The deputy commissioner denied benefits under the intoxication defense, and the decision was affirmed by the commissioner on intra-agency appeal and by the district court on judicial review.

Holding: Affirmed. The supreme court adopted a test set forth in Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995), to determine if a person is intoxicated for purposes of Iowa Code § 85.16(2). Intoxication is established if one or more of the following four factors is present: a) the person's reason or mental ability has been affected; b) the person's judgment is impaired; c) the person's emotions are visibly excited; and/or d) the person has, to any extent, lost control of bodily actions or motions. The court held that the toxicologist's opinions were substantial evidence supporting a finding of intoxication. The court further held that the evidence supported a finding that intoxication was a substantial factor in causing the injury,

despite the hazardous working conditions which may have also contributed to the injury.

10. OCCUPATIONAL HEARING LOSS - SUBSEQUENT EMPLOYERS

Grundmeyer v. Weyerhauser Co., --- N.W.2d ---, 2002 WL 1573419 (Iowa July 17, 2002).

Facts: Grundmeyer began work for Mead Container in 1966. In 1987, Weyerhauser purchased Mead Container's assets and assumed many of Mead's liabilities, except for some specific liabilities, including workers' compensation claims. The change in ownership did not affect Grundmeyer's work duties, seniority, benefits, or pay. Weyerhauser never informed Grundmeyer that any change in her employment relationship had occurred, though Grundmeyer and all other employees had to fill out Weyerhauser applications. Grundmeyer worked for Weyerhauser until she retired in 1996.

Prior to working at Mead, Grundmeyer had no hearing problems. She wore no hearing protection for at least the first 15 years of her employment with Mead. Grundmeyer noticed a gradual hearing loss in the mid-1980s, and was diagnosed with a hearing loss in 1984. About that time, Mead began to provide hearing protection for its employees, and Grundmeyer testified she used hearing protection "religiously" until she retired. Hearing tests in 1988 showed a 15.3% hearing loss, which increased to 42.2% in 1995 and to 53.8% in 1998. In 1997, Grundmeyer filed a petition for hearing loss benefits, alleging as the date of injury her date of retirement in 1996.

At hearing, Grundmeyer's expert attributed the hearing loss to her work at the plant for both Mead and Weyerhauser. Weyerhauser offered opinions from two medical experts who stated the hearing loss was primarily the result of Grundmeyer's first 15 years of work with Mead, and that subsequent hearing loss was attributed to a genetic predisposition to gradual hearing loss from progressive nerve deterioration. The deputy commissioner held that the acquisition contract established that Weyerhauser was not responsible for any hearing loss claims incurred prior to 1987, and that Grundmeyer had failed to establish that her work for Weyerhauser after 1987 had caused any hearing loss. On intra-agency appeal, the commissioner held that the contract of acquisition could not be used to deprive Grundmeyer of workers' compensation benefits, but also agreed that Grundmeyer had failed to prove a causal connection between her work for Weyerhauser and her hearing loss. Grundmeyer sought judicial review in district court. The district court reversed the commissioner's decision, holding that Iowa Code §§ 85B.5 and 85B.11 establish liability for hearing loss related to "employment" in general, and consequently the change in employers did not relieve Weyerhauser of responsibility for the hearing loss incurred before it purchased Mead. Weyerhauser appealed to the Iowa supreme court.

Holding: Reversed and remanded. The court held that Weyerhauser was not a successor in interest to Mead, and consequently a new employer-employee relationship began when Weyerhauser purchased Mead. Because chapter 85B does not include a "last injurious exposure rule" as does chapter 85A (occupational disease statute), the court held Weyerhauser was not responsible for Grundmeyer's hearing loss incurred while a Mead employee. The court further determined that Weyerhauser could not be held liable for any of Grundmeyer's pre-existing hearing loss under Iowa Code § 85B.11. The court finally held that substantial evidence supported the commissioner's findings that Grundmeyer had not proven any hearing loss attributable to her employment with Weyerhauser.

11. THIRD-PARTY CLAIMS - GROSS NEGLIGENCE CLAIMS AGAINST COEMPLOYEES

Forbes v. Rexam, --- N.W.2d ---, 2002 WL 1559073 (Iowa July 17, 2002).

Facts: Forbes sustained severe burn injuries when a flammable solvent ignited while he was working in an enclosed area. Rexam and its workers' compensation carrier provided significant benefits. Forbes subsequently filed a gross negligence claim against several co-employees for their alleged contribution to his injuries. Rexam filed a notice of lien pursuant to Iowa Code § 85.22(1). Forbes moved to have the lien dismissed, and the district court entered a ruling invalidating the lien, holding that all claims against co-employees are excepted out of the scope of an employer's lien under section 85.22. Rexam appealed to the Iowa supreme court.

Holding: Reversed and remanded. The Iowa supreme court first held that an order dismissing a collateral lien was a final action subject to immediate appeal by the parties affected. The court then looked to the legislative intent behind section 85.22, as well as the scope of employer and co-employee immunity under section 85.20. The court held that section 85.22 permits an employer lien in any action for which section 85.20 does not grant immunity. Consequently, Rexam was entitled to a lien in Forbes' gross-negligence suit against his co-employees, as those claims were not subject to section 85.20 immunity.

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

IOWA APPELLATE COURT UPDATE - 2002

Employment, Attorney, 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

The speaker gratefully acknowledges the willing and able work of three law clerks on the outline material, namely: Carey Erhard-Drake University, David Funkhouser-University of Iowa, and Robert "Bill"
Hancock-Drake University

I. EMPLOYMENT

Harvey v. Care Initiatives, Inc.
634 N.W.2d 681 (Iowa 2001).

Harvey worked as a social worker and nursing home consultant at a nursing home and rehabilitation center operated by Care Initiatives, Inc. Harvey was employed by Care Initiatives under a written contract, which included a provision for termination of the agreement upon thirty days notice by either party. Harvey concedes that she was an independent contractor**.** Care Initiatives gave Harvey written notice of the termination of the contract a few months after Harvey started her employment. Harvey alleged that she was terminated in retaliation for filing a complaint against the facility. Harvey responded by filing an action for wrongful termination, claiming that her termination violated public policy. Care Initiatives moved for summary judgment on the grounds that a cause of action for wrongful discharged in violation of public policy did not exist for independent contractors. The district court granted the motion for summary judgment, determining that Harvey had no claim for retaliatory discharge. Harvey appealed to the Iowa Supreme Court.

HELD: Under Iowa law, at-will employees have a cause of action in tort for wrongful termination of employment when discharged by an employer in violation of public policy. This exception to the at-will doctrine is necessary to protect the employee from the inequity of bargaining position in a typical at-will employer-employee relationship. The disparity in bargaining power found in an at-will employment relationship does not exist with an independent contractor. Independent contractors have greater control and flexibility in their work and in the hiring process. There is a distinct difference in the nature of the relationship between independent contractors and at-will employees which suggests that there is a greater need to protect at-will employees. Further, there is no compelling need, as there is for at-will employees, to support a wrongful termination tort for independent contractors. Independent contractors also have additional remedies, other than retaliatory discharge, such as breach of contract. The court ultimately holds that there is **no cause of action** for retaliatory discharge of an independent contractor for filing a complaint against a care facility.

Meade v. Ries
641 N.W.2d 237 (Iowa 2002)

Edward Ries and Patrick Meade were co-employees at Swiss Valley Ag Farms, Co. On the day in question Ries, who was not on duty at the time, brought a tractor tire in to work to try and figure out why it was leaking air. Ries was working on the tire for his own personal benefit. While the tire was filling with air, Ries left it unattended to assist a co-worker. At that time Meade walked passed Ries's inflating tire when it exploded and struck him. At the time of the injury Meade was performing regularly scheduled tasks during normal work hours. Meade filed suit against Ries, alleging he was negligent and seeking damages for the injuries Meade suffered due to that negligence. Ries answered, denying the allegations and asserting the defense of coemployee immunity pursuant to Iowa Code section 85.20(2). Ries moved for summary judgment on the ground that he was immune under the co-employee immunity

statute. The district court sustained the motion for summary judgment, and Meade appealed.

HELD - For coemployee immunity to apply, the conduct of the coemployee seeking immunity must "arise out of" and be "in the course of" employment. Iowa Code § 85.20. The test for determining the applicability of coemployee immunity under workers' compensation law is whether the coemployee's actions causing the employee's injuries arose out of an din the course of the coemployee's employment; in other words, whether the coemployee would have been entitled to receive benefits had he been injured in the same accident. In this case, had Ries been injured in the same accident, his injury would not have arisen out of and in the course of employment, and therefore, he was not entitled to coemployee immunity with respect to negligence action brought by Meade. Therefore, the case was reversed and remanded the case for further proceedings.

Brown v. Quik Trip Corp.
No. 00-0868 (Iowa Feb. 27, 2002)

Brown was employed by Quik Trip as a convenience store clerk. While at work, Brown first viewed a violent altercation between customers and later was the victim of a robbery. As a result of these two incidents, Brown began suffering from delayed posttraumatic stress disorder. Brown filed a claim for workers' compensation, which was denied by the commissioner because Brown was not able to show his stress was greater than that of other workers employed in the same or similar jobs. Brown sought judicial review, and the district court affirmed. On appeal the court of appeals reversed and remanded the case to the commissioner to determine if Brown had established legal causation. The Iowa Supreme Court granted further review.

HELD- When the event or events giving rise to a claim for mental injury are readily identifiable, the appropriate test for legal causation is not whether the stress is greater than that experienced by similarly situated employees. Rather, the legal causation test is met when a claim is based on a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain. The two violent events occurring in Brown's employment satisfy this test. The case is remanded to the industrial commissioner to determine the extent of Brown's disability.

Grimm v. US West Communications, Inc.
No. 00-1275 (Iowa May 8, 2002)

Kristin Grimm was employed by US West from June 1988 until she was discharged in March 1997. In June 1988 US West issued Grimm an employee handbook which stated in part that discrimination against an individual based on sexual orientation was contrary to US West policy. Grimm is a homosexual, and she lived with another female employee of US West, a fact well known by her supervisor, Jamie McAllister. Following her discharge, Grimm brought suit against US West and McAllister (supervisor) in federal court. The federal court dismissed the case, and the plaintiff filed it in Polk County District Court, which sustained defendants' motion to dismiss. Plaintiff appealed.

Held: I. Because Grimm alleges McAllister's actions were malicious, wanton, and pursued for an improper purpose, her claim may fall within the beyond-the-scope-of-the-agency exception to the rule that parties to a contract cannot tortiously interfere with the contract. These allegations are **sufficient to survive** a motion to dismiss because they allege McAllister was acting outside the scope of her agency, and, thus in effect, removed herself form the contract.

II. Resolution of Grimm's suit for intentional infliction of emotional distress is not, as a matter of law, preempted by the Federal Labor Management Relations Act (LMRA) and therefore we reverse the district court on that issue.

III. The district court erred in dismissing Grimm's intentional infliction of emotional distress claim on the basis it was preempted by the Iowa Civil Rights Act.

IV. We cannot say as a matter of law on a motion to dismiss that Grimm was negligent for failing to bring her action within the two-year statute of limitations within the meaning of Iowa Code section 614.10.

V. The court erred in dismissing Grimm's claim for interference with a contractual relationship, her claim of a breach of the handbook contract, her claim of intentional infliction of emotional distress, and in dismissing all claims under our statute of limitations.

Reversed and Remanded

Estate of McGill v. McAninch
No. 01-0019 (Iowa App. Ct. May 15, 2002)

Gary Morgan, a McAninch employee, became intoxicated on a McAninch job site. After leaving the site, Morgan became involved in a traffic accident that caused the death of Sean McGill. McGill's family and estate sued McAninch, alleging that it owned them a duty of care under Restatement Second of Torts section 317, which imposes a duty of care upon employers to prevent off-duty employees on the employer's premises from conducting themselves so as to create an unreasonable risk of harm to others. The district court found that Morgan's action in driving after becoming intoxicated, rather than the consumption of alcohol, constituted the unreasonable risk of harm, and dismissed the petition. The estate appeals.

HELD - Recognizing a claim under section 317 in these particular circumstances would run contrary to Iowa law. By defining their claim as an assertion McAninch had a duty to prevent Morgan from consuming alcohol on their job site, and that liability should attach to the alleged furnishing of alcohol by McAninch employees, the plaintiffs attempt to impose the equivalent of **social-host liability**. However, absent a statutory mandate to the contrary, the general rule is that the consumption of alcohol by the intoxicated person is the proximate cause of any injuries that person inflicts. Because the law defines Morgan's consumption of alcohol as the proximate cause of any injuries inflicted due to his intoxication, the duty under section 317 cannot serve as the proximate cause of any injuries suffered by McGill's family or estate. The dismissal of the petition is affirmed.

Garcia v. Naylor Concrete Co.
No. 01-341 (Iowa July 17, 2002)

Claimant Garcia was working as a welder for Naylor Concrete Co. when he slif off the edge of the roof. He sustained injuries and was taken to a hospital, where blood and urine samples were taken. The results showed an alcohol concentration of 0.094 thirty minutes after claimant's fall and after he had received funds intravenously. Garcia filed a petition seeking workers' copensation benefits. Naylor Concrete Co. resisted payment of benefits, raising voluntary intoxication under Iowa Code section 85.16(2) as an affirmative defense. The industrial commissioner denied benefits on the basis that the cause of Garcia's injuries was his intoxication. The district court affirmed the agency decision, and the claimant appealed.

HELD - For purposes of the affirmative defense of intoxication under section 85.16(2), a person is intoxicated when one or more of the following are true: (1) the persons's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions. The expert testimony of the toxicologist indicated that claimant's ability to perform his job would have been imparied by the level of alcohol in his blood as shown in the test results, and that alcohol was one of the causes of the accident. The testimony of the toxicology expert constituted substantial evidence to support the industrial commissioner's finding on the causation issue. The Iowa Supreme Court affirmed the denial of benefits.

Grundmeyer v. Weyerhaeuser Co.,
No. 01-849 (Iowa July 17, 2002).

In 1966, Nancy Grundmeyer began working at Mead Container, a box factory. On August 1, 1987, Weyerhaeuser Company purchased Mead. Weyerhaeuser purchased Mead's assets and assumed Mead's liabilities with certain exceptions, including workers' compensation liabilities. When Grundmeyer began working for Mead in 1966 she had no hearing problems, though her work exposed her to high levels of noise. In 1988, a test showed Grundmeyere had a 15.3% hearing loss. A 1995 exam showed a hearing loss of 42.2%. Her hearing lost worsened after her retirement. Grundmeyer filed a petition for workers' compensation benefits for her hearing loss. The commissioner denied the claim on the ground that Grundmeyer had an occupational hearing loss, but that under Iowa Code sections 85B.11 and 85B.8 Weyerhaeuser was not liable for hearing loss incurred before the August 1, 1987 purchase date. Further, the commissioner found that Grundmeyer failed to show any hearing loss after that date was caused by exposure to excessive noise at work. The district court reversed the commissioner's decision, concluding that under section 85B.11 Weyerhaeuser was liable for all of the hearing loss that Grundmeyer sustained while working at the box factory. Weyerhaeuser appealed.

HELD - The legislature did not intend th language of section 85B.11 and section 85B.8 to cover an employee's entire employment with different employers when such and interpretation would make the last employer liable for all compensation payable for an occupational hearing loss. Substantial evidence supports the commissioner's implicit finding that Weyerhaeuser was not a successor in interest to Mead and for that reason a new employer-employee relationship occurred in 1987. Under sections 85B.11 and 85B.8 Weyerhaeuser is liable **only** for any hearing loss that resulted after the August 1, 1987 purchase date. There is also substantial evidence to support the commissioner's conclusion that Grundmeyer failed to prove her hearing

loss was caused by her exposure to excessive noise while employed by Weyerhaeuser. The judgment of the district court is reversed, and the case is remanded for an order affirming the ruling of the commissioner.

Kartheiser v. American National Can Company
No. 00-3924 (8th Cir. Nov. 29, 2001)

Salaried employee brought suit against former employer for payment of overtime work under employer's supplemental pay program. Employee brought action against former employer under Iowa Wage Payment Collection Law, Iowa Code Ch. 91A. The jury returned a verdict for the employee. The trial court set aside the jury verdict and granted the employer's motion for judgment as a matter of law, finding that the employee had not properly complied with employer's supplemental pay program and thus was not eligible for overtime compensation. The employee appealed.

HELD: The Eight Circuit Court of Appeals holds that the purpose of the Iowa Wage Collection Law is "uncomplicated and direct" and is meant to facilitate the collection of wages by employees. The Court of Appeals further holds that this law is meant to be liberally construed. The court found sufficient facts to support the jury's verdict and therefore reversed the trial court's grant of judgment as a matter of law and remanded with directions to reinstate the jury's verdict.

Mead v. Intermec Technologies Corporation
No. 01-1066 (8th Cir. Nov. 13, 2001)

Employee filed claim against former employer for short-term disability benefits and also asserted statutory claims under ERISA. The District Court granted summary judgment in favor of the employer and the employee appealed. The employee asserts that the district court erred in granting summary judgment because there were material facts in dispute. The employee further asserts that the District Court erred in determining that his ERISA claim was barred by the statute of limitations and that the District Court further erred in holding that the former employer owed no duty to provide the employee a requested plan summary after termination.

HELD: The Eight Circuit Court of Appeals finds that the employee failed to comply with the eligibility requirements as contained within the plain and ordinary interpretation of the plan's language. The Court of Appeals finds that the employee voluntarily and knowingly signed a severance agreement and waiver of all claims against the former employer. The court holds that releases of legal claims in exchange for severance benefits are enforceable under ERISA. The Court finds that even if the employee was otherwise eligible for short-term disability benefits, the severance agreement and waiver are sufficient to dispose of the claim. The Court further holds that because ERISA contains no statute of limitations, ERISA claims are governed by the "most analogous" state statute of limitation and finds that in this instance the two-year statute of limitation applies under the Iowa Wage Payment Collection Act. Finally,

the Court of Appeals holds only plan participants are owed a duty to receive information from a former employer regarding plan summaries. The Court holds that participants are defined as former employees who have a colorable claims that would prevail in a suit for benefits. Since the court finds that the employee plaintiff had no colorable claims that would prevail in a suit for benefits, the court holds that the former employer owed no duty to provide a plan summary to the employee.

II. ATTORNEYS

Schreiber v. Bastemeyer
644 N.W.2d 296 (Iowa 2002).

Schreiber filed a complaint against his former attorney, which was ultimately dismissed by the Iowa Supreme Court Board. Schreiber sought review of this decision by the district court, and damages from the board's administrator, Norman Bastemeyer. The district court dismissed the suit on grounds that it lacked subject matter jurisdiction and that Bastemeyer was immune from suit. Schreiber appealed the dismissal to the Iowa Supreme Court.

HELD: While Iowa Code section 17A.19 permits aggrieved persons to file a petition for judicial review from an agency decision, an agency under chapter 17A does **not** include the judicial branch or any of its components. The ethics board is clearly a component of the judicial branch. Therefore, because the named defendant to the action is a component of the judicial branch, the suit could not be maintained under chapter 17A. Further, Bastemeyer, as a member of the ethics board staff, was immune from suit for his conduct in the course of his duties as ethics administrator under Iowa Court Rule 35.22.(2). The Iowa Supreme Court ultimately holds that the district court properly dismissed this action.

Iowa Supreme Ct. Bd. of Prof'l Ethics and Conduct v. Engelhardt
630 N.W.2d 810 (Iowa 2001).

Attorney Englehart entered an Alford plea, in which he plead guilty without admitting guilt, to failing to file state quarterly employee withholding tax returns. Upon receiving notice of Engelhardt's criminal conviction the Iowa Supreme Court Board of Professional Ethics and Conduct initiated an investigation into the facts surrounding the matter. Engelhardt was dilatory in responding to requests for information by the Board. Concurrently with the investigation, Engelhardt was the subject of a complaint filed by a client. In regard to the complaint, Engelhardt was again dilatory in responding to the Board's request for information. The trial on the disciplinary complaint resulted in a finding by the commission that Englehart had violated the Iowa Code of Professional Responsibility by failing to timely file state income tax returns and employee withholding tax declarations and in failing to respond to the investigation into his conduct, and ordered a suspension of his license for at least one year. Engelhart appeals.

HELD: Englehart's criminal conviction for failing to file state quarterly employee withholding tax returns, notwithstanding his Alford plea in which he pled guilty without admitting guilt,

precluded him from contended, in the attorney disciplinary proceeding that he was not guilty of the offense. Additionally, Engelhart's delay in responding to the Board's request for information regarding his failure to timely file the tax returns was prejudicial to the administration of justice, and constituted a violation of the ethical rules. Based on these findings, the Supreme Court held that Engelhart's conduct warranted an indefinite period of suspension, with no possibility of reinstatement within six months.

Iowa Supreme Ct. Bd. of Prof'l Ethics and Conduct v. Pracht
627 N.E.2d 567 (Iowa 2001).

Attorney Pracht removed court document filing system records from the county district court clerk's office without authorization. Pracht's removal of the records necessitated a full inventory of the files in the clerk's office. After the inventory was complete, the county attorney confronted Pracht, who admitted he had the records and turned them over. The Board of Professional Ethics and Conduct filed a complaint against Pracht, which resulted in the recommended a two-year suspension by the grievance commission. Pracht appeals the recommendation of the grievance board.

HELD - The taking, and hiding, of the court records caused an intensive, resource-demanding investigation resulting in an expenditure of nearly $12,000. Attorney Pracht's conduct in removing the records, hiding them, and concealing them until questioned by the court attorney, evidenced dishonesty and deceit. Pracht's conduct, and violation of the Iowa Code of Professional Responsibility, warranted a two year suspension.

In re McCormick
639 N.W.2d 12 (Iowa 2002).

*While this case involves a disciplinary action against Judge, and not an attorney, it is interesting in light of the Supreme Court of the United State's recent decision regarding expression of political views by judges and judicial candidates.**

Patrick C. McCormick is a district associate judge in the third judicial district of Iowa. Prior to the November 2002 elections, Judge McCormick allowed a candidate for public office to place a sign in support of that candidate outside of his private residence. When questioned by the Commission about the sign, Judge McCormick admitted its presence in his front yard, but falsely stated that his wife had authorized the placement of the sign. One month later, Judge McCormick wrote the commission and admitted that his earlier statement was false, and that he had authorized the placement of the sign in his front yard. The Iowa Supreme Court convened to determine the appropriate sanction.

HELD: Judicial independence and neutrality requires judges to abstain from involvement in a variety of activities, including politics. In allowing a candidate for public office to place a promotional sign in his front yard, Judge McCormick engaged in a prohibited political activity and improperly lent the prestige of his office to advance the private interests of another. Judge McCormick's false statement that his wife had authorized the placement of the sign violated canons requiring judges to uphold the integrity and independence of the judiciary and to act in a manner promoting public confidence in the judiciary. Mitigating the wrong were the facts

that this was a single, isolated incident that occurred outside the courtroom, the Judge acknowledged his wrongdoing, and he corrected his misrepresentation before it was discovered. The Supreme Court of Iowa held that the proper penalty in this case was a public reprimand.

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Sullins
No. 02-396 (Iowa July 17, 2002)

The Iowa Supreme Court Board of Ethics and Conduct initiated attorney discipline proceedings against Sullins based on his unprofessional conduct with six separate clients. Five clients alleged neglect of their legal matters. All six clients alleged one or more improprieties concerning Sullins' handling of his clients' retainer fees. Two complaints alleged Sullins did not inform his clients of his June 1, 2000, suspension from the practice of law. The Grievance Commission found Sullins in violation of several disciplinary rules in handling the six clients and recommended that his license to practice law in Iowa be revoked.

HELD - (1) By not performing the tasks his clients required and neglecting their interests, Sullins is in violation of DR7-101A and DR 6-101(A)(3). **(2)** Sullins' failure to file lawsuits, comply with discovery requests, and investigate clients' cases was also a violation of the disciplinary rule prohibiting the violation of the disciplinary rules, and engaging in conduct prejudicial to the administration of justice that reflects adversely on the attorney's fitness to practice law. **(3)** Sullins also violated disciplinary rules by collecting an excessive fee from two clients, by failing to notify clients of his previous suspension, and by failing to place clients' funds in a trust account. Sullins defense to failing to place client funds in a trust account is that the retainers were flat fees. This illustrates that Sullins clearly misunderstands the concept that advance fees are the client's funds until the attorney earns them. **(4)** Further, Sullins has a long record or prior disciplinary actions, cumulating in his suspension from the practice of law on June 1, 2000. He has had numerous opportunities to alter his behavior, yet he continues with a pattern of serious ethical violations, showing a disrespect for the entire profession. Sullins is NOT fit to practice law and his license to practice law in Iowa is revoked.

Companion Case: Baltzley v. Sullins, No. 00-1385 (Iowa July 17, 2002).
Plaintiffs filed a legal malpractice action against Ray Sullins and served an original notice on him. Sullins failed to respond, and the court entered a default judgment against him. The Iowa Supreme Court Affirmed the judgment against him. The issue on appeal is whether the district court abused its discretion by ordering $6094.24 in attorney fees and costs as a sanction for Sullins' failure to comply with discovery orders.
HELD - The district court found that Sullins failed to provide discovery documents to the plaintiffs and that his failure had been careless, in disregard of the plaintiffs' rights and had caused the plaintiffs to incur attorneys fees in order to deal with the missing documents. The cour also found Sullins' actions in filing duplicate pleadings caused the plaintiffs to incur excessive attorney fees, and he willfully and wantonly disregarded the plaintiffs' legitimate discovery attempts. Based on these facts, the district court did not abuse its discretion in awarding $6094.24 as a discovery sanction.

III. COMMERCIAL

S.E. Iowa Co-Op Elec. Ass'n v. Iowa Utilities Bd.
633 N.W.2d 814 (Iowa 2001).

Mount Pleasant Municipal Utilities, a municipally owned electric utility, petitioned the State Utilities Board for electric transmission line franchises. The petitions asserted that the lines were necessary for a public use as they would save their customers money. The State Utilities Board granted the petition. Members of the power company who had been charging utility a wheeling fee to connect to electric transmission filed application for rehearing, claiming that the lines did not serve a public use nor did they represent a reasonable relationship to an overall plan of transmitting electricity in the public interest as required by Iowa Code section 478.4. The petition for rehearing was denied, and the cooperative members then petitioned for judicial review. The district court denied the petition for review, and the cooperative members appealed.

HELD - Chapter 478 was intended to entrust the State Utility Board with determining whether a public use existed, and if so, the necessity of the public use. The transmission of electricity to the public constitutes such a public use. As a matter of first impression, the court held that economic considerations could constitute the sole basis for a finding by the Board that proposed electric transmission lines were necessary to serve a public use. Further, the court affirmed the denial of the petition for judicial review, finding that the Board properly balanced applicable factors in determining substantial benefits outweighed the costs and conducted a sufficiently reliable power source study.

Buisness Designs, Inc. v. MidNational Graphics, L.L.C.,
No. 01-1087 (Iowa App. Ct. May 15, 2002).

Business Designs, Inc. (BDI) is a company specializing in producing signs and decals advertising car washes for service stations. BDI acquired two employees, Lane Shaver and Heidi Raymond. Subsequently, Lane Shaver and Heidi Raymond left BDI to join MidNational Graphics, L.L.C., a company that also produces signs and decals advertising car washes. Within a week of the departure of Shaver and Raymond from BDI, MidNational was shipping packages to BDI customers. Most of MidNational's profits came from former BDI customers. BDI filed a trade secret suit against MidNational, Shaver, and Raymond. BDI also filed for an injunction. The district court enjoined the defendants from doing business of any kind with six former BDI customers. Defendants appealed.

HELD - The defendants claim that this case does not involve the type of information which would constitute a trade secret under Iowa Code section 550.2(4). To qualify as a trade secret, the information first must have economic value. Economic value is assessed by determining if the information protects the owner's competitive edge or advantage. Because no other competitor has a product of the same quality as BDI, the Iowa Supreme Court found that the information had economic value. Second, BDI must demonstrate that the trade secret was the subject of efforts that are reasonable under the circumstances to maintain its secrecy. In this instance BDI's practice was not to reveal its methods and means of production, price lists, or

customer lists to any competitors. The Iowa Supreme Court finds this sufficient to establish BDI's efforts to keep its trade secrets secret were reasonable under the circumstances. The Iowa Supreme Court affirms the holding of this district court, but allows the defendants to sell products to the six targeted customers if they develop new technology not being used by BDI.

IV. CONSTITUTIONAL

Bousman v. Iowa District Court for Clinton County
630 N.W.2d 789 (Iowa 2001)

County Attorney's office applied for nontestimonial identification order requiring suspect to submit to a swabbing of his mouth in order to collect a saliva sample to be used for DNA analysis purposes to aid in a burglary investigation. After the order issued, the suspect filed motion to quash the order. The district court denied the suspect's motion and the suspect appealed.

HELD: The Supreme Court holds that a nontestimonial identification order issued must be constitutionally reasonable. Finding that the period of detention for a mouth swabbing procedure is brief and that it needs to be done only once, it does not invade the suspect's private life or thoughts, and can be scheduled at a time convenient for the suspect, the court holds that the Fourth Amendment reasonableness requirement for a nontestimonial identification order requiring a subject to submit to this procedure may be based upon a finding of reasonable grounds to suspect rather than upon a showing of probable cause. The court found the evidentiary showing, in support of the order in this case, to be deficient because it lacked the statutorily required information regarding an unnamed information. Therefore, the court holds that the order was improperly issued and that the judge abused its discretion and remanded for entry of order granting suspect's motion to quash.

State v. Ramirez
636 N.W.2d 740 (Iowa 2001)

Pursuant to plea agreement, defendant who was permanent legal resident pled guilt in District Court to felony offense of possessing controlled substance with intent to deliver. The district judge did not mention, at the plea or sentencing proceedings, the possible effects of the guilty plea on the defendant's immigrations status nor that the guilty plea would subject the defendant to a mandatory deportation without possible relief. The defendant appealed. The defendant contends that the court committed constitutional error by allowing a guilty plea without the court first satisfying itself that the plea was a knowing, intelligent and voluntary choice by the court raising the possible deportation issue to the defendant.

Held: The Supreme Court holds that as a matter of first impression, neither the rules of criminal procedure nor constitutional due process require that a trial court has to advise the defendant of the possible deportation consequences of his guilty plea. The court further holds that defense counsel has no duty to advise a defendant of the possible deportation consequences

of his plea. The court stated generally that deportation is a collateral consequence of a defendant's guilty plea to a felony offense and that because it is a collateral rather than direct consequence, neither the court nor counsel for the defendant are required to inform the defendant of possible deportation consequences.

V. CONTRACTS

In re Marriage of Van Horn
No. 01-789 (Iowa App. Ct. July 3, 2002)

Marcella and Robert Van Horn entered into an antenuptial agreement two days before their wedding. Though Marcella was advised of and understood her right to seek independent counsel, she signed th document without representation after viewing only the first portion. The agreement waived each parties rights and interests in the existing and after acquired property of the other, as well as any right to spousal support or attorney fees. The agreement listed each party's assets and specifically listed most of Robert's assets, but without assessing individual values. During the marriage, the parties did not commingle funds. At the time of the dissolution, the district court found the antenuptial agreement enforceable, but divided the parties 401K accounts as well as outstanding loans made by Robert to his family farm corporation. It also awarded Marcella $5,500 per month in alimony, attorney and expert witness fees. Robert appeals.

HELD - (1) The antenuptial agreement is enforceable because Marcella's wavier of her marital rights was voluntary and the terms of the agreement were fair. (2) Because under the agreement the parties hold and retain as their own separate property both premarital and after-acquired property, the parties' separate 401K accounts and Robert's claim to the outstanding farm loans were not subject to division. (3) The signing of the agreement is only one factor in determining whether to award alimony. Finding that Robert has significant income and assets, the Appellate court affirms the award of $5,500 per month alimony to Marcella. (4) The agreement precludes the award of attorney's fees, and therefore Marcella cannot be reimbursed for them. However, expert witness fees are recoverable under the agreement and that portion of the award to Marcella is affirmed.

McNally & Nimergood v. Neumann-Kiewitt Constructors, Inc.
00-550 (Iowa July 17, 2002)

Defendant rented crawler crane from plaintiff. Lease terms for the rental agreement were developed by and exchange of each party's respective form agreements. The plaintiff's form agreement provided that the defendant would indemnify the plaintiff against any harm for any and all loss, liability, or damage in connection with any injury or claim of injury by the defendant's employees. The defendant's form agreement provided that the defendant would be liable for any and all damage to any persons or property while the crane was in the defendant's possession, except for damage caused by defects in the plaintiff's equipment. Representatives from both parties signed the defendant's lease agreement; while the defendant did not sign the

plaintiff's lease agreement. Subsequently, defendant's employee was seriously injured when his arm was pinched by a section of a tower crane being hoisted into place with the plaintiff's crawler crane. The injured employee sued both his employer, the defendant, and owner of the crawler crane, the plaintiff. The district court dismissed the action against the employer, determining recovery was limited to workers' compensation, and the crane owner eventually settled the employee's claim. The crane owner, plaintiff, filed action against the contractor, defendant, for indemnification under the lease agreement. The District Court granted the defendant's motion for summary judgment finding that the agreement between the parties was confined to the rental agreement under the defendant's integration clause and that the agreement did not provide for indemnification for the plaintiff's own negligence. The plaintiff appealed.

HELD: The Iowa Supreme Court finds that the legal claims for damages paid by the plaintiff in settlement were based solely on the allegations of its own negligence. The Court holds that indemnification contracts will not be interpreted so as to permit an indemnitee to recover for its own negligence unless this intention is clearly and unambiguously expressed within the contract. The court finds that there was no implied agreement for indemnification based on contractual duties imposed to maintain the crane. The court holds that even if there was an implied indemnification agreement, such an implied agreement would not include indemnification for the indemnitee's own negligence. Therefore, the Iowa Supreme Court holds that the district court properly granted summary judgment.

Shatzer v. Globe American Casualty Company
639 N.W.2d 1 (Iowa 2001)

Insured was seriously injured in automobile accident and brought action against underinsured motorist (UIM) carrier for benefits. The UIM carrier filed a motion for partial summary judgment seeking a determination whether the underinsured motorist benefits should be offset by amounts of private disability benefits received by the insured from his employer. The trial court denied the motion. After insured was awarded damages and future pain and suffering at trial, the trial court reduced the future damages to the present value. The insured appealed and the UIM carrier cross-appealed claiming that trial court erred in denying their motion for partial summary judgment.

HELD: The Iowa Supreme Court holds that while insurers may include in their contracts "terms, exclusions, limitations, conditions, and offsets to avoid duplication of insurance or other benefits," the insurance contract must contain these limitations or exclusionary clauses in clear and explicit language. The Court found that the language of the policy in question was not clear or unambiguous concerning the fact that UIM benefits would be reduced by the amount of private disability benefits received from an employer. Accordingly, the Court holds that the UIM carrier is not expressly authorized to offset the private benefits the insured received from his employer. The Court, therefore, affirms the District Court's denial of partial summary judgment.

VI. DAMAGES

Channon v. United Parcel Service, Inc.
629 N.W.2d 835 (Iowa 2001).

Appellant, Channon, brought Title VII claims of sex discrimination, retaliation and sexual harassment against her employer, UPS. The jury reached a verdict in favor of Channon on the Title VII claims of sex discrimination and retaliation, and awarded her compensatory and punitive damages. However, the jury rejected her Title VII claim of sexual harassment. In a posttrial ruling, the district court imposed caps, pursuant to 42 U.S.C. § 1981a, on the compensatory and punitive damage awards. Channon appeals the imposition of damage caps on several different grounds.

HELD - (1) Future pecuniary damages are subject to limits based on the size of the employer. 42 U.S.C. § 1981a(b)(3). But, under Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001), front pay damages are not subject to the damages cap, and the district court erred in concluding otherwise. (2) The district court erred in refusing to allocate compensatory damages under the Iowa Civil Rights Act and punitive damages under Title VII. (3) The damages cap imposed by 42 U.S.C. § 1981a(b)(3), capping damages according to the number of employees, does not violate the Fifth Amendment due process requirements and does not unduly infringe on the province of the judiciary.

Comes v. Microsoft Corp.,
No. 00-1268 (Iowa June 12, 2002).

Computer consumers brought a class action claiming Microsoft used a monopoly in conjunction with its Windows 98 operating system for the purpose of excluding competition or controlling, fixing, or maintaining prices in violation of the Iowa Competition Law. District court dismissed suit finding that Iowa's law was to be interpreted consistent with federal law according to Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), where indirect purchasers were barred from recovering damages for alleged antitrust violations. Class appealed.

Held: I. Iowa Competition Law creates a cause of action for **all consumers**, regardless of one's technical status as a direct or indirect purchaser.

II. Iowa's harmonization statute, Iowa Code § 553.2, does not present a question of federal preemption, and Iowa Competition law is not bound by Illinois Brick.

III. Harmonization provision aimed not at who can sue under state antitrust law, but rather, is designed to achieve uniform application of the state and federal laws prohibiting monopolistic practices.

IV. Iowa Competition Law is construed to encourage the primary goal of prohibiting restraints of economic activity and monopolistic conduct.

V. Iowa Competition Law was enacted prior to Illinois Brick and that status of pre-Illinois Brick federal law supports conclusion that Iowa legislature intended indirect purchasers to have standing under the Iowa Competition Law.

VI. Class **may pursue an action** for violation of Iowa Competition Law and has stated a claim upon which relief may be granted.

Reversed and Remanded.

VII. GOVERNMENT

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

Plaintiff Adams was operating a telescopic conveyer as part of a roofing project on a Des Moines residence. The conveyor was mounted on a flatbed truck that Adams parked in the home's driveway. Unbeknownst to Adams, the boom on his truck came in contract 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 one firefighter extinguished the fire in the house, another firefighter instructed Adams to move the boom truck out of the driveway. At this time Adams was under the mistaken belief that the power had been turned off. When Adams grabbed the door of the truck, he was thrown to the ground by a jolt of electricity. Adams sued the City of Des Moines for the his injuries resulting from the electrical shock. The City moved for summary judgment, claiming immunity from liability as a matter of law based on Iowa Code section 670.4(11), which exempts a municipality from liability for claims "arising out of an act or omission in connection with an emergency response." The district court granted the City's motion on the grounds that the acts complained of, whether authorized or not, were in connection with an emergency response. Adams appealed.

HELD - The court first noted that though Adams raised the argument that Iowa Code section 670.4(11) was unconstitutional as applied to him at the district court level, he did not move the district court to expand its ruling when it failed to address the issue, and therefore the issue os not preserved for appellate review. The court also determined that the city firefighter's conduct in ordering Adams to move his boom truck after the electrical fire, occurred "in connection with an emergency response" and thus, the City was immune from liability for the resulting shock injury. The court found that even if the emergency no longer existed at the time the injury occurred, because the injury occurred shortly after the fire was extinguished and while firefighters remained at the scene, it was in connection with an emergency response. Further, the court held that it is the occurrence and continuation of the emergency response, rather than just an emergency, that extends the City's immunity from liability.

Pauline Co, Inc. v, Iowa Dep't of Transp.,
637 N.W.2d 191 (Iowa 2001).

The plaintiffs, Pauline Company and Rabbit Corporation, are both minority-owned construction companies. The plaintiffs brought a civil rights action under 42 U.S.C. § 1981 against the Department of Transportation (DOT), alleging that they were subjected to racial discrimination in the course of performing subcontracts on IDOT projects. The IDOT moved to dismiss the claim on the ground that 42 U.S.C. § 1981 could not be the basis for a damage claim against a state entity, and the remedy for state action that does not comply with § 1981

lies exclusively under 42 U.S.C. § 1983. The district court rejected IDOT's argument, and IDOT appealed that ruling to the Iowa Supreme Court by permission.

HELD : In determining whether § 1983 is the exclusive remedy for a § 1981 violation, the court first looked to the history of § 1981. Before the 1991 amendment, the United States Supreme Court, in Jett v. Dallas Independent Sch. Dist., held that § 1983 was the exclusive remedy for damage actions brought against state actors for violations of rights declared in § 1981. In 1991, § 1981 was amended to include a new subsection (c) ,which provides that "[t]he rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law." The Iowa Supreme Court then noted that only one circuit, the Ninth, had since held that the purpose of the 1991 addition of subsection (c) was to treat private actors similarly with respect to their right to sue. However, the Iowa Supreme Court follows the holdings of the Eleventh and Fourth Circuits, and determines that the 1991 amendment to § 1981 did not alter its legal effect with respect to remedies against state actors. Noting that nothing in the 1991 amendment speaks of adding a remedy under that statute for claims against state actors, the court holds that § 1983 is the exclusive remedy for damage actions brought against state actors for violations of rights under § 1981. The court reverses and remands the case to the district court for an order granting IDOT's motion to dismiss both actions.

McMurray v. The City Council of the City of West Des Moines
No. 01-0701 (Iowa Feb. 27, 2002)

In connection with a developer's proposal to build a regional shopping mall on land in the City of West Des Moines, the city agreed to pay for all road, sewer, and water main infrastructure, and to finance these improvements through tax increment financing by adopting an urban renewal plan pursuant to Iowa Code chapter 403. The adopted plan designated a tract which including the shopping center property as an urban renewal area for economic development and proposed to undertake public improvements within the area. The city did not mention the proposed shopping mall, but the plan exclusively provided for the development and improvement of public infrastructures. Opponents, individual tax payers and owners of two shopping malls, challenged the actions of the West Des Moines City Council on two grounds: (1) The city failed to comply with the procedural requirements of Iowa Code chapter 403 in adopting the plan; and (2) the plan violated article III, section 31 of the Iowa Constitution, which prohibits the appropriation of public money for private purposes. The opponents appeal the district court's granting of the city's motion for summary judgment.

HELD - (1) Iowa Code section 403.5(1) does not impose a burden on the city council to make specific findings in determining an economic development area and in designating an urban renewal project. The city complied with all of the statutory requirements, and therefore the district court properly found that the city had validly exercised its authority. (2) The city did not violate a requirement to provide assistance for low and moderate-income family housing. A municipality is only required to provide such assistance when the economic area has been designated appropriate for public improvements related to housing. In this case the area was designated as an economic development area for the purpose of developing commercial or

industrial enterprises, and therefore their was no requirement that the city provide housing assistance. (3) The plan uses public money to build or improve public infrastructures, and therefore it does not violate article III, section 31 of the Iowa Constitution.

2002 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR SCHEDULE

Wednesday, September 25, 2002

10:00 a.m. **Registration Open**

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

12:50 - 1:00 p.m. **Welcome and Report of the Association**
IDCA Pres.-Elect, J. Michael Weston, Esq.

1:00 - 1:30 p.m. **Recent Developments in the Iowa Court of Appeals**
Honorable Van D. Zimmer
Judge, Iowa Court of Appeals
Des Moines, IA

1:30 - 2:00 p.m. **The Law of Expert Witnesses: Daubert and Beyond**
Sarah Gayer, Esq.
Shuttleworth & Ingersoll, P.L.C.
Cedar Rapids, IA

2:00 - 2:30 p.m. **Moving to the Model Rules of Ethics: The Change to Come**
Sharon Soorholtz Greer, Esq.
IDCA Board Member
Cartwright, Druker & Ryden
Marshalltown, IA

2:30 – 3:15 p.m. **Annual Case Update #1**
Christine L. Conover, Esq.
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, IA
Matthew J. Haindfield, Esq.
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, IA
Stephen E. Doohen, Esq.
Whitfield & Eddy, P.L.C.
Des Moines, IA

3:15 - 3:30 p.m. **BREAK**

3:30 - 4:15 p.m. **Employment Law Update**
Thomas D. Wolle, Esq.
Cedar Rapids, IA

4:15 - 5:00 p.m. **Interventional Treatments in Chronic Pain: Separating the Wheat from the Chaff (Or the Kernel from the Cob)**
Dr. George A. Lederhaas
Department of Anesthesiology
Iowa Methodist Medical Ctr., Des Moines, IA

5:15 - 7:00 p.m. **Tour of the New Justice Building**
Shuttle will leave every 15 minutes from the front lobby area to take individuals to the new Justice Building for a tour.
Tour will rake 20-30 minutes.

Thursday, September 26, 2002

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

7:30 - 8:00 a.m. **Continental Breakfast**

8:00 - 8:15 a.m. **Legislative Update**
Robert Kreamer, Esq.
IDCA Executive Director
Des Moines, IA

8:15 - 9:00 a.m. **Defending Post Traumatic Stress Disorder Claims**
Dr. Steven Carter
MEDPsych Corporation
Virginia, MN

9:00 - 9:30 a.m. **Improving Professionalism and Ehics in the Courtroom**
Honorable Arthur E. Gamble
Chief Judge of the Fifth Judicial District Iowa
Des Moines, IA

9:30 – 10:30 a.m. **Practical Issues in Working with Experts in Product Liability Cases**
Kevin M. Reynolds, Esq.
Chair, DRI and IDCA Product Liability Committees
Whitfield & Eddy, P.L.C.
Des Moines, IA

John Trimble, P.E.
Exponent Failure Analysis Associates
Chicago, IL

10:30 - 10:45 a.m. **BREAK**

10:45 - 11:15 a.m. **Bad Faith in Iowa: An Update**
Brenda K. Wallrichs, Esq.
Moyer & Bergman, P.L.C.
Cedar Rapids, IA

11:15 - 12:00 noon **Lawyers and the Ethics Enforcement Process**
Roger Stetson, Esq.
Belin, Lamson, McCormick, Zumbach & Flynn, P.C.
Des Moines, IA

12:00 – 12:30 p.m. **LUNCH**

12:30 – 12:40 p.m. **Annual Meeting of IDCA**

12:40 – 1:10 p.m. State of the Judiciary
Honorable Louis A. Lavarato
Chief Justice, Iowa Supreme Court
Des Moines, IA

1:15 - 1:45 p.m. **Workers Compensation Update**
Iris Post, Esq.
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, IA

1:45 - 2:30 p.m. **Storytelling in Oral Argument: A Plaintiff's Prospective**
Bruce A. Braley, Esq.
Dutton, Braun, Staack & Hellman, P.L.C.
Waterloo, IA

2:30 - 3:15 p.m. **Annual Case Update #2**

3:15 - 3:30 p.m. **BREAK**

3:30 - 4:00 p.m. **Practical Tips for Better Trial Practice**
Honorable John A. Jarvey
Chief Magistrate Judge
U.S. District Court for Northern District Iowa
Cedar Rapids, IA

4:00 - 4:30 p.m. **Challenges for the Iowa Lawyer**
Alan E. Fredregill, Esq.
Past President IDCA, President Iowa State Bar Association
Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P.
Sioux City, IA

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 27, 2002

7:30	**Registration Open**
7:30 – 8:00 a.m.	**Continental Breakfast**
8:00 – 9:00 a.m.	**Better Computer Research Skills** Mary B. Walsh, Esq. The West Group Des Moines, IA
9:00 - 9:30 a.m.	**Current National Issues on the Defense Practice** Gregory M. Lederer, Esq. Past President IDCA, Regional Director DRI Simmons, Perrine, Albright & Ellwood, P.L.C. Cedar Rapids, IA
9:30 - 10:15 a.m.	**Annual Case Update #3**
10:15 – 10:45 a.m.	**Brain Scanning: Defense of a Brain Injury** Lyle A. Ditmars, Esq. IDCA Board Member Peters Law Firm, P.C. Council Bluffs, IA
10:45 - 11:00 a.m.	**BREAK**
11:00 - 12:00 noon	**Effective Defense of Damages** Christy D. Jones, Esq. Butler, Snow, O'Mara, Stevens & Cannada Jackson, MS David E. Dukes, Esq. Nelson, Mullins, Riley & Scarborough Columbia, SC
12:00 - 12:30 p.m.	**LUNCH**
12:30 - 1:00 p.m.	**Current Developments in the Federal Courts** Honorable Ronald E. Longstaff Chief Judge US District Court for the Southern District of Iowa Des Moines, IA
1:00 - 2:30 p.m.	**Winning: A Survey of Successful Trial Techniques** Christy D. Jones, Esq. Butler, Snow, O'Mara, Stevens & Cannada Jackson, MS David E. Dukes, Esq. Nelson, Mullins, Riley & Scarborough Columbia, SC Stephen V. Powell, Esq. Swisher & Cohrt, P.L.C. Waterloo, IA Patrick M. Roby, Esq. Past President IDCA Elderkin & Pirnie, P.L.C. Cedar Rapids, IA
2:30 p.m.	**Adjourn**

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Please welcome the following new members admitted to the Iowa Defense Counsel Association from September 2001 through August 2002.

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Nicole Claussen, Cedar Rapids, IA

Elizabeth V. Croco, Cedar Rapids, IA

Thomas M. Cunningham, West Des Moines, IA

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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
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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

2002 ANNUAL MEETING & SEMINAR

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THE LAW OF EXPERT WITNESSES

SARAH GAYER
SHUTTLEWORTH & INGERSOLL, PLC
PO BOX 2107
CEDAR RAPIDS, IA 52406
319-365-9461
sjg@shuttleworthlaw.com

I. FEDERAL LAW

A. THE TRIAL COURT'S GATEKEEPING ROLE

The "gatekeeping role" of the trial court "requires judges to not only determine the admissibility of expert testimony of scientists, but also that of all expert witnesses." Krueger v. Johnson and Johnson Professional Inc., 160 F.Supp.2d 1026, 1030 (S.D. Iowa 2001) (emphasis added); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999) ("We conclude that Daubert's general holding – setting forth the trial judge's general 'gatekeeping' obligation – applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge").

Trial courts have "substantial latitude" regarding whether to admit expert testimony. United States v. Larry Reed & Sons Partnership, 280 F.3d 1212, 1215 (8th Cir. 2002). An appellate court reviews a trial court's decision whether to admit expert testimony for an abuse of discretion. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999); United States v. Dico, Inc., 266 F.3d 864, 869 (8th Cir. 2001).

B. RULE 702

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Rule 702 "clearly" is a rule of "admissibility rather than exclusion." Lauzon v. Senco Prod., Inc., 270 F.3d 681, 686 (8th Cir. 2001); Weisgram v. Marley Co., 169 F.3d 514, 523 (8th Cir. 1999); Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1298 (8th Cir. 1997).

"Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony." Lauzon v. Senco Prod., Inc., 270 F.3d 681, 686 (8th Cir. 2001) (emphasis added); Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1298 (8th Cir. 1997).

C. RELEVANCY

"[E]vidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact." Lauzon v. Senco Prod., Inc., 270 F.3d 681, 686 (8th Cir. 2001) (emphasis added); Bonner v. ISP Technologies, Inc., 259 F.3d 924, 929 (8th Cir. 2001).

"It is far better where, in the mind of the district court, there exists a close case on relevancy of the expert testimony in light of the plaintiff's testimony to allow the expert opinion and if the court remains unconvinced, allow the jury to pass on the evidence." Lauzon v. Senco Prod., Inc., 270 F.3d 681 (8th Cir. 2001).

1. Expert testimony held relevant

Bonner v. ISP Technologies, Inc., 259 F.3d 924, 929 (8th Cir. 2001) (affirming admission of testimony by pharmacologist / toxicologist regarding the plaintiff's acute symptoms caused by defendant's product because the issue was relevant to expert analysis regarding plaintiff's alleged permanent injuries).

Wood v. Minnesota Mining and Mfg. Co., 112 F.3d 306 (8th Cir. 1997). Plaintiff who was injured when his truck was struck by a train claimed that the defendant had negligently constructed the railroad crossing and failed to warn of the crossing. In support of these claims, the plaintiff was allowed to introduce expert testimony by a highway safety specialist. Id. at 309. The Eighth Circuit Court of Appeals affirmed the admission of such testimony as relevant, noting that the district court had instructed the jury that the expert testimony "was not evidence of a legal violation by [the defendant]." Id. at 310.

Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968 (8th Cir. 1995). The plaintiff who was exposed to fumes and dust containing a toxin (manganese) asserted FELA claims. The defendant challenged the plaintiff's expert testimony based on a positron emission tomography (PET). Specifically, the defendant argued that the PET was not reliable for a diagnosis of manganese encephalopathy and not relevant for any other purpose. Id. at 973. The trial court found the testimony was relevant in excluding other diagnoses. The Eighth Circuit Court of Appeals affirmed, holding that "it is relevant that other possible sources of [the plaintiff's injuries] have been ruled out. . . . " Id.

Ventura v. Titan Sports, Inc., 65 F.3d 725, 734 (8th Cir. 1995) (affirming district court's conclusion that expert testimony regarding reasonable royalties was relevant).

2. Expert testimony held irrelevant

United States v. Triplett, 195 F.3d 990-998 (8th Cir. 1999) (affirming the exclusion of testimony by "lighting expert" on grounds of relevancy).

Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076 (8th Cir. 1999). The plaintiff asserted various product liability claims against the manufacturer of a corn head. Id. at 1084. In support of his warning claim, the plaintiff sought to introduce expert testimony by a "human factors engineer" who holds a doctorate in experimental psychology. Id. at 1080. The Eighth Circuit Court of Appeals affirmed the exclusion of such testimony as unreliable. Id. at 1084. In addition, the Court explained that expert testimony regarding the failure to warn issue would have been irrelevant because a) the warnings present on the product had been painted over and there was no basis for concluding that the proposed warnings would have been seen by the plaintiff and b) there was evidence that the plaintiff had been warned by co-workers prior to the time of his injury. Id.

United States v. $141,770.00 in United States Currency, 157 F.3d 600 (8th Cir. 1998) (affirming the exclusion of testimony "that 99% of all United States currency is contaminated with drug residue" as irrelevant).

Pestel v. Vermeer Mfg. Co., 64 F.3d 382 (8th Cir. 1995). Plaintiff who was injured by a stump cutter sued the manufacturer. The plaintiff sought to introduce expert testimony by a mechanical engineer that the stump cutter should have contained a safety-bar guard. While the plaintiff's expert did not test his proposed guard, the defendant's expert did conduct videotaped tests of the proposed guard. After viewing the results of those tests, the plaintiff's expert admitted that his guard "needed further refinements" and that he "would not use the guard in its present state on a stump cutter." Id. at 383-4. The district court excluded testimony regarding the proposed guard as irrelevant. The Eighth Circuit affirmed, explaining that the proposed guard "was not relevant to show that a guard could be made that would offer protection, and yet not inhibit the use or practicality of the machine." Id. at 384.

Sorensen v. Shaklee Corp., 31 F.3d 638 (8th Cir. 1994). Plaintiffs asserted products liability claims against the manufacturer of alfalfa tablets. Plaintiffs claimed that they had consumed alfalfa tablets treated with ethylene oxide and that such tablets had caused mental retardation in their children. Id. at 639. In support of their claim, plaintiffs sought to introduce causation testimony by several physicians. The Eighth Circuit Court of Appeals affirmed the exclusion of such evidence as irrelevant, explaining that the plaintiffs had not proven that they had consumed alfalfa tablets containing ethylene oxide residue. Id. at 648.

D. RELIABILITY

Expert testimony "must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires." Lauzon v. Senco Prod., Inc., 270 F.3d 681, 686 (8th Cir. 2001) (emphasis added). See Bonner v. ISP Technologies, Inc., 259 F.3d 924, 929 (8th Cir. 2001) ("[Rule 702's] concern with 'scientific knowledge' is a reliability requirement").

"[T]he law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 142 (1999) (emphasis added).

"[N]either Rule 702 nor *Daubert* requires that an expert opinion resolve an ultimate issue of fact to a scientific absolute in order to be admissible." Bonner v. ISP Technologies, Inc., 259 F.3d 924, 929 (8th Cir. 2001).

A court may consider "one or all of the Daubert factors" in making its determination regarding reliability of expert testimony. In re Air Crash, 291 F.3d 503, 2002 WL 1059718 (8th Cir. 2002); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). Those factors include the following:

1) whether the expert's methodology has been tested. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993); Lauzon v. Senco Prod., Inc., 270 F.3d 681, 687 (8th Cir. 2001); Bonner v. ISP Technologies, Inc., 259 F.3d 924, 928 n. 3 (8th Cir. 2001) (quoting Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208-9 (8th Cir. 2000)).

2) whether the theory/technique has been subjected to peer review and publication. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993); Lauzon v. Senco Prod., Inc., 270 F.3d 681, 687 (8th Cir. 2001); Bonner v. ISP Technologies, Inc., 259 F.3d 924, 928 n. 3 (8th Cir. 2001) (quoting Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208-9 (8th Cir. 2000)).

3) whether the technique has a known or knowable rate of error. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 594 (1993); Lauzon v. Senco Prod., Inc., 270 F.3d 681, 687 (8th Cir. 2001); Bonner v. ISP Technologies, Inc., 259 F.3d 924, 928 n. 3 (8th Cir. 2001) (quoting Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208-9 (8th Cir. 2000)).

4) whether the theory/technique has been generally accepted in the proper scientific community. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 594 (1993); Lauzon v. Senco Prod., Inc., 270 F.3d 681, 687 (8th Cir. 2001); Bonner v. ISP Technologies, Inc., 259 F.3d 924, 928 n. 3 (8th Cir. 2001) (quoting Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208-9 (8th Cir. 2000)).

5) whether the expertise was "developed for litigation or naturally flowed from the expert's research." Lauzon v. Senco Prod., Inc., 270 F.3d 681, 687 (8th Cir. 2001).

6) whether the proposed expert ruled out other alternative explanations. Lauzon v. Senco Prod., Inc., 270 F.3d 681, 687 (8th Cir. 2001).

7) whether the proposed expert sufficiently connected the proposed testimony with the facts of the case. Lauzon v. Senco Prod., Inc., 270 F.3d 681, 687 (8th Cir. 2001).

1. Expert testimony held reliable

United States v. Larry Reed & Sons Partnership, 280 F.3d 1212, 1215 (8th Cir. 2002). An agricultural partnership and its partners were charged with submitting a false crop insurance claim in violation of the False Claims Act. Id. at 1214. The defendants challenged the admission of expert testimony regarding soil preparation that was based on computer analysis of satellite images. Id. at 1215. The Eighth Circuit Court of Appeals affirmed the admission of the testimony, noting the widespread acceptance of the methodology as well as the cogent nature of the expert's testimony. Id. at 1215-6.

Lauzon v. Senco Prod., Inc., 270 F.3d 681 (8th Cir. 2001). Plaintiff was injured while using a pneumatic nail gun manufactured by the defendant. Id. at 684. The plaintiff sought to introduce testimony by an engineer who had previously testified in approximately 40 pneumatic nail gun cases. Id. at 685. The district court excluded the testimony as unreliable. Id. The Eighth Circuit Court of Appeals reversed, concluding that the testimony was sufficiently reliable in light of testing, peer review, general acceptance, the opinion's basis, and the exclusion of possible causes. Id. at 696.

United States v. Dico, Inc., 266 F.3d 864 (8th Cir. 2001). United States brought CERCLA claims against landowner related to the cleanup of groundwater. Id. at 868. The landowner argued that the testimony of the government's hydrogeologist should have been excluded as unreliable. Id. at 869. Specifically, the landowner argued a) that the expert ignored evidence regarding alternative sources of contamination; b) that the expert's analysis of the migration of contaminants into the groundwater was based on

unreliable methodology; and c) that the expert's findings were based on insufficient data. Id. at 869-872. The Eighth Circuit Court of Appeals affirmed the admission of the testimony, concluding that the landowner's arguments went to the weight of the testimony. Id. at 872.

Miles v. General Motors Corp., 262 F.3d 720, 724 (8th Cir. 2001) (affirming the trial court's finding that accident reconstruction testimony was reliable).

Bonner v. ISP Technologies, Inc., 259 F.3d 924 (8th Cir. 2001). The plaintiff who was exposed to an organic solvent ("FoamFlush") sued the manufacturer, claiming psychological problems, cognitive impairment and personality disorders, and "Parkinsonian" symptoms. Id. 928. In support of her claims, the plaintiff sought to introduce testimony by a pharmacologist / toxicologist. Id. at 928. The defendant argued that the pharmacologist / toxicologist's testimony should have been excluded as unreliable, criticizing the sources upon which the expert relied and the expert's failure to test his theory. Id. at 930. The district court allowed the pharmacologist / toxicologist to testify that the plaintiff's acute symptoms were caused by the solvent but did not allow the expert to testify that her "permanent Parkinsonian symptoms" were caused by the solvent. Id. The Eighth Circuit Court of Appeals affirmed. Id. at 931. The plaintiff also sought to introduce testimony of a neuropsychologist / neurotoxicologist that she suffers from permanent organic brain dysfunction consistent with exposure to the defendant's solvent. Id. at 928, 931. The district court allowed the neuropsychologist / neurotoxicologist to testify that because of her exposure to the defendant's solvent, the plaintiff suffered "permanent organic brain dysfunction manifesting itself in Parkinsonian physical symptoms, cognitive impairments, and personality disorders." Id. at 931. The defendant argued that the neuropsychologist / neurotoxicologist should not have been allowed to testify that the solvent caused permanent injury. Id. The Eighth Circuit Court of Appeals affirmed the admission of such evidence, explaining that 'the scientific questions were best addressed by allowing each side to present its experts and then submitting their opinions to the jury." Id. at 932.

United States v. Jolivet, 224 F.3d 902, 905-6 (8th Cir. 2000) (affirming admission of testimony by "expert in handwriting comparison").

EFCO Corp. v. Symons Corp., 219 F.3d 734 (8th Cir. 2000). A manufacturer of metal panels asserted various claims against a competitor. The defendant challenged the testimony of the plaintiff's expert witness regarding damages as unreliable. After conducting a two-day hearing, the district court held that such testimony was sufficiently reliable. Id. at 739. The Eighth Circuit Court of Appeals affirmed, noting that the defendants' criticisms were "grist for the jury." Id.

Bone v. Ames Taping Tool Sys., Inc., 179 F.3d 1080 (8th Cir. 1999). The plaintiff who worked as a drywall taper asserted product liability claims against the manufacturer of an automated taping gun (known as the "bazooka"). In support of his claims, the plaintiff relied upon the testimony of treating physicians to prove causation. Id. at 1082. The district court rejected such testimony and entered summary judgment for the

manufacturer. Noting that "absolute certainty" regarding causation is not required, the Eighth Circuit Court of Appeals held that the expert testimony was sufficiently reliable to establish that the taping gun had caused injuries to the plaintiff's wrist, shoulder and elbow. Id.

Forklift of St. Louis, Inc. v. Komatsu Forklift, USA, Inc., 178 F.3d 1030, 1035 (8th Cir. 1999) (affirming the admission of expert testimony regarding damages).

Clark v. Heidrick, 150 F.3d 912 (8th Cir. 1998) (affirming admission of expert testimony that a "nuchal arm was a possible cause" of the plaintiff's brachial plexus injuries, even though the expert could not determine with a "reasonable degree of medical probability" what caused the injuries).

Air Evac EMS, Inc. v. Aeronautical Accessories, Inc., 124 F.3d 207, 1997 WL 545304 at *1 (8th Cir. 1997) (affirming admission of expert testimony and noting that the alleged weakness in testimony goes to its weight rather than its admissibility).

Wood v. Minnesota Mining and Mfg. Co., 112 F.3d 306 (8th Cir. 1997). Plaintiff who was injured when his truck was struck by a train claimed that the defendant had negligently constructed the railroad crossing and failed to warn of the crossing. In support of these claims, the plaintiff was allowed to introduce expert testimony by a highway safety specialist. Id. at 309. The defendant argued that the expert's "methodology and fact-gathering techniques relating to his decibel readings and site distance triangulation were suspect." Id. at 310. The Eighth Circuit disagreed, holding that the district court had not abused in discretion in admitting the testimony. Id.

United States v. Davis, 103 F.3d 660, 674 (8th Cir. 1996) (affirming admission of ballistics testimony as reliable).

United States v. Beasley, 102 F.3d 1440, 1445-8 (8th Cir. 1996) (affirming admission of DNA evidence using polymerase chain reaction method of DNA typing).

Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 974 (8th Cir. 1995) (affirming admission of expert testimony regarding polysomnogram as reliable; affirming admission of expert causation testimony because "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility").

Ventura v. Titan Sports, Inc., 65 F.3d 725 (8th Cir. 1995). Plaintiff asserted various claims (including fraud) against wrestling organization. The defendant claimed that the plaintiff's expert testimony regarding royalty rates was speculative and therefore unreliable. Id. at 734. The Eighth Circuit Court of Appeals affirmed the admission of such testimony, noting that the expert had based his testimony on a "survey of thousands of licensing agreements." Id.

Jeanes v. Allied Life Ins. Co., 168 F.Supp.2d 958, 963-4 (S.D. Iowa 2001) (admitting expert testimony regarding lost future profits that projected income "based on historical growth rates").

Waitek v. Dalkon Shield Claimants Trust, 934 F. Supp. 1068, 1090 (N.D. Iowa 1996) (in the alternative, affirming admission of expert causation testimony as reliable).

2. Expert testimony held unreliable

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). Plaintiffs who were injured when a tire failed asserted product liability claims against the tire's manufacturer and distributor. In support of their claims, the plaintiffs sought to introduce causation testimony by a mechanical engineer with expertise in tire failure analysis. Id. at 142, 153. The district court excluded the testimony as unreliable, and the United States Supreme Court affirmed. The plaintiff claimed that the issue presented was whether "a method of tire failure analysis that employs a visual/tactile inspection is a reliable method." Id. at 156. The Supreme Court disagreed, explaining that the issue was not "the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine whether overdeflection had caused the tire's tread to separate from its steel-belted carcass" but rather "the reasonableness of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding . . . the likelihood that a defect in the tire at issue caused its tread to separate from its carcass." Id. at 154 (emphasis added).

In re Air Crash, 291 F.3d 503, 2002 WL 1059718 (8th Cir. 2002). Plaintiff brought claims to recover for injuries sustained during a plane crash. In support of her claims, the plaintiff was allowed to introduce testimony by a psychiatrist that her post-traumatic stress disorder was a "biological syndrome, rather than merely a psychological one." While the psychiatrist maintained that functional tests would reveal physiological changes in the brain, he had performed no such tests on the plaintiff. The Eighth Circuit Court of Appeals held that the admission of the psychiatrist's testimony was error, noting: "Because no doctor performed any of the various available diagnostic tests, there was no connection established between the alleged physical brain changes [the psychiatrist] referred to in his testimony and [the plaintiff's] condition."

Glastetter v. Novartis Pharmaceuticals Corp., 252 F.3d 986 (8th Cir. 2001). The plaintiff asserted products liability claims against a drug manufacturer. Plaintiff's experts conducted differential diagnoses, which concluded that the defendant's drug [Parlodel] caused her intracerebral hemorrhage [ICH]. Id. at 989. The Eighth Circuit Court of Appeals confirmed that a medical opinion regarding causation is sufficiently reliable if based upon a "proper differential diagnosis." Id. (quoting Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000)). However, the Court affirmed the exclusion of the plaintiff's differential diagnoses on the grounds that "the data does not

demonstrate to an acceptable degree of medical certainty that [the defendant's drug] can cause an ICH." Id.

Children's Broadcasting Corp. v. Walt Disney Co., 245 F.3d 1008, 1017-8 (8th Cir. 2001). The plaintiff asserted breach of contract, misappropriation of trade secrets, fraud, breach of fiduciary duties, and negligent misrepresentation claims. In support of its claims, the plaintiff introduced expert testimony that "any breach of contract, any use of confidential information, or any misappropriation of any trade secret caused the exact same amount of damage to [the plaintiff]." Id. at 1018. In its ruling on post-trial motions, the trial court concluded that it should have excluded the expert's testimony as unreliable. Id. at 1017. The Eighth Circuit Court of Appeals affirmed, noting that the expert had failed to consider the effect of competition, "his theory of causation was questionable," and his testimony was based on a report rendered prior to narrowing the claims for trial. Id.

J.B. Hunt Transport, Inc. v. General Motors Corp., 243 F.3d 441 (8th Cir. 2001). Crashworthiness action against manufacturer of automobile. Id. at 443. The defendant sought to exclude the testimony of the plaintiff's accident reconstructionist on the grounds that the testimony (based on three impacts) was not supported by the evidence. Id. The district court excluded the testimony on the grounds that it was unreliable. Id. The Eighth Circuit Court of Appeals affirmed, explaining that such testimony was "mere speculation and pure conjecture." Id. at 444. The Eighth Circuit Court of Appeals also affirmed the exclusion of the testimony of an alleged expert in "foamology", concluding that such testimony was derivative of the excluded testimony of the accident reconstructionist. Id. at 443-5.

Giles v. Miners, Inc., 242 F.3d 810 (8th Cir. 2001). Plaintiff who injured her hand in a supermarket freezer asserted various product liability claims against the manufacturer and the owner of the supermarket. In support of her claims, the plaintiff sought to introduce an engineer's testimony regarding a proposed safety guard. Id. at 812. The district court excluded such testimony as unreliable. The Eighth Circuit Court of Appeals affirmed, noting both that the engineer had not "analyzed how the proposed safety guard would interact with the freezer's proper functioning" and that the proposed guard apparently would violate government and industry standards. Id. at 813. In so holding, the Eighth Circuit Court of Appeals confirmed that Daubert analysis does not apply only to "novel scientific issues." Id. at 812.

Turner v. Iowa Fire Equip. Co., 229 F.3d 1202 (8th Cir. 2000). Plaintiff sustained injuries when the fire extinguisher system at her place of employment was accidentally activated. The plaintiff asserted claims against the company that had inspected the fire extinguisher system. In support of her claims, the plaintiff sought to introduce causation testimony by her treating physician. The district court excluded such testimony as unreliable, and the Eighth Circuit Court of Appeals affirmed. In so holding, the Eighth Circuit Court of Appeals affirmed that a causation opinion based upon a proper differential diagnosis may satisfy Daubert. However, the Court held that the plaintiff's

expert had performed a differential diagnosis only with respect to the plaintiff's condition, not its cause. Id. at 1208.

United States v. Bahena, 223 F.3d 797, 810 (8th Cir. 2000) (affirming exclusion of expert testimony regarding voice spectography).

Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000). Boat builders asserted antitrust claims against the stern drive engine manufacturer. The defendant sought to exclude the testimony of plaintiffs' expert witness (an economics professor at Stanford) on the grounds that "it was contrary to undisputed record evidence and . . . did not separate lawful from unlawful conduct." Id. at 1055. The district court admitted the testimony, ruling "that the jury could draw its own conclusions about the value of his testimony." Id. at 1046. The Eight Circuit Court of Appeals reversed.

United States v. Triplett, 195 F.3d 990-998 (8th Cir. 1999) (affirming the district court's exclusion of the testimony of a "lighting expert" on grounds of reliability).

National Bank of Commerce v. Associated Milk Producers, Inc., 191 F.3d 858 (8th Cir. 1999). The plaintiff claimed that he developed laryngeal cancer as a result of exposure to defendant's aerosolized milk, which contained aflatoxin M-1 [AFM]. The district court excluded the plaintiff's expert causation testimony. According to the Eighth Circuit Court of Appeals, "the essence of the district court's decision is that even though a single molecule of AFM could cause [the plaintiff's] laryngeal cancer, the possibility of that happening in a case with such low level exposure is so slight that the expert testimony that the AFM caused [the plaintiff's] cancer should be rejected." Id. at 863. The Eight Circuit Court of Appeals criticized the district court's opinion, noting that the plaintiff was exposed not to a "single shot of AFM" but instead was exposed to "billions of molecules of AFM." Id. The Eighth Circuit Court of Appeals further found that the plaintiff's differential diagnosis report was "entitled to more weight than it was given by the district court." Id. However, the Eighth Circuit Court of Appeals held that the district court had not abused its discretion in excluding the expert testimony. Id. at 864-5.

United States v. Villiard, 186 F.3d 893-895 (8th Cir. 1999) (affirming the exclusion of expert testimony regarding the reliability of eyewitness identification).

Blue Dane Simmental Corp. v. American Simmental Ass'n, 178 F.3d 1035 (8th Cir. 1999). Action brought against American Simmental Association (which maintains a herd book for Simmental breed of cattle) and the owner of certain cattle whose registration was allegedly inaccurate. In support of their claims, the plaintiff sought to introduce expert testimony "that the introduction of the 19 . . . animals [owned by the defendant] into the full blood Simmental market in the United States caused the market value of all American Simmentals to drop substantially." Id. at 1040. The expert's testimony was based on "before and after modeling". The district court excluded such testimony as unreliable, deeming the analysis "simplistic". Id. The Eighth Circuit Court of Appeals affirmed, noting that the case was analogous to Kumho. Id. at 1040-1041.

Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076 (8th Cir. 1999). The plaintiff asserted product liability claims against the manufacturer of a corn head, alleging that the corn head was unreasonably dangerous because it lacked awareness barriers. Id. at 1084. In support of this claim, the plaintiff sought to introduce testimony by a mechanical engineer. The Eighth Circuit Court of Appeals affirmed the exclusion of such testimony as "unabashed speculation", noting that the expert had not constructed or even drawn the proposed barriers and could not identify any manufacturer that incorporated such a device. In support of his warning claim, the plaintiff sought to introduce expert testimony of a "human factors engineer" who holds a doctorate in experimental psychology. Id. at 1080. The Eighth Circuit Court of Appeals affirmed the exclusion of such testimony as unreliable, noting that the expert had not created an alternative warning device, had not read the warnings that the defendant used, and had not identified other manufacturers who were using the proposed warnings. Id. at 1084.

Weisgram v. Marley Co., 169 F.3d 514 (8th Cir. 1999), *aff'd* 528 U.S. 440 (2000). Plaintiff asserted product liability claims against the manufacturer of an allegedly defective baseboard heater. The plaintiff was allowed to introduce expert testimony by the fire captain that the baseboard heater had malfunctioned. Id. at 518. The Eighth Circuit Court of Appeals held that the district court abused its discretion in allowing such testimony, explaining that the fire captain should be allowed to testify regarding the origin of the fire but not causation. Id. at 519. The plaintiff was also allowed to introduce testimony by a "fire investigator" / "technical forensic expert" regarding the alleged defects of the heater. Id. The Court held that the admission of this testimony was an abuse of discretion, noting that there was no evidence to support it. Id. at 520. In addition, the Court held that the district court had erroneously admitted the testimony of a metallurgist, noting that his analysis was not "scientifically sound." Id. at 521.

United States v. $141,770.00 in United States Currency, 157 F.3d 600 (8th Cir. 1998) (affirming the exclusion of testimony "that 99% of all United States currency is contaminated with drug residue" as unreliable).

Nichols v. American National Ins. Co., 154 F.3d 875 (8th Cir. 1998). Plaintiff asserted sexual harassment and constructive discharge claims under Title VII. In defense, the employer offered expert testimony by a psychiatrist that the plaintiff had "poor psychiatric credibility" and "recall bias" and that the plaintiff's statements "were affected by secondary gain and malingering". Id. at 882. The Eighth Circuit Court of Appeals explained that an expert may not offer an opinion regarding the truthfulness of a witness' testimony. Id. at 883. Noting that expert evidence "can be both powerful and quite misleading", the Court held that the admission of such testimony was error. Id. at 884.

Robertson v. Norton Co., 148 F.3d 905 (8th Cir. 1998). Plaintiff asserted product liability claims against the manufacturer and distributor of a grinding wheel. In support of his warnings claim, he introduced expert testimony that the product warnings were defective "because the warning label did not explain 'improper use', because a copy of the safety guide was not enclosed with each wheel in 'blister pack' packaging, and because the warning label's cross reference to a 120-page ANSI publication was

ineffective." Id. at 907. The Eighth Circuit Court of Appeals held that the testimony should have been excluded as unreliable, criticizing the expert's "failure to consider in a systematic fashion the problems inherent in devising a warning for a product of this type…." Id. at 908.

National Bank of Commerce v. Dow Chem. Co., 133 F.3d 1132 (8th Cir. 1998) (affirming the exclusion of expert causation testimony as unreliable because "it was not based on accepted scientific methodology for determining whether a chemical agent can cause birth defects in humans").

Dancy v. Hyster Co., 127 F.3d 649 (8th Cir. 1997). Plaintiff asserted products liability claims against the manufacturer of a "lift truck." The plaintiff sought to introduce expert testimony by a mechanical engineer (specializing in thermal science) that the lift truck should have had a certain type of guard. The expert had not designed the proposed guard, seen a similar guard on a similar machine, or "tested this theory in any way." Id. at 651. The district court excluded such testimony as unreliable, and the Eighth Circuit Court of Appeals affirmed. Id. at 652.

Penney v. Praxair, Inc., 116 F.3d 330, 333-4 (8th Cir. 1997) (affirming exclusion of Positron Emission Tomography [PET] scan as unreliable evidence of brain injury and questioning the accuracy of the control group).

Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir. 1996). Plaintiff who was injured using a tire-changing machine asserted products liability claims against the manufacturer. The plaintiff sought to introduce expert testimony that the product was defective because "(1) the machine acted as a 'launch pad' for the exploding tire and wheel assembly, (2) the clamps did not restrain the exploding tire and wheel assembly, (3) the machine could not limit the amount of air pressure the operator could put into the tire, (4) the machine had no interlock system that would prevent the operator from inflating the tire unless the restraint system was in place, and (5) the machine had no mirror or other device by which the operator could inspect the lower bead during inflation." Id. at 297. The district court excluded such testimony as unreliable, and the Eighth Circuit Court of Appeals affirmed. In so holding, the Eighth Circuit criticized the expert's failure to design or test the proposed safety device, his failure to subject his theories to "scientific peer review", and the lack of evidence regarding the rate of error. Id.

Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1108 (8th Cir. 1996) (holding that the trial court erred in admitting causation testimony because it was not based on "scientific knowledge").

Gier v. Educational Serv. Unit No. 16, 66 F.3d 940 (8th Cir. 1995). Plaintiffs asserted IDEA and Section 1983 claims alleging that they had been emotionally, physically, or sexually abused while attending the defendant's school. In support of their claims, the plaintiffs sought to introduce expert testimony by psychiatrists who had conducted psychological evaluations and determined that the plaintiffs had been abused.

Id. at 942. The psychological evaluations consisted of "(1) reviewing Child Behavior Checklists (CBCs) completed by the [plaintiffs'] parents; (2) conducting clinical interviews with [plaintiffs] that involved role playing with anatomically correct dolls; and (3) interviews with [plaintiffs'] parents and assessment of their credibility." Id. at 943. The district court refused to admit such testimony as unreliable. Id. The Eighth Circuit Court of Appeals affirmed, explaining: "Even if we considered the evaluation methodology employed by the [plaintiffs'] experts in this case to be reliable, it would be reliable only to choose a course of psychotherapy for these disturbed children, . . . which must . . . rely on perception as well as reality, and upon the subjective reports of parents or others. . . The methodology is not reliable enough to make factual or investigative conclusions in legal proceedings." Id. at 944.

Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995) (affirming exclusion of testimony regarding a proposed guard as unreliable when the proposed guard had not been tested, its design was "still evolving", it had not been subjected to peer testing, and there was no general acceptance of such a guard).

Watkins v. Schriver, 52 F.3d 769 (8th Cir. 1995). Plaintiff filed Section 1983 claim for injuries that he received while in the "city drunk tank." Id. at 770. In support of his claim, the plaintiff sought to introduce a neurologist's testimony that his injury "was more consistent with being thrown into a wall than a slip and fall." Id. at 771. The district court excluded such testimony as unreliable and speculative. Id. The Eighth Circuit Court of Appeals affirmed. Id. at 771-2.

Sorensen v. Shaklee Corp., 31 F.3d 638 (8th Cir. 1994). Plaintiffs asserted product liability claims against the manufacturer of alfalfa tablets, alleging that they had consumed alfalfa tablets treated with ethylene oxide and that such tablets had caused mental retardation in their children. Id. at 639. In support of their claim, plaintiffs sought to introduce causation testimony by several physicians. The Eighth Circuit Court of Appeals concluded that such evidence was unreliable, citing the lack of testing, the lack of peer review, and the lack of general acceptance. Id. at 649-51.

Hahn v. Linn County, 191 F.Supp.2d 1051, 1059-62 (N.D. Iowa 2002) (discussing reliability of expert testimony regarding "facilitated communication").

Krueger v. Johnson and Johnson Prof. Inc., 160 F.Supp.2d 1026, 1030 (S.D. Iowa 2001) (in case involving cervical plate used in cervical diskectomy and fusion surgery, excluding metallurgist's testimony as unreliable).

Stibbs v. Mapco, Inc., 945 F. Supp. 1220 (S.D. Iowa 1996). Plaintiff who was injured in an explosion of a propane-fueled water heater asserted products liability claims. In support of his claims, the plaintiff sought to introduce expert testimony regarding a "particle theory" of causation. Id. at 1223. The Court excluded such testimony as unreliable, noting the experts' failure to test their theory and the defendant's inability to test the experts' theory. Id. at 1224-5. However, the Court allowed the

experts to testify regarding "the issue of whether the explosion was an LP gas explosion, and the circumstances of the explosion." Id. at 1226.

E. QUALIFICATION OF THE EXPERT

"[I]t is the responsibility of the trial judge to determine whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case." Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706, 715 (8th Cir. 2001) (emphasis added).

"Once initial expert qualifications and usefulness to the jury are established, . . . a district court must continue to perform its gatekeeping role by ensuring that the actual testimony does not exceed the scope of the expert's expertise . . . ." Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706, 715 (8th Cir. 2001) (emphasis added).

1. Expert held qualified

Miles v. General Motors Corp., 262 F.3d 720 (8th Cir. 2001). While riding a motorcycle, the plaintiff collided with a truck. The plaintiff asserted various product liability claims against the truck's manufacturer, alleging that the rear bumper was defective. Id. at 722. The plaintiff sought to exclude the testimony of the defendant's expert (a mechanical engineer) on the grounds that he was "not versed on the issue of hooking bumpers." Id. at 723. The trial court held that the individual was qualified to offer expert testimony, and the Eighth Circuit Court of Appeals affirmed, explaining that he "has designed and tested bumpers for production vehicles and has been involved with automobile design and testing for over 30 years." Id. at 724. The Court also noted that the individual had testified as an expert more than 200 times. Id.

United States v. Withorn, 204 F.3d 790 (8th Cir. 2000). Defendant was charged with aggravated sexual abuse by the use of force and sexual abuse of a minor. In support of its case, the government offered expert testimony by a certified nurse midwife. The Eighth Circuit Court of Appeals affirmed the admission of such testimony, finding the expert qualified to offer testimony regarding the injuries sustained. Id. at 797.

Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997). Class action for sex harassment and discrimination. The plaintiffs sought to introduce expert testimony by psychiatrists and psychologists regarding causation. Id. at 1295. The Special Master excluded all such testimony as unreliable. Id. at 1296-7. The Eighth Circuit Court of Appeals reversed, finding that the testimony was "thorough and meticulously presented." Id. at 1298. The Court further observed that the Special Master's decision appeared to be based on "his own preconceived notions relating to psychiatric proof." Id. at 1297. In remanding the case, the Court "emphasize[d] that the weight and credibility of the evidence was for the trier of fact to determine." Id. at 1299.

Wood v. Minnesota Mining and Mfg. Co., 112 F.3d 306, 309 (8th Cir. 1997) (affirming district court's finding that a "highway safety specialist" was qualified to testify as "an expert in the field of traffic control systems and railroad crossings").

United States v. Johnson, 28 F.3d 1487, 1496 (8th Cir. 1994) (affirming that unindicted coconspirator and gang member was qualified to testify as an expert regarding drug trafficking, due to his extensive experience in the drug trafficking business).

United States v. Cotton, 22 F.3d 182, 185 (8th Cir. 1994) (affirming that detective with specialized knowledge and years of experience was qualified to testify that the amount of crack cocaine seized was indicative of distribution).

Reedy v. White Consol. Indus., Inc., 890 F. Supp. 1417 (N.D. Iowa 1995). Plaintiff asserted various claims against his former employer, including wrongful discharge in violation of public policy and bad faith termination of workers compensation benefits. In support of his claims, the plaintiff sought to introduce expert testimony regarding "claims procedures." Id. at 1445. The defendant sought to exclude such testimony on the grounds that the purported experts were not qualified. Id. at 1447. The Court held that the experts were qualified to testify based on their practical experience. Id. at 1448.

2. Expert held not qualified

Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706 (8th Cir. 2001). The plaintiff sued its warehouseman bailee for damages to steel sustained during Mississippi River flood of 1993. Id. at 710. In defense, the defendant offered the testimony of a "hydrologist specializing in flood risk management." Id. at 715. The Eighth Circuit Court of Appeals held that the district court abused its discretion in allowing the hydrologist to testify regarding warehousing practices. Id. at 715-6. According to the Court, although the hydrologist was "eminently qualified to testify as an expert hydrologist regarding matters of flood risk management", he "sorely lacked the education, employment, or other practical personal experiences to testify as an expert specifically regarding safe warehousing practices." Id. at 715.

Smith v. Rasmussen, 249 F.3d 755 (8th Cir. 2001). Plaintiff asserted claims against Iowa Department of Human Services because of its refusal to provide Medicaid benefits for sex reassignment surgery. Id. at 756-7. In defense, the Department offered the testimony of a general psychiatrist. The district court allowed the psychiatrist to testify regarding "general psychiatric principles and basic diagnostic criteria" but did not allow testimony regarding the "effectiveness and necessity of sex reassignment surgery in general and for [the plaintiff] in particular." Id. at 758. The Eighth Circuit Court of Appeals affirmed, noting that the excluded testimony was based "neither on [the psychiatrist's] personal experience nor on his knowledge of the relevant discipline." Id. at 759.

Weisgram v. Marley Co., 169 F.3d 514 (8th Cir. 1999), *affirmed* 528 U.S. 440 (2000) (holding that while a fire captain was qualified "as a fire cause and origin expert", he was not qualified to offer an opinion regarding the malfunction of an allegedly defective baseboard heater; holding that a metallurgist was not qualified to testify as an expert in fire cause and origin).

Robertson v. Norton Co., 148 F.3d 905 (8th Cir. 1998). Plaintiff asserted product liability claims against the manufacturer and distributor of a grinding wheel. The plaintiff's "ceramics expert" testified both regarding the alleged manufacturing defect and the alleged warning defect. Id. at 907. The Eighth Circuit Court of Appeals held that he was not qualified to testify as a warnings expert, explaining that his "knowledge of ceramics would not provide the expertise on 'questions of display, syntax, and emphasis' that the jury would expect from a bona fide warnings expert." Id.

Krueger v. Johnson and Johnson Professional Inc., 160 F.Supp.2d 1026, 1030 (S.D. Iowa 2001) (holding that a metallurgist was not qualified to testify as an expert in a case regarding a cervical plate used in cervical diskectomy and fusion surgery).

II. STATE LAW

A. TRIAL COURT'S DISCRETION

The admission of expert testimony "rests on the sound discretion" of the trial court. Martins v. Interstate Power Co., 2002 WL 534890 at * 7 (Iowa Ct. App. 2002); Carolan v. Hill, 553 N.W.2d 882, 888 (Iowa 1996).

An appellate court will not reverse a trial court's decision regarding admission of expert testimony "absent an abuse of discretion to the prejudice of the complaining party." State of Iowa v. Holtz, 2002 WL 663683 at *2 (Iowa Ct. App. 2002) (emphasis added); Mercer v. Pittway Corp., 616 N.W.2d 602, 628 (Iowa 2000); Johnson v. Knoxville Community School District, 570 N.W.2d 633, 636 (Iowa 1997).

B. IOWA RULE OF EVIDENCE 5.702

Iowa Rule of Evidence 5.702 governs expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 5.702.

C. A "LIBERAL VIEW" ON ADMISSIBILITY

Iowa courts are "committed to a liberal view on the admissibility of expert testimony. . . ." Mercer v. Pittway Corp., 616 N.W.2d 602, 628 (Iowa 2000); Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 531 (Iowa 1999); In re Sybers, 583 N.W.2d 890 (Iowa 1998); Johnson v. Knoxville Community Sch. Dist., 570 N.W.2d 633, 636 (Iowa 1997); Martins v. Interstate Power Co., 2002 WL 534890 at * 7 (Iowa Ct. App. 2002).

The Iowa Supreme Court has described the standard for the admission of expert testimony as follows:

> 1. The testimony must be "relevant";
>
> 2. The testimony "must be in the form of scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue";
>
> 3. The expert must be "qualified as an expert by knowledge, skill, experience, training or education";
>
> 4. If evidence is "novel", "complex" or otherwise has "potential for an exaggerated effect," the trial court may require "proof of acceptance of the theory or technique in the scientific community."

Mercer v. Pittway Corp., 616 N.W.2d 602, 628 (Iowa 2000); Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 531 (Iowa 1999); Martins v. Interstate Power Co., 2002 WL 534890 at * 7 (Iowa Ct. App. 2002).

Cf. Johnson v. Knoxville Community School District, 570 N.W.2d 633, 637 (Iowa 1997) (quoted in State of Iowa v. Holtz, 2002 WL 663683 at *2 (Iowa Ct. App. 2002)).

1. Expert testimony held admissible

Mercer v. Pittway Corp., 616 N.W.2d 602 (Iowa 2002). The plaintiffs asserted products liability claims against the manufacturer of a smoke detector. In support of their claims, the plaintiffs offered expert witness testimony regarding the flow of smoke from the point of origin to the smoke detector and expert testimony regarding the response time of ionization smoke detectors. Id. at 628. The Iowa Supreme Court affirmed the admission of such testimony, noting that the expert witnesses were "qualified experts in the area of fire safety engineering" and that the defendants' expert witnesses presented contrasting opinions. Id. at 628-29. In addition, the plaintiffs offered expert testimony regarding the pricing of defendant's smoke detector. Id. at 629. The Iowa Supreme Court concluded that the defendant failed to preserve error regarding this issue. In

addition, the Court explained that such evidence was properly admitted as relevant to the risk utility analysis under plaintiffs' strict liability claim. Id.

Leaf v. Goodyear Tire and Rubber Co., 590 N.W.2d 525 (Iowa 1999). The plaintiff, who was injured while working on a tire, asserted strict liability claims against the tire manufacturer. In support of his design defect claim, the plaintiff was allowed to introduce expert testimony. The defendant argued that such testimony should have been excluded because the witness was not qualified "as an expert in the field of radial truck tire design engineering." Id. at 532. Specifically, the defendant argued that the witness was not qualified because he had no professional engineering degree, had no experience in actually designing complete radial tires, had performed no scientific testing to determine whether there was a feasible alternative design, and his experience with other Goodyear tires was "all anecdotal." Id. at 535. The Iowa Supreme Court affirmed the admission of such testimony, noting that the witness had thirty years of experience in the tire industry and that neither "proof of the development of an alternative design" nor the performance of scientific testing is required to qualify as an expert. Id.

In re Sybers, 583 N.W.2d 890 (Iowa 1998). State of Florida sought disinterment to support a murder indictment. The state was allowed to present expert testimony that relied upon a forensic toxicologist's report, which itself was based on a "postmortem potassium measurement theory." Id. at 896. Noting that it was a "close" question, the Iowa Supreme Court affirmed the admission of the expert testimony despite the fact that the theory was "novel" and "untested." Id.

Olson v. Nieman's Ltd., 579 N.W.2d 299 (Iowa 1998) (affirming admission of testimony by patent attorney regarding patentability; holding that the damages expert was qualified despite his "lack of experience with the recreational vehicle industry"; holding that the expert testimony regarding damages was reliable despite the assumptions upon which it was based).

Johnson v. Knoxville Community Sch. Dist., 570 N.W.2d 633 (Iowa 1997). The plaintiff who suffered head injuries from a fall on a school playground sued the school district for negligence. The defendant was allowed to introduce expert testimony by a neuropsychiatrist regarding the causes of the plaintiff's behavioral problems. The Iowa Supreme Court held that Daubert was not applicable because the psychiatrist's testimony "was not based on 'scientific knowledge' but rather was of the nature of 'technical or other specialized knowledge.' " Id. at 639. The Iowa Supreme Court concluded that the expert testimony was sufficiently reliable, noting that the psychiatrist had conducted a two-hour interview with the plaintiff, was familiar with relevant studies, and was a board-certified, licensed neuropsychiatrist. Id. at 640.

Mensink v. American Grain and Related Indus., 564 N.W.2d 376 (Iowa 1997). The plaintiff truck driver was injured when lightning struck a grain elevator and caused a grain dust explosion. Id. at 378. In support of his claims, the plaintiff presented expert testimony by a retired professor of electrical and computer engineering. The Iowa Supreme Court affirmed that the witness was qualified to offer expert testimony, noting

that a witness "need not be a specialist in the particular area of testimony so long as the testimony falls within the witness' general area of expertise." Id. at 379. The Iowa Supreme Court held that Daubert did not govern the issue of the reliability of the expert witness' testimony because the factors relied upon by the expert "do not involve a highly complex matter of scientific evidence." Id. at 381.

Williams v. Hedican, 561 N.W.2d 817 (Iowa 1997). Medical malpractice action alleging negligent treatment of woman exposed to chickenpox during pregnancy. The plaintiff sought to introduce expert testimony that the antibody VZIG, which lessens the effects of chickenpox in a pregnant woman, can also lessen the effects of chickenpox in the fetus. *Id.* at 820. The trial court excluded the expert's testimony. The Supreme Court reversed, finding the testimony reliable and relevant. Id. at 828 – 31.

Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996) (holding that the trial court erred in excluding the testimony of a nurse anesthesiologist regarding standard of care.)

Hutchison v. American Family Mutual Ins. Co., 514 N.W.2d 882 (Iowa 1994). Plaintiffs sought underinsured motorist benefits, claiming damages resulting from a closed head injury. In support of their claim, the plaintiffs introduced expert causation testimony by a clinical psychologist. The defendant sought to exclude such testimony on the grounds that the alleged expert was not board-certified as a neuro-psychologist. The Iowa Supreme Court held that the lack of board certification went to the weight of the expert's testimony, not its admissibility. Id. at 886. The defendant also alleged that the expert was not qualified to offer expert testimony regarding medical causation. The Iowa Supreme Court disagreed, concluding that the "professionally trained neuro-psychologist" was qualified to testify as an expert regarding causation. Id. at 889.

Mermigis v. Servicemaster Indus., Inc., 437 N.W.2d 242, 247-8 (Iowa 1989) (affirming admission of expert testimony of economist).

Martins v. Interstate Power Co., 2002 WL 534890 (Iowa Ct. App. 2002). The plaintiffs asserted various claims alleging that their dairy operation was damaged by stray voltage. The defendant argued that the plaintiffs' expert had been allowed to testify "beyond his level of confidence." Id. at *7. The Iowa Court of Appeals disagreed, noting that the expert witness had relevant "specialized knowledge." Id.

Millis v. Hute, 587 N.W.2d 625 (Iowa Ct. App. 1998). Action arising from an automobile accident. Defendant was allowed introduce expert testimony by a neurologist who explained that the plaintiff's back problem "was caused by multiple factors" and also "offered an estimate as to the percentages of causation attributable to each factor. . . . " Id. at 628-9. The Iowa Court of Appeals affirmed the admission of such testimony, explaining that "an expert may express his or her opinion as to possibility, probability or actuality of causation." Id. at 628.

Oelwein v. Board of Trustees, 567 N.W.2d 237, 239 (Iowa Ct. App. 1997) (finding that treating physician's testimony was reliable even though he did not state his opinion "with absolute certainty").

Guidichesse v. ADM Milling Co., 554 N.W.2d 563 (Iowa Ct. App. 1996). (affirming admission of expert testimony by "an expert in grade crossing" despite lack of formal training in psychology or psychiatry because testimony dealt with "the procedures to be used in a safe crossing.")

2. Expert testimony held inadmissible

Sallis v. Lamansky, 420 N.W.2d 795 (Iowa 1988). Action arising from an automobile accident. Defendant presented expert testimony by a psychologist who testified that the plaintiff had a "hysterical personality." Id. at 796. The testimony was based on the psychologist's analysis of psychological tests as well as a computer analysis of the test results. The trial court struck the expert's testimony regarding the computer analysis. The Supreme Court affirmed, holding that there was insufficient evidence of reliability. Id.

State of Iowa v. Holtz, 2002 WL 663683 (Iowa Ct. App. 2002). The state filed a petition to commit the defendant as a sexually violent predator. To establish the defendant's risk of re-offense, the state introduced expert testimony relying on actuarial risk assessment instruments. Id. at *1. The Iowa Court of Appeals held that the trial court erred in admitting such testimony, explaining that there was insufficient evidence of testing, peer review, and general acceptance. Id. at *5.

Kirk v. Union Pacific Railroad, 514 N.W.2d 734, 740 (Iowa Ct. App. 1994) (affirming exclusion of accident reconstructionist's testimony as unreliable).

Ort v. Klinger, 496 N.W.2d 265 (Iowa Ct. App. 1992). Action arising from an automobile accident. The defendant was allowed to introduce testimony by a physician regarding "how chiropractic treatment could be counter-productive and could possibly hinder recovery or further injure a patient." Id. at 267. However, because the physician did not know what type of chiropractic treatment the plaintiff had received, he was not allowed to testify "as to the effect on chiropractic treatments on plaintiff's injury." Id. The Iowa Court of Appeals affirmed the exclusion of such testimony. Id.

D. DAUBERT ANALYSIS IS NOT REQUIRED

Daubert is not binding on Iowa state courts. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 531 (Iowa 1999). However, the Iowa Supreme Court has explained that "trial courts may find it helpful in complex cases to use one or more of the relevant Daubert 'considerations' in assessing the reliability of expert testimony." Mercer v. Pittway Corp., 616 N.W.2d 602, 628 (Iowa 2000); Leaf v. Goodyear Tire &

Rubber Co., 590 N.W.2d 525, 532 (Iowa 1999); Martins v. Interstate Power Co., 2002 WL 534890 at * 7 (Iowa Ct. App. 2002).

MOVING TO THE MODEL RULES OF ETHICS: THE CHANGES TO COME

By: Sharon Soorholtz Greer
CARTWRIGHT, DRUKER & RYDEN
112 West Church Street
Marshalltown, IA 50158

Report of the Iowa Rules of Professional Conduct Drafting Committee to the Supreme Court of Iowa

A. Introduction

The Iowa Rules of Professional Conduct Drafting Committee, appointed by this Court to formulate and propose a new set of ethical rules to govern lawyer conduct in Iowa, is pleased to submit the attached proposed Iowa Rules of Professional Conduct for this Court's consideration. The members of your Committee believe that we have prepared a progressive, well-balanced, up-to-date, carefully designed, aspirational, and professional set of rules that will establish Iowa as a leader in professional governance while preserving longstanding ethical ideals and values in our state.

By Order Dated March 8, 2000, this Court concluded that "a new ethics framework should be adopted in Iowa, and the Model Rules of Professional Conduct should be the primary source of that framework." The Court further directed that--

(1) "[w]here the Model Rules are silent on a subject that traditionally has been regulated in Iowa," the Code provisions should be retained;
(2) "[w]here the existing Code provisions are clearly superior," the Code provisions should be retained;
(3) "any rules adopted should carefully preserve the high level of professionalism now existing among the Bar of this state," by including aspirational guidance such as that found in the preamble and the ethical considerations in the Code; and
(4) Code provisions on confidentiality and lawyer advertising shall be retained.

The Committee believes that the attached proposed Iowa Rules of Professional Conduct are in full accord with this Court's charge and expectations. In our work, the Committee especially has sought to attain two interrelated goals: clarity and professionalism. First, we have striven to draft a set of Rules that provides clear and comprehensive guidance to lawyers regarding their professional responsibilities. Second, the proposed Rules not only establish minimum standards but offer lawyers assistance in aspiring to the higher ideals of our profession. We submit these proposed Rules for this Court's consideration and approval.

B. The Work and Process of the Iowa Rules of Professional Conduct Drafting Committee

The Committee appointed by this Court consisted of a diverse group of lawyers, in respect of location within the state; size of practice; nature of client representation; experiences in the practice of law; and gender, race, and age. The members met as a full Committee on numerous occasions over the past two years, for up to six hours on each occasion. Each member also served on one of four subcommittees, which devoted substantial time and effort to drafting proposals on segments of the Rules for consideration by the full Committee. Many additional hours were devoted to individual study and consideration of draft proposals which were circulated in advance of each Committee meeting. Given the diversity of the Committee, the extent of agreement and the rarity of significant division was notable and, we believe, a tribute to the willingness of the members as a whole to seek common ground and to devote the additional time and attention necessary to achieve consensus. On occasion, as reflected in the particular proposed Rules, the Committee reached a thoughtful balance, in which each provision or paragraph is integrated with others and the overall proposal was carefully crafted to ensure broad acceptance.

Each proposed Rule and its accompanying Comments and Ethical Considerations have gone through five layers of consideration and examination by your Committee. First, each of four subcommittees was assigned a discrete segment of the Rules to evaluate and prepare. Each subcommittee performed the initial drafting work, generally with one or more individual members preparing an initial draft of each Rule and those drafts then being examined, revised, and approved by the subcommittee. Second, the subcommittee draft was considered, debated, revised, and approved by the full Committee at one of its meetings. Third, the Committee draft was carefully reviewed by the Committee's Reporter, with the assistance of several members of the Committee, to ensure the absence of errors and to consider whether any substantive problems or concerns had been overlooked. Based upon that review, the Reporter then proposed further revisions or prepared research memoranda on important points for Committee members to study before the next meeting. Fourth, the Committee draft was reconsidered at the next meeting of the Committee and, after further revision as appropriate, was given tentative approval. Fifth, and finally, the Committee considered a complete draft of all Rules in the light of public comment and gave final approval to the proposed Rules that are submitted today.

During the course of its work and deliberations, the Committee has consistently made draft Rules available to the Iowa profession, through posting drafts on an internet web site (which has been visited more than four-hundred (400) times), by notification in the Iowa Lawyer, by distribution of full draft of the proposed Rules through the Iowa State Bar Association annual meeting, by discussion at continuing legal education seminars, and by reports to various bar and professional organizations. We know from various sources and reports that the proposed Rules have been reviewed by hundreds of our colleagues, in bar association and bar section meetings, in meetings of professional associations, at continuing legal education seminars, and by lawyers in their offices. The Committee repeatedly and widely solicited comments from the profession at large and received many comments and much encouragement, from the leaders of bar sections, from professional associations, and from practitioners, and the final proposals reflect our evaluation of those comments. We understand that the Court may wish to circulate these proposed Rules to interested members of the bench and bar in Iowa and offer an opportunity for the submission of further comments on these proposals.

The Committee would welcome an opportunity to further present its proposed Rules to the Court and to respond to any comments received or questions by the Court. The Committee's response could be made either in writing or, as may be more convenient and efficient given the breadth of these materials and the difficulty in determining which issues might be of greatest concern to the Court, through a oral dialogue with the Court at a meeting or hearing open to the public.

Accordingly, these proposed Rules generally reflect the considered and informed agreement of your Committee. The most significant exception to general consensus among Committee members is paragraph (b) of proposed Rule 4.2, which concerns the proper scope of communications by a government lawyer with a represented person during the investigatory stage and before the person is arrested, charged, or named as a defendant. As discussed in the Drafting Committee Notes following proposed Rule 4.2, the Committee remained divided on this specific proposal. In addition, individual members of the Committee may have disagreed with some aspect of a particular proposal during the course of our proceedings, as would be expected given the diverse membership of the body, and indeed a specific dissent is recorded in the Drafting Committee Notes to Rule 3.8. However, with these exceptions, we were able through deliberation and compromise to reach a rough consensus on the overall set of proposed rules

to which all participating members of the Committee were able to give consent and indeed hearty endorsement.

C. Sources for Proposed Iowa Rules of Professional Conduct

With the exceptions that are noted in the Drafting Committee Notes following certain proposed Rules, the Committee generally has not attempted to be innovative or unduly creative in terms of re-designing rules, but rather has striven to identify and clearly state the standards reflected in the American Bar Association's Model Rules of Professional Conduct together with the proposed revisions of the Ethics 2000 Commission, while preserving important standards in the existing Iowa rules. Thus, where the Committee has departed from the Model Rules or the Ethics 2000 Commission report in these proposals, the purpose has been to retain superior Iowa standards, further enhance the professionalism of the Iowa bar, and provide greater guidance and clarity in the Rule regarding the longstanding expectations in Iowa, whether derived from the Iowa Code of Professional Responsibility, decisions of this Court, Iowa ethics opinions, ethical rules in other states, or other eminent sources on standards for lawyer behavior.

Beginning of course with the language of the Model Rules and their commentary, the Committee also drew upon the following other sources:

- the Iowa Code of Professional Responsibility for distinctive provisions that establish enduring principles or reflect Iowa professionalism;
- Iowa Supreme Court decisions that shed further light on ethical expectations for lawyers in Iowa;
- Iowa Board of Professional Ethics and Conduct opinions for trends that should be preserved or thoughtful suggestions that should be codified;
- ethical rules in other states, particularly for examples of how other states have departed from the Model Rules of Professional Conduct as a matter of principle or for greater clarity and guidance to practitioners;
- the final report of the American Bar Association's Ethics 2000 Commission as adopted by the American Bar Association House of Delegates in February 2002 regarding revisions to the Model Rules (as well as earlier versions of those Ethics 2000 proposals); and

9 the *Restatement of the Law Governing Lawyers,* adopted by the American Law Institute in 1998.

In looking to these various sources, this Committee has carefully deliberated and exercised independent judgment about what we believe is best and most in keeping with Iowa expectations. The Drafting Committee Notes following each proposed Rule identifies the particular sources consulted and the source of language for the Rule, together with a generally brief explanation of the Committees reasons for making a particular decision.

Iowa now has a unique opportunity to enhance its longstanding role as a leader in legal ethics and professional responsibility. The Iowa Supreme Court's vigorous leadership in moving forward toward a new set of professional conduct rules for Iowa promises to put our state a good step ahead of the rest of the country. The Committee believes that the proposed Rules being submitted with this report will be the most current, comprehensive, professional, and progressive set of Rules in the nation. Through our work on this proposal, the Committee hopes that it might have contributed toward maintaining Iowa as a national leader, which is our state's deserved position when it comes to professionalism and ethical practice.

D. Aspirational Guidance

Beyond drafting mandatory standards for lawyer conduct that provide clear direction to lawyers about the minimum expectations for proper behavior, the Committee has ensured that this proposal also includes aspirational guidance, as charged by the Court. Thus, rather than merely attaching comments to each Rule as in the Model Rules of Professional Conduct, each Rule is followed by "Comments and Ethical Considerations" which not only provide further explanation of the mandatory standard but also encourage the highest ideals of practice for lawyers in our state. Many of the provisions of the Ethical Considerations from the Iowa Code of Professional Responsibility have been incorporated or adapted into the "Comments and Ethical Considerations" accompanying the Rules.

E. Confidentiality, Attorney Advertising, Multi disciplinary Practice, and Multi jurisdictional Practice

As directed by the Court, we have not modified the substance of the rule governing confidentiality. Thus, the language of Disciplinary Rule 4-101 -- the core provision on confidentiality -- has been incorporated verbatim into proposed Rule 1.6. Where other provisions of the Rules touch on aspects of confidentiality, we have likewise preserved the existing Iowa standards. For example, Rules 3.3 and 4.1 have been framed to retain the essence of Iowa standards regarding confidentiality and the disclosure of confidential information, while framing the standards in the language of the Model Rules and clarifying some areas of ambiguity.

As also directed by the Court, we have not modified the substance of the rules governing attorney solicitation and advertising. The existing Iowa rules on advertising (including the most recent revisions approved by the Court) have been retained without change and inserted into Article 7 of the Model Rules.

The Committee agrees that any further modification of confidentiality and advertising rules in Iowa should be considered separately from this present process of transition to the Model Rules, so that controversies surrounding such matters would not delay or interfere with the primary purpose of the Committee's drafting responsibilities. However, the Committee suggests reconsideration of Rule 1.6 on confidentiality in the near future; regardless of whether substantive revisions to confidentiality principles are or are not made, it would be appropriate to adopt contemporary terminology that is more in keeping with the remaining provisions in the Rules.

As requested by the Court, the Committee also considered the question of multi disciplinary practice, whether attorneys should be permitted to join together with non-lawyers in sharing legal fees and providing services, thereby allowing non-lawyers to direct or supervise lawyers in the provision of legal services. The Committee preserved the longstanding principle, stated here in proposed Rule 5.4, that lawyers should not share legal fees with non-lawyers. As thereby proposed by this Committee, lawyers would not be permitted to enter into partnerships with those not who are not admitted to the practice of law and who thus are not obliged to uphold the high standards and special responsibilities of the legal profession. The American Bar Association has also rejected, by a wide margin, a proposal to authorize multi disciplinary practice under the Model Rules of Professional Responsibility. Moreover, the Multi-Disciplinary Practice

Committee of the Iowa State Bar Association, chaired by Phillip Willson, continues to examine these issues and monitor developments across the country.
Similarly, the Committee considered and declined to adopt the proposal of the American Bar Association's Ethics 2000 Commission to address the subject of multi jurisdictional practice, that is lawyers practicing law in states other than their state of admission. In view of the fact that the subject of multi jurisdictional practice is being studied at both the state and national level, adoption of a particular proposal is premature before some degree of consensus has arisen from the discussion.

F. The Future of Ethics Rules in Iowa

Based upon what the Committee learned in conducting a thorough study of legal ethics and preparing a set of proposed Rules that we believe best promotes professional responsibility in Iowa, the Committee suggests that the Iowa Supreme Court consider permanently establishing a standing committee on the Rules of Professional Conduct. While the Committee agrees that modifications to the Iowa Rules of Professional Conduct should not be made lightly and that frequent and wholesale changes would be unsettling soon after completion of this major transition, such a continuing committee would be in a position to identify national and state trends justifying new or supplemental treatment or situations in which the Rules as applied need reevaluation.

G. Conclusion

Accordingly, we submit the attached proposed Iowa Rules of Professional Conduct for the Court's consideration. For each proposed Rule, the Committee has laid out the draft text of the Rule in bold, followed by the draft of the "Comments and Ethical Considerations" for that Rule. To facilitate ease of reference by members of the Iowa bar and for consistency and uniformity in comparison of the Iowa Rules of Professional Conduct with the American Bar Association's Model Rules of Professional Conduct and with the parallel rules of other states, the Committee believes it important to maintain the rule-numbering format of the Model Rules. In addition, for the information of the Court and the profession in understanding the proposed Rules, but not to be included in the publication of the official text of the Rule and Comments and Ethical Considerations, the

Drafting Committee Notes for each Rule explain the source for each of the rule and comment provisions, document the Committee's decisions regarding these proposed Rules, and compare the proposed Rule to the existing Iowa Code provisions.

Submitted by:

Sharon Greer, Chair
Marshalltown

Prof. Gregory Sisk, Reporter
Drake University Law School
Des Moines

Bruce Braley
Waterloo

David Brown
Des Moines

Michael Byrne
Davenport

John Courtney
Des Moines

John French
Council Bluffs

Christine Luzzie
Iowa City

Iris Muchmore
Cedar Rapids

Julie Pottorff
Des Moines

Prof. Lawrence Raful
Creighton University Law School
Omaha

Prof. Margaret Raymond
University of Iowa School of Law
Iowa City

John Roehrick
Des Moines

Mark Smith
Des Moines

Gary Streit
Cedar Rapids

Judith Whetstine
United States Attorney's Office
Northern District of Iowa

RULES TO NOTE

1.2(a)	Lawyer by agreement may limit the objectives on scope of services provided.
1.5	Fees - contingency fee agreements must be in writing. - can divided fees on any basis, provided the client agrees and that both lawyers assume joint responsibility
1.7	Conflict of Interest standard - easier to understand
1.9	Successive Conflict of Interest - duties to former clients - consent may be required.
1.10(a)	Ethical Screening - Asubstantial role@ test
1.8(e)	Financial Assistance to client - making costs and expenses contingent on outcome of litigation
3.3	AIowa Rule@ - Don=t have to disclose client confidence - Must not knowingly offer perjured testimony at trial but client=s admission to perjury after-the-fact is protected by attorney-client privilege.
3.6	Fair Comment rule - Acan=t materially prejudice an adjudicative proceeding.@ Protects 1st amendment speech.
8.3	Reporting Misconduct of other attorneys
4.2	Communications with Persons Represented by Counsel - controversial

EMPLOYMENT LAW UPDATE

Thomas D. Wolle
Moyer & Bergman, P.L.C.
Cedar Rapids, IA 52406-1943
twolle@moyerbergman.com

I. FAMILY AND MEDICAL LEAVE ACT

Ragsdale v. Wolverine Worldwide Inc., 122 S.Ct. 1155 (2002). In a 5-4 decision, the United States Supreme Court struck down Department of Labor regulations requiring an employer to give notice that leave taken would count against the employee's FMLA leave. The plaintiff developed cancer and was given 30 weeks of leave by her employer. The employer failed to notify plaintiff that the 30 weeks would count against her FMLA leave. The Eight Circuit Court of Appeals invalidated the DOL regulations, which provide that leave which would ordinarily be covered under the FMLA may not be "counted" against FMLA leave if the employer fails to give notice that such leave constitutes part of the employee's 12 weeks of leave under the FMLA. Ragsdale v. Wolverine Worldwide Inc., 218 F.3d 933 (8th Cir. 2000). The Court agreed, stating: "The challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relives employees of the burden of proving any real impairment of their rights and resulting prejudice."

II. "CONTINUING VIOLATION" DOCTRINE IN HARASSMENT CLAIMS

National Railroad Passenger Corp. v. Morgan, 536 U.S. _____, 122 S.Ct. 2061 (2002). In Morgan, plaintiff brought a claim of race discrimination, alleging his employer harassed and unequally disciplined him. The Supreme Court addressed the issue of whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside the statutory time period. Some of the plaintiff's allegedly discriminatory incidents occurred within 300 days of the time he filed his charge with the EEOC, but some fell outside the relevant time period, and the employer moved for summary judgment on all incidents that fell outside the 300 day filing period. (Under Iowa Code section 216.15, an allegation of discrimination must be made with the

Iowa Civil Rights Commission (or local agency) within 180 days of the discriminatory act. However, under 42 U.S.C. § 2000e-5(c), a complaint may be made with the EEOC within 300 days of the discriminatory act if the complainant has initially filed a charge with a state or local agency.) The Supreme Court distinguished between claims of "discrimination" and "harassment." With respect to discrimination claims, plaintiff argued that when a number of discrete events are sufficiently related they constitute a single "practice," and therefore the filing need only be within the last event occurring in the "practice." The court rejected that argument, holding that there can be no "continuing violation" theory based on the idea that individual "discrete acts" are so interrelated they constitute a single discriminatory practice. For harassment claims, however, the Court noted that the theory of harassment is itself one of repeated conduct. "It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." Slip op. at 12. Accordingly, as long as one act contributing to the claim occurs within the filing period, then all incidents which are part of the same hostile work environment are actionable, whether or not they occurred within the statutory time period. Query: what are "discrete acts" of employment? The Court specifically mentions "termination, failure to promote, denial of transfer, or refusal to hire" as "easy to identify." Slip op. at 11. This holding does not affect the admissibility of "non-discrete acts" that serve as evidence of the employer's discriminatory intent.

III. IOWA CIVIL RIGHTS COMMISSION STATISTICS

See www.state.ia.us/government/crc

Number of complaints. In fiscal year 2001, 2,150 complaints were filed with the Iowa Civil Rights Commission. 145 of these were either non-jurisdiction or untimely filed. Over 77%

of the filings were in the area of employment discrimination; 10.1% of the filings were in the area of public accommodation, followed by housing with 5.1%.

Types of complaints. The type and number of discrimination charges in non-housing discrimination complaints were as follows: disability - 27.1%; sex discrimination - 23.9%; race - 16.5%; retaliation - 14%; age - 12.6%; and national origin - 4.4%. In housing complaints, race was the most frequently named basis for discrimination at 42.2%, followed by disability at 26.5% and gender at 12.7%.

Private vs. public. 1,487 cases, or 74.2%, were filed against private employers; 9.9% were against state and local government employers.

Location. Of the 2005 complaints over which the Commission exercised jurisdiction, 496 were from residents of Polk County; 186 were from Scott County; 140 were from Linn County; 113 were from Black Hawk County; 86 were from Johnson County; followed closely by Dubuque, Woodbury, Pottawattamie and Clinton Counties.

Disposition. Disposition of the 2095 case resolutions was broken down as follows:

Does not warrant further investigation - administrative closure: 1,265

Right to Sue letter issued - 315

Settlement prior to determination - 244

No probable cause - 173

Withdrawal by complainant - 41

Probable Cause - 36

Successfully conciliated after probable cause - 14

Not timely/no jurisdiction - 6

Public hearing - 1

Mediation. The ICRC uses four mediators who conduct mediation throughout the state. From March 26, 2001 to June 30, 2001, the team resolved a total of 82 cases amounting to $335,814 collected for complainants. While statistics are not completed for year 2002, it is expected that these numbers will increase significantly. Mediation sometimes occurs prior to an initial determination by the ICRC concerning the merits of a complainant's case.

IV. ARBITRATION OF EMPLOYMENT LAW CLAIMS.

An increasingly popular question posed to attorneys for employers is whether the company should have employees sign an agreement mandating arbitration for all employment related claims the employee may bring against the employer. The Federal Arbitration Act (FAA) provides that written arbitration agreements will be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." Section 1 of the FAA excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (Emphasis added.) In Circuit City Stores v. Adams, 1212 S.Ct. 1302 (2001), the Court, in a 5-4 decision, reversed a decision of the 9th Circuit holding that the FAA did not apply to employment contracts. The Court made held that section 1 of the Act must be narrowly construed to exempt employment contracts of transportation workers, but no others, from FAA coverage. That is, because Congress chose to include specific exemptions for seamen and railroad employees, Congress must have meant the general exemption to be limited to transportation workers.

The questions that need to be answered in determining whether there is an enforceable arbitration agreement are: (1) is there a "written agreement" to arbitrate? I.e., will a provision in

an employee handbook suffice? (2) Is the arbitration agreement valid? I.e., are there any grounds in law or equity to support the revocation of the agreement, such as unconscionability or contract of adhesion? See Perez v. Globe Airport Sec. Services, Inc., 253 F.3d 1288 (11th Cir. 2001) (arbitration agreement containing provisions that defeat a federal statute's remedial purpose is not enforceable); Brennan v. Bally Total Fitness, 88 FEP Cases 335 (S.D.N.Y. January 2, 2002) (court held employer's conduct in forcing employees to sign 16-page contracts in 15-minute time period was overreaching and invalidated arbitration provision); but see Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001) (plaintiff, who had signed an arbitration agreement that contained a provision limiting punitive damages, sued for sex discrimination; court held the underlying claims must be arbitrated but severed the provision concerning punitive damages).

V. "PERCEIVED DISABILITY" CLAIMS.

As indicated in section III, above, disability discrimination claims are the most frequently litigated kind of civil rights cases. 42 U.S.C. § 12112(2) defines disability as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. A multitude of cases have addressed whether a plaintiff has produced sufficient evidence to show that the employer "regarded" or "perceived" the plaintiff as being "disabled." These claims often arise in the context of a plaintiff alleging the employer regarded her as substantially limited in the major life activity of "working." In order to prove this claim, a plaintiff must show that the employer regarded the individual as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to

the average person having comparable training, skills and abilities." Cases addressing "perceived disability" have produced varying results: Compare EEOC v. Woodbridge Corp., 263 F.3d 812 (8th Cir. 2001) (test intended by employer to determine whether job applicants were more likely to develop carpal tunnel syndrome did not show that employer regarded individuals as "disabled" under ADA) with EEOC v. Texas Bus Lines, 923 F.Supp. 965, 981 (S.D. Texas 1996) (doctor's unsupported opinion about obese individual's lack of mobility was "direct evidence" that defendant regarded plaintiff as disabled).

INTERVENTIONAL PAIN ANAGEMENT

Separating the kernel from the cob

George Lederhaas, M.D.
Des Moines, Iowa

1. Epidural Steroid Injections
    a. Indications
    b. Frequency
    c. Use of Fluroscopy
    d. Side Effects/Complications
    e. Concurrent Therapies
    f. Outcome Studies
2. Radiofrequency Lesioning and Cryolysis
    a. Indications
    b. Patient Evaluation
    c. Number of Levels
    d. Complications
    e. Outcome Studies
3. Sympathetic Blocks
    a. Complex Regional Pain Syndrome (CRPS)
    b. Frequency
    c. Concurrent Therapies
    d. Complications
    e. Outcome Studies
4. Spinal Cord Stimulators
    a. Indications
    b. Patient Evaluation
    c. Limitations/Complications
    d. Outcome Studies
5. Intrathecal Delivery Systems
    a. Indications
    b. Patient Evaluation
    c. Complications
    d. Outcome Studies

Professional Organizations

International Association for the Study of Pain
American Society of Anesthesiologists
American Academy of Pain Medicine
American Society of Regional Anesthesia and Pain Medicine

2002 LEGISLATIVE REPORT

ROBERT M. KREAMER
Kreamer Law Office
5835 Grand Avenue Suite 104
Des Moines, IA 50312-1437

The 2002 legislative session was dominated by extensive work and debate over the state budget. With Democrat Tom Vilsack occupying the governor's office and the Republicans controlling both the Iowa Senate and Iowa House of Representatives, both sides were eager to assign blame for the cause of the state budget deficit and were in total disagreement on how to resolve the deficit issue. Because of the dominance of the budget issue throughout the 2002 legislative session, there was a significantly reduced amount of time left for consideration and debate of other issues.

The Iowa Defense Counsel Association (IDCA) at its December 2001 Board of Directors meeting adopted the following legislative agenda for the 2002 Iowa legislative session:

1. Amend Iowa Code Chapter 677 to stop the running of all prejudgment interest from the date that a successful Offer to Confess Judgment is served. See House Study bill 140.
2. Repeal the five percent (5%) cap on the reduction of a plaintiff's damages for failure to use a seatbelt and/or safety harness as provided in Iowa Code Section 321-445 (4)(b). See House Study Bill 100.
3. Repeal Iowa Code Section 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 85 to allow the Industrial Commissioner and courts to apportion permanent impairment and/or disability payments so that current employers pay only their proportionate share of an award. See Senate File 2190.
5. Oppose any legislation attempting to require mandatory mediation in civil cases.

The IDCA initiatives of amending Iowa Code Chapter 677, repealing Iowa Code Section 321.334 (4)(b), and repealing Iowa Code Section 228.9 were discussed with various legislators and supportive interest groups but received no formal legislative attention.

The issue of mandatory mediation in civil cases, while supposedly being drafted and promoted by Iowa Attorney General Tom Miller and supported by some legislators, never was formally introduced during the 2002 session.

The IDCA initiative to amend Iowa Code Chapter 85 to allow apportionment of permanent impairment and/or disability payments so that current employers pay only their proportionate share of an award, unlike the other IDCA initiatives, quickly became the most controversial and divisive issue of the 2002 legislative session other than budget issues. This proposal was originally known as Senate File 2200 and was late to be introduced because of the logjam of bills to be drafted by the Iowa Legislative Service Bureau. When debated by the Iowa Senate, Senate File 2200 was weakened by an amendment and still only received the minimum number of votes (26 Republican senators) necessary for passage on March 12, 2002. When Senate File 2200 reached the Iowa House of Representatives, there was only one meeting of the House Labor Committee scheduled prior to the March 14th funnel-deadline. Because this meeting was scheduled late in the day on March 14th, it was feared that there might not be

enough favorable votes to approve Senate File 2200. Consequently, efforts to approve Senate File 2200 in the House Labor Committee were abandoned by IDCA. IDCA then helped win House Labor Committee approval of Senate File 2190, Worker's Compensation legislation initiated by the Iowa State Bar Association, with the intention of amending the content of the original Senate File 2200 into the body of Senate File 2190 during debate by the Iowa House of Representatives. When Senate File 2190 came up for debate on Marcy 27th, our amendment H-8299, formerly Senate File 2200, was filed and it immediately attracted 42 hostile amendments designed to cripple or kill our apportionment concept. These negative amendments promoted by the plaintiff's bar and various labor unions, were all defeated during an 11-hour debate, and Senate File 2190 was approved on a straight party line vote of 53-42. Senate File 2190 then returned to the Iowa Senate for concurrence or rejection of our amendment H-8299. With the legislative adjournment deadline approaching, I was concerned that there would not be enough time set aside to debate this legislation since the plaintiff's bar, unions and other opponents, including the Iowa State Bar Association, filed the identical 42 amendments previously considered by the Iowa House of Representatives. I met with Senate Majority Leader Stew Iverson regarding the merits of this legislation and was pleased that he agreed to attempt passage of Senate File 2190. Senator Iverson called Senate File 2190 up for debate at 10:30 p.m. on April 8th with the hope that the lateness of the house might cut back the amount of debate. After seven hours of highly emotional and partisan debate, Senate File 2190 was approved at 5:30 a.m. by the bare minimum vote of 26-18. Opponents of this legislation referred to this legislation as "one of the most heartless attacks on Iowa workers in recent years" and stated that "amendment H-8299 would so unbalance the system that it would arguably become an inherently anti-worker system".

To no one's surprise, Governor Vilsack vetoed Senate File 2190 on May 9th and used many of the same exaggerated arguments of the legislative opponents in his veto message. Nowhere during the entire legislative process was there any recognition by opponents that Senate file 2190 was a good-faith effort to overturn the Iowa Supreme Court decision in Venegas v. IPB, Inc., 638 N.W.2d 699 (2002) and prevent an injured employee from receiving compensation twice for the same injury. The National Council on Compensation Insurance has estimated that this veto will prevent a 2.4% premium reduction and savings of $8.85 million for Iowa employers.

Other legislation of interest that was introduced during the 2002 legislative session included the following:

1. House File 2026 provided a rebuttable presumption of negligence against the operator of a motor vehicle involved in a traffic accident while using a cell phone. IDCA opposed this legislation and it never got out of the House Transportation Committee.
2. House Study Bill 551 provided a cap of $250,000.00 on non-economic damages arising out of the personal injury or death of a nursing-home resident. IDCA opposed this legislation and it never got out of the House Commerce Committee.

In addition to the above activity, my daily presence at the Capitol gives me the opportunity to monitor other legislation and converse with legislators to make certain such legislation does not take a form contrary to the interests of IDCA. It is important that IDCA have this daily presence to provide answers and information to legislators and help them be better informed on issues of concern to them and their constituents.

Finally, I want to thank you, the members of the Iowa Defense Counsel Association for allowing me the opportunity to represent you before the Iowa General Assembly and Mike Weston, our legislative chair, for his support, enthusiasm, and leadership this past year. Thank you!

House Study Bill 140

Bill Text

PAG LIN

1 1 Section 1. NEW SECTION. 677.10A PREJUDGMENT INTEREST.
1 2 If any offer to confess judgment is made under this chapter
1 3 and is not accepted, and a subsequent trial results in a
1 4 judgment which is less than the offer to confess judgment,
1 5 prejudgment interest shall not be calculated or be subject to
1 6 recovery after the date of the offer to confess judgment.
1 7 EXPLANATION
1 8 This bill limits recovery of prejudgment interest in any
1 9 pending or proposed action where an offer to confess judgment
1 10 is made, but is not accepted, and a subsequent trial results
1 11 in a judgment that is less than the amount in the offer to
1 12 confess judgment. In such a case, no prejudgment interest is
1 13 to be calculated or is recoverable after the date of the offer
1 14 to confess judgment.
1 15 LSB 2166YC 79
1 16 rh/cf/24

House Study Bill 100

Bill Text

PAG LIN

Section 1. Section 321.445, subsection 4, paragraph b, subparagraph (2), Code 2001, is amended to read as follows:

(2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section 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~~ proportionate to the degree to which the failure to wear a safety belt or safety harness contributed to the plaintiff's claimed injury or injuries, after any reductions for comparative fault.

EXPLANATION

This bill eliminates the limitation on the reduction in damages awarded to plaintiffs who fail to wear a safety belt or safety harness. Currently, Code section 321.445 provides that the trier of fact may reduce the amount of a plaintiff's recovery by an amount not to exceed 5 percent of the damages awarded after any reductions for comparative fault if the evidence supports a finding that the plaintiff's failure to wear the belt or harness, in violation of that section, contributed to the plaintiff's claimed injury or injuries.

LSB 2164YC 79

rh/gg/8

Bill Text

PAG LIN

SENATE FILE 2190

AN ACT

CONCERNING WORKERS' COMPENSATION.

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

Section 1. Section 22.7, Code Supplement 2001, is amended by adding the following new subsection:

NEW SUBSECTION. 43. Confidential information relating to an injured employee as provided in section 86.45.

Sec. 2. Section 85.27, subsection 7, Code Supplement 2001, is amended to read as follows:

7. If, after the third day of incapacity to work following the date of sustaining a compensable injury which does not result in permanent partial disability, or if, at any time after sustaining a compensable injury which results in permanent partial disability, an employee, who is not receiving weekly benefits under section 85.33 or section 85.34, subsection 1, returns to work and is required to leave work for one full day or less to receive services pursuant to this section, the employee shall be paid an amount equivalent to the wages lost at the employee's regular rate of pay for the time the employee is required to leave work. For the purposes of this subsection, "day of incapacity to work" means eight hours of accumulated absence from work due to incapacity to work or due to the receipt of services pursuant to this section. The employer shall make the payments under this subsection as wages to the employee after making such deductions from the amount as legally required or customarily made by the employer from wages. Payments made under this subsection shall be required to be reimbursed pursuant to any insurance policy covering workers' compensation. Payments under this subsection shall not be construed to be payment of weekly benefits.

Sec. 3. Section 85.34, subsection 5, Code 2001, is amended to read as follows:

5. RECOVERY OF EMPLOYEE OVERPAYMENT. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and

employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the workers' compensation commissioner. The employer shall not take any adverse action against the employee for failing to agree to such a written settlement agreement. However, an overpayment shall not be created if an employee has been paid compensation for either a functional loss or industrial disability from an injury resulting in permanent partial disability and who subsequently suffers an injury in which the finding of functional loss or industrial disability is less than the amount or percentage of the earlier compensation paid.

Sec. 4. Section 85.34, Code 2001, is amended by adding the following new subsection:

NEW SUBSECTION. 7. APPORTIONMENT. Compensation for a permanent partial disability which would otherwise be payable pursuant to this section shall be reduced as provided in this subsection as follows:

a. If an employee has a preexisting functional loss under subsection 2, paragraphs "a" through "t", or a preexisting industrial disability under subsection 2, paragraph "u", the preexisting functional loss or industrial disability shall be apportioned and the employer shall not be liable for that preexisting loss or disability with respect to claims for a permanent partial disability resulting from subsequent injuries which result in an increase in the permanent impairment to the same member or an increase in industrial disability with respect to any condition affecting employability. However, the apportionment authorized by this paragraph shall not apply if the preexisting functional loss or preexisting industrial disability was the product of a work injury with the same employer and the employee did not recover benefits pursuant to this chapter for that preexisting functional loss or preexisting industrial disability, or if the preexisting functional loss or preexisting industrial disability resulted from any physical or mental injury sustained by the employee while in the service of the armed forces of this country, or if the preexisting functional loss or preexisting industrial disability resulted from a congenital defect or condition which manifested itself and was apparent at birth.

b. If an employee has received a benefit under this chapter, chapter 85A, or chapter 85B, for a previous injury to a portion of the body as described in subsection 2, the employer shall not be liable for the amount representing the applicable previous payment with respect to claims for a permanent partial disability resulting from subsequent injuries to the same portion of the body. For purposes of this paragraph, the applicable previous payment is the percentage of disability that resulted from the previous injury for which compensation was received under this chapter, chapter 85A, or chapter 85B, or the dollar amount received in a contested case settlement, disregarding any dollars received in a contested case settlement related to past or future medical benefits, interest, temporary total disability benefits, healing period benefits, penalty benefits, or any

other dollars paid for any consideration received by the injured worker for anything other than permanent impairment benefits.

Sec. 5. Section 86.42, Code 2001, is amended to read as follows:

86.42 JUDGMENT BY DISTRICT COURT ON AWARD.

Any party in interest may present a ~~certified~~ copy of an order or decision of the commissioner, from which a timely petition for judicial review has not been filed or if judicial review has been filed, which has not had execution or enforcement stayed as provided in section 17A.19, subsection 5, or an order or decision of a deputy commissioner from which a timely appeal has not been taken within the agency and which has become final by the passage of time as provided by rule and section 17A.15, or an agreement for settlement approved by the commissioner, and all papers in connection therewith, to the district court where judicial review of the agency action may be commenced. The court shall render a decree or judgment and cause the clerk to notify the parties. The decree or judgment, in the absence of a petition for judicial review or if judicial review has been commenced, in the absence of a stay of execution or enforcement of the decision or order of the workers' compensation commissioner, or in the absence of an act of any party which prevents a decision of a deputy workers' compensation commissioner from becoming final, has the same effect and in all proceedings in relation thereto is the same as though rendered in a suit duly heard and determined by the court.

Sec. 6. Section 86.43, Code 2001, is amended to read as follows:

86.43 JUDGMENT – MODIFICATION OF.

Upon the presentation to the court of a ~~certified~~ copy of a decision of the workers' compensation commissioner, ending, diminishing, or increasing the compensation under the provisions of this chapter, the court shall revoke or modify the decree or judgment to conform to such decision.

Sec. 7. NEW SECTION. 86.45 CONFIDENTIAL INFORMATION.

1. For purposes of this section, "confidential information" means all information filed with the workers' compensation commissioner as a result of an individual's injury or death that would allow the identification of an injured employee or that employee's dependents. "Confidential information" includes first reports of injury and claim activity reports. Pleadings, motions, orders, decisions, opinions, and applications for approval of settlements are not confidential information.

2. The workers' compensation commissioner shall not disclose confidential information except under any of the following circumstances:

a. Pursuant to the terms of a written waiver of confidentiality.

b. To another governmental agency, or an advisory, rating, or research organization, for the purpose of compiling statistical data, evaluating the state's workers' compensation system, or conducting scientific, medical, or public policy research, that will not disclose the identity of the injured employee or that employee's dependents.

c. To the individual, or the individual's agent or attorney, whose information is contained in the reports and records.

d. To the person, entity, or agent who submitted the reports, records, or information.

e. To the agents, attorneys, investigators, consultants, and adjusters for an employer, insurance carrier, or third-party administrator of workers' compensation claims who are involved in administering a claim for benefits made with respect to injury or the death of the individual.

f. To all parties in a contested case proceeding before the workers' compensation commissioner in which the injured employee or the injured employee's representative or dependent is a party.

g. In compliance with a subpoena.

h. To attorneys, investigators, agents, or adjusters on behalf of an employee, employer, insurance carrier, or third-party administrator in connection with an insurance claim.

MARY E. KRAMER
President of the Senate

BRENT SIEGRIST
Speaker of the House

I hereby certify that this bill originated in the Senate and is known as Senate File 2190, Seventy-ninth General Assembly.

MICHAEL E. MARSHALL
Secretary of the Senate

Approved _____, 2002

THOMAS J. VILSACK
Governor

House File 2026

Partial Bill History

- Bill Introduced: H.J. 8
- Complete Bill History

Bill Text

PAG LIN

Section 1. NEW SECTION. 321.494 MOBILE TELEPHONE USE – PRESUMPTION OF NEGLIGENCE.

1. A rebuttable presumption arises that an operator of a motor vehicle who was involved in a traffic accident was negligent in the operation of the motor vehicle if the operator was using a mobile telephone at the time of the accident.

2. This section does not apply to the operator of a motor vehicle using a mobile telephone in the course of the operator's duties on behalf of a public safety agency as defined in section 34.1.

3. For purposes of this section, the following definitions apply:

a. "Mobile telephone" means any type of wireless telecommunications device, whether hand-held or hands-free.

b. "Using a mobile telephone" means actually physically interacting with the mobile telephone either by physically holding, picking up, or setting down the mobile telephone or any accessory associated with use of the mobile telephone, dialing or pressing keys of the mobile telephone, or talking into or listening to the mobile telephone, as part of a voice telephone call.

EXPLANATION

This bill creates a rebuttable presumption of negligence against an operator of a motor vehicle who was involved in a traffic accident if the operator was using a mobile telephone at the time of the accident. The bill defines "mobile telephone" as any type of wireless telecommunications device, whether hand-held or hands-free. An operator uses a mobile telephone if the operator actually physically interacts with the mobile telephone.

The presumption does not apply to the operator of a motor vehicle using a mobile telephone if such use is in the course of the operator's duties on behalf of a public safety agency as defined in Code section 34.1.

LSB 5295HH 79
nh/pj/5

House Study Bill 551

Bill Text

PAG LIN

Section 1. NEW SECTION. 613.22 LIMITATION ON LIABILITY OF HEALTH CARE FACILITIES.

1. a. In an action to recover damages arising out of the personal injury or death of a resident of a health care facility, as defined in section 135C.1, the present value of the damages awarded for noneconomic losses incurred or to be incurred in the future by the resident shall not exceed two hundred fifty thousand dollars.

b. In an action described in paragraph "a" tried to a jury in which damages for noneconomic losses are sought, the court shall submit an instruction to the jury that the maximum allowable award for noneconomic losses is two hundred fifty thousand dollars. The court shall submit a separate interrogatory verdict for damages for noneconomic losses unless waived by all parties.

c. As used in this section, "noneconomic losses" includes, but is not limited to, pain and suffering, mental anguish, emotional distress, humiliation, loss of consortium, lost opportunity, loss of expectations, and punitive or exemplary damages.

EXPLANATION

This bill creates new Code section 613.22, limiting damages for noneconomic losses arising out of the personal injury or death of a resident of a health care facility. The bill limits damages for noneconomic losses to $250,000, and defines noneconomic losses to include pain and suffering and punitive or exemplary damages. The bill also requires a special interrogatory and instructions in a jury trial where noneconomic losses are sought.

LSB 6210HC 79

jj/pj/5

DEFENDING POST TRAUMATIC STRESS DISORDER CLAIMS

Dr. Steven Carter, PsyD LP
MEDPsych Minnesota
604 13th Street North
Virginia, MN 55792-2233 USA

Phone: 866-749-3107 or 218-749-3107
Fax: 218-741-9673
Website: http://www.defenseinformationcenter.com/

POSTTRAUMATIC STRESS DISORDER (PTSD): ESCAPING THE BLACK HOLE OF LITIGATION!

PTSD & Litigation

- No other diagnosis in American psychiatry has had such a profound impact on civil and criminal law.
- Hundreds of millions of dollars per year in over & under-compensation.
- It's a growth industry.
- Several problems with forensic assessment and legal defense of claims of PTSD:
    - Incident specific with the result that other factors important to the determination of causation are ignored.
    - Occurs comorbidly with other psychiatric disorders.
    - Numerous premorbid risk factors with no proximate relationship to the legal cause of action can contribute to onset and course of PTSD.
    - The symptoms can be malingered.
    - It is difficult to quantify the severity of the resulting disability in cases of genuine PTSD.

DSM-IV-TR Diagnostic Criteria

- First officially created by DSM-III in 1980. Current version is DSM-IV-TR.
- Brief review of diagnostic criteria in handout.
- Not a cookbook or a statute.
- PTSD is classified as an anxiety disorder but dominated by **dissociative** symptoms.
- The more **dissociative** the quality of the re-experiencing phenomenon described by the plaintiff, the more likely the plaintiff will meet criterion B for PTSD.
- The specifier "with delayed onset" does not allow for hindsight traumatization in response to events that were originally nontraumatic.

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Guidelines for Forensic Assessment

- Adherence to DSM-IV-TR criteria
- Consideration of multiple stressors
- Review of all past records
- Subjective reporting by itself is insufficient
- Use standard assessment methods
- Search for collateral data
- Avoid false positive data collection methods
- Recognize known patterns of true PTSD
- Investigate malingering and symptom manipulation

Risk Factors Associated with Onset and Chronic Course

- Stressor severity
- Number of symptoms
- Current comorbidity
- Lifetime comorbidity
- Childhood separation and abuse
- Demographics
- Life stressors
- Family history
- Support
- Treatment
- Functional Impairment

Deposition Points

- Exact circumstances of the claimed trauma.
- Full description of the claimed dreams and flashbacks.
- Plaintiff's religious, social, recreational, & occupational functioning before & after the traumatic event.
- Detailed medical, psychological, and social history.
- Developmental history (abuse, abandonment, antisocial behavior, drug abuse)
- Family stressors and recent changes.

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- Other psychosocial stressors.

Defense Points

Challenging the forensic examiner

- Failure to adhere to published forensic assessment guidelines.
- Failure to obtain and review of all past records.
- Lack of collateral evidence (e.g. interview of family and friends).
- Failure to assess for malingering or response bias.
- Failure to conduct a thorough hypothesis-driven mental status exam.
- Failure to consult with other providers who have different diagnoses.
- The examiner has a financial interest in the outcome (e.g., lien).
- Treatment and expert roles are mixed.

Challenging the proof of damage

- Failure to utilize a DSM-IV-TR five-axis diagnosis.
- Diagnostic criteria were never fulfilled (take a criterion by criterion approach).
- Failure to use standard assessment records (e.g. use of symptom checklists).
- Diagnosis is based solely on subjective self-reported information.
- Malingering, symptom manipulation, and response bias has not been assessed (or the results of that assessment were ignored.)
- Symptoms are a result of multiple or premorbid traumas.
- Failure to consider medication side effects as a source of the plaintiff's symptoms.
- Failure to consider recreational drugs as source of the plaintiff's symptoms (e.g., alcohol withdrawal, nicotine withdrawal, cannabis use, hallucinogen use, etc.).
- Failure to consider other medical conditions as a source of symptoms (e.g., hyperthyroidism).

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- Treatment is sought or provided in a litigation pattern rather than a wellness pattern.
- Litigation effects, rather than chronic PTSD, are sustaining the symptoms.

Challenging the assessment of damage

- Insufficient symptoms to continue diagnosis.
    - Spontaneous remission
    - Effective treatment
- Lack of occupational impairment.
- Lack of social & recreational impairment.
- Pre-existing psychological problems were uncovered, aggravated, accelerated, or reactivated by traumatic stress (i.e., the plaintiff's problems were inevitable).
- Failure to mitigate damages by seeking and adhering to a treatment regimen.
- Failure to utilize standard psychological and psychopharmacologic treatments for PTSD.
- Plaintiff's problems (e.g., marital, financial, etc.) are secondary consequences of not working & socializing.
- Plaintiff's accident provided the occasion to assume a formerly unacceptable disabled role.

Handouts

- Lecture outline.
- DSM-IV-TR Entry for Posttraumatic Stress Disorder (PTSD)
- Defense Cross-examination Concepts and Alternative Causes for Claimed Symptoms.
- Reference List.

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DSM-IV-TR Entry for Posttraumatic Stress Disorder (PTSD)

(Taken from the American Psychiatric Association (2000). *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR).* Washington, DC: American Psychiatric Association, pages 463-468)

Diagnostic Features: Posttraumatic Stress Disorder

The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person's response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behavior) (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event (Criterion B), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than 1 month (Criterion E), and the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F).

Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness. For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury. Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. Events experienced by others that are learned about include, but are not limited to, violent personal assault, serious accident, or serious injury experienced by a family member or a close friend; learning about the sudden, unexpected death of a family member or a close friend; or learning that one's child has a life-threatening disease. The disorder may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape). The likelihood of developing this disorder may increase as the intensity of and physical proximity to the stressor increase.

The traumatic event can be reexperienced in various ways. Commonly the person has recurrent and intrusive recollections of the event (Criterion B1) or recurrent distressing dreams during which the event is replayed (Criterion B2). In rare instances, the person experiences dissociative states that last from a few seconds to several hours, or even

days, during which components of the event are relived and the person behaves as though experiencing the event at that moment (Criterion B3). Intense psychological distress (Criterion B4) or physiological reactivity (Criterion B5) often occurs when the person is exposed to triggering events that resemble or symbolize an aspect of the traumatic event (e.g., anniversaries of the traumatic event; cold, snowy weather or uniformed guards for survivors of death camps in cold climates; hot, humid weather for combat veterans of the South Pacific; entering any elevator for a woman who was raped in an elevator).

Stimuli associated with the trauma are persistently avoided. The person commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event (Criterion C1) and to avoid activities, situations, or people who arouse recollections of it (Criterion C2). This avoidance of reminders may include amnesia for an important aspect of the traumatic event (Criterion C3). Diminished responsiveness to the external world, referred to as "psychic numbing" or "emotional anesthesia," usually begins soon after the traumatic event. The individual may complain of having markedly diminished interest or participation in previously enjoyed activities (Criterion C4), of feeling detached or estranged from other people (Criterion C5), or of having markedly reduced ability to feel emotions (especially those associated with intimacy, tenderness, and sexuality) (Criterion C6). The individual may have a sense of a foreshortened future (e.g., not expecting to have a career, marriage, children, or a normal life span) (Criterion C7).

The individual has persistent symptoms of anxiety or increased arousal that were not present before the trauma. These symptoms may include difficulty falling or staying asleep that may be due to recurrent nightmares during which the traumatic event is relived (Criterion D1), hypervigilance (Criterion D4), and exaggerated startle response (Criterion D5). Some individuals report irritability or outbursts of anger (Criterion D2) or difficulty concentrating or completing tasks (Criterion D3).

Specifiers:

The following specifiers may be used to specify onset and duration of the symptoms of Posttraumatic Stress Disorder:

Acute. This specifier should be used when the duration of symptoms is less than 3 months.

Chronic. This specifier should be used when the symptoms last 3 months or longer.

With Delayed Onset. This specifier indicates that at least 6 months have passed between the traumatic event and the onset of the symptoms.

Associated Features/Disorders

Associated descriptive features and mental disorders. Individuals with Posttraumatic Stress Disorder may describe painful guilt feelings about surviving when others did not survive or about the things they had to do to survive. Avoidance patterns may interfere with interpersonal relationships and lead to marital conflict, divorce, or loss of job. Auditory hallucinations and paranoid ideation can be present in some severe and chronic cases. The following associated constellation of symptoms may occur and are more commonly seen in association with an interpersonal stressor (e.g., childhood sexual or physical abuse, domestic battering, being taken hostage, incarceration as a prisoner of war or in a concentration camp, torture): impaired affect modulation; self-destructive and impulsive behavior; dissociative symptoms; somatic complaints; feelings of ineffectiveness, shame, despair, or hopelessness; feeling permanently damaged; a loss of previously sustained beliefs; hostility; social withdrawal; feeling constantly threatened; impaired relationships with others; or a change from the individual's previous personality characteristics.

There may be increased risk of Major Depressive Disorder, Substance-Related Disorders, Panic Disorder, Agoraphobia, Obsessive-Compulsive Disorder, Generalized Anxiety Disorder, Social Phobia, Specific Phobia, and Bipolar Disorder. These disorders can either precede, follow, or emerge concurrently with the onset of Posttraumatic Stress Disorder.

Associated laboratory findings.
Increased arousal may be measured through studies of autonomic functioning (e.g., heart rate, electromyography, sweat gland activity).

Associated physical examination findings and general medical conditions.
Physical injuries may occur as a direct consequence of the trauma. In addition, chronic Posttraumatic Stress Disorder may be associated with increased rates of somatic complaints and, possibly, general medical conditions.

Specific Culture and Age Features

Individuals who have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of Posttraumatic Stress Disorder. Such individuals may be especially reluctant to divulge experiences of torture and trauma due to their vulnerable political immigrant status. Specific assessments of traumatic experiences and concomitant symptoms are needed for such individuals.

In younger children, distressing dreams of the event may, within several weeks, change into generalized nightmares of monsters, of rescuing others, or of threats to self or others. Young children usually do not have the sense that they are reliving the past; rather, the reliving of the trauma may occur through repetitive play (e.g., a child who was involved in a serious automobile accident repeatedly reenacts car crashes with toy

cars). Because it may be difficult for children to report diminished interest in significant activities and constriction of affect, these symptoms should be carefully evaluated with reports from parents, teachers, and other observers. In children, the sense of a foreshortened future may be evidenced by the belief that life will be too short to include becoming an adult. There may also be "omen formation"—that is, belief in an ability to foresee future untoward events. Children may also exhibit various physical symptoms, such as stomachaches and headaches.

Prevalence

Community-based studies reveal a lifetime prevalence for Posttraumatic Stress Disorder of approximately 8% of the adult population of the United States. Information is not currently available with regard to the general population prevalence in other countries. Studies of at-risk individuals (i.e., groups exposed to specific traumatic incidents) yield variable findings, with the highest rates (ranging between one-third and more than half of those exposed) found among survivors of rape, military combat and captivity, and ethnically or politically motivated internment and genocide.

Course:

Posttraumatic Stress Disorder can occur at any age, including childhood. Symptoms usually begin within the first 3 months after the trauma, although there may be a delay of months, or even years, before symptoms appear. Frequently, the disturbance initially meets criteria for Acute Stress Disorder (see p. 469) in the immediate aftermath of the trauma. The symptoms of the disorder and the relative predominance of reexperiencing, avoidance, and hyperarousal symptoms may vary over time. Duration of the symptoms varies, with complete recovery occurring within 3 months in approximately half of cases, with many others having persisting symptoms for longer than 12 months after the trauma. In some cases, the course is characterized by a waxing and waning of symptoms. Symptom reactivation may occur in response to reminders of the original trauma, life stressors, or new traumatic events.

The severity, duration, and proximity of an individual's exposure to the traumatic event are the most important factors affecting the likelihood of developing this disorder. There is some evidence that social supports, family history, childhood experiences, personality variables, and preexisting mental disorders may influence the development of Posttraumatic Stress Disorder. This disorder can develop in individuals without any predisposing conditions, particularly if the stressor is especially extreme.

Familial Pattern

There is evidence of a heritable component to the transmission of Posttraumatic Stress Disorder. Furthermore, a history of depression in first-degree relatives has been related to an increased vulnerability to developing Posttraumatic Stress Disorder.

Differential Diagnosis:

In Posttraumatic Stress Disorder, the stressor must be of an extreme (i.e., life-threatening) nature. In contrast, in **Adjustment Disorder**, the stressor can be of any severity. The diagnosis of Adjustment Disorder is appropriate both for situations in which the response to an extreme stressor does not meet the criteria for Posttraumatic Stress Disorder (or another specific mental disorder) and for situations in which the symptom pattern of Posttraumatic Stress Disorder occurs in response to a stressor that is not extreme (e.g., spouse leaving, being fired).

Not all psychopathology that occurs in individuals exposed to an extreme stressor should necessarily be attributed to Posttraumatic Stress Disorder. **Symptoms of avoidance, numbing, and increased arousal that are present before exposure to the stressor** do not meet criteria for the diagnosis of Posttraumatic Stress Disorder and require consideration of other diagnoses (e.g., a Mood Disorder or another Anxiety Disorder). Moreover, if the symptom response pattern to the extreme stressor meets criteria for **another mental disorder** (e.g., Brief Psychotic Disorder, Conversion Disorder, Major Depressive Disorder), these diagnoses should be given instead of, or in addition to, Posttraumatic Stress Disorder.

Acute Stress Disorder is distinguished from Posttraumatic Stress Disorder because the symptom pattern in Acute Stress Disorder must occur within 4 weeks of the traumatic event and resolve within that 4-week period. If the symptoms persist for more than 1 month and meet criteria for Posttraumatic Stress Disorder, the diagnosis is changed from Acute Stress Disorder to Posttraumatic Stress Disorder.

In **Obsessive-Compulsive Disorder,** there are recurrent intrusive thoughts, but these are experienced as inappropriate and are not related to an experienced traumatic event. Flashbacks in Posttraumatic Stress Disorder must be distinguished from illusions, hallucinations, and other perceptual disturbances that may occur in **Schizophrenia, other Psychotic Disorders, Mood Disorder With Psychotic Features,** a **delirium, Substance-Induced Disorders,** and **Psychotic Disorders Due to a General Medical Condition.**

Malingering should be ruled out in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role.

Diagnostic Criteria for 309.81 Posttraumatic Stress Disorder

A. The person has been exposed to a traumatic event in which both of the following were present:

   1. the person experiences, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

2. the person's response involved intense fear, helplessness, or horror. **Note:** In children, this may be expressed instead by disorganized or agitated behavior

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

1. recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.

2. recurrent distressing dreams of the event. **Note:** In children, there are may be frightening dreams without recognizable content.

3. acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). **Note:** In young children, trauma-specific reenactment may occur.

4. intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

5. physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

1. efforts to avoid thoughts, feelings, or conversations associated with the trauma

2. efforts to avoid activities, places, or people that arouse recollections of the trauma

3. inability to recall an important aspect of the trauma

4. markedly diminished interest or participation in significant activities

5. feeling of detachment or estrangement from others

6. restricted range of affect (e.g., unable to have loving feelings)

7. sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

1. difficulty falling or staying asleep

2. irritability or outbursts of anger

3. difficulty concentrating

4. hypervigilance

5. exaggerated startle response

E. Duration of the disturbance (symptoms in criteria B, C, &D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

Acute: if duration of symptoms is less that 3 months
Chronic: if duration of symptoms if 3 months or more

Specify if:

With Delayed Onset: if onset of symptoms is at least 6 months after the stressor

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Defense Cross-examination Concepts and Alternate Causes for Claimed Symptoms	
Post-traumatic Stress Disorder (PTSD)	An anxiety disorder following a traumatic event with essential features of persistent reexperiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness, and persistent symptoms of increased arousal.
Traumatic event	PTSD requires an extreme event. In many cases, the correct diagnosis may actually be a simple Adjustment Disorder.
Chronic v. acute claim	A stress condition that appears and resolves within four weeks is an Acute Stress Disorder, not PTSD.
Required trauma level	PTSD requires actual or threatened death or serious injury, or a threat to the physical integrity of self or others ***and*** the person's response involved intense fear, helplessness, or horror.
Re-experiencing the trauma	Must be recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Not merely bad memories.
Dreams/Nightmares	Must be of the traumatic event (event specific). Many plaintiff's are on medications that produce dreams / nightmares.
Discovery note:	*Discover the plaintiff's pharmacy records / computer print-out.*
Flashbacks	Must be of the event and dissociative in nature (as if the event was actually occurring) not merely an upsetting memory.
Re-exposure distress	Distress must be intense when exposed to actual or symbolic cues. In many cases, after time, there is mild distress that remains when most of the other PTSD symptoms resolve. This is a remaining artifact of the condition, but it is not PTSD. Litigation itself may serve to keep the symptoms alive.
Resolution over time	By the time many PTSD cases go to trial, there is only an artifact of the condition remaining and this does not constitute the full diagnosis of PTSD.
Physiological reactions	The physiological symptoms may actually be from a non-related medical condition, medication side effect, phobia

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Defense Cross-examination Concepts and Alternate Causes for Claimed Symptoms	
	or anxiety.
Discovery note:	*Discover the plaintiff's full medical history.*
Avoidance / Numbing	Plaintiff may have pre-existing Avoidant of Schizoid Personality Disorder.
Recall Problems	Several medical conditions and medication can interfere with recall (memory). Depression, headaches, hypertension can disrupt recall, also cardiovascular, antidepressant, sedative Rx.
Diminished interest	Look for other life stressors, personality disorders, medical conditions, substance abuse, polypharmacy.
Detachment	Look for other life-long personality disorders, polypharmacy, dissociative mental illness, migraine, temporal lobe epilepsy, bereavement, and drug abuse such as cannabis.
Restricted affect	Look for medication side effects, personality disorders, neurological illness, bereavement, marital conflict, other stressors, life-stage crisis, onset of new medical condition and a long-term, low level, pre-existing depression (e.g., Dysthymia Disorder).
Foreshortened future	Expectations of a foreshortened future may stem from physical illness, depression, personality disorders, social-cultural background (e.g., crime-ridden neighborhood).
Sleep dysfunction	Also caused by medication effects, chaotic wake-sleep cycle, caffeine, some illnesses such as metabolic, gastro, pulmonary, cardiovascular conditions, other stressors, age related insomnia, sleep apnea, restless legs syndrome, nocturnal myoclonus, alcohol, depression, menopause onset and headaches.
Outbursts of anger	Consider personality disorders, medication-effects, general medical illnesses including thyroid, hypertension and hypoglycemia. Look for other life stressors and losses, intermittent explosive disorder, Adjustment Disorder, substance abuse and withdrawal including nicotine and caffeine.
Difficulty concentrating	Routinely caused by depression, medications, many diseases and illnesses, dementia of any type, Adjustment Disorders, specific cerebrovascular disease, personality

Defense Cross-examination Concepts and Alternate Causes for Claimed Symptoms	
	disorders and headaches.
Hypervigilance & exaggerated startle	Can be caused by general anxiety, paranoid personality, hearing disorder, paranoid mental disorders, street drugs and medications and hyperexplexia (rare.)
Required levels of impairment	For the diagnosis of PTSD, the diagnostic manual requires "…significant distress or impairment in social, occupational & other important areas of functioning."
PTSD General Defenses	**1.** PTSD does go into remission in many cases, **2.** PTSD is treatable, **3.** In most cases, persons with PTSD can still be employed, **4.** By the time most cases go to trial, the plaintiff has only a remaining artifact of PTSD and not the full, required symptoms of PTSD.
Discovery note:	*Discover the plaintiff's work performance ratings.*
Discovery note:	*Discover the doctor's handwritten clinical notes.*
New tests	*There are now psychological tests and MMPI subscales to measure PTSD.*
Checklists	*Doctors that give patients PTSD symptoms checklists, encourage false-positive responses.*

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IMPROVING PROFESSIONALISM IN THE COURTROOM

LAWYER INCOMPETENCE & NEGLECT, LAWYER DECEIT, and *EX-PARTE* COMMUNICATION

Chief Judge Arthur E. Gamble
Iowa Defense Counsel Association
Monday, September 26, 2002

I. INTRODUCTION:

We are fortunate to live in a state where lawyers and judges respect the nobility of the legal profession. While we may disagree on important issues from time to time, we generally work together to preserve professionalism and civility in the practice of law. In civil litigation, trial counsel usually observes the highest ethical standards. Occasionally, however, judges observe lapses of professionalism in the courtroom. These ethical failures most often fall into three main categories: lawyer incompetence and neglect, lawyer deceit, and *ex parte* communication.

II. LAWYER INCOMPETENCE & NEGLECT:

The legal profession is highly selective. The standards for admission to law school are demanding. Our law schools graduate highly qualified candidates for admission to the bar. Our bar exam weeds out some candidates that are less likely to succeed in the practice of law. Upon admission to the bar, we have stringent continuing legal education requirements including mandatory ethic hours. Despite all of this, we still observe a few lawyers who struggle with incompetence.

According to the ABA publication The Judicial Response To Lawyer Misconduct, lawyer incompetence is manifested in several different ways:

- Neglect of Entrusted Legal Matters
- Improper Administration and Misuse of Funds
- Ineffective Assistance of Counsel
- Unreasonable Delay
- Failure to Associate with a More Experienced Attorney
- Inadequate Preparation
- Inadequate Communication

A. Proposed Iowa Rules of Professional Conduct (Drafted After the ABA Model Rules for Professional Conduct),

- 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.")
- 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.")
- 1.4 ((a) "a lawyer shall keep the client reasonably informed about the about the status of a matter and promptly comply with reasonable requests for information"(b) "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.")
- 1.15(a) ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred….")
- 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.")
- 5.3 ("With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner or a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure the nonlawyer's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of the nonlawyer that would be a violation of the Iowa Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.")

B. Current Ethical Standards, Iowa Code of Professional Responsibility: Applicable Iowa Rules (Iowa Rules of Court, 2002 rev ed.),

- DR 1-102(A)(1),(5),(6) ("A lawyer shall not: (1) violate a disciplinary rule; (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.") [See EC 1-5.]
- EC 2-33 ("Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent the client by advising whether to take an appeal and, if the appeal is prosecuted, by

representing the client through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.") [See DR 2-110].

- DR 3-104(D) ("The delegated work of nonlawyer personnel shall be such that it will assist only the employing lawyer or law firm…. A lawyer shall examine, supervise and be responsible for all work delegated to nonlawyer personnel.")
- DR 6-101(A)(1),(2),(3) ("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.") [See EC 6-1, 6-4.]
- DR 7-101(A)(1),(2),(3) ("A lawyer shall not intentionally: (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules….; (2) fail to carry out a contract of employment entered into with a client for professional services….; (3) prejudice or damage a client during the course of the professional relationship….")
- DR 9-102(B)(3),(4) ("A lawyer shall: (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; (4) promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.")
- [See Iowa Court Rule 35.21]

C. Applicable Iowa Cases & Summaries,

- Bd. of Prof. Ethics & Conduct v. Sullins, LEXIS (2002). Sullins gave his client inaccurate legal advice, he failed to place client funds into a trust account, and he never contacted the client after the initial meeting. The Commission concluded that Sullins had violated DR 7-101(A), and DR 1-102(A)(1), (5) and (6). Sullins was also charged with neglecting a second client's dissolution action.
- Bd. of Prof. Ethics & Conduct v. Grotewald, 642 N.W.2d 288 (Iowa 2002). Grotewald neglected his client's legal matter by failing to properly provide services to client, an executor. DR 6-101(A)(3). He repeatedly failed to perform required functions as attorney for the executor, repeatedly failed to meet deadlines, and failed to close the estate within a reasonable period of time. His conduct was dilatory. DR 1-102(A)(5),(6). Grotewald also neglected a client matter by failing to file a timely answer in a case and by failing to move to set aside the default judgment. DR 6-101(A)(3); DR 7-101(A).
- Bd of Prof. Ethics & Conduct v. Ramey, 639 N.W.2d 243 (Iowa 2002). Ramey was hired by client to represent estate of her brother. Client tried to contact Ramey on several occasions, but with no success. The Grievance Commission found Ramey failed to carry out his term of employment, DR 6-103(A)(3) and DR 7-101(A), and failed to return the client's retainer and provide any accounting for services performed, DR 9-102(B)(3),(4) and DR 1-102(A)(1).
- Bd. of Prof. Ethics & Conduct v. Herrera, 626 N.W.2d 107 (Iowa 2001). In the first matter, Herrera was charged with failure to pursue an appeal and failure to supervise his paralegal. The Iowa Supreme Court Board affirmed that Herrera had neglected a client matter in violation of DR 6-101(A). He ignored several

deadlines and failed to properly respond to the notices from the clerk of court. He also was found to have failed to properly supervise his paralegal.

- Bd. of Prof. Ethics & Conduct v. Stowers, 626 N.W.2d 130 (Iowa 2001). Stowers neglected his client's legal matter by failing to file a petition for a National Interest Waiver. He then told the client that he had filed the waiver petition when he had not. Stowers was charge by the board/commission under DR 1-102(A)(4),(6); DR 6-101(A)(3); and DR 7-101(A)(1), (2). The Iowa Supreme Court Board affirmed the commission's findings.
- Prof'l Ethics & Conduct Bd. v. Lesyshen, 585 N.W.2d 281, 287-88 (Iowa 1998). Lesyshen was charged with neglect in handling her client's lawsuit in violation of DR 6-101(A) and DR 1-102(A)(6). The Iowa Supreme Court Board found that the factual scenario establishes neglect by a convincing preponderance of the evidence. The Court found she committed neglect and not mere inadvertence or errors. She ignored motions to compel, two court orders, and numerous letters from opposing counsel. She did not confer with witnesses, she used dilatory discovery practices, and she conducted herself with a cavalier attitude.
- Committee on Prof. Ethics v. Foudree, 477 N.W.2d 384 (Iowa 1991).
- Committee on Prof. Ethics v. Nadler, 467 N.W.2d 250 (Iowa 1991).

III. LAWYER FRAUD & DECEIT UPON THE COURT:

Honesty is the hallmark of an ethical lawyer. The trial is a search for truth. Public confidence in the adversary process depends upon the integrity of the participants including judges, jurors, witnesses, parties and lawyers. Our ethics call for zealous advocacy "within the bounds of the law." Due to the adversary nature of the trial practice, lawyers occasionally cross the line.

The ABA guide to The Judicial Response To Lawyer Misconduct identifies lawyer deceit as follows:

- Presentation of False Testimony
- Filing False Pleadings
- Fabricating Evidence
- Suppression of Evidence, Omission of Facts, Spoliation
- Improper Influence and Inducing Unavailability of Witnesses
- Advising Client or Third Party to Engage in Deceitful Conduct
- Filing Frivolous Suits and Defense

A. Proposed Iowa Rules of Professional Conduct (Drafted After the ABA Model Rules for Professional Conduct),

- 3.1 ("A lawyer shall not bring or defend a proceeding, or continue with the prosecution or defense of a proceeding, or assert or controvert an issue therein, or continue to assert or controvert an issue, unless the lawyer reasonably believes after inquiry that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.")

- 3.3(a) In an adjudicative matter, a lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or another person; (2) fail to disclose a material fact to a tribunal or another person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except when barred from doing so by Rule 1.6 or Iowa Code section 622.10 and subject to paragraph (b); (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false.
- Also, see 3.3(b),(c), and (d).

B. Current Ethical Standards, Iowa Code of Professional Responsibility: Applicable Iowa Rules (Iowa Rules of Court, 2002 rev ed.),

- DR 1-102(A)(1)
- DR 1-102(A)(3) ("a lawyer shall not engage in illegal conduct involving moral turpitude").
- DR 1-102(A)(4) ("a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation").
- DR 1-102(A)(5) ("a lawyer shall not engage in conduct that is prejudicial to the administration of justice").
- DR 1-102(A)(6) ("a lawyer shall not engage in any other conduct that adversely reflects on the fitness to practice law").
- DR 7-102(A)(2) (in representing a client, a lawyer shall not (2) "knowingly advance a claim or defense that is unwarranted under existing law, except that a lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law").
- DR 7-102(A) (in representing a client, a lawyer shall not (5) "knowingly make a false statement of law or fact" or (6) "participate in the creation of evidence when the lawyer knows or its is obvious that the evidence is false").
- DR 9-102(B)(1) ("a lawyer signing an instrument in a representative capacity shall so indicate by initials of signature").

C. Applicable Iowa Cases & Summaries,

- Bd of Prof. Ethics & Conduct v. Lane, 642 N.W.2d 296 (Iowa 2002). Lane plagiarized from a treatise and submitted his plagiarized work to the court as his own. The board/committee charged that this plagiarism constituted a misrepresentation to the court in violation of DR 1-102(A)(4). The Iowa Supreme Court Board affirmed that Lane knowingly plagiarized and intended to deceive the court. Further, it was found that Lane deceived the court through the submission of inflated time and expense records and legal sources relied upon.
- Bd of Prof. Ethics & Conduct v. Grotewald, 642 N.W.2d 288 (Iowa 2002). Grotewald misrepresented the status of the estate to the district court in violation of DR 1-102(A)(4), (5). His conduct did not result from negligence, but his casual, reckless disregard for the truth.
- Bd of Prof. Ethics & Conduct v. Ramey, 639 N.W.2d 243 (Iowa 2002). After his failure to represent his client, the board/commission attempted to contact Ramey

on several occasions. Ramey's failure to respond to the board's/commission's inquiries violated DR 1-102(A)(5),(6).

- Bd. of Prof. Ethics & Conduct v. Stamp, 590 N.W.2d 496 (Iowa 1999). The board/commission filed a complaint against Stamp based on DR 1-102(A)(4),(5),(6) for purchasing bank's stock from his client far below what it was worth. Stamp was a director at the bank and did not obtain prior approval from distributes, give notice to distributees under the will, or report for approval. The will did not give the executor sole power to sell assets of the estate. Stamp sent the distributes a copy of the final report which did not include a record of the sale of stock to himself. The report requested fees but did not reflect an offset of fees against the purchase price of the stock.
- Prof'l Ethics & Conduct Bd. v. Lesyshen, 585 N.W.2d 281, 287-88 (Iowa 1998). Lesyshen forged her client's signature to the supplemental answers and falsely notarized the signature. The Iowa Supreme Court Board affirmed that she violated DR 9-102(B)(1); DR 7-102(A)(5); and DR 1-102(A).
- Committee on Prof'l Ethics & Conduct v. Hutcheson, 504 N.W.2d 898, 899 (Iowa 1993).
- Committee on Prof'l Ethics & Conduct v. Bauerle, 460 N.W.2d 452, 453 (Iowa 1990).

IV. *EX PARTE* COMMUNICATIONS:

Due process requires notice and an opportunity to be heard. Usually the hearing requires notice to both sides of the case. The Fundamental fairness of the system breaks down when the judge communicates with counsel for one party but not the other. Lawyers and judges alike must recognize the need for open communication with notice to all parties in the case.

Examples of improper *Ex Parte* Communication:

- Judge requires one lawyer to prepare proposed order without notice to the other.
- Ex parte requests for temporary injunction without certificate as required by rule.
- One lawyer visits judge in chambers without notice to the other.
- One lawyer serves subpoena duces tecum upon a witness for document production without notice to the other.

A. Proposed Iowa Rules of Professional Conduct (Drafted After the ABA Model Rules for Professional Conduct),

- Rule 3.3(e) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.")
- Rule 3.5(b) ("A lawyer shall not…communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order").

B. Current Ethical Standards, Iowa Code of Professional Responsibility: Applicable Iowa Rules (Iowa Rules of Court, 2002 rev ed.),

- DR 7-110(B) ("[i]n an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except….").
- Code of Judicial Conduct, Canon 3(A)(4) ("A judge should…neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding").
- Code of Judicial Conduct, Canon 3(D)(1)

C. Applicable Iowa Cases & Summaries,

- Bd. of Prof'l Ethics & Conduct v. Ackerman, 611 N.W.2d 473 (Iowa 2000). After Ackerman was appointed to represent client on a charge, he moved to dismiss the prosecution under Iowa R. Crm. P. 27(2)(a) (criminal prosecutions must be dismissed if an indictment is not found within 45 days of arrest…in the absence of good cause or waiver). Ackerman's motion was misleading since an information had been timely filed. He had misrepresented material facts to the court on previous occasions. Found to have violated DR 7-110(B) by presenting the dismissal order *ex parte* without advising the county attorney.
- Prof'l Ethics & Conduct Bd. v. Lesyshen, 585 N.W.2d 281, 287-88 (Iowa 1998). The board/commission filed a three-count complaint against Lesyshen alleging she improperly obtained an *ex parte* order placing temporary custody of a child. Lesyshen filed a custody suit on behalf of her client and on the same day obtained the *ex parte* order, which transferred the physical custody of child from mother to her client. In the petition, Lesyshen used language from a letter written by opposing counsel's attorney to her client; she wrote the petition using this language without notifying opposing counsel. Also, she did not tell the judge about the letter to her client or that the mother was represented by opposing counsel. The judge was deceived into signing an order he otherwise would not have.
- Bd. of Prof'l Ethics & Conduct v. Alexander, 574 N.W.2d 322 (Iowa 1998). In Count I, Alexander prepared and submitted an order for modification to a judge without showing a copy to the opposing client or his attorney. She was found to have violated DR 7-110(B).
- Committee on Prof'l Ethics & Conduct v. Postma, 430 N.W.2d 387 (Iowa 1988). Attorney did not disclose many material facts to the judge upon obtaining the *ex parte* order. Because these matters were not discussed the judge was deceived about the effect of the order he was persuaded to sign. This amounted to misrepresentation of material facts by an attorney to a court.

V. CODE OF JUDICIAL CONDUCT:

A. Proposed Iowa Rules of Judicial Conduct (Drafted After the ABA Model Rules for Professional Conduct),

- Cannon 3(B)(7) ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that….

  Exceptions:
  - Routine matters or emergencies
    - No procedural or tactical advantage
    - Notice and opportunity to respond
  - Disinterested expert exception
  - Consulting with court personnel
  - Mediation or settlement conferences
  - When expressly authorized by law

B. Iowa Code of Judicial Conduct, (Iowa Rules of Court, 2002 rev ed.),

- Cannon 3(A)(4) ("A judge should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before that judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.")

VI. STANDARDS FOR PROFESSIONAL CONDUCT:

Judges and lawyers can improve civility and professionalism in and out of courtrooms by recognizing ethical lapses and aspiring to the highest standards of our professionalism code.

Rule 33.1 Preamble:

(1) A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner.

(2) A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality and protection against unjust and improper criticism or attack.

(3) Conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice.

(4) The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

(5) We expect judges and lawyers will make a mutual and firm commitment to these standards. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout the state.

(6) Lawyers are alerted to the fact that, while the standards refer generally to matters which are in court, the same standards also apply to professional conduct in all phases of the practice of law.

(7) These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined.

Rule 33.2 Lawyers' Duties to Other Counsel:

(1) We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.

(2) We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties or witnesses. We will abstain from disparaging remarks or acrimony toward other counsel, parties or witnesses. We will treat adverse witnesses and parties with fair consideration.

(3) We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.

(4) We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

(5) We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client's lawful interests.

(6) We will cooperate in the transfer of files, wills, and other documents to another attorney when requested to do so, orally or in writing, by a person authorized to make that request. We will provide reasonable assistance in organizing and explaining items transferred, recognizing that such cooperation assists the client in receiving competent legal representation.

(7) We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.

(8) We will promptly acknowledge the receipt of contracts from other attorneys, whether those contact are by telephone or in writing, and we will make an appropriate response to the subject matter of the contact as soon as reasonably possible.

(9) When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

(10) We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.

(11) In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

(12) We will not use any form of discovery or discovery scheduling as a means of harassment.

(13) We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.

(14) We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

(15) We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

(16) We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

(17) We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.

(18) We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.

(19) We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

(20) We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know the opposing counsel's identity.

(21) We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.

(22) We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

(23) We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.

(24) During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

(25) We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.

(26) We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and nonprivileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

(27) We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place and undue burden or expense on a party.

(28) We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and nonprivileged information.

(29) We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

(30) When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

(31) We will not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

(32) Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

Rule 33.3 Lawyers' Duties to the Court:

(1) We will speak and write civilly and respectfully in all communications with the court.

(2) We will be punctual and prepared for all court appearances so that all hearings, conferences and trials may commence on time; if delayed, we will notify the court and counsel, if possible.

(3) We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

(4) We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.

(5) We will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.

(6) We will not write letters to the court in connections with a pending action, unless invited or permitted by the court.

(7) Before a date for hearing or trial is set or, if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

(8) We will act and speak civilly to court attendants, clerks, court reporters, secretaries and law clerks with an awareness that they too are an integral part of the judicial system.

Rule 33.4 Courts' Duties to Lawyers:

(1) We will be courteous, respectful and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and authority to ensure that all litigation proceedings are conducted in a civil manner.

(2) We will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses.

(3) We will be punctual in convening all hearings, meetings and conferences; if delayed, we will notify counsel, if possible.

(4) In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties and witnesses.

(5) We will make all reasonable efforts to decide promptly all matters presented to us for decision.

(6) We will give the issues in controversy deliberate, impartial and studied analysis and consideration.

(7) While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

(8) We recognize that a lawyer has a right and duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

(9) We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

(10) We will do our best to ensure that court personnel act civilly toward lawyers, parties and witnesses.

(11) We will not adopt procedures that needlessly increase litigation expense.

(12) We will bring to lawyers' attention uncivil conduct which we observe.

Rule 33.5 Judges' Duties to Each Other:

(1) We will be courteous, respectful and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.

(2) In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

(3) We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

VII. SANCTIONS:

The legal profession is a self-policing institution. The Iowa Code of Professional Responsibility, the Iowa Code of Judicial Conduct and the Model Code all require lawyers and judges to report ethical violations of which they are aware to the appropriate disciplinary authority.

A. In The Judicial Response To Lawyer Misconduct, the ABA recommends:

> Because the client is most likely to be injured by his attorney's negligence, it is the client who initiates disciplinary action in the majority of cases. However, the judiciary should not rely on injured clients to police the legal profession. Often a client's lack of sophistication will prevent him from distinguishing between attorney negligence and a well-represented but unsuccessful claim. Also to be noted is the public's general reluctance to become involved in the legal process any more than they need to be. Judges are in the best position to evaluate an attorney's conduct and to know how to initiate disciplinary action. Attorney incompetence damages the efficiency of the courts and the legal profession, whether or not a client suffers serious injury as a result. Judges should feel a strong responsibility to safeguard the effectiveness and reputation of the legal system. (Pp. II.4)
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> * * *
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> Deceiving a court constitutes a most serious and direct interference with the administration of justice and harms to clients, the Bar and the public. Truth and candor are essential to our system of justice and the judiciary must play a key role in deterring fraud. If deception remains unchallenged the public's perception of the legal system, the judiciary and our profession will suffer.

> Only by strictly enforcing rules against deception and by taking initiative against violators will the judiciary earn the respect of the public and help improve the justice system. A court's failure to take action against deception, whether it be by failing to report the misconduct to a disciplinary agency or by failure to invoke contempt power, tacitly encourages this type of professional misbehavior. (Pp. III.3)

VIII. CONCLUSION:

In the final analysis it is up to us as lawyers and judges to retain public trust and confidence in the legal profession by living up to our own ethical standards and correcting members of the profession who do not. As the Iowa Supreme Court recently stated in Sullins:

> We must bear in mind the purposes of attorney disciplinary proceedings which include: protecting the courts and the public from persons unfit to practice law, vindicating public confidence in the integrity of our system of justice, assuring the public the courts will maintain the ethics of the profession, and deterring other lawyers from similar misconduct. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lyzenga, 619 N.W.2d 327, 332 (Iowa 2000).

PRACTICAL ISSUES IN WORKING WITH EXPERTS IN PRODUCT LIABILITY CASES

Kevin M. Reynolds
Whitfield & Eddy, PLC
317 6th Ave., Suite 1200
Des Moines, IA 50309
Tel: (515) 288-6041
Fax: (515) 246-1474
E-mail: reynolds@whitfieldlaw.com

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INTRODUCTION

Expert witnesses are ubiquitous in products liability cases. Other than perhaps the initial inspection of the product or plaintiff's deposition, the most critical juncture in a products case is most likely the deposition of plaintiff's expert. Without a good expert and a complete understanding of the related issues and strategy concerns, a product liability case will be difficult to defend. This paper will concentrate on the legal aspects of dealing with experts in products cases. Our discussion is organized around issues that I have dubbed "The Top Ten Rules for Expert Witnesses in Products Cases in Iowa."

RULE NO. 1: REMOVE THE CASE TO FEDERAL COURT.

Any defense lawyer who has a stable of products cases to defend is acutely aware of this Rule. Simply put, federal courts in Iowa and the Eighth Circuit Court of Appeals have a distinctly different view of Daubert v. Merrell Dow (and its progeny) than does the Iowa Supreme Court. Where the federal courts strictly adhere to Daubert and have dismissed numerous products cases for lack of proper expert witness support, the Iowa Supreme Court has steadfastly refused to do so. This anachronistic result is so even though the Iowa Rules of Evidence (with regard to experts) are identical to the federal rules (and in fact were based upon them), and the Iowa Supreme Court has stated, time and time again, that federal interpretations of the rules of evidence are persuasive authority in Iowa courts. See, e.g., Brunner v. Brown, 480 N.W.2d 33 (Iowa 1992)(cases which interpret and discuss the federal rules of evidence regarding the admissibility of expert testimony may be of substantial benefit). Nevertheless, Iowa trial courts, as guided by the Supreme Court, seem chary to dismiss a case based on questionable (or nonexistent) "scientific" expert opinion testimony.

As proof of the foregoing statements and for comparison purposes, one need only look

as far as two cases: Williams v. Hedican, 561 N.W.2d 817 (Iowa 1997) and Giles v. Miners, Inc., 242 F.3d 810 (8th Cir. 2002). Williams was a medical malpractice case, and not a products case, but it presents perhaps the best view of the present attitude of the Iowa Supreme Court on Daubert and defense efforts to dismiss a case on summary judgment after an expert's opinion has been "tossed" from the case. In Williams, district court judge George Stigler did an exhaustive review of the "science" that underlie plaintiff's expert's opinion that had a vaccine been injected into a pregnant mother, a certain birth defect would have been avoided. Judge Stigler concluded that the expert's opinion in this regard was not based on sound science, applied the principles underlying Daubert, excluded the expert's testimony and granted summary judgment. The Iowa Supreme Court, however, had a different view of things, and in an opinion authored by Justice (now Chief Justice) Louis Lavorato, reversed and remanded for a trial. In so doing, the Court took the unusual step of finding that Judge Stigler had "abused his discretion" in his evidentiary ruling below. It is respectfully submitted that had Williams been venued in federal court, the case likely would have gone the other way, and the ruling of the trial court would have been affirmed.[1]

[1]Numerous other examples exist demonstrating the reluctance of the Iowa courts to dismiss a case premised on a "Daubert" type attack on a plaintiff's expert. See, e.g., Hutchinson v. American Fam. Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994) and Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525 (Iowa 1999). Hutchinson is instructive, although it was not a

products case, because it was the first Iowa case to mention and discuss Daubert, and it did so in the context of an attack on a defense expert. Leaf was a products case and when faced with the question of whether the Iowa Supreme Court would follow Daubert, the court expressly answered that question "no," but left open the possibility that trial courts, in their discretion, could consider the Daubert factors when addressing the admissibility of expert opinion evidence.

In Giles v. Miners, Inc., 242 F.3d 810 (8th Cir. 2001), former IDCA President Richard J. Sapp represented the product-defendant, and was successful in a Daubert challenge of a plaintiff's expert at trial. Without the support of expert testimony, a summary judgment was granted in favor of defendant by U. S. District Court Judge Robert Pratt. This ruling, both excluding the expert's testimony as "unreliable" under Daubert, and granting a dismissal as a result, was affirmed by the Eighth Circuit Court of Appeals.[2]

If you are a defense counsel who periodically does plaintiff's work, then you need to keep in mind the "correlative" of the rule to "remove the case to federal court:" make sure you make the case "non-removable." This is ordinarily done by joining non-diverse defendants, such as a retailer, distributor, or co-employees into the case as defendants. This destroys the "complete" diversity of citizenship required for federal court jurisdiction and insulates the case from removal to federal court by defendant.

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[2]Numerous examples can be cited where the Eighth Circuit has affirmed a summary judgment of dismissal in a products case, subsequent to a successful attack on a plaintiff's expert. See, e.g., Pestel v. Vermeer Mfg. Co., 64 F.3d 382 (8th Cir. 1995); Peitzmeier v. Hennessey Industries, Inc., 97 F.3d 293 (8th Cir. 1996); Dancy v. Hyster Co., 127 F.3d 649 (8th Cir. 1997), cert. denied, 118 S. Ct. 1186, 140 L.Ed.2d 316 (1998); Weisgram v. Marley Co., 120 S. Ct. 1011 (2000). At least one case in the Eighth Circuit has reversed a dismissal based on Daubert. Lauzon v. Senco Products, Inc., 270 F.3d 681 (8th Cir. 2001). In addition to Giles, cited *infra*, a local federal court has dismissed a case after finding that the testimony of two well-known plaintiff's experts in this area was excluded as being unreliable under Daubert. Stibbs v. Mapco, Inc., 945 F.Supp. 1220 (S. D. Iowa 1996).

Finally, even if a case is not originally removable to federal court, keep in mind that if it later becomes removable within one (1) year of the date of filing, that it can be removed to federal court at that time. There may be circumstances under which a product manufacturer might "accept" a tender of defense from a retailer, expeditiously move for summary judgment (based on Iowa Code §613.18, for example), and if the non-diverse defendant is dismissed from the case within one (1) year of the filing date, thereafter remove the case to federal court.

RULE NO. 2: GET YOUR EXPERT INVOLVED EARLY.

The better experts in products cases are busy people and can be difficult to work with from a scheduling point of view. In light of this fact, and in light of the fact that you will want the benefit of the expert's opinion in fashioning discovery requests to the other side, get your expert involved early.

This advice needs to be tempered somewhat by the fact that in some case, Plaintiff's liability theory may be so unclear as to prevent you from retaining the right type of expert until after Plaintiff's designation has been made. For example, if Plaintiff has designated a metallurgical engineer, then it may well be that you will have to designate a "counter" metallurgical engineer of your own. This makes it crucial that you obtain the substance of Plaintiffs' expert's opinions at the earliest possible time, and that you determine clearly what theory of defect (design, manufacture, or failure to warn) is implicated in the case.

RULE NO. 3: USE YOUR EXPERT TO HELP FASHION DEPOSITION QUESTIONS OF THE OPPOSING EXPERT.

All too often it seems that defense counsel is only concerned with retaining experts shortly before the expert witness designation deadline. This problem is exacerbated by the fact that in state court, only a name and address (and perhaps a c.v.) need be disclosed at the time of the expert witness deadline. In federal court, under amended Rule 26 a detailed report, c.v., list

of publications and list of litigations within the last four (4) years needs to be disclosed at the time of the expert witness deadline. See Fed. R. Civ. P. 26(a)(2)(B). In state court, disclosures have to be made, but the rules are silent as to when they have to be made, other than at least thirty (30) days before trial. See Iowa R. Civ. P. 1.508(3).

RULE NO. 4: GET THE BEST EXPERT YOU CAN AFFORD.

This rule is self-explanatory. All of us (at one time or another) has probably seen the expert who appears strong in direct examination, only to "give the case away" on adverse cross-examination. Simply put, there is no substitute for experience and judgment when it comes to expert witnesses.

RULE NO. 5: ASSUME THAT ANY PAPER YOU GIVE YOUR EXPERT WILL BE DISCLOSED IN DISCOVERY.

Under the "liberal" rules of discovery employed by Iowa courts, both state and federal, defense counsel should not assume that information or documentation shared with your expert is privileged as attorney work product. Both the Iowa and federal rules of civil procedure recognize that information shared with a testifying expert witness is generally discoverable. See Iowa R. Civ. P. 1.508(1)(b)(2); Fed. R. Civ. P. 26(a)(2)(B). Importantly, the Iowa rules allow discovery of "documents and tangible things including all tangible reports, physical models, compilations of data, and other materials prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony." Similarly, the federal rules permit discovery of "the data or other information considered by the witness in forming the opinions." Thus, the fact that the expert may not be "relying" on the subject information in expressing his or her opinions does not render the information privileged or otherwise not subject to disclosure in discovery.

RULE NO. 6: LEVEL WITH YOUR EXPERT; DON'T KEEP THE "BAD STUFF" AWAY.

The credibility of your expert's opinion is only as good as its factual basis. If you have given your own expert only "half the story," a good Plaintiff's lawyer will bring this fact to light during cross examination, and it will be very effective. The point is well taken: if you haven't given your expert all of the information available in the case, it is likely that the expert's opinion will be attacked since it is based on incomplete information.

RULE NO. 7: USE AN OUTLINE FOR OPPOSING EXPERT'S DEPOSITION SO YOU DON'T FORGET ANYTHING IMPORTANT.

An effective way to depose an opposing expert is to use a detailed outline as a "checklist," supplemented by specific questions tailored to that particular case. Set forth within this paper is a generic outline that can be used. After that, I set forth an outline that can be used in deposing an expert in an "on-product" warnings case.

Adverse Expert Witness Deposition Outline

1. Background and Qualifications.
    1. Obtain resume, curriculum vitae, bibliographies, and lists of presentations.
    2. Education and training.
        1. What schools or training courses has the expert attended?
        2. What on-the-job training received?
        3. What degrees or certificates obtained and when?
        4. What licensing, specialty certification, or other professional accreditation received, from whom, and when?
        5. Have expert's accreditations ever been questioned, investigated, suspended or removed?

6. Has the expert ever been sued as a result of his professional activities?

3. Litigation Experience.

1. Has the expert testified in a lawsuit before?

2. Where, when, and how often?

3. How much of the witness' income is derived from testifying and preparing to do so?

4. Does the expert advertise his or her services, and if so, where and when?

5. How did the witness get into this case?

6. Has the expert served for this lawyer or his or her firm before, and how often?

7. The analysis that was done in this case: has the expert ever done research or written about it, outside of the litigation context?

8. Has any of the expert's opinions been excluded or limited to any extent by any court or judge? Has the expert been subjected to a Daubert attack in any previous case? Please give all particulars.

4. Publications.

1. Has the expert ever published any original work on the subject of this lawsuit?

2. Review the expert's bibliography and presentation with him or her as to their bearing on the current action.

3. Get copies of articles authored by the expert.

4. Confront the expert with statements from the articles that are at odds with his opinions in this case.

5. Research.

    1. Has the witness ever done research relevant to the subject at issue?

    2. If so, get details as to when, where, under what circumstances, and for whom.

    3. Were the results published, and if so, where can you get a copy?

6. Professional organizations.

    1. As to a physician, to what hospital staffs does he belong?

    2. As to all experts, get details as to which organizations they belong to and any positions held.

    3. Have they ever had their privileges or memberships thereon questioned, investigated, suspended or removed? Get details.

2. Materials Provided.

1. Records.

    1. Get a complete list.

    2. From what source were they derived?

    3. Are they copies and if so, from what source were they copied?

    4. Is the witness expecting to examine more records and if so, what records, when and from where?

    5. Were there any records the witness wanted but couldn't get?

2. Literature, Tables and Standards.

    1. From what precise source were they obtained?

    2. Who obtained them?

    3. Were copies retained by the witness?

4. Is this material authoritative, useful, persuasive, generally relied on in the industry, etc.?

5. Is the expert aware of any literature that is relevant but still in preparation or in the process of being published? Get details.

3. The specific product in suit.

1. Was the specific item that allegedly injured the Plaintiff examined?

2. How was it obtained? Trace the chain of custody.

3. How was it identified?

4. Were photographs taken, and if so, where are they?

5. If it was a similar product, but not the same one, what differences were there?

6. Where and how was the similar product obtained?

7. Were any measurements taken? If so, detail those.

4. Oral information.

1. From whom was the information obtained and when?

2. What information was obtained?

3. What part did the information play in the witness' activities?

4. What notes or records were made of the oral information and where are these?

5. Other material.

1. What other materials or information was gathered and used?

2. When and where and from whom obtained? Where are these materials now?

3. Is anything else expected and if so, what, when and from whom?

3. The Task of the Expert Witness.

1. What was the Task?

1. Has the expert ever done this task before? Get details.

2. Did they do what they were asked to in this case?

3. Did they do anything beyond what they were asked to do?

2. Defects.

1. What do you understand to be a "defect?"

2. Do you differentiate design defects, manufacturing defects, and warning defects? Get details.

1. Do you have design defect opinions? If so, what are they? Get details.

1. What is your alternative design?

1. What are the advantages to the alternative design?

2. What are the disadvantages to the alternative design?

3. Has the alternative design been drawn?

4. Has the alternative design been built?

5. Has the alternative design been operated?

6. Has the alternative design been tested?

1. In the laboratory?

2. In the "field?"

3. Were the results documented? Please

produce all documentation.

2. Do you have manufacturing defect opinions? If so, what are they? Get details.

3. Do you have warning defect opinions? If so, what are they? Get details.

    1. What is your alternative warning?

    2. Has your alternative warning been tested?

    3. How effective is your alternative warning at changing a user's behavior?

3. Standards.

    1. What is your definition of the "standard of care?"

    2. How do you know what the standard of care is in this case?

    3. Describe any field experience you may have in practicing under these standards.

    4. If the standards are derived from a publication, which one specifically?

    5. If there are governmental or industry standards, did you help to prepare such standards? Give relevant details.

    6. What standards were violated by defendant? Give all details.

4. Who Gathered Information for the Expert.

    1. Did you personally do all of the work that led to your opinions?

    2. Give full names, addresses, titles and qualifications of others involved in gathering and evaluating data.

    3. What did each of these people do?

4. Were you actively involved in their work or did you supervise?

5. Were you present at all times while the others performed their work?

6. Give full names, addresses, titles, and qualifications of any independent consultants whose input was received.

7. What did they produce?

8. How was it used?

9. Explore qualifications and hearsay problems.

5. Terminology.

1. All non-lay terms of any complexity or strangeness must be identified.

2. Never forget that the jury may not know a term just because you are familiar with it.

3. Never fear appearing ignorant. Require the expert to explain in simple language all technical terminology.

6. What Was Done.

1. Records Reviewed.

1. Describe the time spent and thoroughness of your review.

2. What part did the records play in the formation of your opinions?

2. Technical publications.

1. How were manuals and other technical publications obtained?

2. Do you have copies?

3. What part did the publications play in the formation of your opinions?

3. Products.

1. Who examined or worked on the products at issue?

2. What was done with or to the products?

3. What findings were made?

4. What is the significance of the findings?

5. Were photographs, microscope slides, videotapes, x-rays or other pictorial or graphic records made?

6. Who has these visual records?

7. What do they demonstrate?

4. Computers.

1. Describe the type of computers used in gathering and analyzing information.

2. Who used the computers?

3. What sort of special software was used?

4. Describe what was done with the computers?

5. Do you have copies of any printouts of the results?

6. What do the results mean to the expert's opinions?

5. Other Equipment.

1. Describe all scientific or technical equipment and machinery used in gathering and analyzing information.

2. Was the equipment calibrated? When and how? Is it documented?

3. Who operated the equipment and what did he do?

4. What were the results?

5. Where are the results recorded?

6. What do the results mean to the expert's opinions?

7. Opinions.

    1. Lay Them Out.

        1. Have the witness list each professional opinion reached or category of opinion.

        2. Read the list of opinions back to be sure you have it right.

        3. Get the witness to agree you have them all, and that your list is accurate.

    2. Facts.

        1. With respect to each opinion, get a recitation of the operative facts on which it is based.

        2. If it is not stated or clear, get a citation to the source of each fact.

        3. Get a list of any assumptions made about the facts.

        4. What is the basis of the assumptions?

        5. Make the witness agree you have all the relevant facts for each opinion.

    3. Reasoning.

        1. With respect to each opinion, get an explanation of the reasoning process from facts to conclusions.

    4. Causal Relationship.

        1. With respect to each opinion, get an explanation of its causal or other relationship to the case.

        2. Get an explanation of the interrelationship of multiple factors.

        3. Be sure proper legal tests are met, such as “reasonable medical probability or scientific probability,” etc.

        4. Get an apportionment of causes to effects, if possible.

5. Get expert to agree that a mere "temporal" relationship, e.g., "B comes after A" does not establish a cause and effect relationship.

6. Get the expert to agree that a mere "association" does not establish a cause and effect relationship.

5. Standards.

1. Are the opinions based on proper industry or professional standards?

2. What standards and what is the printed source?

3. Would the majority of the expert's peers agree with the stated opinions?

4. Are there any respected minority opinions in the field?

5. Does the witness concede the legitimacy of minority or differing views in the field.

VIII. Concluding.

1. Other work.

1. What additional responsibilities or participation does the expert expect to undertake in this case?

2. When is it to be done?

3. If none is to be done, does the witness feel what has been done is sufficient basis for the opinions rendered?

4. Get the expert to confirm that their opinions are "final."

2. Have all the witness' professional opinions or conclusions reached in this case been explored in the deposition?

1. If not, what else is there? Follow up as above.

2. Does the witness feel he or she has had a fair chance to state these other

opinions or conclusions?

3. Is there anything the witness would like to add so as not to be misunderstood?

Outline for Deposition of an Expert in an "On-Product" Warnings Case

1. Has the engineer ever designed a warning that was place onto a product that was mass-produced and commercially sold?
   a. What specific products, manufacturer, model, type, date?
   b. How many sold?
   c. What specific procedure or methodology did the expert use to design that warning? Describe in detail.
   d. Was that warning ever tested prior to market? Describe methodology of testing protocol in detail.
   e. What were the results of those tests?
   f. How were the tests conducted?
   g. What was the error rate?
   h. What controlling standards were consulted?
   i. Did the expert publish any data or research?
   j. Was any of that data or research subjected to peer review?
   11. Identify all research done outside of the litigation context.
2. Has the expert ever "tested" a warning? How was it done? Describe in detail.
3. What is the specific warning that should have been on the product but wasn't?

   [Make expert create warning -- if he/she won't, move to exclude all warning opinions as imprecise theory or concept - see Stancyzk v.

Black & Decker].

4. Is it expert's opinion that if a different warning had been given, the Plaintiff's behavior would have changed?

   a. What is this opinion based on?

   b. Has the expert tested this Plaintiff to determine his/her response to a specific warning under specific circumstances?

   c. Since the expert has not tested Plaintiff, have the expert admit it would be speculation to say that Plaintiff would have acted differently if there had been an on-product warning.

5. Make the expert specifically cite to any and all scientific studies generally recognized which proves that warnings on products are effective at changing people's behavior.

   a. Name of study, author, date.

   b. What was the methodology of the study?

   c. What was the error rate?

   d. What was the rate of compliance/noncompliance?

6. Make the expert specifically cite an example of a product proven to have been made safer (i.e. a lower accident rate as a direct, causative result) by the adding of a warning sticker or label.

7. Have the expert admit the following:

   a. No study has proven that the addition of an on-product warning makes a product safer.

   b. No study has proven that people's behavior is predictably changed

in a positive manner by addition of an on-product warning.

c. Several studies have concluded that on-product warnings are relatively ineffective at changing people's behavior.

d. Empirical research has not confirmed the intuitive idea that on-product labels are the best medium for delivering warning messages.

e. Have the expert specifically identify what he/she believes are the "generally accepted warning design criteria."

1. Where did they come from?

f. "Generally accepted warning design criteria" are not necessarily supported by any empirical evidence.

8. If ANSI 2535.4 Product Safety Signs & Symbols is used, proceed as follows:

a. Have expert admit that this is an industry consensus safety standard only - is not mandatory, only voluntary.

b. Have expert tell you everything he/she knows about the creation of this standard -- what committee created it, make-up of committee, and exactly how they arrived at their conclusions.

9. ANSI requires:

a. Signal word: "DANGER, WARNING, CAUTION"

[How were these particular words chosen?]

b. Statement describing the hazard.

c. Description of probable consequences of involvement with the

hazard.

d. Instructions on how the hazard can be avoided.

e. Appropriate colors, graphics, and pictorials.

10. There is, at present, no empirical evidence that any of these elements suggested by ANSI significantly enhance the ability of an on-product warning to induce safer use of a product.

Ex. a. Sign with pictorial v. without

b. Black v. blue sign

c. Black v. yellow sign

d. Black v. red sign

etc.

11. If the expert disagrees, have him/her specifically cite all studies to the contrary by name, author, date, and methodology.

12. Although it has been studied, there is no proof that signal words or colors are reliable predictors of the behavior of a person presented with a warning sign.

13. Experiments show that colors alone have no predictable effect on compliance with warning labels.

14. Pictorials - studies show that one cannot expect all users to derive the same meaning from a given pictorial or symbol.

<u>ANSI 2535.3 Criteria for Safety Symbols (1991)</u>

15. ANSI itself requires that before a symbol should be used, a statistically reliable test should show that the symbol is correctly identified by at least 85% of the participants in the test.

16. Despite this, two researchers have said that subjects "did well" in comprehension when barely 50% of the subjects correctly described the action required.

17. Have the expert admit that the on-product warning sign he/she advocates has not been proven to meet the suggested minimum threshold of compliance referred to in ANSI.

SIGNAL WORDS

18. Empirical research does not support the use of signal words (DANGER, WARNING, CAUTION) or the hierarchy attributed to them by the ANSI standard.

19. Research regarding whether people perceive a different hazard level for each of these terms is equivocal.

20. Some studies have failed to find any difference among these terms (DANGER, WARNING, CAUTION).

21. Studies don't support a distinction between "CAUTION and WARNING."

22. There is no scientifically demonstrable significant difference between DANGER, WARNING and CAUTION and the propensity of these terms to generate compliance via an on-product warning.

STATEMENT OF CONSEQUENCES

23. Although some people say this is required for a "good" warning, empirical evidence fails to establish the efficacy of a warning with a "statement of consequences."

    a. Some studies say likelihood of injury motivates compliance; others that severity of injury motivates compliance.

24. Studies relative to "statement of consequences" are unreliable because they test only noticing the warning, and not compliance (changing their behavior because of the warning).

    a. If a warning is noticed, but not obeyed, it is ineffective to prevent an accident.

25. When behavioral responses to warnings are measured, statement of consequences produces results far more ambiguous than forensic human factors experts imply.

AVOIDING THE HAZARD

26. Although some experts claim that directions on how to avoid the hazard are necessary for a "good" warning, no empirical evidence supports the conclusion that a warning should contain instructions for avoiding the hazard.

27. Studies have shown that ANSI warning signs do not increase safe behavior compared to a generic warning.

28. Some test show increased compliance with generic warnings, as opposed to those that comply in every respect with ANSI.

THE "WARNINGS MODEL."

29. Ask expert if he is familiar with warnings model? If not, why not? Does the expert claim to be an expert in warnings? If the expert is truly an expert in this area, why can't he/she define the "warnings model?"

30. Name the elements of the "warnings model."

    a. The subject must be exposed to the warning stimulus.

    b. The subject must attend to the stimulus.

c. There must be active processing of the warning message.

d. The subject must comprehend and agree with the warning message.

e. The subject may be required to store and retrieve the warning message at the appropriate time.

f. An appropriate response must be selected.

g. The subject must perform the appropriate response.

h. The response must be adequate to avoid the injury.

31. Have the expert admit that the failure of <u>any</u> one step in the above process renders the warning ineffective.

32. Have the expert admit that the model illustrates how unlikely it is that Plaintiff would have complied with a warning, even if given.

33. Have the expert admit that the probability that a warning will influence behavior is equal to the product formed by multiplying every conditional probability within the sequence from exposure to any adequate response.

34. If 85% for each of the above eight steps is used, the product is:

27% compliance. If 80% = only 17% compliance.

35. Tests prove this: in one, 89% noticed the warning, 64% correctly recalled all three precautionary steps to take, yet only 43% put on all three types of safety gear.

36. Does he/she contend the warning needs to be there to <u>remind</u> Plaintiff of a hazard Plaintiff is already aware of?

[Do not let this happen - there is no proximate cause between failure to warn and the accident if Plaintiff already knew of the warning -- also, there is no duty to warn of hazards that are open and obvious].

37. Have the expert identify the court case which says that a manufacturer has a duty to warn Plaintiff about something that is already known to Plaintiff.

38. Has the expert written any warnings papers in scholarly journals subject to peer review?

39. Does the expert's methodology correspond to that which is generally accepted in the scientific community? What is the expert's basis for saying so?

40. Are there controlling standards which are consistent with the expert's opinions? Are there standards to the contrary? What specific standards?

41. What is the rate of error of the expert's methodology? How is the rate of error determined? Does the expert admit there is a rate of error to the methodology?

42. Is there a product on the market which exemplifies the warning he/she is talking about?

43. Who does the expert consider to be authoritative in the warnings field?

44. What are the authoritative texts in the warnings field?

45. What are the authoritative scientific tests in the warnings field, in terms of methodology used?

Source: "A Critical Analysis of On-Product Warning Theory," William H. Hardie, BNA Product Safety & Liability Reporter, 2-11-94, pp. 145-163.

RULE NO. 8: SET UP THE "DAUBERT" ATTACK BUT DON'T CALL IT A "DAUBERT" ATTACK.

We previously discussed the Iowa Supreme Court's apparent "animosity" toward Daubert and using its standards to guarantee the reliability of expert witness opinion testimony. So, what's a defense counsel in Iowa to do? The Answer: use Daubert's analysis and standards to attack the reliability of expert witness testimony, and seek to get the case dismissed on pretrial motion. However, if you are in an Iowa state court, whatever you do, don't call it a Daubert attack! If you do, this will almost certainly doom your effort to failure!

Virtually any expert witness can be "set up" for the Daubert attack by using the following outline or "template." Using this will ensure that all relevant inquiries have been made toward determining whether the expert's opinions are reliable under the Daubert test.

Daubert Template

1. In order to be admissible, the expert opinion evidence must be:
    a. Relevant; and
    b. Reliable.

In order to be reliable from a scientific point of view, the evidence must:

1. whether the theory or technique can be and has been tested;
    a. If it can't be tested, then it is not based on science.
2. whether the theory or technique has been subjected to peer review and publication;
3. whether there are controlling standards;
4. the known or potential rate of error;
5. whether the theory has been generally accepted; and

6. whether the deponent has done testing or analysis of this subject matter outside of the litigation context.

RULE NO. 9: USE PRETRIAL DISPOSITIVE MOTIONS AND MOTIONS *IN LIMINE* WISELY.

After opposing expert's deposition, and at least 60 days prior to trial (see Iowa R. Civ, P. 1.981(3)), the defense will likely be filing a motion for summary judgment. Timing with regard to this motion is important; if filed too early in the case, plaintiff will likely claim that the motion is premature. From a strategic point of view, a motion filed too early in the case will allow the Plaintiff to concentrate on the weaker areas of their case, with enough time remaining before trial to "patch up" those weaker spots and create a jury issue for trial. If filed too late, the court may not have enough time to consider the motion carefully before trial, and the cost and expense inherent in trial preparation will not be avoided.

Another consideration is whether to file a pre-trial dispositive motion (i.e., a motion for summary judgment) or simply raise the same issues in a pretrial motion *in limine*. If a good, colorable argument exists for dismissal of the case, in whole in or in part, a motion for summary judgment is the better choice. On the other hand, if the attack addresses the admissibility of only a portion of an expert's testimony, that may be better explored in a motion *in limine*. Another possible strategy is to use the vehicle of an application for adjudication of law points. See Iowa R. Civ. P. 1.454.

RULE NO. 10: GRAPPLE WITH THE CONUNDRUM: DO I PUT ON "THE FULL COURT PRESS" AT DEPOSITION, OR DO I SAVE IT FOR TRIAL?

This is one of the most important issues and strategy concerns to confront with regard to the deposition of any adverse expert. Some have said that if you believe it likely that the case will settle, then put on the "full court press" in deposition, exposing all of the weaknesses of the

expert's opinion at deposition, so that the settlement value of the case will be thereby affected. On the other hand, the same school of thought teaches that if you believe it likely that the case will go to trial, then you may not want to do this. If you expose all of the expert's mistakes in deposition, by the time trial rolls around, those errors will be "fixed" and the expert will put on a better and more convincing presentation at trial in front of the jury. The "great argument" that you had for cross examination will have been taken away, and the point that the expert had made an error in deposition will have been lost on the jury at trial.

The only trouble with this approach is that it is not always possible to determine which cases will settle, and which cases will go to trial. Further, to the extent that weaknesses or mistakes in the expert's opinions are not explored at deposition, those issues cannot form the basis for a pre-trial Daubert attack on the admissibility of the expert's opinions in the case. Finally, most trial lawyers are very uncomfortable about proceeding to trial and planning to cross examine the opposing expert in a certain fashion, without knowing exactly what the expert will say in response. "Surprises" at trial rarely bode well for the defense.

CONCLUSION

Preparing to depose and cross examine opposing expert witnesses may very well be the "lifeblood" of defending a product liability case. The better you are at doing so, the more likely you are to meet with success in the ultimate verdict and resolution of the case.

BAD FAITH CLAIMS IN IOWA

by
Brenda K. Wallrichs
Moyer & Bergman, P.L.C.

Insurance contracts contain an implied covenant of good faith that "neither party will do anything to injure the rights of the other in receiving the benefits of the agreement." Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1982). Iowa courts have allowed tort remedies to be brought against insurers which breach this covenant. "Bad faith" refers to a breach of the implied covenant of good faith. Id. at p. 34. Iowa first adopted the tort of "third party bad faith" and, later, "first party bad faith." In light of these recognized torts, insurance carriers, and their counsel, must be well advised as to their obligations and the case law that has developed which governs their conduct.

1. THIRD PARTY BAD FAITH

Third party bad faith arises in the context of an insurer's handling of claims made against its own insured. According to Iowa Civil Jury Instruction 1400.2, bad faith arises "when the insurance company, by its misconduct, serves its own interest and irresponsibly exposes the insured to an unreasonable risk of liability."

The most frequent plaintiff in third party bad faith cases is the injured plaintiff from the underlying case who has received a verdict above the insured's policy limits. The plaintiff has two options for obtaining the insured's bad faith claim. Under Iowa Code §516.1, the plaintiff can execute on the judgment against the insured, have the judgment return unsatisfied, and then bring a direct action against the insurer to recover the excess judgment. Iowa Code §516.1(2001). Otherwise, the insured can assign his or her rights against the insurer in exchange for a promise or covenant by the plaintiff not to execute against the insured on the excess judgment. The plaintiff can then bring an action against the insurer for the excess judgment. Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995). In either of these events, the plaintiff has the same rights and arguments available to it as the insured would have, had the

insured brought the claim. Koppie v. Allied Mutual Ins. Co., 210 N.W.2d 844, 846 (Iowa 1973); Ferris v. Employers Mutual Casualty Co., 122 N.W.2d 263, 265-266 (Iowa 1963). These scenarios are popularly called "excess verdict" or "excess coverage" cases.

A. Iowa Adopts the Tort.

Henke v. Iowa Home Mutual Casualty, 97 N.W.2d 168 (Iowa 1959), was the first case which addressed third party bad faith in Iowa. Henke was named the administrator of a deceased insured's estate and was sued by four passengers in the insured's vehicle who were either killed or severely injured as a result of an automobile accident. There was overwhelming evidence that the deceased insured would be determined completely at fault for the accident and minimal evidence that suggested that a third party driver would be assessed with a small percentage of fault.

Prior to the first trial, the injured parties offered to jointly settle their cases for substantially less than the policy limits. The deceased insured's insurer rejected the offer. The first of the four trials resulted in a large excess verdict. After this trial and before trial of the other claims, the remaining passengers again offered a joint settlement for below the limits. It was again rejected by the insurer and the second jury verdict was also in excess of the limits. The plaintiff administrator of the insured's estate then sued the insurer for the unpaid balance of the judgments based on bad faith in failing to settle all of the cases below policy limits.

The Iowa Supreme Court followed several other jurisdictions which had previously recognized third party bad faith claims. The Court held that if an insurance company acts in bad faith, the trial court is obligated to submit the question for recovery of the excess verdict to the jury. The Court found that the insurer had acted in bad faith when it: 1) disregarded overwhelming evidence indicating that recoveries would likely greatly exceed policy limits and

failed to settle for substantially lower than the policy limits; 2) failed to follow the advice of its attorney to settle; 3) unreasonably insisted that a third party insurance company pay a portion of the settlement demand when the evidence tended to show that its insured was not at fault; and 4) considering all of the factual circumstances, disregarded its insured's interest. Importantly, the Court also held that payment of the excess verdict by the insured is not a condition precedent for the insured's recovery against the insurance company.

2. The Elements Of Third Party Bad Faith.

The elements of third party bad faith in Iowa are identified in Iowa Civil Jury Instruction 1400.1. They are as follows:

1. A specific demand for settlement was made by the claimant;
2. The insurer rejected the settlement demand in bad faith;
3. The bad faith was a proximate cause of plaintiff's damages;
4. The nature and extent of the damage.

However, as addressed below, the denial of a settlement demand is not the only basis for a bad faith claim. Other actions, or inactions, may contribute to establishing bad faith.

3. The Relationship Between Bad Faith and Negligence.

The general rule is that an insurer will be liable for its acts in representing an insured only if bad faith, and not simply negligence, is established. Kooyman at p. 33. However, negligent acts on the part of the insurer can be considered in determining whether there has been bad faith. Evidence of negligence which shows a disregard for the interests of the insured can be material on the issue of bad faith. Id.; Kohlstedt v. Farm Bureau Mut. Ins. Co., 139 N.W.2d 184, 185 (Iowa 1965).

4. Avoiding A Third Party Bad Faith Claim.

Case law has specifically addressed several failures on the part of an insurer which may give rise to successful third party bad faith claims. As such, there are specific actions which defense attorneys can take that should avoid a bad faith claim being successfully brought against their insurance company clients.

1. Seriously Consider Settlement: The best standard of good faith in a specific negotiation is to ignore the existence of policy limits. In determining if an insurer acts with good faith, the test is whether the insurer has approached the matter of settlement as if there were no policy limits at all. Kooyman at p. 34. When it does so, it views the claim objectively and renders equal consideration to the interests of itself and of the insured. Id. If, but for the policy limits, the insurer would settle for an offered amount, it is obliged to pay toward settlement up to the policy limits. Wierck v. Grinnell Mutual Reinsurance Co., 456 N.W.2d 191, 195 (Iowa 1990). However, the insurer is free to reject an offer if it would have rejected the same offer under policy limits covering the whole claim. Id. The insurer is not responsible for compensating the insurer for his or her failure to purchase adequate policy limits. Kohlstedt at p. 189.

2. **Investigate:** The duty cast on the insurer is to conduct a good faith investigation of all aspects of the case and to consider and propose settlement in good faith based on its investigation and apparent state of the law within policy limits. Kohlstedt at p.185 (Iowa 1965). This means an insurer's employees and agents, including doctors and lawyers, must also act in good faith. Id. An insurer must investigate and prepare for trial in a way which does not illustrate an indifference

to the insured's interests. Kooyman at p. 35. Failure to adequately investigate a case may, in some scenarios, solely support a finding of third party bad faith. Id.

3. **Communicate With the Insured:** Failure of an insurer to advise its insured of the status of settlement negotiations is indicative of indifference and, thus, of bad faith. Kooyman at p. 36.

4. **Educate the Insured:** A duty to inform an insured of the expected consequences of a failure to settle exists on the part of an insurer. Kooyman at p. 36. The insurer has a duty to advise the insured "*in detail"* of the consequences of a failure to settle. Loudon v. State Farm Mut. Auto. Ins. Co., 360 N.W.2d 575, 579 (Iowa App. 1984). Failing to do so may be indicative of bad faith. Id.

E. Vigorously (or even reasonably) Defending Will Not A Bad Faith Claim Make.

Knowledge of the specific inactions which have illustrated an existence of bad faith are helpful to insurers and defense attorneys while preparing their cases. However, we should not be motivated to simply settle cases because of the fear of a claim being made against our insurer clients. If a reasonable basis exists for refusing to pay a claim and for proceeding to trial, it is unlikely that a subsequent bad faith claim will be successful.

The Iowa Supreme Court has stated that an insurer will not be found to have acted in bad faith if it does not disregard its legitimate liability defense, even when the damage award is potentially excessive. Ferris at p. 267. Also, bringing a reasonable declaratory judgment action to determine whether coverage exists does not amount to bad faith. Wierck at p. 193. Neither is simply undervaluing a claim. Trask v. Iowa Kemper Mut. Ins. Co., 248 N.W.2d 97, 101 (Iowa 1976). The Iowa Supreme Court has declared that more than an error in judgment is required to establish bad faith and an insurer cannot be required to predict with certainty the result of a

closely contested claim. Kooyman at p. 35.

An insurer is not required to pay every offer of settlement within the policy limits. To show bad faith it must appear not only the settlement offer was reasonable but that the insurer had no reasonable basis for its judgment that the offer was not reasonable. Kohlstedt at p.186. When determining whether an insurer has acted in bad faith, the facts known to the insurer prior to the trial, and not in hindsight, must be evaluated in connection with the applicable legal principles. Trask at p.101.

A plaintiff cannot make an excess case by making a suggestion of settlement within policy limits and later raising the offer in excess of the limits. Kohlstedt at p.186. Additionally, the plaintiff must make a clear demand to settle within the limits prior to trial in order to successfully bring a bad faith claim. A bad faith claim cannot be based on settlement demands never made by the plaintiff. Wierck at p.195. It is incumbent on the person claiming bad faith to show that a settlement offer was extended to and was in bad faith rejected by the insurer. Id. In Wierck, a bad faith verdict at the trial court level was reversed because the insurer was not given an unconditional demand for settlement within the policy limits before trial.

F. Evidentiary Concerns.

The burden of proof is upon the insured to prove bad faith and not upon the insurer to prove lack of it. Ferris at p. 265. Plaintiff's burden is to show bad faith by a preponderance of the evidence. Koppie at p. 846. Substantial evidence is necessary to prove that an insurer acts in bad faith in handling a claim. Trask at p. 98. Evidence is substantial when a reasonable person's mind would find it adequate for reaching a conclusion or decision. Loudon at p. 579, *citing* Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982).

7. Expert Testimony May Be Allowed.

In Iowa, certain actions amounting to bad faith need not be established by expert testimony. Loudon at p. 582. Thus, where the insurer takes only its insured's statement in evaluating a serious personal injury claim, refuses to take the depositions of the plaintiff's treating physicians, rejects a limits settlement demand even where it recognizes its insured's limits are "gone," and defense counsel fails to prepare for trial, expert testimony will likely not be necessary. These actions are clearly within the understanding of laypersons and expert testimony is not required to establish a breach of the standard of care. Kooyman. However, where the insurer's and defense counsel's actions are less egregious, query whether expert testimony is necessary to establish the standard of care.

2. FIRST PARTY BAD FAITH

"First party" claims are those made by an insured for pecuniary benefits from his own insurance carrier. The most common scenarios giving rise to these claims are: (1) an insurer's alleged failure to pay a claim asserted by its own insured without a reasonable basis for the denial; (2) untimely payment to the insured; and (3) payment or offer of payment less than the amount demanded by the insured.[1]

A. Iowa Adopts the Tort.

The Iowa Supreme Court first recognized the tort of first party bad faith in Dolan v. AID Insurance Company, 431 N.W.2d 790 (Iowa 1988). The Court adopted the test for first party bad faith that is set forth in the case of Anderson v. Continental Insurance Company, 271 N.W.2d 378 (Wis. 1978). To show a claim for bad faith in the first party context, the Plaintiff is required to show, (1) the absence of a reasonable basis for denying the benefits of the policy, and

[1] Kathy J. Maus, *Bad Faith Findings in the Absence of Coverage*; FOR THE DEFENSE, December 2000.

(2) the carrier's knowledge or disregard of a lack of reasonable basis for denying the claim. Dolan at p. 794.

The Dolan Court also made two observations which are important to note with regard to the tort of first party bad faith. First, the Court recognized that the relationship between an insured seeking pecuniary benefits from his own policy and insurance company is a different relationship than that of an insured who is being defended by a liability insurance carrier in the third party context. Specifically, the Court noted that there is no fiduciary relationship in the first party context. Second, the Court found that the tort was remedial in nature and gives the insured an independent basis for redress against insurance companies, who, by the nature of their relationship have unequal bargaining and investigative power. The Court noted that the acts that need to be committed for first party bad faith necessarily make the tort intentional in nature. In Reuter v. State Farm Mutual Automobile Insurance Co., 469 N.W.2d 250, 253 (Iowa 1991), the Court held that the insurance company will be found liable only when it has intentionally denied or failed to pay a claim without a reasonable basis.

B. The Elements of First Party Bad Faith.

The elements of a first party bad faith claim in Iowa are embodied in Iowa Civil Jury Instruction 1410.1. They are as follows:

1. The Defendant (insurance company) denied Plaintiff's claim;
2. There was no reasonable basis for denying the claim;
3. The Defendant knew or had reason to know that there was no basis for denying the claim;
4. Denial was a proximate cause of damage to Plaintiff; and
5. The amount of damage.

C. The "Objective Standard" - Reasonableness.

A reasonableness standard applies in determining whether an insurer has acted in bad faith in the first party context. Therefore, there is an objective element. Reuter at p. 254. The issue being debated can either be legal or factual. Kiner v. Reliance Insurance Co., 463 N.W.2d 9 (Iowa 1990).

An insured's claim becomes fairly debatable precluding a claim for first party bad faith when there is reasonable conflicting evidence of the validity of the claim. Dirks v. Farm Bureau Mutual Insurance Co., 465 N.W.2d 857, 859 (Iowa 1979). The determination as to whether there is a reasonable basis to deny a claim is considered for the time the decision to deny the claim is made. Central Life Insurance v. Aetna Casualty Insurance Co., 466 N.W.2d 257, 263 (Iowa 1991). The *quality* of an insurance company's investigation of the insured's claim is not relevant to whether an objectively reasonable basis for denial to exists. Reuter at p. 254. An imperfect investigation, standing alone, is not sufficient cause for recovery on a first party bad faith claim. Seastrom v. Farm Bureau Life Ins. Co., 601 N.W.2d 339, 346 (Iowa 1999). A delay in payment of claim while the insurer conducts an investigation does not necessarily constitute a bad faith denial. Hochstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100, 111 (Iowa 1986); United Fire & Cas. Co. v.Shelly Funeral Home, 642 N.W.2d 648, 658 (Iowa 2002).

Whether a claim is fairly debatable in any situation can be appropriately decided by a court as a matter of law on a motion for summary judgment. Dolan at p. 794. However, the denial of an insured's motion for directed verdict at trial does not automatically establish that the issue raised by the insurer is fairly debatable as a matter of law. Reuter at p. 254.

D. The "Subjective Standard" - Knowledge of Lack of Reasonable Basis.

There is also a subjective element in a first party bad faith case which is the insurer's knowledge of a lack of reasonable basis upon which to deny a claim.

The first issue typically is whether or not there was a proper investigation made by the insurance company. Failure of an insurer to properly investigate a claim is evidence of bad faith, but it is not conclusive of the issue. Reuter at p. 255. In a first party bad faith case, the insurer has no clearly defined duty of investigation and may require the insured to present adequate proof of loss before honoring the claim. North Iowa State Bank v. Allied Mutual Insurance Co., 471 N.W.2d 824 (Iowa 1991).

Even though an insurer has a reasonable basis to deny the claim upon initial presentation, it may be held in bad faith if it is presented with additional facts after the initial denial which establishes the validity of the insured's claim. Dirks at p. 862.

5. Fact or Legal Question?

There has been some confusion about when a first party bad faith claim should be decided by the Court as a matter of law and when the claim should be decided by a jury. In Wetherbee v. Economy Fire & Casualty Co., 508 N.W.2d 657 (Iowa 1993), the Court held that a decision in a first party bad faith claim was appropriate by the Court when the question was purely legal (e.g. whether there was coverage at all based upon the terms of the policy); or when no reasonable jury could find bad faith based upon the facts presented either in a motion for summary judgment or at the directed verdict stage of trial. In other cases, decisions by a fact finder are required.

6. Accrual of a First Party Bad Faith Case.

A first party bad faith claim accrues when the elements are known or should have been

known based upon reasonable discovery to the insured/claimant. Brown v. Liberty Mutual Insurance Co., 513 N.W.2d 762, 763 (Iowa 1994). In Brown, a first party bad faith claim for failure to pay workers' compensation benefits accrued as of the date of the denial. *Typically* the claim period accrues as of the date of the denial.

7. No "Reverse" Bad Faith.

In Johnson v. Farm Bureau Mutual Insurance Co., 533 N.W.2d 203 (Iowa 1995), the Court decided whether a claim of reverse bad faith could be made against an insured. In Johnson, a claim was brought against Farm Bureau who had allegedly wrongfully denied a defense to Johnson under a liability policy. Johnson made a bad faith claim against Farm Bureau. Farm Bureau counterclaimed for "reverse" first party bad faith against its insured for filing a frivolous bad faith case. The Iowa Supreme Court refused to recognize the claim for "reverse bad faith" against the insureds. The Court found that the insurance carrier had adequate remedies against its insured for making frivolous claims, including Iowa Rule of Civil Procedure 80 (now Rule1.413) sanctions and abuse of process/malicious prosecution claims.

H. Miscellaneous First Party Bad Faith Cases.

1. Thompson v. United Fidelity and Guaranty Co., 559 N.W.2d 288 (Iowa 1997). The insurance company denied workers' compensation benefits on the belief that the insured worker was intoxicated or using cocaine in the work place. The Industrial Commissioner ruled against the insurance carrier and ordered it to pay benefits. A bad faith claim ensued. The Court held that there was no bad faith because the claim was fairly debatable. There was reference in medical records that the insured/worker had used cocaine in the work place.

2. Sampson v. American Standard Insurance Co., 582 N.W.2d 146 (Iowa 1998). American Standard issued its insured an uninsured motorist policy with a policy limit of

$25,000. The insured was injured in an accident with an uninsured motorist. A dispute arose as to whether the insured's claim was worth $25,000. The Court held that the insurance company had the right to question whether the damages experienced by the Plaintiff exceeded the $25,000 limit of coverage.

3. Higgins v. Blue Cross of Western Iowa, 319 N.W.2d 232 (Iowa 1979). An insurance carrier was allowed to rely on conflicting reports by physicians which supported its misrepresentation defense. Therefore, the claim was fairly debatable and Plaintiff's bad faith claim failed.

4. Amco Mutual Insurance Co. v. Lamphier, 541 N.W.2d 910 (Iowa App. 1993). The Iowa Court of Appeals held that an insured's own lack of cooperation in providing documents required under the policy is an objective basis for denial of a claim.

5. Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388 (Iowa 2001). The Iowa Supreme held that the evidence which was sufficient to submit a bad faith claim to a jury was also sufficient to support submitting a claim for punitive damages. In Gibson, the Court found that there was no reasonable basis for an employer denying workers' compensation benefits to an employee.

III. TIME LIMITATIONS FOR BRINGING BAD FAITH CLAIMS

Limitations of actions are found in Iowa Code Chapter 614. There is no clear statement by the Iowa Supreme Court as to whether the tort of first party bad faith has a two, five or ten- year statute of limitations. Iowa Code Section 614.1(2) provides for a two-year limitation for any injury to a person or reputation including injuries to relative rights that are based upon contract or tort. Therefore, a conservative reading of statute would require bad faith claims to be brought within two years. Iowa Code Section 614.1(5) provides that the statute of limitations for breach of a written contract is ten years.

A question, then, is whether a bad faith claim is a claim "on the contract" or "extra

contractual". In Stahl v. Preston Mutual Insurance Co., 517 N.W.2d 201 (Iowa 1994), the Court held that a bad faith claim which arises out of the conduct of an insurance carrier under the terms of the policy (e.g. investigation, interpretation of policy language, decision of whether to pay benefits under the policy) is a suit "on the contract." A claim for extra contractual damages against the insurance carrier based upon conduct outside of the contract such as slander, actions by the insurance carrier in the procurement of the policy, misappropriating the premiums, or independent tort claims which do not arise under the contract are "extra-contractual". Insurance contracts can contain provisions which shorten the period for making a claim if clearly articulated within the policy. Hamm v. Allied Mut. Ins. Co., 612 N.W.2d 775, 784 (Iowa 2000).

A bad faith claim which is an action on the policy, therefore, can be shortened by a contractual limitation to that effect. In Stahl, 517 N.W.2d 201, a fire claim was denied based on an alleged misrepresentation of the insured. The homeowners insurance contract contained a one-year limitation from the date of the loss for filing a lawsuit against the insurance company for benefits under the policy. Some 23 months after the fire loss, the insured filed suit against Preston Mutual for benefits under the policy and for bad faith. The Court determined that the bad faith claim arose from the decision by the insurance company not to pay the claim. Therefore, the Court held that the suit was a claim "on the policy" and was subject to the one year contractual limitation.

IV. INSURANCE TRADE PRACTICES

Iowa has adopted the Unfair Practices Act which is found in Chapter 507B of the Code. This uniform law was promulgated to regulate trade practices of insurers. It covers the actions of insurance carriers licensed in the State of Iowa and prohibits unfair and deceptive claims practices. Iowa Code Section 507B.4(9) provides the following unfair claims practices:

> "9. *Unfair claim settlement practices.* Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages of issue.

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information.

e. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear, or failing to include interest on the payments of claims when required under subsection 12 or section 511.38.

g. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

h. Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising

material accompanying or made part of an application.

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured.

j. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

l. Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

m. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a

compromise settlement.

1. Failing to comply with the procedures for auditing claims submitted by health care providers as set forth by rule of the commissioner. However, this paragraph shall have no applicability to liability insurance, workers' compensation or similar insurance, automobile or homeowners' medical payment insurance, disability income, or long-term care insurance."

Violation of the Unfair Claims Settlement Practice Acts does not give rise to a civil cause of action against an insurer. Seeman v. Liberty Mutual Insurance Co., 322 N.W.2d 35 (Iowa 1982). In Seeman, the Court concluded that the act was regulatory in nature and gave certain powers to the Insurance Commissioner and the State. No civil cause of action based upon a breach of its provisions lies in Iowa. However, notwithstanding the failure of a claim of violation of Iowa's Unfair Claims Practices Statute, factual allegations were not to be stricken to the extent that they were relevant to separate claims for punitive damages for bad faith under other claims. Terra Industries v. Commonwealth Insurance Co. of America, 990 F.Supp. 679 (N.D. Iowa, 1997).

* I would like to give recognition and thanks to my associate, Nicole L. Claussen, for her work in assisting me in preparing this outline.

REPRESENTING AN ATTORNEY IN THE IOWA DISCIPLINARY PROCESS

Roger T. Stetson
Belin Lamson McCormick Zumbach Flynn, A Professional Corporation

I. THE STRUCTURE OF THE PROCESS – BOARD OF PROFESSIONAL ETHICS AND THE GRIEVANCE COMMISSION

A. Iowa Supreme Court Board of Professional Ethics

1. The Board consists of 7 lawyers and 2 lay persons appointed by the Supreme Court. Ethics Administrator (Norm Bastemeyer) works for the Board. *Chapter 35.2. Attorney Discipline, Disability and Reinstatement. (Hereafter "Rule 35.2").*

2. Job is to initiate or receive and process complaints against attorney licensed to practice law in Iowa for violation of the Iowa Code of Professional Responsibility and laws of U.S. and Iowa. Also, attorneys not licensed who engage in the practice of law.

3. Upon receipt of Complaint, notice is provided to attorney. *Rule 36.6.*

a) Attorney has 20 days to file a written answer.

b) Failure to timely answer will result in deemed admission of allegations. *Rule 36.7.*

4. Upon completion of investigation, the Board may

a) Dismiss the complaint

b) Admonish the attorney (private)

c) Reprimand the attorney (public)

d) Prosecute the complaint before the grievance commission

e) Refer non Iowa attorneys to the unauthorized practice of law committee.

5. Reprimand by Board of Ethics

a) Filed with Clerk of Grievance Commission and served on attorney. Thirty days to take exception. If not reprimand final and public.

b) If take exception, not public. Ethics Board must decide to prosecute or dismiss. *Rule 35.3.*

B. Grievance Commission

1. Five attorneys in each judicial district, plus lay people appointed by Supreme Court.

2. Job is to hold hearings and receive evidence concerning alleged violations of the Iowa Code of Professional Responsibility or laws of United States of Iowa.

3. Complaint to Grievance Commission

    a) Signed by chairman of Board of Ethics

    b) Prosecuted by ethics counsel (Charles Harrington and David Grace)

    c) Discovery permitted. *Rule 35.6.*

    d) Process expedited

        i. Discovery commenced within 30 days of Complaint

        ii. Hearing held not less than 60 days or more than 75 days from service of Complaint. *Rule 35.7*.

    e) Principles of issue preclusion apply. *Rule 35.7(3).*

4. Upon completion of the hearing the Grievance Commission shall

    a) Dismiss the Complaint

    b) Issue a Private Admonition

    c) Recommend to the Supreme Court that attorney

        i. Reprimanded

        ii. License suspended

        iii. License revoked

    d) Complainant notified of decision to dismiss or admonish. If no appeal within 10 days, becomes final. *Rule 35.9.*

II. IOWA SUPREME COURT ROLE IN ATTORNEY DISCIPLINE

A. Whenever the Grievance Commission recommends discipline of an attorney, the commission reports its findings of fact, conclusions of law, and recommendations to the Supreme Court. This report is a public document upon its filing with the Supreme Court clerk.

1. If no appeal is taken, the Court proceeds to review de novo the record made before the Commission and determines the case without oral argument or further notice to the parties. The Court in its de novo review may impose a lesser or greater sanction than the discipline recommended by the Grievance Commission. *Rule 35.10.* The Court has initiated a procedure to allow the Board and attorney an opportunity to file a written statement supporting or opposing the recommendations of the Commission. In at least one case in recent years, the Court has issued a show cause order to the attorney requiring the attorney to appear and show cause why the recommended penalty should not be increased. Generally, however, in cases in which no appeal is taken, the Court issues its opinion on review only on the written record.

2. If an attorney wishes to appeal from a Grievance Commission report and recommendation, the notice of appeal must be filed with the Clerk of the Grievance Commission within 10 days after the report is filed. *Rule 35.11.* The abbreviated time limits specified in Ia. R. of App. P. 17 apply. The Court ordinarily enters an order immediately setting out the briefing schedule and assigning the case for submission at a specified time. In addition, the Court ordinarily provides in its scheduling order that extensions of time for briefing are not favored and will not be granted upon a verified showing of the most unusual and compelling circumstances. Traditionally these orders mention serious disability and death as examples of such circumstances.

3. Every decision of the Supreme Court on review, whether an appeal has been taken or not, results in a written en banc opinion by the Supreme Court. This has been the practice of the Supreme Court, starting with the decision in Committee on Professional Ethics & Conduct v. Kinion, 206 N.W.2d 726 (Iowa 1973).

B. There are no disciplinary decisions made by the Iowa Supreme Court since the Kinion case in which the Supreme Court in its decision has failed to impose discipline. Discipline takes the form of a reprimand, suspension or revocation.

1. Despite requests that it do so, the Court thus far has not imposed alternative dispositions, common among other professions, such as probation or orders for community service. The Court has cited the absence of resources as reasons for not considering probationary dispositions.

2. When a suspension is imposed, the suspension continues for the minimum time specified in the Court's order and until the Court has approved the attorney's written application for reinstatement. The Court may impose conditions that must be complied with for reinstatement including passing the multistate professional responsibility examination. *Rule 35.12.*

   a) It is important to recognize that suspensions are indefinite without any assurance of reinstatement. The hearing on an application for reinstatement is set for a date not less than 60 days after the filing of the application. *Rule 35.13(3).* The application for reinstatement may be filed 60 days prior to the expiration of the suspension period. *Rule 35.13(1).* Another factor involved is that the applications for reinstatement are considered by the Court en banc, and the hearing date depends on the availability of the entire Court. In a decision filed February 16, 2000, the Court ordered a minimum suspension of one month. As a result of the time involved in the reinstatement process, this becomes at least a two-to-three-month suspension.

   b) During the period of suspension, the attorney is prohibited from doing any work that lawyers do, even if it is work done by other professionals, such as consummation of real estate transactions and preparation of tax returns.

   c) If a suspended lawyer has not complied with the terms of suspension or if the attorney has committed new infractions, reinstatement will not be ordered. When reinstatement is ordered, the order is usually entered within a day or two after the reinstatement hearing.

3. Revocations are generally permanent and occur most frequently in cases involving moral turpitude, including convictions of felonies and misappropriation of client funds. The rules do not provide a procedure for applying to set aside a revocation but such applications have been made and in exceptional cases have been successful.

4. In imposing discipline, the Court appears to give overriding consideration to its view of the public interest, wishing to assure the public that lawyers will be disciplined when they violate ethical constraints. The Court also believes that disciplinary penalties have a deterrent effect. Even though the Court gives deference to Grievance Commission recommendations concerning penalties, it also strives to reconcile the penalties with cases involving similar infractions. In close cases, the Court seems to give particular deference to Commission recommendations.

C. An attorney subject to investigation or a pending disciplinary proceeding may acquiesce to disbarment, but only by filing an affidavit with the Grievance Commission complying with requirements of *Rule 35.15*. When a satisfactory affidavit is filed, the Court will enter an order disbarring the attorney on consent. The disbarment order is a public record, but the confidentiality of the affidavit is maintained. The affidavit serves the same purpose as the factual basis for a guilty plea in criminal courts.

D. The Supreme Court has an earned reputation for firmness and toughness in disciplinary cases. Disciplinary infractions result from human frailty, and the system has little tolerance for frailty. An attorney who is adjudicated to be a mentally incapacitated person, or an alcoholic, or a drug addict, or is institutionalized for treatment for one of those conditions may receive a disability suspension. *Rule 35.16*. Mental illness, ill health, alcoholism or other drug addition are sometimes urged in defense or in mitigation of disciplinary charges. Economic pressures are undoubtedly another cause of disciplinary problems. None of these conditions is recognized as a defense to disciplinary charges. As administered by the Supreme Court, the disciplinary system does not accommodate an attorney's personal problems.

III. REPRESENTING THE ATTORNEY THROUGH THE DISCIPLINARY PROCESS

A. A lawyer who receives notice of complaint filed with the Iowa Supreme Court Board of Professional Ethics should ordinarily seek advice before responding.

B. The lawyer should make a timely, accurate and complete response within the time period provided or seek and obtain an extension of time within which to do it.

C. If the complaint is without merit, the lawyer should attempt that each stage of the process to respond in a way that demonstrates the lack of merit.

D. The attorney or his counsel should be active in working with the Ethics Board to deter prosecution of a complaint. Communication prior to filing a formal complaint is with the Ethics Administrator, Norm Bastemeyer. Communications once a referral for prosecution has been made are with the Ethics Counsel, either Charles Harrington or David Grace.

E. Although there is no “plea bargaining” in the disciplinary process, it is possible to provide information to the Ethics Administrator or Ethics Counsel which may help bring about an acceptable resolution of the complaint.

F. Once a formal complaint is filed, the proceeding is much like an ordinary civil action involving extraordinary and sensitive issues where “judges of the facts” are fellow members of the Bar and a lay representative.

G. Any decision by the Grievance Panel, which involves a recommendation for a reprimand, suspension or revocation is subject to automatic review de novo by the Supreme Court, whether an appeal is taken or not.

H. Upon review by the Supreme Court, even when an appeal is not taken, an appellate decision is written and published.

I. The Supreme Court relies on its own precedent more than the precedent of other courts in adjudicating issues of ethical infractions. The Court does look at decisions of other courts when confronted with new issues. In doing so, the Court has sometimes followed decisions made in Model Rules states. The Court is currently considering the adoption of the Model Rules in Iowa. If it occurs, it will not dramatically change Iowa disciplinary law. In preparing an appeal, both Iowa and other jurisdiction law should be researched.

J. Attorneys representing lawyers in disciplinary cases face the challenge of representing professionals who frequently have their own ideas about how their cases should be handled and how they should come out. Moreover, in handling an appeal, an attorney must have a full understanding not only of the appellate process but also of the disciplinary process and the history of discipline by the Court.

K. If a defense exists on the merits of a charge, the record must be made in the Commission proceeding. If the opportunity to present evidence is denied, an offer of proof should be made.

L. Because of the deference to Commission findings and recommendations, cases can effectively be won or lost at the Commission level.

M. If an innovative disposition will be sought at the Supreme Court level, a record on the issue should be made before the Commission. Hopefully the Court will eventually introduce more flexibility into its dispositions by recognizing alternative sanctions, such as probation, community service, and other forms of service and that the Court will give more consideration to the economic impact of suspensions on lawyers and the lawyer's family members, employees and others whose lives are affected by suspensions.

1

Workers' Compensation Update

Iowa Defense Counsel Association
September 26, 2002
Iris J. Post

Revision of Prehearing Procedures

- Prehearing Conference Orders no longer forwarded by agency - still required to file by all parties w/in 120 days of date petition filed w/ agency; or
- Parties may telephone Agency for back-up and primary hearing dates following completion of Prehearing Conference Report (120 days). No rescheduling.

2

Changes in Hearings/Appeals

- No Chief Deputies.
- Former Chief Deputy Jon Heitland and Deputy Tere Hillary handling UI Appeals 50% of time.
- Only Interim Commissioner Trier "writing" appeal decisions, as well as reviewing his "own" decisions as a Deputy.

3

SUPREME COURT DECISIONS

4

Heartland Express, Inc. v. Terry, 631 N.W.2d 260 (Iowa 2001)

- Holding:The "contract for hire" occurred where the claimant was when he accepted the telephone offer of employment (in Georgia). The state of Iowa had no subject matter jurisdiction of claim.

5

Herrara v. IBP,Inc., 633 N.W.2d 284 (Iowa 2001).

- Holding: For cumulative injuries, apply Jordan principles to determine date of injury, then the "discovery rule" to determine whether claim timely filed.
- Claimant "discovered" cumulative injury on date when she knew or should have known she had a condition or injury and that the condition was work-related.

6

IBP, Inc. v. Harker 633 N.W.2d 322 (Iowa 2001).

- Holding: Because claimant "chose" physicians pursuant to Nebraska law, physicians were not "employer chosen" and those physicians' opinions could not be used to trigger IME pursuant to Iowa Code section 85.39 at employer's cost.

7

Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

- Holding: Employer entitled to "debate" claim when claimant's history of work injury changed from initial report. Penalty benefits were not appropriate pursuant to Iowa Code section 86.13. Employer did not need to produce rebuttal medical evidence as its denial was based on claimant's credibility and altered history of injury event.

8

Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002).

- Holding: Full responsibility rule applied to prior work-related injury for a **different** employer. Employer of employee with pre-existing permanent impairment rating of 35% PPD w/ permanent restrictions from California jurisdiction was not allowed to "apportion" out the 35% disability from the 55% PPD found in Iowa.

9

Floyd v. Quaker Oats, ___ N.W.2d __ (June 12, 2002).

- Holding: Full responsibility rule does not apply in cases where a scheduled member w/ preexisting permanent disability. Apportionment is still a "defense" assuming medical providers (expert testimony) "divides" preexisting disability and current one.

10

Brown v. Quick Trip Corp., 641 N.W.2d 725 (Iowa 2002).

- Holding: Mental/Mental claim test (medical and legal causation) extended so that legal causation element may be satisfied by a traumatic, unexpected, or unusual stressful event even though other employees similarly situated experience the same or similar stress.

11

Garcia v. Naylor Concrete Co., __ N.W.2d __ (Iowa July 17, 2002).

- Holding: Adoption of intoxication test set forth in Benavides v. J.C.Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995) for Iowa Code section 85.16(2). One or more must be present: (1) reason or mental ability affected; (2) judgment impaired; (3) emotions visibly excited; and/or (4) to any extent, lost control of actions or motions.

12

Grundmeyer v. Weyerhauser, __ N.W.2d. __ (Iowa July 17, 2002).

- Holding: Occupational Hearing Loss statute does not have "last injurious exposure rule" and current employer was not a successor in interest to former employer. Therefore, current employer not responsible for hearing loss incurred while claimant employed by former employer.

13

14

IOWA DEFENSE COUNSEL ASSOCIATION

Opening and Closing the Book: Storytelling from the Plaintiff's Perspective

Bruce L. Braley

Dutton, Braun, Staack & Hellman, P.L.C.
Waterloo, Iowa
319-234-4471
braleyb@wloolaw.com

Behold ... the Power of Cheese.

Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)

DULLNESS: THE EIGHTH DEADLY SIN

Dullness in front of a jury is the deadliest sin committed by trial lawyers. We spend far too much time focusing on "detail work" and far too little time developing creative presentations of evidence and argument. The following suggestions should sharpen your creative focus and provide greater enjoyment to you and your audience (the jury):

STUFF YOU NEED TO KNOW

Don't forget your ABCs.

Be a spellbinder ... not a stemwinder.

Visualize ... don't intellectualize ... *USE PLAIN ENGLISH!*

No matter how brilliant and articulate you are, a picture really IS worth a thousand words.

Be prepared[1], be original, be creative.

A mind is a terrible thing to waste ... trust yours, don't use notes.

---

[1]"Ah, preparation! There is where the magic begins! Yet, young lawyers yearn for an easy formula that will permit them to bypass the stodgy stuff called work. True preparation is not work. It is the joy of **creating. Preparation is wading into life, languishing in it, rolling in it, embracing it, smearing it over one's self, living it."** Gerry Spence, "Let Me Tell You a Story," *Trial*, Feb. l995.

Don't flatline.

Humility sells ... but don't overdo it.

Never minimize the importance of what you have to say.

Been there ... heard that.

Teach the jurors how to do their jobs -- use the verdict forms.

Read, listen to, and watch great trial lawyers. Then be yourself.

Be passionate ... or go write title opinions[2] for a living.

STUFF YOU NEED TO KNOW FOR CLE CREDIT

Iowa Rule of Civil Procedure 1.919

After the jury is sworn, the trial shall proceed in the following order:

(1) 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.

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

Iowa Rule of Civil Procedure 1.923.

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. A party waiving opening argument is limited, in closing, to reply to

[2]Some would consider this a proper form of penance for committing the Eighth Deadly Sin. The Vatican did not return calls for verification of this point.

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.**

***The Federal Rules of Civil Procedure contain NO RULES on the subject of opening statements or closing arguments.**

Local Rule 83.6(b) of U.S. Dist. Court for Northern and Southern Districts of Iowa.

(a) **Opening Statements**. *Unless the court orders otherwise*, **an opening statement shall not exceed 15 minutes.**

(b) **Arguments.** *Unless the court orders otherwise*, **arguments for each side shall not exceed one hour. The plaintiff's allotted time includes any time for rebuttal argument.** Counsel for each side may divide their time between themselves, but no more than two attorneys for each side will be allowed to address a jury during arguments, except with the permission of the court granted **before** arguments open.

Iowa Code § 602.10112. Duties of Attorneys and Counselors.

3. Employ such means only as are consistent with truth, and never seek to mislead the judges or make a false statement of fact or law.

***

5. Abstain from all "offensive personalities," and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause.

Iowa Code of Professional Responsibility for Lawyers.

Disciplinary Rule 7-106(4) and Ethical Consideration 7-24.

... The expression by a lawyer of a **personal opinion** as to the justness of a cause, **as to the credibility of a witness, as to the culpability of a civil litigant**, or as to

the guilt or innocence of an accused **is not a proper subject for argument to the trier of fact.**... However, a lawyer may argue, on analysis of the evidence, for any position or conclusion with respect to the foregoing matters.

Disciplinary Rule 7-106(6) and Ethical Consideration 7-36.

[A lawyer] should not engage in any conduct that offends the dignity and decorum of the proceedings.... The lawyer should avoid any conduct which appears to be calculated to gain special consideration from a judge or jury.

Ethical Consideration 7-37.

A lawyer should not make unfair or derogatory personal references to opposing counsel**.**

Standard For Professional Conduct: Lawyers' Duties to the Court.

5. We will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral ... communication to the court.

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A guide to using Westlaw® Internet software

Starting a Westlaw Session

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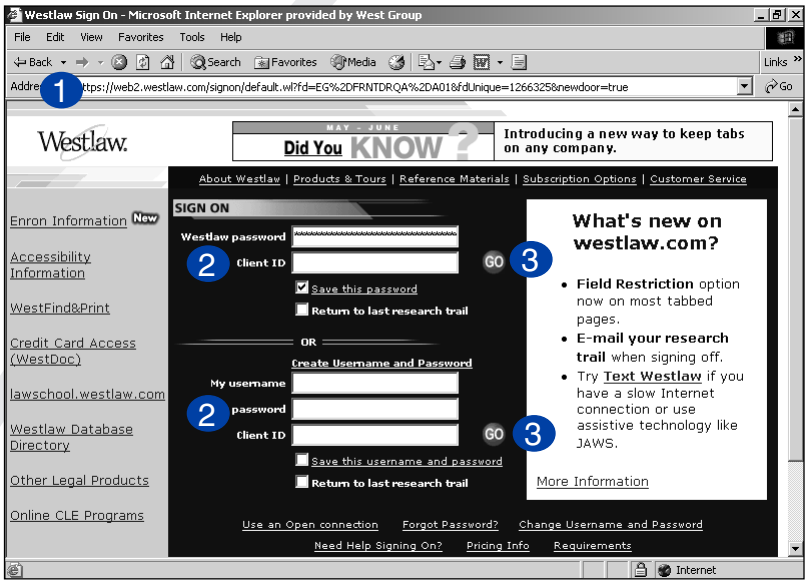
2. Type your Westlaw password and a client identifier in the *Sign On* section.

   Alternatively, type your personalized username and password and a client identifier. To create a personalized username and password, click **Create Username and Password**.
3. Click **GO** to sign on to Westlaw.

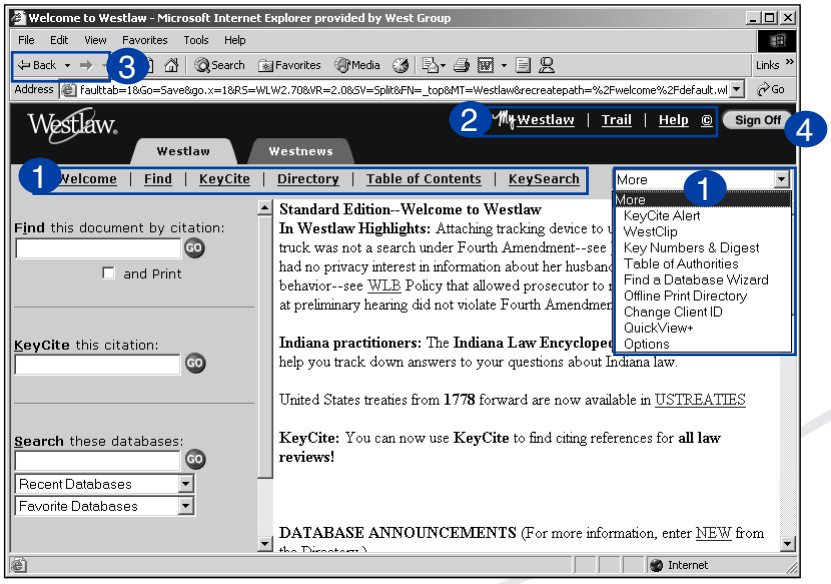


Signing on to Westlaw

Beginning Your Research

The following navigation features are always available during your research session:

1. To access westlaw.com services, use the links and the *More* drop-down list on the toolbar.
2. To access tabbed custom pages, your research trails, or Help, click the appropriate link in the upper-right corner.
3. To view your previous research pages, click the **Back** and **Forward** buttons in the browser.



Using navigation features in westlaw.com

Ending a Westlaw Session

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Westlaw is available on the Web at **www.westlaw.com**.

For technical assistance, call West Group Customer & Technical Services at **1-800-WESTLAW** (1-800-937-8529).

For search assistance, call the West Group Reference Attorneys at **1-800-REF-ATTY** (1-800-733-2889).

Accessing a Database

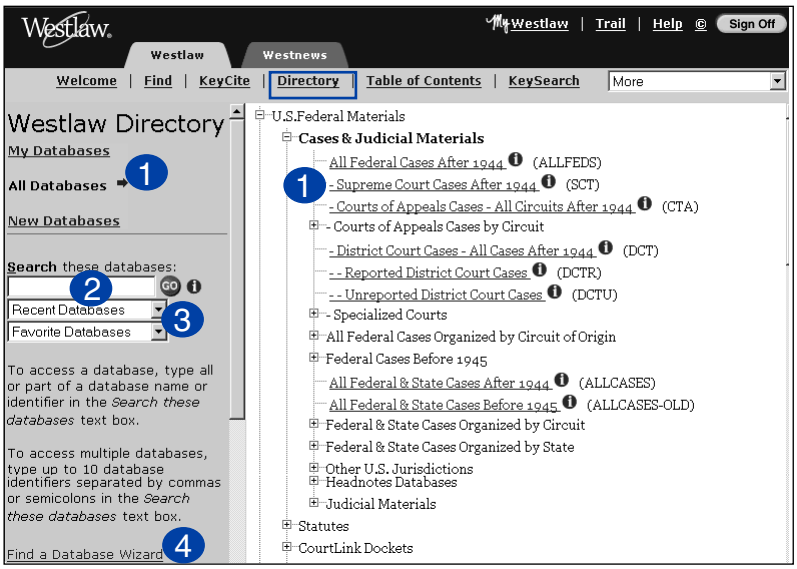
To view a list of all databases on Westlaw, click **Directory** on the toolbar. The Westlaw Directory provides several methods for accessing databases:

1. Click a link in the left frame, then browse the Directory in the right frame by clicking the plus (+) and minus (-) symbols. Click a database name to access a database.
2. Type all or part of a database name or identifier or a description of the database in the *Search these databases* text box in the left frame and click **GO**.

   Example: Type **texas insurance** or **insurance cases from texas** to access the Texas Insurance Cases database (TXIN-CS).

   Or, to access up to 10 databases at one time, type the database identifiers separated by commas or semicolons in the *Search these databases* text box in the left frame and click **GO**.

   Example: Type **txin-adc,txin-cs** to access the Texas Insurance Administrative Code (TXIN-ADC) and Texas Insurance Cases (TXIN-CS) databases.



Accessing databases in the Westlaw Directory

3. Select a database from the *Recent Databases* or *Favorite Databases* drop-down list in the left frame and click **GO**.
4. Click **Find a Database Wizard** to have a wizard help you select a database.

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Once you've accessed a database, follow these steps to search Westlaw:

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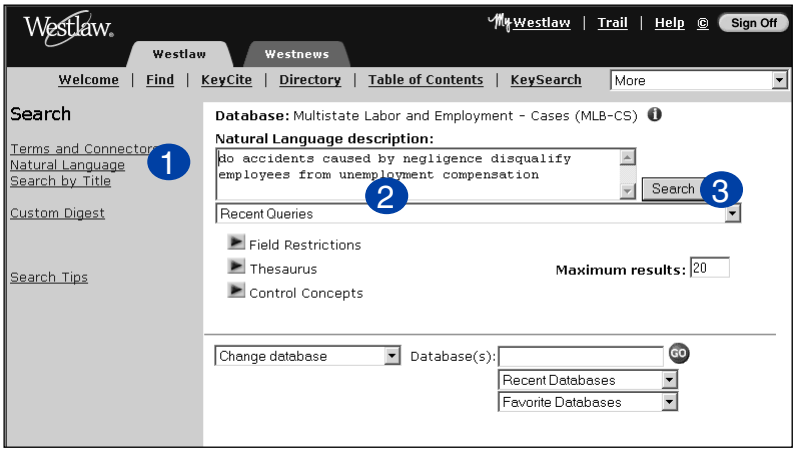
3. Click **Search**.



Searching Westlaw

Browsing a Search Result—Left Frame

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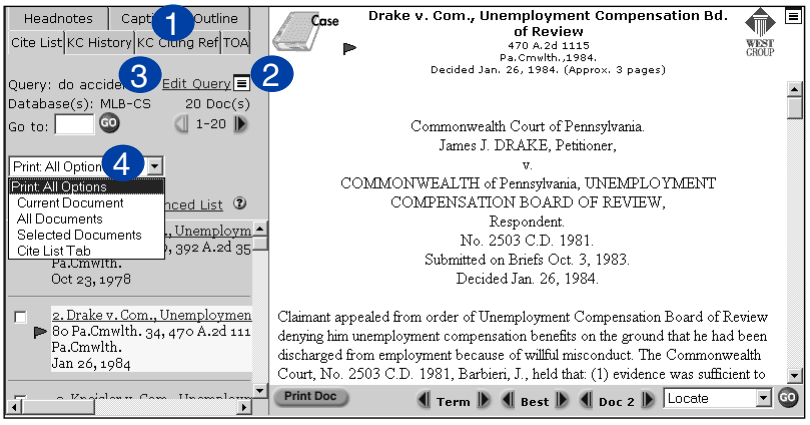
1. Click an Information Tab to view information in the left frame related to the document displayed in the right frame.
2. Click the **Full-Page View** icon to view the content on the current Information Tab across the entire page.
3. Click **Edit Query** to edit the current search or run a new search.
4. Choose an option from the drop-down list to select what you want to print, e.g., current document, all documents, selected documents, or the citations list.

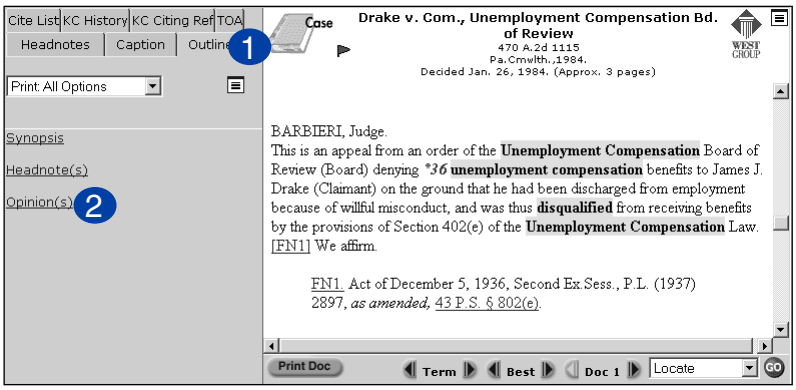


Browsing a search result

Next let's examine a few Information Tabs in more detail:

Outline Tab

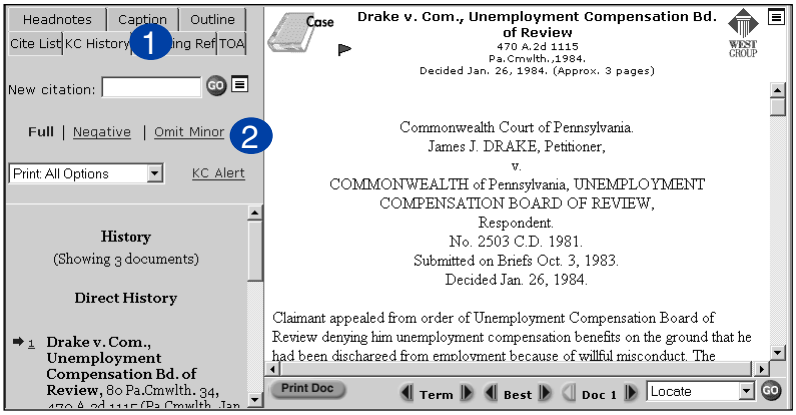
1. Click the **Outline** tab to view links to selected portions of the document.
2. For example, click **Opinion(s)** to go directly to the judge's opinion.



Using the Outline tab

KeyCite® History Tab

1. Click the **KC History** tab to view the history of the displayed case.
2. Use the options on this tab to customize the history you view: full history, negative history only, or omit minor history.

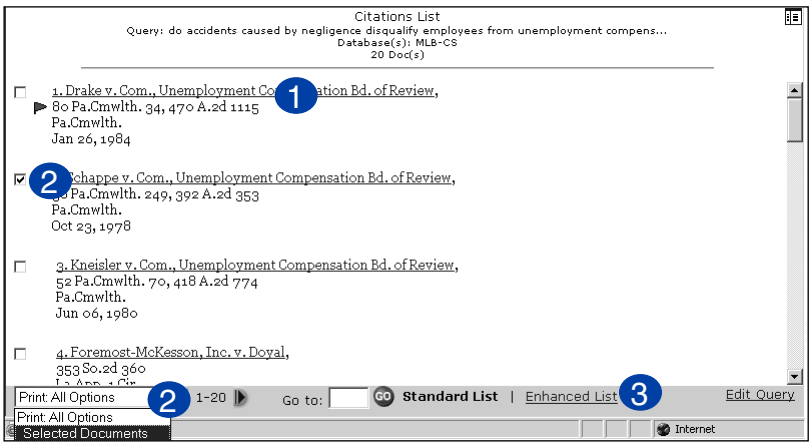


Using the KC History tab

Cite List Tab

Click the **Cite List** tab to help you choose documents to display or print.

1. Click the name of a case to view its full text.
2. Print documents directly from the citations list: select the check box next to the documents you want to print, then choose **Selected Documents** from the *Print: All Options* drop-down list.
3. Click **Enhanced List** to view additional information such as your search terms in surrounding text or the best portion of a Natural Language result.



Viewing the Cite List tab in full-page view

Browsing a Search Result—Right Frame

Navigation features in the right frame provide many options for viewing the current search result:

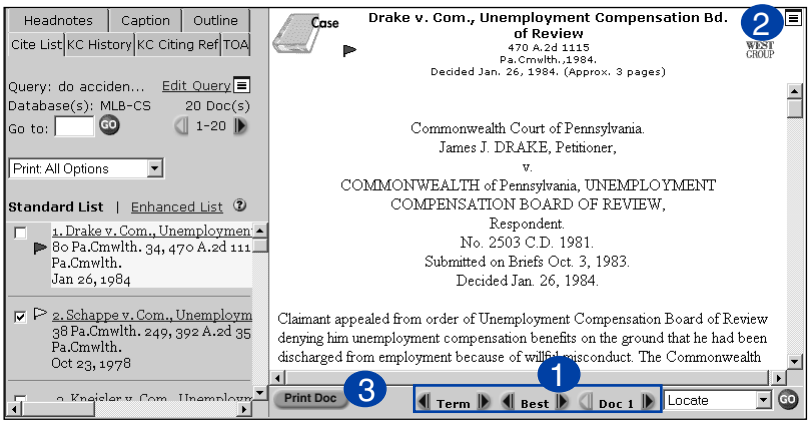
1. Click the **Term** arrows to view your search terms; click the **Best** arrows to view the portion of each document most closely matching your Natural Language description; click the **Doc** arrows to display the next or previous document in your search result.
2. Click the **Full-Page View** icon to view the current document across the entire page.
3. Click **Print Doc** to print the document displayed in the right frame.

With the document in full-page view, you can easily access related information:

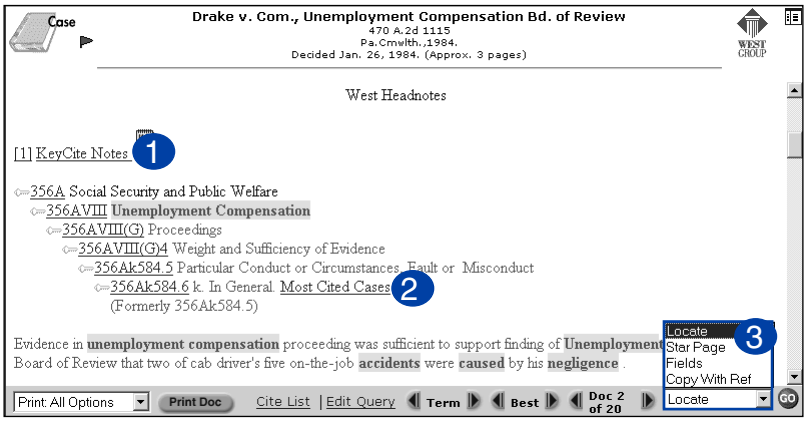
1. Click **KeyCite Notes**™ to retrieve the KeyCite result for the case limited to citing references that discuss the legal issue dealt with in a specific headnote.
2. Click **Most Cited Cases**™ to retrieve a list of cases most often cited for a particular point of law.
3. Select an option from the drop-down list and click **GO**. In this example you can choose to locate specific terms in the retrieved documents, go to a specific page of a print publication, restrict your document display to specific fields, or copy document text including the document's citation.

The Link Viewer allows you to preview cited documents:

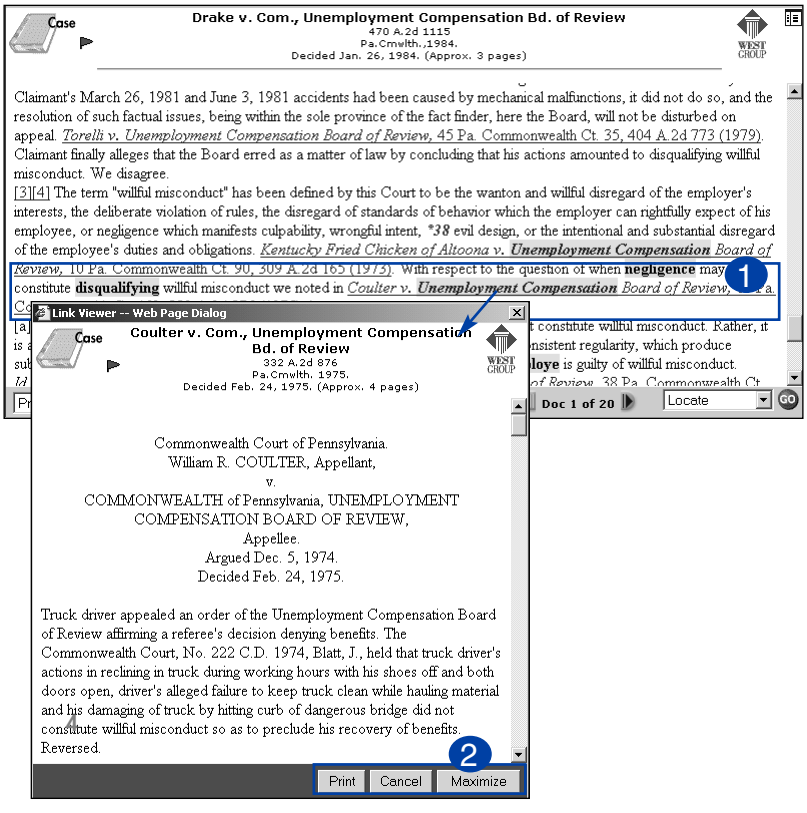
1. Click a hypertext link in the displayed document to preview the cited document in the Link Viewer.
2. Click **Print** to print or download the document in the Link Viewer; click **Cancel** to close the Link Viewer; click **Maximize** to display the document in the Link Viewer in the right frame.



Browsing a search result



Browsing a search result in full-page view

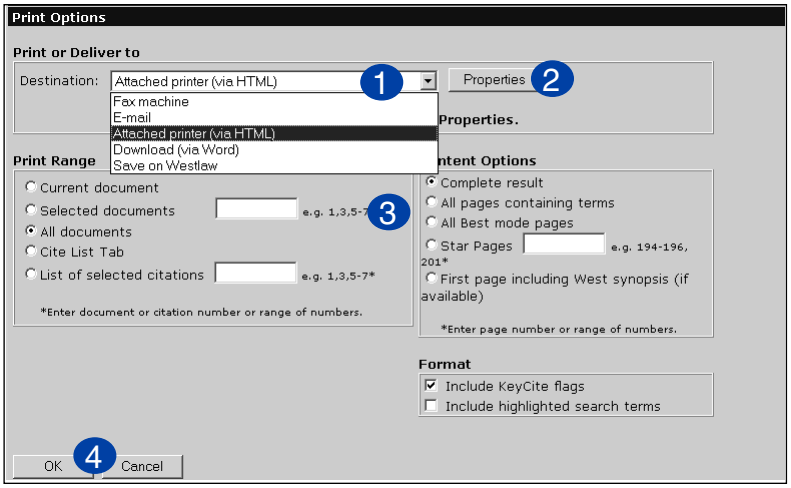


Previewing documents in the Link Viewer

Printing Documents

After you select an option from the *Print: All Options* drop-down list in your search result, complete these steps to print your document:

1. At the Print Options page, verify the destination or select a new destination (e.g., **Download**, **E-mail**, **Attached printer**, **Stand-alone printer**, **Fax machine**, **Save on Westlaw**) from the *Destination* drop-down list.
2. To modify the destination settings, click **Properties**. After you make your selections, click **Save**.
3. Verify or change the selections in the *Print Range*, *Content Options*, and *Format* boxes.
4. Click **OK** to print the document.



Printing documents

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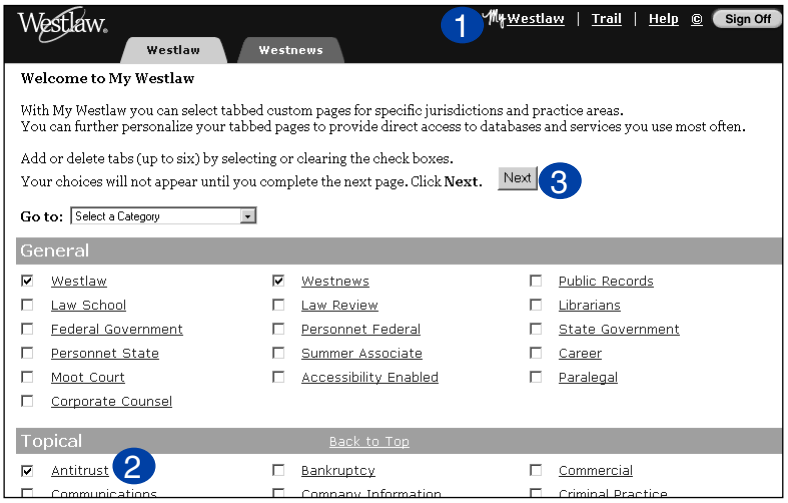

Selecting tabbed custom pages

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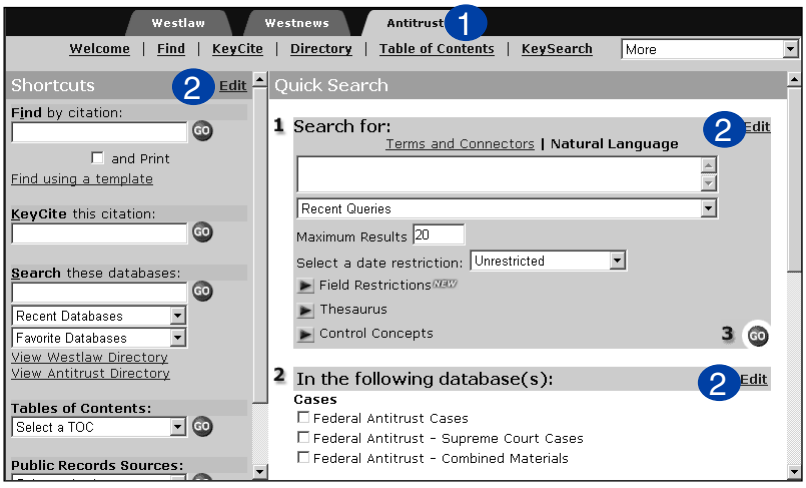

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- From a displayed case headnote, click **KeyCite Notes** to retrieve the KeyCite result for the case limited to citing references that discuss the legal issue dealt with in the headnote. *See page 4.*
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Gregory M. Lederer
Simmons, Perrine, Albright & Ellwood, P.L.C.
115 Third Street SE, Suite 1200
Cedar Rapids, Iowa 52401
319-366-7641
gledere@simmonsperrine.com

REPORT OF THE *AD HOC* COMMITTEE ON THE DRI RECOMMENDED CASE HANDLING GUIDELINES FOR INSURERS AND LAW FIRMS

February 15, 2002

Michael F. Aylward
John H. Martin
David L. Phipps
Michael H. Runyan

PREFACE

In the fall of 2001, the Alabama Defense Lawyers Association and the Board of Directors of the Texas Association of Defense Counsel separately submitted resolutions to the DRI requesting that it reconsider its February 28, 2000 decision to publish certain Recommended Case Handling Guidelines for Insurers and Law Firms. In response to these resolutions, the DRI Board of Directors voted at its October 6, 2001 meeting to authorize the formation of an *ad hoc* committee to study the experience of the Guidelines and make recommendations to the Board with respect to whether these Guidelines should be withdrawn, maintained or modified.

Pursuant to this charge, on December 4, 2001, DRI President Nick Harkins appointed four Board members (Michael F. Aylward, John H. Martin, David L. Phipps, and Michael H. Runyan) to be assisted by Second Vice-President Richard Boyette. Our committee conferred on December 12 and agreed that in order to provide an informed recommendation to the Board with respect to this resolution, we needed to undertake a broad-based inquiry as to how these Guidelines have been received by the insurers and law firms most directly impacted by them. We therefore committed to:

1. Survey the membership of the DRI, including both law firms and insurers, concerning their experiences with guidelines generally and their views with respect to the DRI Recommended Guidelines specifically.

2. Send a separate mailing to the presidents of all State and Local Defense Organizations, as well as those insurers who have participated in Insurance Roundtables in recent years, explaining the scope of our inquiry and inviting their input.

3. Interview the DRI officers and individuals who were instrumental in the development and promulgation of the DRI Recommended Guidelines.

4. Obtain information independently that might inform our discussions with respect to the experience of the Guidelines and other steps that might be undertaken to improve the working relationship between insurance companies and outside counsel.

Separate questionnaires for law firms and insurers were drafted by the subcommittee and, following approval by the DRI officers, were e-mailed to members of the Defense Research Institute in the first week of January. A hard copy of these survey materials was also separately mailed to the Presidents of all state and local defense organizations (SLDOs) and to those senior insurance claims executives who had attended past DRI Insurance Roundtables. The survey recipients were asked to provide their written responses, along with any comments, by January 15, 2002. In order to give respondents more time, a reminder notice went out shortly after New Year's extending the time to respond through February 1, 2002.

During this period, committee members also interviewed Robert Scott and Lloyd Milliken, the individuals who had served as President during the period of time that the DRI Recommended Guidelines had been developed and approved, as well as Shaun Baldwin, who was Chair of the DRI Insurance Law Committee at the time and spearheaded the group that drafted the Guidelines.

Committee members also reviewed dozens of different sets of insurer litigation guidelines contained in their law firms' files including, where possible, sets of guidelines that pre-date February 2000 as well as guidelines that have been published by insurers since the DRI's promulgation of the Recommended Guidelines.

Finally, we undertook research with respect to the court opinions that have addressed these issues as well as the several dozen opinions of state ethics committees around the country that have commented upon potential conflicts of interest or ethical improprieties arising out of the use of case handling and litigation guidelines.

The following report is an effort to synthesize the information that we received through these various inquiries and to set forth our views with respect to what the DRI Recommended Guidelines were intended to accomplish, the extent to which they have been successful in this regard and what further steps the Board may wish to consider.

EXECUTIVE SUMMARY

Our Committee was asked to appraise what impact, if any, the DRI Recommended Guidelines have had in the two years since the Board adopted them and what changes might be appropriate in light of this experience. Over the past two months, we surveyed the DRI membership concerning these issues; have evaluated the DRI Recommended Guidelines and compared them with old and new insurer guidelines; have interviewed key DRI members who were involved in developing and promulgating these guidelines and researched key state ethics opinions and case law on the issue of guidelines.

Based upon this analysis, it is our considered conclusion that:

- The DRI Recommended Guidelines should not be abandoned, although certain improvements are warranted.

- The DRI Recommended Guidelines promote a constructive partnership between defense counsel and a policyholder's liability insurer while maintaining the primacy of defense counsel's independent professional judgment in the event of a dispute.

- Although a significant number of liability insurers have adopted the Guidelines in the past two years, these carriers represent only a fraction of the insurance industry and, accordingly, the benefits of these Guidelines have not reached a large percentage of the DRI membership.

- A key goal of the Guidelines - - reducing internal administrative costs that law firms must support to comply with the numerous different and conflicting guidelines maintained by various insurers - - cannot be achieved until a sufficiently large group of insurers has adopted them so as to achieve general acceptance within the insurance industry.

- Consistent with the purpose of the Guidelines, several changes are recommended to reenforce the point that guidelines may not interfere with the ethical responsibilities of defense counsel.

- Finally, we have recommended that the DRI promulgate a separate protocol for resolving disputes between defense counsel and insurers involving either claims handling decisions or billing disputes arising out of the implementation of such Guidelines.

We hope that the foregoing analysis is of assistance to the Board in its evaluation and understanding of these issues and presents a potential blueprint for further action to address the issues and problems that were the motivation behind the original approval of the DRI Recommended Guidelines two years ago.

I. Guidelines: The Ethical Context

We begin our report with an overview of the Model Rules of Professional Conduct that have been adopted in most states and which govern the manner in which defense counsel must comport themselves in undertaking the representation of a client. We follow with a discussion of state ethics committees that have interpreted and applied these Rules in the specific context of insurer-promulgated case handling guidelines.

A. Model Rules of Professional Responsibility

Three sections of the Model Rules of Professional Responsibility, which have been codified in most jurisdictions, have application to the relationship between insurers and counsel retained by insurers to defend their policyholders:

Rule 1.7(b):

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8(f):

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 5.4(c):

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.

B. Ethics Opinions

To date, about two dozen opinions have been issued by state ethics committees interpreting and applying the foregoing canons and rules in the specific context of insurer claims handling and litigation guidelines.[1]

A difference of opinion exists among state courts with respect to whether defense counsel have a "client" relationship with the insurer that retains them to represent their policyholders. There is clear agreement, however, that, whether a client or otherwise, an insurer may not interfere with the lawyer's independent exercise of professional judgment without creating an ethical conflict pursuant to Rules 1.8(f) and 5.4(c) of the Rules of Professional Conduct.

Our survey of the state ethics opinions that have addressed the issue of litigation management guidelines indicates that these opinions have concluded that guidelines are not *per se* unethical. Indeed,

[1]These issues have also become the subject of numerous law review articles, including: Douglas R. Richmond, *Walking A Tightrope: The Tripartite Relationship Between Insured and Insured and Insurance Defense Counsel*, 73 Neb. L. Rev. 265 (1994); Charles Silver and Kent Syverud, *Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255 (1995). For a timely and comprehensive survey, see also Michael D. Morrison and James R. Old, *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Insurance Defense Practice*, 53 Baylor L.R. 349 (2001).

most of the opinions recognize that insurers have a legitimate interest in controlling the costs of litigation. *See* ABA Opinion 01-421; Arizona State Bar Opinion No. 99-08; Indiana Opinion 3 of 1998 and Kentucky Bar Association Ethics Committee Opinion 00-416. Whether the insurer is a client or merely a third party payor, however, the ABA opinion cautioned that:

> although defense lawyers must be sensitive to the economic interests of the insurance companies that employ them and cognizant of the fact that costs of litigation ultimately are borne by insureds through premiums, they must not allow their professional judgment or the quality of their legal services to be compromised materially by the insurer.

The ABA opinion found that in most cases conflicts do not arise and defense counsel may comply with insurer litigation management guidelines without ethical concerns. In certain circumstances, however, counsel may believe that litigation management guidelines are compromising counsel's ability to provide competent representation to both the insured and insurer clients.

> If the lawyer reasonably believes his representation of the insured will be impaired materially by the insurer's guidelines or if the insured objects to the defense provided by a lawyer working under insurance company guidelines, the lawyer must consult with both the insured and the insurer concerning the means by which the objectives of representation are being pursued...if the insurer does not withdraw or modify the limitation on the lawyer's representation and the insured refuses to consent to the limited representation the lawyer must withdraw.

The ABA Opinion concluded that:

> In representing an insured, a lawyer must not permit compliance with 'guidelines' or other insurer directives relating to the lawyer's services to impair materially the lawyer's independent professional judgment. There may be rare instances when the lawyer reasonably believes some limitation imposed by the insurer's directives is materially compromising the lawyer's ability to provide competent representation to both the insured and the insurer. In such situations, if the lawyer is unable to persuade the insurer to withdraw the limitation, the resulting conflict between the insurer's directives and the insured's interest requires the lawyer to protect the immediate interests of the insured while preparing to withdraw from representing both the insured and the insurer.

While ABA Opinion 01-421 and earlier opinions from numerous state ethics committees have generally concluded that guidelines do not invariably create a conflict of interest for defense counsel, all conclude that some guidelines create a potential for such conflicts that may arise in particular cases. In particular, the following four areas have most commonly been the subject of ethical scrutiny:

- Guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate or senior attorney or which state that such tasks will only be reimbursed at the rate of the support staff deemed appropriate to perform them.

- Guidelines that restrict or require prior approval before performing computerized or other legal research.

- Guidelines that require approval before conducting discovery, taking a deposition or consulting with an expert witness.

- Guidelines that require an insurer's approval before filing a motion or other pleading.

1. Limitations on Case Staffing

Many guidelines state that the insurer's consent is required before a second attorney can attend a deposition or court hearing. Also, many guidelines refuse to pay for inter-office conferences or state that only the senior attorney present may bill for attending. Finally, some guidelines also state that certain "functions", such as reviewing documents or scheduling meetings, are a "secretarial" or "paralegal" function and must either be performed by such individuals or, if undertaken by an attorney, may only be billed at the hourly rate chargeable for a paralegal or secretary.

In *Dynamic Concepts, Inc. v. Truck Insurance Exchange*, 61 Cal. App. 4th 999 (1998), the California Court of Appeals questioned "the wisdom and propriety of so-called outside counsel guidelines by which insurers seek to limit or restrict certain types of discovery, legal research or computerized legal research by outside attorneys they retain to represent their insureds." The court observed that:

> Some guidelines go so far as to call for the use of paralegals, rather than attorneys to respond to "routine" discovery requests or prohibit the retention of experts or the filing of certain pre-trial motions until shortly before trial. Under no circumstances can such guidelines be permitted to impede the attorney's own professional judgment about how best to competently represent the insureds. If the attorney's representation is to be limited in any way that unreasonably interferes with the defense, it is the insured, not the insurer, who should make that decision.

Concerns with respect to the impact of such Guidelines were also expressed by two justices of the Texas Supreme Court in a concurring and dissenting opinion in *State Farm Mutual Automobile Insurance Company v. Traver*, 980 S.W.2d 625, 633 (Tex. 1998), wherein Justices Gonzalez and Abbott stated that while

> cost containment is not bad in itself...measures designed to produce a no-frills defense can easily result in only a token defense...Defense lawyers may be reluctant to resist cost-cutting measures that detrimentally affect the quality of the insured's defense. There is a real risk that these efforts at cost containment compromise a lawyer's autonomy and independent judgment on the best means for defending an insured.

The following state ethics opinions have specifically addressed Guideline requirements that restrict the manner in which defense counsel can staff a case:

- *Alabama*

An attorney wrote to the Alabama State Bar Office of General Counsel asking whether or how he might comply with litigation management guidelines that a workers' compensation carrier had directed him to follow in representing its policyholders. The guidelines imposed restrictions on discovery, the use of experts and other third-party vendors; restricted the number of lawyers who could work on a file and required counsel to obtain prior approval before spending time on research, travel and deposition activity. In an informal opinion, the Office of General Counsel responded on June 16, 1998 that:

> [T]he billing guidelines and litigation management guidebook as described in your letter constitute an interference with the lawyer's independence of professional judgment or with the client-lawyer relationship in violation of Rule 1(f)(2) and also constitute an attempt to direct or regulate the lawyer's professional judgment in violation of Rule

> 5.4(c)...It is the opinion of the Office of General Counsel that it would be ethically improper for you to agree to restrictions that the insurance company is attempting to impose on your representation of its insureds.

In November 1998, the Disciplinary Commission of the Alabama State Bar issued a further opinion (Opinion No. OR-98-02). Amplifying on the June 16 opinion of the Office of General Counsel, the Disciplinary Commission opined that certain litigation guidelines could interfere with the exercise of a lawyer's independent professional judgment. The Commission cautioned that "an attorney should not allow litigation guidelines, or any other requirement or restriction imposed by the insurer, to in any way impair or influence the independent and unfettered exercise of the attorney's best professional judgment in his or her representation of the insured."

- *Arizona*

In Opinion No. 99-08, the Arizona Bar Ethics Committee surveyed a "compliance review and audit program" implemented by an insurer that, among other things, allowed a third-party adjuster to select counsel, to prohibit counsel from performing legal services on behalf of the insured unless the service was pre-authorized in writing, restricted research (and provided that routine legal research will not be compensated) and only permitted compensation for motions that were not only agreed to but as to which the adjuster believed had a 50% or greater chance of success.

The committee concluded that the audit program would interfere with a lawyer's independent professional judgment by:

1. Allowing the audit examiner and not the attorney the right to choose which motions will be filed based on the audit examiner's belief as to the motion's chance of success;

2. Allowing the audit examiner the right to withhold authorizations of those services for which the attorney must seek pre-authorization before he performs them if he is going to be paid;

3. Restricting the amount of research that will be compensated; and

4. Directing that certain tasks be undertaken without the supervision of an attorney.

The committee concluded that "while there is nothing wrong with the carrier attempting to reduce defense costs, the attorney cannot ethically participate in such an effort if it involves the use of procedures that allow a third party to regulate or direct the lawyer's independent professional judgment on behalf of his client, as is the case with this audit program."

- *Colorado*

The Bar Association declared in Formal Opinion No. 107 that "any guideline which arbitrarily and unreasonably limits or restricts compensation for the reasonable time spent on task necessary to the representation is to be avoided. Billing guidelines that impose a *de facto* or arbitrary rate for certain services, such as compensating a lawyer at paralegal rates are also to be avoided."

- *Indiana*

In Opinion 3 of 1998 criticized any blanket prohibition against interoffice conferences or the imposition of arbitrary rules with respect to the type of personnel (*e.g.* paralegals v. associates) who could handle particular tasks. "Such impairments of the responsible attorney's exercise of professional judgment as to the assignment of the most effective member of the litigation team to a given task is ethically impermissible."

- *Kentucky*

In Opinion 416, the Bar Association Ethics Committee declared that any Guideline that requires that all investigative work or that any document review only be undertaken by lower level employees or be billed at paralegal rates represents an unethical constraint on the lawyer's professional judgment. "Limiting compensation for such fact gathering or document review to paralegal rates would create a material disincentive to the lawyers exercising independent professional judgment, putting the client's interests at unacceptable risk." The Committee agreed, however, that it was appropriate for guidelines to provide a tentative allocation of lawyer and non-lawyer/paralegal tasks and that it would be appropriate to set a reasonable tentative budget for investigative effort or document review, subject to later revision as might be necessary.

- *Massachusetts*

Any across the board requirement that certain tasks only be undertaken by paralegals was criticized by the Ethics Committee of the Massachusetts Bar Association in an opinion released in September 2000. The Committee found that a lawyer must make his or her own personal judgment before complying with such a requirement as Rule 5.3(b) of the Rules of Professional Conduct contemplates the use of paralegals but requires the lawyer to decide in any given case whether a task may appropriately be delegated to a paralegal. For example, if drafting a deposition notice is too complex for a paralegal to do in a particular case, the lawyer may not ethically delegate that task.

- *North Carolina*

On January 15, 1999, the North Carolina State Bar Ethics Committee issued Formal Ethics Opinion No. 17. At issue was a set of litigation guidelines proposed by an insurer that stated that the insurer would not pay for summer associate and law clerk time; research exceeding three hours per case (except with prior written approval); making deposition arrangements or arrangements for meetings or conference calls; intra-office conferencing and memoranda; trial preparation prior to the date that a trial date is set; and billing on any given day for more than 10 hours in the absence of identifiable extraordinary circumstances.

The Ethics Committee concluded that such limitations could not ethically be complied with unless the insured consented after full disclosure. The committee noted that "the insured, rather than the insurance carrier, is the lawyer's primary client...therefore, the lawyer must be free to exercise his or her independent professional judgment on behalf of the insured" as provided for under Rule 1.8(f) and Rule 5.4(c). The billing requirements and guidelines:

> ...are designed to regulate the allocation of time and resources to the representation of the insured and thereby reduce the cost of representation. However, such cost saving measures may restrain a lawyer's exercise of independent professional judgment when determining the tasks and services necessary to represent the insured competently. If the requirements and guidelines will restrain a lawyer's professional judgment in representing a particular insured, the lawyer is ethically prohibited from complying with the guidelines and restrictions...However, a lawyer may comply with billing instructions and guidelines if the insured consults to the cost saving measures after full disclosure of the benefits and risks involved.

- *Ohio*

In light of the Ohio Rules of Professional Conduct, the Supreme Court Board of Commissioners on Grievances and Discipline declared in Opinion No. 2000-3 that it would be improper under DR5-107(B) for an insurer to impose guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate or senior attorney.

2. Requirements of Prior Approval

In the sole state supreme court case that has addressed such questions to date, the Montana Supreme Court concluded in *In The Matter of The Rules of Professional Conduct and Insurer-Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) that "the requirement of prior approval fundamentally interferes with defense counsels' exercise of their *independent* judgment, as required by Rule 1.8(f), M.R.Prof.Conduct. Further, prior approval creates a substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense."

Even though the St. Paul guidelines that court was reviewing required "prior approval," the Supreme Court suggested that even mere "consultation" requirements might also prove problematic in certain circumstances:

> We conclude that whether the requirement of prior approval seldom results in denials of authorization for defense counsel to perform legal services begs the question whether the requirement of prior approval violates the Rules of Professional Conduct. Without reaching the issue here, moreover, we caution further that a mere *requirement* of consultation may be indistinguishable, in its interference with a defense counsel's exercise of independent judgment and ability to provide competent representation, from a requirement of prior approval.

2 P.3d at 815.

The following states have issued ethics opinions addressing Guideline requirements that require defense counsel to obtain the insurer's prior approval before undertaking legal research, filing certain pleadings or retaining experts:

- *Alabama*

See above.

- *Arizona*

See above.

- *Kentucky*

In Opinion No. E-416, the Kentucky Bar Association Ethics Committee concluded that prior approval requirements with respect to limitations on the number of counsel were ethically permissible if they did not pose an immediate conflict for defense counsel and the guidelines allowed for approval of additional staff later on as the need arose. As before, the Committee emphasized the need for a process of ongoing consultation with the insurer to resolve any issues that might arise. On the other hand, the committee found that requirements of prior approval before defense counsel could undertake discovery, legal research or motion practice were an unethical constraint on the lawyer's independent professional judgment.

- *New York*

In Opinion No. 721 the Committee on Professional Ethics was asked to consider whether defense counsel might ethically comply with guidelines imposed by an insurer on what constitutes "reasonable" costs for outside research and/or that required the lawyer to first make use of an outside data bank of trial and appellate briefs and research materials maintained by the insurer. The Committee observed that although the insurance contract gave the insurer certain rights with respect to the defense of the suit, it

did not entitle the insurer "to impose conditions that would lead to inadequate representation or constrain the lawyer's independent professional judgment on behalf of the client." Nevertheless, so long as the insured consents, the insurer may impose reasonable limitations. The Opinion found, however, that "a requirement that the lawyer do no additional research or writing of memoranda or briefs without the consent of the insurance company is appropriate only if the lawyer concludes in the exercise of independent professional judgment that, on the particular occasion, no additional work is necessary to the effective representation of the client."

- *North Carolina*

See above.

- *Ohio*

The Supreme Court Board of Commissioners on Grievances and Discipline declared in Opinion No. 2000-3 that it would be improper under DR5-107(B) for an insurer to impose guidelines that interfered with the attorney's exercise of his or her professional judgment. Specifically, the Board concluded that the following type of guidelines might present ethical conflicts:

> (1) guidelines that restrict or require prior approval before performing computerized or other legal research;
>
> (2) guidelines that require approval before conducting discovery, taking a deposition or consulting with an expert witness; and
>
> (3) guidelines that require an insurer's approval before filing a motion or other pleading.

- *Rhode Island*

In Advisory Opinion No. 99-18, the Rhode Island Supreme Court Ethics Committee stated that "it is reasonably apparent to this Panel that certain of the guidelines under consideration, even though intended to achieve cost efficiency, infringe upon the independent judgment of counsel and induce violations of our Rules." The Panel noted that guidelines that merely define the financial relationship between the insurer and defense counsel do not give rise to ethical concerns. On the other hand, those provisions that specifically require the insurer's pre-approval for specified legal services "extend beyond the financial and working relationship between the insurer and defense counsel, and infringe upon the attorney/client relationship between the insurer and [defense counsel]. Noting various examples where an insurer's required prior approval for legal research, motion practice, discovery and other activities, the Panel found that "to the extent that the insurer reserves unto itself the right to withhold approval for reasonable and necessary legal services to be provided to an insured, these provisions of the guidelines impermissibly interfere with the independent professional judgment of the inquiring attorney." Since the inability to obtain payment for such work would create a "material disincentive to provide legal services that are reasonable and necessary to the defense of the insured," the Opinion concluded that such material disincentives gave rise to a conflict of interest and were therefore inappropriate.

- *Texas*

In Opinion No. 533, the state Supreme Court Ethics Committee was asked to consider whether litigation/billing guidelines that place certain restrictions on how defense counsel conducts the defense of the insured conflict with the ethical obligations of Texas attorneys. Some of the Guidelines reviewed by the Committee related to:

1. Whether to hire an expert in the defense of the insured;

2. What. if any, legal research may be conducted by the lawyer in defense of the insured;

3. What, if any, depositions may be taken in the defense of the insured;

4. Whether the defense counsel may investigate the claims made against the insured;

5. Whether particular depositions may be videotaped;

6. Whether any motions, including, motion to dismiss or for summary judgment, may be filed; and

7. Whether the lawyer or a paralegal should engage in the preparation of various documents.

Because defense counsel has a client relationship with the insured that he or she has been hired to represent, counsel may not allow a third party to direct or regulate the lawyer's professional conduct without violating Rule 5.04(c) of the Texas Disciplinary Rules of Professional Conduct, nor does Rule 1.08(e)(2) allow the lawyer to accept compensation from a third party if it interferes with the lawyer's independence of professional judgment or with the attorney-client relationship.

The Committee opined that "litigation/billing guidelines which interfere with the lawyer's professional judgment not only violate the above mentioned Rules but also Rule 1.01(b) which prohibits a lawyer from frequently failing to "carry out completely the obligations that the lawyer owes to the client or clients. Loyalty to the client/insured demands that 'the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions.' *State Farm Mutual Automobile Ins. Co. v. Traver*, 980 S.W. 2d 625, at 628(Tex. 1998)."

> [When] restrictions in litigation/billing guidelines direct and control legal services rendered by the lawyer to a client and how those services are to be delivered, imposing such restrictions upon the lawyer would result in a violation of the Rules by the lawyer. Although, the lawyer is free to enter into an agreement with the insurer regarding his fee and services to be rendered for the insured/client, such an agreement cannot override the ethical responsibilities of the lawyer under the Texas Disciplinary Rules. In other words, regardless of such an agreement with the insurer, the lawyer must at all times be free to exercise his or her independent professional judgment in rendering legal services to the client.

Although insurers may impose some reasonable requirements relating to third-party payment for legal representation such as when to submit statements for legal services rendered or other routine matters that do not actually affect the representation of the insured, the Committee opined that "no restriction or requirement by the third-party insurer can direct or regulate the lawyer's professional judgment in rendering such legal services or affect the lawyer's responsibility to the insured/client." The Committee concluded that "litigation/billing guidelines which interfere with the lawyer's professional judgment not only violate [Rule 1.08(e)] but also Rule 1.01(b) which prohibits a lawyer from frequently failing 'to carry out completely the obligations that the lawyer owes to the client or clients.'"

In the spring of 2001, the Texas legislature approved Senate Bill 1654, which would have imposed civil penalties and allowed policyholders any insurer that imposed any set of guidelines that "requires or suggests that a defense counsel perform an activity that:

> (1) interferes with:
>
> (A) the counsel's duty of loyalty to the insured;
>
> (B) the counsel's duty to exercise independent professional judgment; or

(C) the attorney-client relationship between the counsel and the insured;

or

(2) would result in a waiver of any privilege of the insured.

b) The types of litigation-management guidelines prohibited by this section include guidelines that require a defense counsel to obtain the insurer's approval before performing a task or incurring an expense to represent and protect the insured.

The legislative battle over Senate Bill 1654 was hotly contested and emotions ran high on both sides. The legislation was vetoed by Texas Governor Rick Perry on June 17, 2001 after vigorous lobbying by the insurance industry.[1]

II. The DRI Recommended Guidelines

A. The History of The DRI Recommended Guidelines

1. Drafting The Guidelines: 1997-99

The DRI Recommended Guidelines were developed by the Insurance Company Relations Subcommittee of the DRI Insurance Law Committee under the leadership of Shaun Baldwin of the Chicago law firm of Tressler, Soderstrom, Maloney & Priess. The effort was initiated by President Robert Scott in 1997-98 pursuant to the Future of the Defense Lawyer initiative, a multi-faceted effort to prevent the destruction of the traditional insurance defense practice from economic and legal pressures arising out of the changing insurance defense marketplace, the growing use of staff counsel and the increasingly burdensome imposition of insurer guidelines and third-party audits.

In late 1997, a survey was prepared by the managing partner of Plunkett & Cooney, who was then Chair of the DRI Law Office Economics Practice Committee, which detailed how each of his firm's insurance clients had their own set of guidelines and how these several dozen guidelines conflicted materially, dramatically increasing the firm's internal administrative costs as well as increasing the risk that the firm's lawyers would inadvertently fail to comply with such guidelines, thus giving rise to billing disputes, write-downs and delays in payment. It was the view of Scott and others at the time that, insofar as insurers were going to use guidelines, law firms would benefit by having a single, streamlined set of guidelines,

The Guidelines subcommittee began working in 1998 by accumulating as many copies as possible of existing insurer guidelines. These materials were culled into a single working draft that sought to streamline the existing guidelines, adopting the useful aspects while discarding provisions that were either extraneous or duplicative. A working draft was prepared and circulated to leading law firms and insurers for comment and review. Between January 1999 and January 2000, 13 separate drafts were prepared by the subcommittee. Ultimately, parallel sets of recommended guidelines for insurers and law firms were submitted to the DRI Board of Directors for its consideration.

2. Board Debate: 1999-2000

[1]The history of these disputes in Texas is recounted in Michael D. Morrison and James R. Old, *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Insurance Defense Practice*, 53 Baylor L.R. 349 (2001).

The issue of guidelines and third party audits was considered by the DRI Board of Directors on several occasions during 1999-2000. On February 16, 1999, the Board approved a Third Party Audit Resolution that urged the insurance industry to "respect, support and accommodate" counsel's ethical responsibilities in states that had issued ethics opinions prohibiting a lawyer from submitting legal bills to third party auditing firms. On May 27, 1999, the Board issued a second resolution, stating that the DRI did not approve the use of outside audits of the bills of defense counsel and, furthermore, that *"litigation guidelines should never interfere with the independent judgment and ethical obligations of defense counsel."*

Finally, following a spirited debate, two sets of Recommended Guidelines for Insurers and Law Firms were approved by the Board at its February 28, 2000 meeting and published thereafter in *For the Defense*.[2]

B. DRI Recommended Guidelines' Approach To Ethical Conflicts

The DRI Recommended Guidelines contain several provisions that are responsive to the concerns that these state ethics opinions and court decisions have addressed:

- **Conflicts of Interest**

The prefatory section ("Philosophy") of the DRI Recommended Guidelines states:

> Nothing contained herein is intended to nor shall restrict Counsel's independent exercise of professional judgment in rendering legal services for the Insured.

- **Requirement of Prior Approval**

The DRI Recommended Guidelines eliminate any requirement of "prior approval" with respect to defense tasks. They do state that defense counsel "should consult" with the insurer claims representative if more than one attorney needs to be involved; if legal research will exceed 3 hours and with respect to dispositive motions, retaining experts and the like. While a dialogue is thus encouraged, "in the event of disagreement, the final decision will remain the independent professional judgment of defense counsel."

- **Case Staffing**

The DRI Recommended Guidelines recommend that law firms staff cases in an efficient manner but do not mandate the use of certain types of staff for specific "functions" or limit compensation on that basis:

> Your firm should designate one attorney to have primary responsibility for each case on which your services are requested. The case should be staffed economically and effectively. Obviously, a balance must be struck between the efficiency a more experienced lawyer at your firm brings to a given task and the advantages of having the task performed by a junior lawyer or a paralegal. Duplication of effort within the firm should be avoided.
>
> To achieve the best efficiency and value, the role and responsibilities of the staff members should be clearly defined and appropriate to each individual's qualifications, level of experience and billing rate. Defense

[2]In February 2001, the Board also approved two minor wording changes intended to reinforce the view of the Guidelines that defense counsel's ethical obligations were paramount with respect to case handling decisions.

counsel should delegate work to subordinates wherever possible to achieve efficiency and cost-effectiveness without compromising quality.

The Guidelines allow all counsel attending an inter-office conference to bill their time so long as the conference is necessary and appropriate to the effective defense of the case.

C. State Ethics Opinions Since the DRI Recommended Guidelines

Since the DRI promulgated the Recommended Guidelines, a handful of opinions have been issued addressing guidelines that have adopted the DRI approach or which otherwise embody a less restrictive approach than the insurer-promulgated Guidelines discussed above.

- *Alabama Informal Opinion (July 2000)*

In July 2000, the Office of General Counsel issued an informal opinion concerning the DRI Recommended Guidelines. and is not binding on the Disciplinary Commission of the Alabama State Bar. Mr. Kendrick referenced an earlier opinion (OR-98-02), in which the Disciplinary Commission had determined that certain insurer-promulgated litigation guidelines impermissibly infringed on a lawyer's independent exercise of professional judgment. He concluded that:

> In reviewing the guidelines recommended by the Defense Research Institute, it would appear that these guidelines present many of the same concerns and problems as addressed by the Disciplinary Commission in OR-98-02.
>
> For example, Guideline II requires the attorney to develop defense strategy "in consultation with the insurer." Guideline IV A provides that "Counsel and the insurer will endeavor to agree on the proposed [litigation] activities." Also of concern is Guideline V B which imposes specific restrictions on activities which the attorney may perform in the representation of the insured. Some of these are as follows:
>
> > "6. Multiple Attendance. Unless otherwise agreed, only one attorney should attend trial, court appearances, meetings, depositions, witness interviews, inspections, and other functions.
> >
> > 7. Depositions. Counsel should consult with the insurer before initiating and attending depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto.
> >
> > 8. Legal Research. Counsel should consult with the insurer before undertaking a legal research project requiring over three hours of research time. Copies of all research memoranda shall be provided to the insurer upon request.
> >
> > 9. Motions. Counsel should consult with the insurer before filing any motions not previously identified and approved in the initial Litigation Plan or supplement thereto."
>
> In addition Rule V C(4) provides:
>
> > "4. Professional Services. Counsel should consult with the insurer prior to incurring expenses for experts, consultants, investigators, temporary attorneys or outside paralegals, or other professional services."
>
> It is the opinion of the Office of General Counsel that the above-quoted provisions of the Defense Research Institute Guidelines constitute impermissible restrictions on a lawyer''s independent professional judgment in violation of Rules 1.8(f) and 5.4(c) of the Rules of Professional Conduct of the Alabama State Bar. Therefore, your firm should not enter into an employment agreement with an insurance company to represent an insured which

requires you to comply with such guidelines or which, in any other way, restricts the exercise of independent professional judgment by the attorneys in your firm.

- *Kentucky Ethics Opinion No. 416 (March 2001)*

The Committee was provided with a copy of the DRI Recommended Guidelines prior to issuing its opinion in early 2001 and cited them as an "ethically sound" example of how Guidelines could be drafted. The Kentucky Committee noted out that the DRI Recommended Guidelines represented a two-year collaborative effort between national defense bar leaders and insurer representatives with the mutual goal of developing guidelines that could be implemented within ethical boundaries, thus suggesting that conflicts are not inevitable in this area and can be resolved amicably and responsibly in the great majority of cases.

As above, the Kentucky Opinion found that even requirements of prior approval were acceptable so long as the Guidelines allowed for approval of additional work that might be needed as the case unfolded. The Committee emphasized the need for a process of ongoing consultation with the insurer to resolve any issues that might arise. The Committee acknowledged that the Montana Supreme Court had found that requirements of prior approval and consultation were unethical but suggested that the Montana court's analysis was over-stated and were not intended to provide a "blank check" to lawyers to escalate litigation costs or to eliminate any requirement that defense counsel consult with insurers. In any event, the Kentucky opinion concluded that if the Montana court had really meant to suggest that any requirement of prior approval or consultation was *per se* unethical, then this finding was overbroad and contrary to "better reasoned authorities."

The Committee concluded that "in all of the foregoing situations, the lawyer-insurer relationship contemplates a process for ongoing consultation. Such consultation must be genuine, with the lawyer basing each expenditure or activity request on the needs of the insured, and the insured giving such request careful consideration in light of the lawyer's independent professional judgment. If the insurer's guidelines do not provide such a process, the lawyer should decline a proffered representation...."

- *Maryland Ethics Opinion No. 00-23 (April 2000)*

Staff counsel for an insurance company had sought advice from the Committee on Ethics with respect to whether he might ethically comply with written directives received from the insurance company governing the conduct of representation for insureds of the Company. Included among these directives was a discussion of "tactical considerations" which provided that "each and every decision made with reference to a file must be discussed fully and completely with claim management and, where appropriate, with the client...Once a full and complete discussion on the file handling has taken place, it is necessary that same be documented in the file by a letter, memo or detailed summary of the phone conversation."

In Opinion 00-23, the Ethics Committee declared on April 25, 2000 that litigation guidelines that give an insurer the ability to supervise and monitor the conduct of defense counsel do not necessarily conflict with state ethical requirements. The opinion concluded that both the policyholder and insurance company are clients and are owed obligations by defense counsel. Although this dual representation may potentially lead to a conflict of interest at some point, whether an actual conflict exists must be decided on a case-by-case basis. The guidelines therefore may be complied with unless or until they actually give rise to a conflict that might require fuller disclosure or counsel's withdrawal.

D. Insurers Adopting the DRI Recommended Guidelines

Since their promulgation, the DRI Recommended Guidelines have been adopted[3] by various insurers, including:

- Acceptance
- Amerisure
- CNA
- Hartford
- Liberty Mutual
- Ohio Casualty
- St. Paul
- TIG
- Vanliner
- Zurich

In addition to the companies that have formally adopted the DRI Recommended Guidelines, several insurers responding to our survey indicate that, while not adopting the DRI Recommended Guidelines in their entirety, they did use them as a Recommended for reforming their former guidelines:

- AIG: "We have a program to revise current guidelines which will track closely the DRI Guidelines."
- Allianz: "Our guidelines are constantly changing as we work and grow with our panel counsel. Many points in the DRI guidelines were already included within our guidelines in one form or another."
- Allstate:"Current guidelines mirror the DRI Recommended."
- Chubb "We did not formally adopt the DRI Guidelines as written. However, we found very few significant differences between the DRI Guidelines and our own."
- Nationwide: "While Nationwide Indemnity has not adopted the Guidelines, ours have been significantly influenced by them. Our relationship with outside counsel has improved and the DRI's courage in providing a "common ground" has influenced that result!"
- State Farm: "When State Farm developed its own guidelines, we paid close attention to the DRI document, and only deviated where we felt necessary. (This is not to suggest anything

[3]Any insurer who wishes to adopt the Recommended Guidelines has been obliged to contact the DRI and to provide the DRI with their final Guidelines. Insurers who wish to assert that their Guidelines follow the DRI Recommended Guidelines have not been permitted to make other than cosmetic changes and have been required to clearly label any separate or additional provisions as Addenda.

was wrong with the DRI approach in these areas, only that business experience suggested a different approach for us.) In large measure, the DRI and State Farm guidelines are complementary."

- USAA: "We have slightly amended the DRI Guidelines to fit USAA. They are not what we would have produced on our own, but because DRI created them, we felt that they would be more acceptable to outside firms."

IV . The Experience of the DRI Recommended Guidelines

A. DRI Membership Survey

In late December, a broadcast e-mail was sent to 16,668 DRI members (including 71 corporate insurer members and 100 other corporate members) inviting each to fill out a survey form that was attached to the message. A copy of the Guidelines was also attached to the communication.

1. Lawyer Survey

For outside counsel, the survey form sought demographic information concerning the size of the respondent's law firm and the extent of their "insurance defense" practice. The survey then posed four questions:

- If you represent insureds of one or more of the insurers who have adopted the DRI Recommended Case Handling Guidelines for Law Firms (e.g., Liberty Mutual, Hartford, St. Paul, TIG, Zurich), have those guidelines had a positive or negative impact upon your law practice?
  ____ Positive ____ Negative ____ Not applicable

- Apart from those insurers who have actually adopted the DRI Guidelines, has it been your experience that insurers have modified their Guidelines since 1999 to make them less onerous?
  ____ Yes ____ No

- In general, is your law firm experiencing more or fewer disputes with insurers concerning Guideline compliance than was the case two years ago?
  ____ More ____ Fewer ____ Same

- Are there areas in which the Guidelines (for insurers and law firms) should be improved to facilitate the working relationship between insurers and outside counsel or should the Guidelines be withdrawn?
  ____ The Guidelines are fine
  ____ The Guidelines should be kept, but improved
  ____ The Guidelines should be withdrawn

- Are there other steps that the DRI can take to accomplish the goals that these Guidelines were intended to address, namely, to reduce or eliminate ethical issues arising out of the interaction between insurers and attorneys in providing a defense to policyholders pursuant to insurance contracts?
  ____ Yes ____ No

2. Insurer Survey

A separate survey form was included for DRI insurer members and was also e-mail to two dozen insurers who have participated in the DRI Insurance Roundtables in recent years. The survey asked:

- Has your Company adopted the DRI Recommended Case Handling Guidelines?

- If your Company has adopted the DRI Recommended Case Handling Guidelines, has the reaction of your outside defense counsel been favorable or unfavorable?
  ____ Favorable ____ Unfavorable

- If your Company has not formally adopted the Guidelines but has revised your own Case Handling Guidelines since 1999, did you rely on portions of the DRI Recommended Guidelines in effecting these revisions?
  ____ Yes ____ No ____ Not applicable

- In general, is your Company experiencing more or fewer disputes with defense counsel with respect to Guideline compliance than was the case two years ago?
  ____ More ____ Fewer ____ Same

- Are there areas in which the Guidelines (for insurers and law firms) should be improved to facilitate the working relationship between insurers and outside counsel or should the Guidelines be withdrawn?
  ____ The Guidelines are fine
  ____ The Guidelines should be kept, but improved
  ____ The Guidelines should be withdrawn

- Are there other steps that the DRI can take to accomplish the goals that these Guidelines were intended to address; namely, to reduce or eliminate ethical issues arising out of the interaction between insurers and attorneys in providing a defense to policyholders pursuant to insurance contracts?
  ____ Yes ____ No

B. Survey Responses

We received 607 responses from outside counsel and 56 from insurers. We also received a written response from the Texas Association of Defense Counsel and thoughtful letters and e-mails from various individuals.[4]

1. Insurer Response Highlights

In general, the insurers who responded to the survey had a higher degree of familiarity with the Guidelines and were generally were favorably disposed to them. About a quarter of the respondents worked for insurers that had actually adopted the DRI Recommended Guidelines for the Insurers, although others stated that they had modified their guidelines to reflect, in part, those proposed by the DRI.

Statistical highlights of the survey are that:

- Of the Insurers who have adopted the DRI Recommended Guidelines, twice as many reported that they had received favorable reactions from outside counsel as had received negative feedback.

- 62% of the insurer respondents reported that were seeing fewer guideline-related billing disputes with outside counsel compared to two years ago; whereas 6% said more. The rest said things were about the same as they were before.

[4] A representative sampling of the respondents' comments concerning guidelines and the tripartite relationship is set forth in Exhibit 8 to this report.

- With respect to the future of the Guidelines 58% wanted them kept as is; 35% were interested in improvements and only 7% stated that they should be scrapped.

- Only 53% of the insurer respondents felt that there were other useful initiatives that the DRI could undertake in this area.

2. Law Firm Survey Highlights

By and large, the law firm respondents appear to reflect an accurate cross-sampling of the overall membership of the DRI. Eighty percent of the respondents worked for small (1-10) to medium-sized (11-50) insurance defense firms. Sixty-one percent of the respondents stated that half or more of their work came from insurance companies.

- Only 68% of the law firm respondents had read the Guidelines.

- Only 43% of the respondents work for an insurer who has adopted the DRI Recommended Guidelines to date.

- Barely over half of the lawyers who work for insurers that had adopted or emulated the Recommended Guidelines responded that things had changed for the better.

- For those lawyers who work for insurers that have not adopted the DRI Recommended Guidelines, only 31% said that insurer guidelines have become less onerous since 1999. Over two-thirds said that things were worse.

- Nevertheless, only 24% of lawyers reported an increase in guideline-related billing disputes compared to a few years ago. The rest indicated that things were about the same (43%) or that they were seeing fewer disputes (33%).

- 46% of the lawyer respondents stated that the Guidelines should be kept as is; 28% felt that they should be kept but improved and 26% stated that they should be withdrawn.

3. Comparative Analysis

A side by side comparison of these responses indicates broad agreement between insurers and law firms on the general trend of these topics but also a great sense of skepticism among the lawyer respondents:

	Law Firms	*Insurers*
Familiar with DRI Guidelines	67%	85%
Experiencing more billing disputes.	24%	6%
Guidelines should be scrapped.	26%	10%
Favor future tripartite role for DRI	56%	53%

In contrast to the insurer responses, lawyers seemed more pessimistic with respect to the experience of billing disputes. Forty-three percent of the respondents indicated that they were seeing about the same frequency of disputes as they did a few years ago; 33% indicated that they were seeing fewer disputes and 24% indicated that they were seeing more disputes.

Only a fraction of the insurers or lawyers responding to the survey stated that the Guidelines should be withdrawn (10% for insurers and 26% for lawyer respondents). On the other hand, as between those respondents who stated that the Guidelines were fine and those that indicated the Guidelines should be kept but improved, there was a substantially greater percentage of lawyers who were interested in refining the Guidelines than was the case with insurers, who tended to see them as fine as is.

III. Trends In Insurer Use of Guidelines

Although many larger liability insurers have recently stopped using third-party auditors to review bills and are now handling audits in-house, there does not appear to be any corresponding decrease in the use of litigation and claim handling guidelines by insurers. Indeed, our survey identified several corporate self-insured clients who are now also using such guidelines.

As part of its research, the committee reviewed several dozen different sets of insurer-promulgated Guidelines, including sets that were adopted before and after the DRI's February 2000 decision to publish the Recommended Case Handling Guidelines for Insurers and Law Firms. The chart setting forth these "before" and "after" guidelines is set forth at Exhibit 6 to this report. As indicated in Exhibit 6, most guidelines in use prior to February 2000 contained numerous significant restrictions of the sort that various state ethics opinions have found to be objectionable. Specifically, almost all of these guidelines required prior approval by the insurer before defense counsel could undertake legal research, file motions or use an additional lawyer to defend the case. Most refused to pay for inter-office conferences. Finally, many of these guidelines indicated that certain tasks were the "function" of associates or paralegals and would only be compensated at that rate, whatever the identity of the individual who actually ended up performing the work.

For some of these insurers, we were able to locate both "before" and "after" Guidelines. Exhibit 7 provides a comparison of these insurers' current Guidelines with those that were in effect before the DRI promulgated its guidelines in February 2000.

As illustrated in Exhibits 6 and 7, several insurers have significantly modified their Guidelines since 2000, particularly with respect to the case staffing and "prior approval" aspects that were highlighted above. The changes have been most dramatic among insurers such as Liberty Mutual, St. Paul, TIG and Travelers that have formally adopted the DRI Recommended Guidelines. Improvements are also evident among insurers who have used aspects of the DRI Recommended Guidelines as a model for their own guidelines even if they have not adopted them in full.

The Exhibits make clear that the DRI Recommended Guidelines are a marked improvement over earlier sets of Guidelines with respect to each of the various issues discussed above that have prompted concern by courts and state ethics groups.

Alone among the Guidelines that we reviewed, the DRI Recommended Guidelines repeatedly and specifically emphasize that counsel must exercise independent professional judgment in the defense of his or her client and, in the event that a conflict does arise with the insurer, it is the lawyer's professional judgment that must prevail. We believe that this statement provides an important tool to outside counsel in its relations with insurers and appropriately fosters an ethical working relationship between counsel and insurers.

Also, the DRI Recommended Guidelines eliminate all requirements of prior approval; permit billing for various basic tasks, including inter-office conferences, which previously had been barred by most insurers; and eliminate all limitations setting arbitrary requirements that certain tasks only be performed by paralegals or secretaries.

Unfortunately, however, there are hundreds of other carriers who have not adopted or emulated the DRI Recommended Guidelines and whose own guidelines still contain onerous restrictions dictating the manner in which cases are to be staffed or otherwise imposing the sort of requirements that are likely to give rise to legal and ethical challenges.

V . Have The DRI Recommended Guidelines Had A Positive or Negative Impact?

Some law firms that perform legal services on behalf of insureds of insurers that have adopted the DRI Recommended Guidelines report that the Guidelines have had a positive impact. In particular, the DRI Recommended Guidelines state that they are not intended to interfere with defense counsel's ethical responsibilities and that it is counsel's independent exercise of professional judgment that must control defense strategy. As a result, the law firms who do defense work for these companies now have the freedom to exercise their independent professional judgment under Guidelines that contain language that encourages them to be ethical and which expressly state that, **"in the event of disagreement, the final decision will remain the independent professional judgment of defense counsel."** Also, the Guidelines provide a more sensible and flexible approach to case staffing and allow billing for certain tasks that were not previously recoverable.

On the other hand, the DRI Recommended Guidelines have not received sufficiently widespread acceptance in the insurance industry to achieve the original goal of uniformity. Our survey of existing guidelines now being used by insurers leads to the conclusion that although most guidelines contain the same general recipe of elements, the individual language and treatment or such elements differs from carrier to carrier. Accordingly, law firms largely face the same set of administrative and compliance issues that were identified by the DRI back in 1998 as a significant problem for defense counsel seeking to comply with insurer guidelines in an efficient and cost effective manner.

The goal of achieving uniformity is likely to prove elusive. Anti-trust considerations preclude the insurance industry or its trade groups from joining together to adopt a uniform standard that would govern the manner in which legal services are paid for. While anti-trust considerations do not preclude individual insurers from considering and adopting a standard propose by a third party, such as the DRI, this process is necessarily time consuming in light of the many hundreds of insurers that do business in the United States. While the insurers may be approached through their trade organizations or through meetings sponsored by the DRI, such as our annual meetings and Insurance Roundtables, this is ultimately something that must be addressed on a company by company basis.

It appears that this is a goal that should continue to be pursued, however. Apart from the tangible benefits described above, there is some suggestion that these Guidelines have helped to reduce tensions within the tripartite relationship. Most insurers responding to our survey reported that their relationship with outside counsel has improved over the last two years and, in particular, that they are having fewer disputes with law firms about Guidelines than was the case prior to 2000. Several give credit to the DRI for implementing the Recommended Guidelines and for fostering a constructive dialogue on these issues.

- AIG: The DRI Recommended Guidelines have been "very helpful" in improving relations with outside counsel.
- Nationwide: "Our relationship with outside counsel has improved and the DRI's courage in providing a 'common ground' has influenced that result!"
- St. Paul: The DRI Recommended Guidelines have "helped greatly" in defusing earlier tensions between Company and outside counsel.
- Scottsdale: "The DRI guidelines were a significant, positive contributor to the improvement of the professional relationships between insurers and defense counsel. They demonstrated that both sides of the relationship had basically the same goals and, once productive discussions were facilitated by the Roundtable, agreement could be reached. Everyone who participated in this process deserves to be congratulated"

- State Farm: "The compilation of the guidelines was an important achievement for the DRI and a substantial step forward in the insurer-defense bar relationship. I appreciate the considerable time and effort that went into the guidelines, and just want to say 'thank you.'"

IV. Should The Guidelines Be Withdrawn, Maintained or Improved?

Our committee was tasked with the question of whether the DRI Recommended Guidelines should be withdrawn, kept or improved in some respect. We have considered each of these options in light of our research, the interviews that we conducted with former DRI Officers as well as the comments presented by law firms and insurers responding to our survey.

1. Should The Guidelines Be Withdrawn?

Some members expressed the view that the DRI has done a disservice to its members by giving its imprimatur to the use of guidelines and that the DRI should withdraw the guidelines altogether and adopt a position against the use of all guidelines.

Our committee does not believe that this option is realistic. It is apparent that insurers are going to use guidelines and, indeed, that the use of guidelines is becoming widespread among non-insurer clients. There is no indication from existing state ethics opinions or case decisions that guidelines will be found to be *per se* ethically improper or that a wholesale condemnation of guidelines by the DRI would be justified or appropriate.

Our interviews with former DRI officers such as Bob Scott and Lloyd Milliken point to the possibility that the DRI has gained significant credibility with the insurance industry by sponsoring these Guidelines and may be in a better position to serve a useful role in helping all of its members with respect to economic, legal and ethical issues arising out of the tripartite relationship than would be the case if it took on the role of an antagonist to the insurance industry. Both also strongly believe that withdrawing the Guidelines would have a strong negative impact on our ability to work with insurers in areas of mutual interest.

On a more positive note, we believe that the Guidelines have in fact had a salutary, if somewhat limited, beneficial impact. The DRI Recommended Guidelines are a clear improvement over most past and existing insurer guidelines. The fact that the DRI sponsored these Guidelines has therefore directly benefitted those law firms and DRI members who service those insurers who have formally adopted the DRI Recommended Guidelines.

It is therefore our recommendation that the DRI should not withdraw the Recommended Guidelines.

2. Should The Guidelines Be Maintained Without Change?

Various insurers and law firm respondents have recommended that the Guidelines be maintained as is. Others have argued that specific changes are necessary and appropriate.

The most persuasive argument for not effecting any changes to the Guidelines is that significant revisions might be viewed as breaking faith with those insurers who have already committed to the existing version of the Guidelines. On the other hand, the DRI has never taken the position that these Guidelines are cast in stone, nor do we believe that it would be inappropriate to make constructive revisions within the existing framework as long that are consistent with the intent of the original Guidelines.

On balance, therefore, we believe that it is appropriate that the Guidelines be revisited periodically to assess whether they are working or not and to effect meaningful changes, if warranted by this review.

3. Should The Guidelines Be Modified In Some Respect?

As detailed in the preceding Section, we believe that modifications to the Guidelines may be appropriate if the changes are both useful and not at odds with the goals of the original Guidelines of enhancing the partnership between defense counsel and insurers while also reducing counsel's administrative costs and compliance issues and implementing Guidelines that do not interfere with defense counsel's ethical obligations. We believe that the changes that are proposed in the next Section are entirely consistent with the philosophy of the Guidelines and will be appropriately received by even those insurers that have already adopted our existing Guidelines.

V. Are There Other Steps The DRI Might Take To Reduce or Eliminate Ethical Conflicts Arising Out of The Tripartite Relationship?

A. A Billing Dispute Resolution Mechanism Is Needed

Our principal recommendation is that the DRI aggressively encourage insurers to implement procedures for resolving claim handling or billing disputes between insurers and outside counsel. However fairly drafted, any set of guidelines is susceptible to potential differences of opinion with respect to claims handling strategies. Likewise, disputes may arise concerning particular billing entries.

Certain insurers have already added an ADR clause to their Guidelines as an addendum to the DRI Recommended Guidelines. For instance, one major property and casualty insurer has included a clause that provides that:

- A law firm has the right to appeal any cut.
- The insurer shall respond to the appeal within 30 days.
- If the parties cannot agree at that point, their dispute shall be resolved through binding arbitration.

It is the view of our committee that some formal process for dispute resolution, both as regards billing disputes and claim handling decisions, would help to resolve these problems quickly and efficiently with less delay, expense and damage to the relationships among the parties than presently seems to be the case.

An effort at implementing protocols for resolving billing disputes was begun by DRI in 1999 as a complement to the Guidelines project but foundered due to disagreements between the DRI and certain insurance trade groups concerning details and philosophy. An effort should be made to revive this proposal. It should be broadened, however, to address all disputes involving Guidelines, not just billing issues.

Although a civil remedy must remain for both parties in the event of improper conduct, it is our belief that both law firms and insurers would welcome some sort of alternative dispute resolution procedure that would permit the resolution of lesser disputes in an efficient business-like manner without rancorous litigation that would further polarize the positions of the parties and undermine the goals of the tripartite relationship.

B. Modification To Guidelines

We received a number of specific comments from various outside counsel concerning specific sections of the Guidelines that troubled them. Based upon our review of these submissions and our own review of the materials, there are several specific modifications that we would propose:

1. Philosophy

The Preface to the Guidelines states:

> [Insurer] expects to work with the Firm and the insured to achieve the best result for the insured in an efficient and cost-conscious manner consistent with the Firm's ethical obligations. Nothing contained herein is intended to nor shall restrict Counsel's independent exercise of professional judgment in rendering legal services for the Insured.

Although the Guidelines emphasize that they are not intended to interfere with a lawyer's independent exercise of professional judgment, it was not the intention of the drafters to suggest that only Rules 1.8(f) or 5.4 apply. Accordingly, we would suggest that this prefatory language be expanded as follows:

> [Insurer] expects to work with the Firm and the insured to achieve the best result for the insured in an efficient and cost-conscious manner consistent with the Firm's ethical obligations. Nothing contained herein is intended to nor shall restrict Counsel's independent exercise of professional judgment in rendering legal services for the Insured or otherwise interfere with any ethical directive governing the conduct of counsel.

2. Depositions

Section V.B.7 presently states:

> 7. Depositions. Counsel should consult with [Insurer] before initiating and attending depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto.

As it is our belief that counsel will generally attend most depositions in a case, we would propose to amend this language to read:

> 7. Depositions. Counsel should consult with [Insurer] before initiating depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto and shall advise the [Insurer] of upcoming depositions initiated by other parties that Counsel plans to attend.

3. Audits

Consistent with the Board's May 27, 1999 resolution concerning third party audits, the DRI insists that insurers who choose to review defense bills, whether through the use of outside firms or in-house resources, do so in a manner that does not compromise or interfere with counsel's defense of the policyholder.

Section VI, while subject to the general statement in the Preface, has separate language to this effect as regards "on site" audits. We propose that the on-site language be eliminated and that the language from the Preface be repeated here to clarify and reaffirm this aspect of the Guidelines, so that they would read:

> [Insurer] reserves the right to review all charges for services and disbursements pertaining to litigation, including without limitation all charges paid by the insured with respect to such litigation, whether pursuant to self-insured retentions or deductibles under [Insurer's] insurance policies or otherwise. [Insurer] reserves the right to conduct

audits and to review the defense file and/or defense bills, consistent with the defense attorney's ethical obligations, and in a manner that will not compromise the attorney-client or work product protection accorded material in the file or communications by and between counsel, the client and [Insurer] or otherwise interfere with any ethical directive governing the conduct of counsel. Counsel agrees to comply with all reasonable requests for information and documents, provided that such documents or information are not privileged or intended by the insured to be confidential. In such instance, the [Insurer] must obtain the consent of the Insured. [Insurer] fully reserves all rights to decline to pay or to seek reductions and/or refunds with respect to charges that fail to comply with the requirements set forth herein, and which are not fully explained or documented by the firm after reasonable inquiry. The [Insurer] shall allow the law firm to appeal any declination of payment by [Insurer]. [Insurer] agrees to pay the undisputed portion of bills received from Counsel within _____days.

VI. Conclusion and Recommendations for Action

In conclusion, it is the recommendation of this committee that the DRI not withdraw the Guidelines that the Board first adopted two years ago. At the same time, we believe that there are specific areas where the Guidelines can be made more effective.

Certain members of the committee are of the view that they might not necessarily have voted to approve these Recommended Guidelines if they were being presented for the first time in 2002. Insofar as the issue is whether we should keep or withdraw them, however, it is the unanimous view of our committee that, having initially approved them, withdrawing the Guidelines now would be extremely damaging to our relationship with the insurance industry and would undermine the ability or credibility of the DRI to serve as an engine for constructive change and dialogue in this volatile area.

It is also our view that the Guidelines have accomplished a substantial amount of good, particularly in regard to the law firms that are employed by insurers that have adopted or followed them. As yet, however, less than a dozen insurers have done so. In order for the Guidelines to have a meaningful impact on the broadest group of DRI members or to achieve their goal of reducing internal administrative costs and facilitating compliance, it is necessary that many more insurers adopt them. It is important, therefore, that a renewed effort be mounted through the Insurance Roundtable and related programs to ensure that these Recommended Guidelines achieve broader acceptance of these Recommended Guidelines within the insurance industry. This is consistent with the feedback that we received from many respondents, who urged the DRI to get more insurers to adopt the Guidelines or to take other steps to promote uniformity in the Guidelines that they must follow.

A surprising number of outside counsel and insurance employees who responded to our survey indicated that they had not previously heard of the DRI Recommended Guidelines or were generally unfamiliar with their wording. It is also apparent that many DRI members do not appreciate the opportunity that the DRI Recommended Guidelines present in persuading insurers to amend existing guidelines that law firms may find ethically problematic or administratively onerous. It is our recommendation, therefore, that steps be taken to create publicity about the experience of the Guidelines, including an article based upon this report that should be published in *For the Defense* and placed on the DRI website.

Consistent with these recommendations, we would suggest that if our report is accepted by the full Board that a resolution be proposed at our May 2002 meeting commemorating the second anniversary of the Guidelines, outlining the ethical philosophy and goals that the DRI had in mind when it approved these Guidelines, and encouraging law firms and insurers to adopt and follow them.

We hope that this report is of assistance to the Officers and the Board in their analysis and evaluation of this issue. We will be pleased to meet with you to provide further information or to respond to your questions at your convenience.

EXHIBITS

1. February 16, 1999 DRI Board resolution concerning insurer use of third party audits.

2. May 27, 1999 DRI Board resolution concerning audits and guidelines.

3. DRI Recommended Guidelines for Claim Handling By Insurers (2001 Edition)

4. September 25, 2001 Resolution of the Alabama Defense Lawyers Association

5. November 2001 Resolution of the Board of Directors of the Texas Association of Defense Counsel

6. DRI Comparative Survey of Insurer Guidelines

7. DRI Comparative Survey of Guidelines Before and Since February 2000

8 Comments of survey respondents.

EXHIBIT 1: February 16, 1999 DRI Board Resolution On Third Party Audits

THIRD PARTY AUDIT RESOLUTION

WHEREAS, the DRI is the largest national organization of lawyers who defend civil cases, with over 22,000 members; and

WHEREAS, a large portion of the DRI membership's practice is in the defense of insureds, and, to that extent, DRI members are retained and paid by insurers to represent the insureds interests; and

WHEREAS, over the past several years, some insurers have required defense counsel to submit legal bills to third party auditing firms; and

WHEREAS, there is a substantial issue as to whether this practice violates the confidentiality duty imposed on lawyers by Rule 1.6 of the American Bar Association Model Rules of Professional Conduct, or state counterparts, and may constitute waiver of attorney client privilege; and

WHEREAS, more than twenty (20) state ethics and professionalism committees and/or bar associations have issued opinions prohibiting outside defense counsel from submitting legal bills to third party auditing companies without the informed consent of the insured client; and

WHEREAS, all attorneys are obligated to comply with ethical standards; and

WHEREAS, the DRI is engaged in constructive discussions with insurers and outside counsel on issues related to third party audits;

NOW THEREFORE, IT IS RESOLVED

(1) In those jurisdictions where opinions have been issued prohibiting a lawyer from submitting legal bills to third party auditing firms without the insured client's informed consent, insurers are urged to respect, support and accommodate the ethical obligations of the counsel; and

(2) The DRI supports continued meaningful discussions with insurers relating to third party audits, addressing issues pertaining to lawyers' ethical responsibilities, and to foster a continuing relationship between insurers and counsel.

Unanimously approved by the DRI Board of Directors, February 16, 1999, in Scottsdale, Arizona

EXHIBIT 2: May 27, 1999 DRI Board Resolution On Litigation Guidelines

THIRD PARTY AUDITS

I. DRI does not approve the use of outside audits of the bills of defense counsel.

II. DRI further believes that litigation guidelines should never interfere with the independent judgment and ethical obligations of defense counsel.

III. DRI does believe that when insurers retain its members to review their bills, they should do so in a way that is fair and consistent with the ethical obligations of the lawyers they retain.

Unanimously passed by the DRI Board of Directors, May 27, 1999, in London, England

EXHIBIT 3: DRI RECOMMENDED GUIDELINES FOR INSURERS (2001)

I. PREFACE

Philosophy

[Insurer] expects to work with the Firm and the insured to achieve the best result for the insured in an efficient and cost-conscious manner consistent with the Firm's ethical obligations. Nothing contained herein is intended to nor shall restrict Counsel's independent exercise of professional judgment in rendering legal services for the Insured.

II. CASE DEVELOPMENT

An effective and strategically sound legal defense is the responsibility of counsel and [insurer] and should be developed in a timely manner.

A. A goal is to identify, timely, those claims for which there is liability, and to discuss settlement opportunities early. The activities necessary to defend a given claim and bring it to appropriate resolution should be addressed early and the steps necessary to achieve that resolution should be jointly agreed upon as between the [Insurer] and defense counsel.

B. An early resolution of lawsuits is desirable and the use of alternative dispute resolution is encouraged.

C. If defense counsel is involved in settlement negotiations, settlement authority must be obtained from [Insurer] and requests for authority should be made timely.

III. STAFFING PHILOSOPHY

Your firm should designate one attorney to have primary responsibility for each case on which your services are requested. The case should be staffed economically and effectively. Obviously, a balance must be struck between the efficiency a more experienced lawyer at your firm brings to a given task and the advantages of having the task performed by a junior lawyer or a paralegal. Duplication of effort within the firm should be avoided.

To achieve the best efficiency and value, the role and responsibilities of the staff members should be clearly defined and appropriate to each individual's qualifications, level of experience and billing rate. Defense counsel should delegate work to subordinates wherever possible to achieve efficiency and cost-effectiveness without compromising quality.

IV. REPORTING REQUIREMENTS

A. Reports

Unless otherwise requested, reporting is required for three events: Acknowledgment, Initial Evaluation, and Significant Developments. Reports should be provided to both [insurer] and [insured].

1. Acknowledgment:

Upon receipt of a new case, counsel should send an acknowledgment letter regarding receipt of the file and designating the legal team assigned to the case. Any matters of immediate concern or information that may result in early resolution of the case should be addressed in the acknowledgment letter.

2. Initial Report:

Within _____ days after receipt of the assignment, counsel should send an initial report with the following information:

a. A summary of the allegations in the complaint, the factual basis for the litigation, a summary of the information developed during the preliminary investigation and a preliminary evaluation of liability and damages.

b. A Litigation Plan providing the following:

1. Identify each significant activity counsel proposes to initiate. (e.g., investigation, motion, discovery, legal research, etc.).

2. Identify discovery and motions which have been or are likely to be initiated by other parties.

3. Estimate the completion date for each activity.

4. State the estimated expenses of each activity.

c. Discussion of the potential for early disposition of the case by settlement, and recommendations with respect to arbitration, mediation or direct settlement negotiations.

d. Discussion of the potential success of dispositive motions prior to, or after, the commencement of discovery and when motions to dismiss or for summary judgment are appropriate.

e. An estimate of the probable trial date.

3. Significant Development Report:

Defense counsel should communicate and apprize of significant developments as soon as practical. This will include reports on summaries of depositions, and pre-trial reports, and if applicable:

a. Settlement options and/or dispositive motions.

b. Updated evaluation of the client's liability and damages.

c. An updated Litigation Plan.

d. Trial Report: If it is anticipated the case will proceed to trial, 30 days before the scheduled trial date, a detailed report should be submitted, detailing the issues and an analysis of same and any other information requested by [Insurer].

B. Documentation

Reporting shall not include copies of the following documents, unless specifically requested:

1. Research Memorandum, Motion Papers and Legal Briefs;

2. Deposition Transcripts;

3. Expert Reports;

4. Medical Reports.

Counsel should provide copies of all pleadings and amended pleadings filed by or against the party whom you are defending and Releases and Orders of Dismissal for Final Judgments. Counsel will consult with [Insurer] on the appropriate means of communication, whether by e-mail, fax or regular mail to avoid duplication.

Counsel should comply with all reasonable requests for information and documents, provided however, that any documents or information that are privileged or intended by the insured to be confidential shall not be disclosed, absent consent from the Insured.

C. Consultation

After submission of the Initial Report, counsel welcomes discussion with and input and comment from the insurer. Counsel and [Insurer] will endeavor to agree on the proposed activities outlined in the Litigation Plan. However, in the event of disagreement, the final decision will remain the independent professional judgment of defense counsel.

V. BILLING

A. Billing Procedure

1. Frequency of Billing

    a. Bills should be issued at intervals to be agreed upon by counsel and [Insurer].

2. Billing Format

    a. Heading. The first page of the bill must state: (a) the firm's IRS number; (b) the caption of the case; (c) the name of the insured; and (d) the claim number.

    b. Body. The bill must be prepared with daily entries showing: (a) the date the work was performed; (b) the initials of the person providing the service; (c) a description of the work performed (single activities); and (d) the actual time in tenths of an hour.

    c. End of Bill Summary. The bill must include: (a) the full name of each attorney/paralegal; (b) the status of each timekeeper (i.e., partner, associate, paralegal); (c) the hourly rate of each timekeeper; and (d) the total hours and total amount charged for each timekeeper during the billing period.

    d. Task Codes. Task coding is not required, unless requested. Where requested, the uniform billing codes as currently endorsed by the American Bar Association shall be used.

B. Charges for Service

1. Time Charges. Actual Time in One-Tenth Increments. All charges for services by attorneys and paralegals must be recorded daily based upon their actual time in one-tenth hour increments.

2. Single Entry Timekeeping. Unless otherwise directed, the time for each activity should be separately stated. Grouping multiple activities under a single time charge greater than one-tenth of an hour ("block billing") is not acceptable, absent authorization from the [Insurer].

3. Information Descriptions of Services. Descriptions of services should inform of the nature, purpose or subject of the work performed, and the specific activity or project to which it relates.

4. Compensation. Counsel should consult with [Insurer] regarding any increase in the rate of compensation.

5. In-Firm Conferences. Where counsel consults with another attorney in the firm to obtain specific advise or counsel on substantive or procedural aspects of the case that result in a more effective defense, said reasonable and necessary conference time will be reimbursed, provided that sufficient detail of the subject of the communication is set forth to demonstrate its relevance and value.

6. Multiple Attendance. Counsel should consult with insurer where it is anticipated that more than one attorney's attendance is necessary at trial, court appearances, meetings, depositions, witness interviews, inspections and other functions.

7. Depositions. Counsel should consult with [Insurer] before initiating and attending depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto.

8. Legal Research. Counsel should consult with Insurer before undertaking a legal research project requiring over three hours of research. Copies of all research memoranda shall be provided to [Insurer] upon request.

9. Motions. Counsel should consult with [Insurer] before filing any motions not previously identified and approved in the initial Litigation Plan or supplement thereto.

10. Revising Standardized Forms/Pleadings. Only the actual time spent in personalizing standardized pleadings, documents, or discovery responses or requests to the case at hand should be billed, rather than the time originally spent drafting standard language.

C. Disbursement

1. Internal Expenses. [Insurer] shall advise counsel of its guidelines as to reimbursement of internal expenses.

2. External Expenses. Charges for service by outside vendors will be reimbursed at their actual cost. Expenses over $_____ may be forwarded to [Insurer] for payment. Disbursements should be itemized on the law firm's statement with the following information, unless back-up documentation is provided: (a) the name of the vendor; (b) the date incurred; and (c) a specific description of the expense. Where back-up documentation is provided, the law firm statement need only set forth a description of the expense and amount incurred.

3. Travel Expenses. Counsel should consult with [Insurer] prior to incurring travel expenses. [Insurer] will reimburse defense counsel for reasonable travel expenses. All expenditures of $25 or more must be supported with receipts attached to the law firm's statement.

4. Professional Services. Counsel should consult with [Insurer] prior to incurring expenses for experts, consultants, investigators, temporary attorneys or outside paralegals, or other professional services.

5. Secretarial and clerical activities. Secretarial and clerical work is not billable to [Insurer]. As examples and not as a complete list, secretarial and clerical work includes receipt and

distribution of mail, new file set up, maintenance of office and attorney calendars, transcribing, copying, posting, faxing, e-mailing, inserting documents into and retrieving documents from the file, maintaining order in the file, stamping documents, tabbing sub-files and assembling materials.

VI. BILL AND FILE REVIEW

[Insurer] reserves the right to review all charges for services and disbursements pertaining to litigation, including without limitation all charges paid by the insured with respect to such litigation, whether pursuant to self-insured retentions or deductibles under [Insurer's] insurance policies or otherwise. [Insurer] reserves the right to conduct on site audits and to review the defense file and/or defense bills, consistent with the defense attorney's ethical obligations, and in a manner that will not compromise the attorney-client or work product protection accorded material in the file or communications by and between counsel, the client and [Insurer]. Counsel agrees to comply with all reasonable requests for information and documents, provided that such documents or information are not privileged or intended by the insured to be confidential. In such instance, the [Insurer] must obtain the consent of the Insured. [Insurer] fully reserves all rights to decline to pay or to seek reductions and/or refunds with respect to charges that fail to comply with the requirements set forth herein, and which are not fully explained or documented by the firm after reasonable inquiry. The [Insurer] shall allow the law firm to appeal any declination of payment by [Insurer]. [Insurer] agrees to pay the undisputed portion of bills received from Counsel within _____days.

EXHIBIT 4: September 25, 2001 Resolution of the Alabama Defense Lawyers Association Concerning Guidelines

RESOLUTION
OF THE
BOARD OF DIRECTORS
OF THE
ALABAMA DEFENSE LAWYERS ASSOCIATION

WHEREAS, the Alabama Defense Lawyers Association is an organization whose membership is composed primarily of lawyers whose principal professional activity involves the defense of civil litigation; and

WHEREAS, a substantial number of our members are engaged in an insurance defense practice, defending individuals and companies through a policy of insurance providing coverage and a defense for a particular claim or suit; and

WHEREAS, a substantial majority of insurance companies now require retained attorneys to follow "Litigation Guidelines" in defending their insureds in civil litigation, most of said guidelines requiring approval of insurance company claims adjusters or litigation managers before the attorney can undertake a wide variety of actions in the litigation; and

WHEREAS, the Office of General Counsel and the Disciplinary Commission of the Alabama State Bar have issued both formal and informal opinions prohibiting an attorney from complying with litigation

guidelines that attempt to control or regulate the attorney's representation of the insured, citing a number of common provisions that impose impermissible restrictions on a Lawyer's independent professional judgment, in violation of the Rules of Professional Conduct of the Alabama State Bar; and

WEHREAS, the Defense Research Institute (DRI) is a national organization composed largely of civil defense, insurance and corporate attorneys which seeks to be "the voice of the Defense Bar" on issues of importance to its members, but on the issue of litigation guidelines, has adopted and endorsed "Case Handling Guidelines for Law Firms" that would put its members in Alabama and other states in conflict with their State's highest ethical and disciplinary authority; and

WHEREAS, the membership of the Alabama Defense Lawyers Association wish to urge and encourage the leadership of DRI to reconsider the litigation guidelines it has adopted, and to seek other and better solutions to a serious problem that is causing increasing tension between insurance companies and their insurance defense counsel;

NOW, THEREFORE, be it RESOLVED, that the Officers and Directors of the Alabama Defense Lawyers Association urge the Officers and Directors of the Defense Research Institute to reconsider the "Case Handling Guidelines for Law Firms" and to seek other and better solutions to the case management problems existing between the insurance industry and the civil defense bar.

BE IT FURTHER RESOLVED, that a copy of this Resolution be forwarded to Officers and Directors of DRI with the request that it be considered and discussed at the DRI 2001 Annual Meeting – "Leadership for the Defense Bar" in Chicago, Illinois.

Done this 25th day of September, 2001:

ALABAMA DEFENSE LAWYERS ASSOCIATION

By: _____
J.F. JANECKY
As Its President

ATTEST:

_____
EDWIN K. LIVINGSTON
As Its Executive Vice President

EXHIBIT 5: November 2001 Resolution of the Texas Association of Defense Lawyers Concerning Guidelines

RESOLUTION OF THE
BOARD OF DIRECTORS OF THE
TEXAS ASSOCIATION OF DEFENSE COUNSEL

WHEREAS, the Texas Association of Defense Counsel is an organization whose membership is composed primarily of lawyers whose principal professional activity involves personal injury defense and civil litigation; and

WHEREAS, a substantial number of our members are engaged in an insurance defense practice, defending individuals and companies through a policy of insurance providing coverage and a defense for a particular claim or suit; and

WHEREAS, many insurance companies now require retained attorneys to follow "Litigation Guidelines" in defending their insureds in civil litigation; and

WHEREAS, the Professional Ethics Committee of the Texas Supreme Court has issued Opinion No.533, a copy of which is attached, prohibiting an attorney from complying with litigation guidelines that attempt to interfere with the defense attorney's independent professional judgment in the representation of the insured, citing a number of common litigation guideline provisions that impose impermissible restrictions on a lawyer's independent professional judgment, in violation of the Disciplinary Rules or Professional Conduct of the State of Texas; and

WHEREAS, although not ultimately signed into law, the 77th Session of the Texas Legislature passed in both the House of Representatives and Senate SB 1654, embracing Texas Ethics Opinion 533 and banning Litigation Guidelines which interfere with the independent judgment of counsel retained to represent an insured; and

WHEREAS, the Defense Research Institute (DRI) is a national organization composed largely of civil defense, insurance, and corporate attorneys which seeks to be "the voice of the Defense Bar" on issues of importance to its members, but on the issue of litigation guidelines, has adopted and endorsed "Case Handling Guidelines for Law Firms" that would put its members in Texas and possibly other states in conflict with their State's highest ethical and disciplinary authority; and

WHEREAS, the membership of the Texas Association of Defense Counsel wishes to urge and encourage the leadership of DRI to reconsider the litigation guidelines it has adopted and to seek other and better solutions to a serious problem that is causing increasing tension between insurance companies and their insurance defense counsel;

NOW, THEREFORE, be it RESOLVED that the Officers and Directors of the Texas Association of Defense Counsel strongly urge the Officers and Directors of the Defense Research Institute to reconsider the "Case Handling Guidelines for Law Firms" and to seek other and better solutions to the case management problems existing between the insurance industry and the civil defense bar.

BE IT FURTHER RESOLVED that a copy of this Resolution be forwarded to the Officers and Directors of DRI with the request that it be considered in conjunction with a similar resolution which was presented by the Alabama Defense Lawyers Association at the DRI 2001 Annual Meeting.

Done this - day of November 2001.

TEXAS ASSOCIATION OF DEFENSE COUNSEL

By: _____
D. Michael Wallach
As Its President

ATTEST:

David Chamberlain
As its Secretary/Treasurer

EXHIBIT 6: Survey of Insurer Guidelines

The following table illustrates how various Guidelines that insurers have promulgated over the past ten years have addressed four of the key issues that state ethics groups and courts have focused on:

INSURER (Date)	Multiple Attorneys	Legal Research	Case Staffing	Motion Practice
Hartford (3/94)	Prior approval required.	Prior approval required before any research.	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
General Accident (10/94)	No.	Prior approval required before any research.	Appropriate use of associates and paralegals encouraged	Prior approval required.
Hanover (1995)	Prior approval required in writing.	Prior approval required if will exceed 1 hour.	Appropriate use of associates and paralegals encouraged.	Must be discussed in advance with file handler.
Truck Insurance (1995)	No.	OK if doesn't duplicate efforts.	No more than 3 people on a file.	
St. Paul (1996)	Prior approval required.	Prior written approval needed if time will exceed 2 hours.	Appropriate use of associates and paralegals encouraged.	Must be discussed in advance with file handler.
Zurich (1996)	Prior approval required.	Prior approval required before any research.	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
Allianz (1996)	Prior approval required.	Prior approval required if will exceed 1 hour.	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
Great West (1997)	Prior approval required.	Prior approval required if will exceed 1 hour.	Paralegal tasks will be paid at paralegal rate	Prior approval required.
Maryland Group (7/97)	Prior approval required.	Prior approval required if will exceed 3 hours.	Paralegal tasks will be paid at paralegal rate	
Metropolitan (2/97)	Prior approval required.	Prior approval required if will exceed 2 hours.	Paralegal tasks will be paid at paralegal rate.	Must discuss if time will exceed 1 hour.
ERC (4/97)	Prior approval required.	Prior approval required if will exceed 1 hour.	Paralegal tasks will be paid at paralegal rate	Prior approval required.
Scottsdale (10/97)	Prior written approval needed	Prior written approval if will exceed 3 hours	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
Cincinatti (1998)	Prior approval required.	Prior approval required before any research.	Appropriate use of associates and paralegals encouraged.	Prior approval required.
Penn America (1998)	Prior consultation required.	Prior consultation required if will exceed 1 hour.	Paralegal tasks will be paid at paralegal rate.	Prior consultation required.

Wausau (2/98)	Prior approval required.	Prior approval required if will exceed 3 hours.	Firm must provide list of staff.	Prior approval required.
Erie (4/98)	Contact insurer in advance.	Consult with claims handler.	Consult in advance.	Consult with claims handler.
Kemper (6/98)	Prior approval required.	Prior consultation required if will exceed 3 hours.	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
Chubb (7/98)	Prior approval required.	Prior approval required.	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
Allstate (9/98)	Must consult.	Must consult	Appropriate use of associates and paralegals encouraged.	Must consult.
Royal-Sun Alliance (9/98)	Prior approval needed if more than one attorney or paralegal used.	Prior approval required if will exceed 1 hour.		Prior approval required.
General Star (2/99)	Prior approval required.	Prior approval required if will exceed 10 hours.		Consult in advance.
Argonaut (5/99)	Must consult.	Must consult if will exceed one hour.		
TIG (1999)	Prior approval required.	Prior approval required if will exceed 2 hours.	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
Unigroup (6/99)	Prior approval required.	Prior consultation required.	Appropriate use of associates and paralegals encouraged.	Prior approval required.
Metropolitan (10/99)	Should consult. .	Should consult if will exceed 2 hours.	Appropriate use of associates and paralegals encouraged.	Should discuss if time will exceed 2 hours.
Hartford (1/00)	Prior consultation and approval needed.	Advance approval required if will exceed 3 hrs	Appropriate use of associates and paralegals encouraged.	Prior consultation and approval needed.
Travelers (2/00)		No.	Use of paralegals encouraged.	
Liberty Mutual (3/00)	Prior approval required.	Prior approval required if will exceed 3 hours	Paralegal tasks will be paid at paralegal rate	Consultation required before dispositive motions
DRI 2/00	**Should consult.**	**Should consult if will exceed 3 hours.**	**Appropriate use of assoc. s and paralegal encouraged.**	**Should consult.**

Hanover (1/01)	Should discuss w/ claims handler	Should discuss w/ claims handler	Appropriate use of associates and paralegals encouraged.	Should discuss w/ claims handler
CNA (9/01) (DRI)	Should consult	Should consult if will exceed 3 hours.	Appropriate use of associates and paralegals encouraged.	Should consult.
Chubb (8/01)	Prior approval required.	Prior approval required if will exceed 2 hours	Paralegal tasks will be paid at paralegal rate.	Prior approval required.
Ace-USA (2/00)	Prior approval required.	Prior approval required if will exceed 3 hrs	Appropriate use of associates and paralegals encouraged.	Plan must be jointly agreed upon.
Admiral (3/00)	Prior approval required.	Prior approval required if will exceed 2 hours.	Appropriate use of associates and paralegals encouraged.	Prior approval required.
Nationwide (5/00)	Prior approval required	Prior approval required if will exceed 1 hour.	Appropriate use of associates and paralegals encouraged.	Prior approval required
Safeco (8/00)	Prior approval required	Prior approval required if will exceed 2 hours.	Approval required to reassign case to others.	
Interstate Insurance (10/00)		No.	Delegate to subordinate when possible.	Prior approval required.
Amerisure (2001) (DRI)	Should consult	Should consult if will exceed 3 hours.	Appropriate use of associates and paralegals encouraged.	Should consult.
Great West (2001)	Prior approval required.	Prior approval required if will exceed 1 hour.	Paralegal tasks will be paid at paralegal rate	Prior approval required.
Coregis (9/01)	Prior approval required.	Prior approval required if will exceed 1 hour.	Use of paralegals required.	No.
Liberty Mutual (9/01) (DRI)	Should consult	Should consult if will exceed 3 hours.	Appropriate use of associates and paralegals encouraged.	Should consult.
Great American (11/01)	Prior approval required.	Prior approval required if will exceed 2 hours.	Paralegal tasks will be paid at paralegal rate	Prior approval required.
Zurich (10/01) (DRI)	Should consult	Should consult if will exceed 3 hours.	Appropriate use of associates and paralegals encouraged.	Should consult.

EXHIBIT 7: Before and After

The following chart contrasts key aspects of Guidelines that insurers followed prior to 2000 with those presently in effect.

Insurers Who Have Formally Adopted DRI Recommended Guidelines

LIBERTY MUTUAL	**Pre-2000 Guidelines**	**Current Guidelines**
Legal research.	Prior approval required if will exceed 2 hours.	Should consult if will exceed three hours.
Use of additional lawyers.	Prior approval required.	Should consult.
Motion practice.	Consultation required.	Should consult.
Case staffing.	"Paralegal work" will only be compensated at paralegal rates no matter who performs task.	Staffing should be appropriate to tasks but at discretion of counsel.
Inter-office conferences.	Not billable.	Billable by all attending.

ST. PAUL FIRE & MARINE	**Pre-2000 Guidelines**	**Current Guidelines**
Legal research.	Prior approval required if will exceed 2 hours.	Should consult if will exceed three hours.
Use of additional lawyers.	Prior approval required.	Should consult.
Motion practice.	Must discuss in advance with file handler.	Should consult.
Case staffing.	"Paralegal work" will only be compensated at paralegal rates no matter who performs task.	Staffing should be appropriate to tasks but at discretion of counsel.
Inter-office conferences.	Will only pay for senior attorney attending.	Billable by all attending.

TIG	**Pre-2000 Guidelines**	**Current Guidelines**
Legal research.	Prior approval required if will exceed 2 hours.	Should consult if will exceed three hours.
Use of additional lawyers.	Prior approval required.	Should consult.
Motion practice.	Prior approval required.	Should consult.
Case staffing.	"Paralegal work" will only be compensated at paralegal rates no matter who performs task.	Staffing should be appropriate to tasks but at discretion of counsel.

Inter-office conferences.	Not billable.	Billable by all attending.

ZURICH	**Pre-2000 Guidelines**	**Current Guidelines**
Legal research.	Prior approval required for any research.	Should consult if will exceed three hours.
Use of additional lawyers.	Prior approval required.	Should consult.
Motion practice.	Prior approval required.	Should consult.
Case staffing.	"Paralegal work" will only be compensated at paralegal rates no matter who performs task.	Staffing should be appropriate to tasks but at discretion of counsel.
Inter-office conferences.	Only senior attorney attending may bill.	Billable by all attending.

Other Insurers

GREAT AMERICAN	**Pre-2000 Guidelines**	**Current Guidelines**
Legal research.	Prior approval required if will exceed two hours.	Should consult if will exceed two hours.
Use of additional lawyers.	Prior approval required.	Should consult.
Motion practice.	Must discuss with file handler if to exceed 1 hour.	Should discuss if time will exceed two hours.
Case staffing.	"Paralegal work" will only be compensated at paralegal rates no matter who performs task.	Appropriate use of paralegals and lower-level staff is encouraged.
Inter-office conferences.	Will only pay for senior attorney attending.	Will only pay for senior attorney attending.

HANOVER	**Pre-2000 Guidelines**	**Current Guidelines**
Legal research.	Prior approval required if will exceed one hour.	Should discuss with claims handler.
Use of additional lawyers.	Prior approval required in writing.	Should discuss with claims handler.
Motion practice.	Must be discussed in advance with file handler.	Should discuss with claims handler.
Case staffing.	Appropriate use of paralegals and lower-level staff is encouraged.	Appropriate use of paralegals and lower-level staff is encouraged.
Inter-office conferences.	Will only pay for senior attorney attending.	Not billable.

HARTFORD	Pre-2000 Guidelines	Current Guidelines
Legal research.	Prior approval required before any research.	Advance approval required if will exceed three hours.
Use of additional lawyers.	Prior approval required.	Prior consultation and approval needed.
Motion practice.	Prior approval required.	Prior consultation and approval needed.
Case staffing.	"Paralegal work" will only be compensated at paralegal rates no matter who performs task.	Appropriate use of paralegals and lower-level staff is encouraged.
Inter-office conferences.	Will only pay for senior attorney attending.	Will pay for all attorneys if conference essential.

METROPOLITAN	Pre-2000 Guidelines	Current Guidelines
Legal research.	Prior approval required if will exceed two hours.	Should consult if will exceed two hours.
Use of additional lawyers.	Prior approval required.	Should consult.
Motion practice.	Must discuss with file handler if to exceed 1 hour.	Should discuss if time will exceed two hours.
Case staffing.	"Paralegal work" will only be compensated at paralegal rates no matter who performs task.	Appropriate use of paralegals and lower-level staff is encouraged.
Inter-office conferences.	Will only pay for senior attorney attending.	Will only pay for senior attorney attending.

EXHIBIT 8: Sample Comments From Survey Respondents

The following is a sample of response that were received in response to the survey that was e-mailed to insurers and law firms in December 2001 and January 2002. Other than the first quote, all of cited examples are from outside counsel:

- A review of the history of this problem suggests that billing guidelines, case management protocols and the like have helped to clarify expectations. However, they have done little to nothing to address the underlying dissimilar economic interests that fuel this debate. In my opinion, the insurance industry and the defense bar need to get together and discuss issues including profitability expectations for the firm, cost management expectations for the industry, and ethical considerations/implications. It is my experience that insurance defense practices are largely handicapped against other practice groups within the firm given the economic pressures that exist. [We have] begun these conversations with [our] Panel Firms to some success. I suggest that the DRI: (1) encourage its member firms and insurance companies to undertake these discussions, and (2) convene an appropriate forum to create a genesis for this conversation.

- Encourage a return to the prior policies of letting the lawyers handle the legal work without all the micro management by the insurance company bean counters. Eliminate the adversarial third-party billing review services.

- Encourage focus on quality, not cost.

- Insurers are routinely now negotiating nationwide or area wide contracts for all manner of ancillary services, especially regarding choice of experts and investigators. This seriously erodes our ability to effectively defend a case.

- Guidelines should be withdrawn in favor of a market-based system of checks and balances between insurers and lawyers.

- Continue to foster communication between attys and insurers. Other issues: include ethical considerations, billing policies - i.e. length of time to get bills paid once approved, streamlining and/or standardizing rate increases etc.

- The insurers that have adopted the guidelines should follow them. It has been our experience that lip service is being paid to the guidelines. Insurers are still using artificial and unexplained/inexplicable standards for bill review and writing off charges.

- Continue dialogue with the carriers over issues such as the impact of guidelines on defense counsel's ethical obligations to assure any "guidelines" are just that and not mandates which improperly intrude on the independent judgment of counsel.

- Encourage insurers to permit counsel to practice independently and measure success based on cost of defense and success of defense. Question insureds as to whether the insured believed he/she received good representation.

- Have all carriers adopt uniform guidelines and follow them.

- I would like to see DRI push the guidelines harder with more carriers. I would like to see the carriers our firm represents, who all have varying guidelines, adopt the DRI set, but most of them are not aware of the DRI guidelines until I mention them.

- Create a dispute resolution mechanism for resolving disputes and require insurers to respond to requests for reconsideration of a billing write off. We have disputed billing write offs with some carriers with no response.

- Continue to encourage discussions with claims professionals to defeat the expanding philosophy that defense attorneys are just one more enemy the insurance industry faces in its daily activities.

- Continue to encourage insurers to adopt a uniform set of guidelines. We are still seeing different guidelines for each insurer. Recommend that those who review bills for compliance with the guidelines have experience in litigation of claims.

- Educate trial lawyers on how to work smarter. Too often the complaints are that the carrier won't allow travel, won't allow lawyer time for activities, etc. Lets talk about how to work around those issues.

- Give more deference to lawyers need to fully represent insureds, especially in situations where there is a reservation of rights or question concerning indemnity. Also, give more leeway for researching of legal issues and need for conferencing.

- I think the statement that the guidelines seek to avoid interference with professional judgment is a good start, but the defense bar should firmly and unequivocally state that the lawyer, who owes a fiduciary duty to the client must ultimately decide.

- DRI has made a valiant attempt to correct a problem that each state has different legal rulings on. The solution is as simple as agreeing that the insured is the client and the attorney has to do what is in the best interest of the insured.

- Select committee of DRI and Carriers to resolve goals and remove roadblocks.

- Initiate a dialogue to find alternatives to hourly billing that could circumvent many of the "control" issues inherent in guidelines.

- Eliminate guidelines altogether. If you have counsel who aren't performing and/or over charge, get rid of them. Don't send your attorneys edicts and manuals telling them how to practice law.

- Continue a dialogue with insurance company representatives and with defense counsel to identify any problematic ethical issues and be part of the resolution process.

- The problem with the guidelines in a state like West Virginia is that the tripartite relationship has been recognized but insurers are being bound by the acts of counsel in the aggressive defense of an insured.

- Work to eliminate guidelines that interfere with insured's right to defense and counsel's duty to insured.

- Scrap the cost containment philosophy of the 90's and simply hire good attorneys to defend according to their fiduciary duties. If attorneys charge exorbitantly or unreasonably, they should be fired.

- Guidelines should be eliminated, as they have the effect of imposing unethical restraints upon defense counsel in their representation of their clients.

- Continue taking steps to improve efficiency, but still preserving defense counsel's independent judgment to defend the insured, which is the direction that the Guidelines are going.

- Ask the industry to look at the bills they are getting now. Are they really any more illustrative, or are they simply full of creative words by the same unscrupulous defense lawyers to hide expenses and work that the guidelines prohibit?

- Continue to urge carriers to let lawyers practice law without unreasonable interference and economic pressure based on control of the work.

- Streamline the guidelines giving more acknowledgment of the attorney client relationship and professionalism, rather that check lists that attempts to pigeon hole all cases with an across the board format.

- Educate insurers re our ethical and their legal responsibilities in providing an insured a zealous representation.

- Encourage insurers to allow defense counsel to be independent attorneys using their judgment on how to best defend their client and let the insurer be the one to decide how much to pay in settlement. Also, provide capable claims people with time to handle files.

- Continued dialogue with insurers to identify areas of concern from both sides - also, emphasize nature and difficulty of tripartite relationship, and that attorney's duty is to client, and not necessarily insurer.

- Promote ethics decisions in each state that clearly eliminate insurance company interference with the way their law firms practice under the rubric of "cost control."

- DRI simply failed to advance the lawyers' perspective. here in Michigan we regard the DRI effort as a failure.

- Insurers should remember that their first duty is to their insureds.

- Seminars, presentations, workshops involving counsel and insurers discussing, examining and refining guidelines.

- Do not allow insurers to change their substance and present them as DRI guidelines.

- The internal auditing of legal bills by insurers seems simply to a way around the outside auditing of bills by third -parties. Also the payment of firm bills many times takes months.

- The Guidelines should be reviewed by an independent panel consisting of individuals not associated with the insurance industry or defense firms. The Guidelines really do not adequately address the serious ethical issues raised.

- The guidelines should have a procedure (or better procedure) where defense counsel are paid within 45 days (at the latest) after bills are submitted. Audits should not delay payment.

- Continue to promote and facilitate insurer/attorney meetings and communications to air out these issues and understand each other's positions.

- Seminar for claims adjusters to explain the tripartite issues and the pressures upon defense counsel.

- Advertise the Guidelines more. Use a campaign to get more insurers to adopt them.

- Keep delivering the message to insurers about the importance of our ethical obligations and generally keep a high level of contact with insurers via the Insurance Roundtable and similar efforts.

- The insurers may adopt the guidelines, but won't follow them. For example, they will still continue to audit, and raise questions about bills that should not be questioned under the new guidelines.

- If the guidelines must be kept, get rid of the use of 3d party auditors - restricts the independent judgment of counsel.

- Better training of claims personnel on ethical guidelines that lawyers must observe; better training re need not to place defense counsel into middle of coverage dispute issues

- Withdraw them completely. Guidelines infringe on the duty an attorney has to represent his client, the insured.

- The Guidelines provide a frame work to legitimatize cost cutting without direction on the need to provide a fair defense.

- I think DRI should undertake a major effort with insurers to get them to sign on

DEFENSE RESEARCH INSTITUTE
RECOMMENDED CASE HANDLING GUIDELINES FOR INSURERS

I. PREFACE

Philosophy

[Insurer] expects to work with the Firm and the insured to achieve the best result for the insured in an efficient and cost-conscious manner consistent with the Firm's ethical obligations. Nothing contained herein is intended to nor shall restrict Counsel's independent exercise of professional judgment in rendering legal services for the Insured or otherwise interfere with any ethical directive governing the conduct of counsel.

II. CASE DEVELOPMENT

An effective and strategically sound legal defense is the responsibility of counsel and [insurer] and should be developed in a timely manner.

A. A goal is to identify, timely, those claims for which there is liability, and to discuss settlement opportunities early. The activities necessary to defend a given claim and bring it to appropriate resolution should be addressed early and the steps necessary to achieve that resolution should be jointly agreed upon as between the [Insurer] and defense counsel.

B. An early resolution of lawsuits is desirable and the use of alternative dispute resolution is encouraged.

C. If defense counsel is involved in settlement negotiations, settlement authority must be obtained from [Insurer] and requests for authority should be made timely.

III. STAFFING PHILOSOPHY

Your firm should designate one attorney to have primary responsibility for each case on which your services are requested. The case should be staffed economically and effectively. Obviously, a balance must be struck between the efficiency a more experienced lawyer at your firm brings to a given task and the advantages of having the task performed by a junior lawyer or a paralegal. Duplication of effort within the firm should be avoided.

To achieve the best efficiency and value, the role and responsibilities of the staff members should be clearly defined and appropriate to each individual's qualifications, level of experience and billing rate. Defense counsel should delegate work to subordinates wherever possible to achieve efficiency and cost-effectiveness without compromising quality.

IV. REPORTING REQUIREMENTS

A. Reports

Unless otherwise requested, reporting is required for three events: Acknowledgment, Initial Evaluation, and Significant Developments. Reports should be provided to both [insurer] and [insured].

1. Acknowledgment:

Upon receipt of a new case, counsel should send an acknowledgment letter regarding receipt of the file and designating the legal team assigned to the case. Any matters of immediate concern or information that may result in early resolution of the case should be addressed in the acknowledgment letter.

2. Initial Report:

Within _____ days after receipt of the assignment, counsel should send an initial report with the following information:

a. A summary of the allegations in the complaint, the factual basis for the litigation, a summary of the information developed during the preliminary investigation and a preliminary evaluation of liability and damages.

b. A Litigation Plan providing the following:

1. Identify each significant activity counsel proposes to initiate. (e.g., investigation, motion, discovery, legal research, etc.).

2. Identify discovery and motions which have been or are likely to be initiated by other parties.

3. Estimate the completion date for each activity.

4. State the estimated expenses of each activity.

c. Discussion of the potential for early disposition of the case by settlement, and recommendations with respect to arbitration, mediation or direct settlement negotiations.

d. Discussion of the potential success of dispositive motions prior to, or after, the commencement of discovery and when motions to dismiss or for summary judgment are appropriate.

e. An estimate of the probable trial date.

3. Significant Development Report:

Defense counsel should communicate and apprise of significant developments as soon as practical. This will include reports on summaries of depositions, and pre-trial reports, and if applicable:

a. Settlement options and/or dispositive motions.

b. Updated evaluation of the client's liability and damages.

c. An updated Litigation Plan.

d. Trial Report: If it is anticipated the case will proceed to trial, 30 days before the scheduled trial date, a detailed report should be submitted, detailing the issues and an analysis of same and any other information requested by [Insurer].

B. Documentation

Reporting shall not include copies of the following documents, unless specifically requested:

1. Research Memorandum, Motion Papers and Legal Briefs;

2. Deposition Transcripts;

3. Expert Reports;

4. Medical Reports.

Counsel should provide copies of all pleadings and amended pleadings filed by or against the party whom you are defending and Releases and Orders of Dismissal for Final Judgments. Counsel will consult with [Insurer] on the appropriate means of communication, whether by e-mail, fax or regular mail to avoid duplication.

Counsel should comply with all reasonable requests for information and documents, provided however, that any documents or information that are privileged or intended by the insured to be confidential shall not be disclosed, absent consent from the Insured.

C. Consultation

After submission of the Initial Report, counsel welcomes discussion with and input and comment from the insurer. Counsel and [Insurer] will endeavor to agree on the proposed activities outlined in the Litigation Plan. However, in the event of disagreement, the final decision will remain the independent professional judgment of defense counsel.

V. BILLING

A. Billing Procedure

1. Frequency of Billing

a. Bills should be issued at intervals to be agreed upon by counsel and [Insurer].

2. Billing Format

a. Heading. The first page of the bill must state: (a) the firm's IRS number; (b) the caption of the case; (c) the name of the insured; and (d) the claim number.

b. Body. The bill must be prepared with daily entries showing: (a) the date the work was performed; (b) the initials of the person providing the service; (c) a description of the work performed (single activities); and (d) the actual time in tenths of an hour.

c. End of Bill Summary. The bill must include: (a) the full name of each attorney/paralegal; (b) the status of each timekeeper (i.e., partner, associate, paralegal); (c) the hourly rate of each timekeeper; and (d) the total hours and total amount charged for each timekeeper during the billing period.

d. Task Codes. Task coding is not required, unless requested. Where requested, the uniform billing codes as currently endorsed by the American Bar Association shall be used.

B. Charges for Service

1. Time Charges. Actual Time in One-Tenth Increments. All charges for services by attorneys and paralegals must be recorded daily based upon their actual time in one-tenth hour increments.

2. Single Entry Timekeeping. Unless otherwise directed, the time for each activity should be separately stated. Grouping multiple activities under a single time charge greater than one-tenth of an hour ("block billing") is not acceptable, absent authorization from the [Insurer].

3. Information Descriptions of Services. Descriptions of services should inform of the nature, purpose or subject of the work performed, and the specific activity or project to which it relates.

4. Compensation. Counsel should consult with [Insurer] regarding any increase in the rate of compensation.

5. In-Firm Conferences. Where counsel consults with another attorney in the firm to obtain specific advise or counsel on substantive or procedural aspects of the case that result in a more effective defense, said reasonable and necessary conference time will be reimbursed, provided that sufficient detail of the subject of the communication is set forth to demonstrate its relevance and value.

6. Multiple Attendance. Counsel should consult with insurer where it is anticipated that more than one attorney's attendance is necessary at trial, court appearances, meetings, depositions, witness interviews, inspections and other functions.

7. Depositions. Counsel should consult with [Insurer] before initiating depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto and shall advise the [Insurer] of upcoming depositions initiated by other parties that Counsel plans to attend.

8. Legal Research. Counsel should consult with Insurer before undertaking a legal research project requiring over three hours of research. Copies of all research memoranda shall be provided to [Insurer] upon request.

9. Motions. Counsel should consult with [Insurer] before filing any motions not previously identified and approved in the initial Litigation Plan or supplement thereto.

10. Revising Standardized Forms/Pleadings. Only the actual time spent in personalizing standardized pleadings, documents, or discovery responses or requests to the case at hand should be billed, rather than the time originally spent drafting standard language.

C. Disbursement

1. Internal Expenses. [Insurer] shall advise counsel of its guidelines as to reimbursement of internal expenses.

2. External Expenses. Charges for service by outside vendors will be reimbursed at their actual cost. Expenses over $_____ may be forwarded to [Insurer] for payment. Disbursements should be itemized on the law firm's statement with the following information, unless back-up documentation is provided: (a) the name of the vendor; (b) the date incurred; and (c) a specific description of the expense. Where back-up documentation is provided, the law firm statement need only set forth a description of the expense and amount incurred.

3. Travel Expenses. Counsel should consult with [Insurer] prior to incurring travel expenses. [Insurer] will reimburse defense counsel for reasonable travel expenses. All expenditures of $25 or more must be supported with receipts attached to the law firm's statement.

4. Professional Services. Counsel should consult with [Insurer] prior to incurring expenses for experts, consultants, investigators, temporary attorneys or outside paralegals, or other professional services.

5. Secretarial and clerical activities. Secretarial and clerical work is not billable to [Insurer]. As examples and not as a complete list, secretarial and clerical work includes receipt and distribution of mail, new file set up, maintenance of office and attorney calendars, transcribing, copying, posting, faxing, e-mailing, inserting documents into and retrieving documents from the file, maintaining order in the file, stamping documents, tabbing sub-files and assembling materials.

VI. BILL AND FILE REVIEW

[Insurer] reserves the right to review all charges for services and disbursements pertaining to litigation, including without limitation all charges paid by the insured with respect to such litigation, whether pursuant to self-insured retentions or deductibles under [Insurer's] insurance policies or otherwise. [Insurer] reserves the right to conduct audits and to review the defense file and/or defense bills, consistent with the defense attorney's ethical obligations, and in a manner that will not compromise the attorney-client or work product protection accorded material in the file or communications by and between counsel, the client and [Insurer] or otherwise interfere with any ethical directive governing the conduct of counsel. Counsel agrees to comply with all reasonable requests for information and documents, provided that such documents or information are not privileged or intended by the insured to be confidential. In such instance, the [Insurer] must obtain the consent of the Insured. [Insurer] fully reserves all rights to decline to pay or to seek reductions and/or refunds with respect to charges that fail to comply with the requirements set forth herein, and which are not fully explained or documented by the firm after reasonable inquiry. The [Insurer] shall allow the law firm to appeal any declination of payment by [Insurer]. [Insurer] agrees to pay the undisputed portion of bills received from Counsel Counsel within _____days.

This is an example of case handling guidelines which promotes uniformity in reporting and billing and effective and efficient case management, consistent with the defense attorney's professional responsibilities. Nothing contained herein constitutes or shall be construed as a standard of care.

DEFENSE RESEARCH INSTITUTE
RECOMMENDED CASE HANDLING GUIDELINES FOR LAW FIRMS

I. PREFACE

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B. An early resolution of lawsuits is generally desirable and the use of alternative dispute resolution is encouraged.

C. If counsel is requested to be involved in settlement negotiations, settlement authority must be obtained from insurer and requests for authority should be made timely.

III. STAFFING PHILOSOPHY

[The firm] will designate one attorney to have primary responsibility for each case on which its services are requested. The case should be staffed economically and effectively. Obviously, a balance must be struck between the efficiency a more experienced lawyer brings to a given task and the advantages of having the task performed by a junior lawyer or a paralegal. Duplication of effort within the firm should be avoided.

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3. Estimate the completion date for each activity.

4. State the estimated expenses of each activity.

c. Discussion of the potential for early disposition of the case by settlement, and recommendations with respect to arbitration, mediation or direct settlement negotiations.

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e. An estimate of the probable trial date.

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Counsel should communicate and apprise of significant developments as soon as practical. This will include reports on summaries of depositions, and pre-trial reports, and if applicable:

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b. Updated evaluation of the client's liability and damages.

c. An updated Litigation Plan.

d. Trial Report: If it is anticipated the case will proceed to trial, 30 days before the scheduled trial date, a detailed report should be submitted, detailing the issues and an analysis of same and any other information requested by the insurer.

B. Documentation

Reporting shall not include copies of the following documents, unless specifically requested:

1. Research Memorandum, Motion Papers and Legal Briefs;

2. Deposition Transcripts;

3. Expert Reports;

4. Medical Reports.

Counsel should provide copies of all pleadings filed by or against the insured client along with releases, orders of dismissal and final judgments. Counsel should consult with the insurer on the appropriate means of communication, whether by e-mail, fax or regular mail to avoid duplication.

Counsel should comply with all reasonable requests for information and documents, provided however, that any documents or information that are privileged or intended by the insured to be confidential shall not be disclosed, absent consent from the insured client.

C. Consultation

After submission of the Initial Report, counsel welcomes discussion with and input and comment from the insurer. Counsel and the insurer will endeavor to agree on the proposed activities outlined in the Litigation Plan, but in no event shall the Litigation Plan interfere with the independent professional judgment of defense counsel.

V. BILLING

A. Billing Procedure

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    a. Bills should be issued at intervals to be agreed upon by counsel and the insurer.

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    a. Heading. The first page of the bill must state: (a) the firm's IRS number; (b) the caption of the case; (c) the name of the insured; and (d) the claim number.

    b. Body. The bill must be prepared with daily entries showing: (a) the date the work was performed; (b) the initials of the person providing the service; (c) a description of the work performed (single activities); and (d) the actual time in tenths of an hour.

    c. End of Bill Summary. The bill must include: (a) the full name of each attorney/paralegal; (b) the status of each timekeeper (i.e., partner, associate, paralegal); (c) the hourly rate of each timekeeper; and (d) the total hours and total amount charged for each timekeeper during the billing period.

    d. Task Codes. Task coding is not required, unless requested. Where requested, the uniform billing codes as currently endorsed by the American Bar Association shall be used.

B. Charges for Service

1. Time Charges. All charges for services by attorneys and paralegals must be recorded daily based upon their actual time in one-tenth hour increments.

2. Single Entry Timekeeping. Unless otherwise directed, the time for each activity should be separately stated. Grouping multiple activities under a single time charge greater than one-tenth of an hour ("block billing") should not be employed, absent authorization from the insurer.

3. Information Descriptions of Services. Descriptions of services should inform of the nature, purpose or subject of the work performed, and the specific activity or project to which it relates.

4. Compensation. Counsel should consult with insurer regarding any increase in the rate of compensation.

5. In-Firm Conferences. Where counsel consults with another attorney in the firm to obtain specific advise or counsel on substantive or procedural aspects of the case that result in a more effective defense, said reasonable and necessary conference time will be reimbursed, provided that sufficient detail of the subject of the communication is set forth to demonstrate its relevance and value.

6. Multiple Attendance. Unless otherwise agreed, only one attorney should attend trial, court appearances, meetings, depositions, witness interviews, inspections and other functions.

7. Depositions. Counsel should consult with [Insurer] before initiating depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto and shall advise the [Insurer] of upcoming depositions initiated by other parties that Counsel plans to attend.

8. Legal Research. Counsel should consult with insurer before undertaking a legal research project requiring over three hours of research. Copies of all research memoranda shall be provided to insurer upon request.

9. Motions. Counsel should consult with insurer before filing any motions not previously identified and approved in the initial Litigation Plan or supplement thereto.

10. Revising Standardized Forms/Pleadings. Only the actual time spent in personalizing standardized pleadings, documents, or discovery responses or requests to the case at hand should be billed, rather than the time originally spent drafting standard language.

C. Disbursement

1. Internal Expenses. Counsel should request insurer to advise counsel of its guidelines as to reimbursement of internal expenses.

2. External Expenses. Charges for service by outside vendors will be reimbursed at their actual cost. Expenses over $_____ may be forwarded to the insurer for payment. Disbursements should be itemized on the law firm's statement with the following information, unless back-up documentation is provided: (a) the name of the vendor; (b) the date incurred; and (c) a specific description of the expense. Where back-up documentation is provided, the law firm statement need only set forth a description of the expense and amount incurred.

3. Travel Expenses. Counsel should consult with the insurer prior to incurring travel expenses. Counsel should secure agreement that insurer will reimburse defense

counsel for reasonable travel expenses. All expenditures of $25 or more must be supported with receipts attached to the law firm's statement.

4. Professional Services. Counsel should consult with the insurer prior to incurring expenses for experts, consultants, investigators, temporary attorneys or outside paralegals, or other professional services.

5. Secretarial and clerical activities. Secretarial and clerical work are not billable to the insurer. As examples and not as a complete list, secretarial and clerical work includes receipt and distribution of mail, new file set up, maintenance of office and attorney calendars, transcribing, copying, posting, faxing, e-mailing, inserting documents into and retrieving documents from the file, maintaining order in the file, stamping documents, tabbing sub-files and assembling materials.

VI. BILL AND FILE REVIEW

[The Firm] recognizes that an insurer has the right to review all legal bills for services and disbursements pertaining to the matter for which the firm has been engaged by the insurer, and, further, that an insurer has the right to review counsel's file. However, such bill and file review, including the review of documents, must be done in a manner that does not compromise the attorney-client privilege, reveal client confidences or diminish the protection afforded counsel's work product or otherwise interfere with any ethical directive governing the conduct of counsel unless appropriate written consent is first obtained from the insured. If the insurer declines to pay or seeks reductions and/or refunds with respect to charges made by [the Firm], full explanation for such action shall be given by the insurer, and [the Firm] shall be given the opportunity to explain the disputed items and appeal such declinations to a representative of claim management of the insurer. It is expected that the insurer will pay the undisputed portion of any legal bill received from [the Firm] within _____ days.

This is an example of case handling guidelines which promotes effective and efficient case management, consistent with the defense attorney's professional responsibilities. These are designed for use by a law firm's attorneys in their representation of an insured client, in the absence of other controlling guidelines. Nothing contained herein constitutes or shall be construed as a standard of care.

Diversity in DRI: Statement of Principle

DRI is the international membership organization of all lawyers involved in the defense of civil litigation. As such, DRI wishes to express its strong commitment to the goal of diversity in its membership. Our member attorneys conduct business throughout the United States and around the world, and DRI values highly the perspectives and varied experiences which are found only in a diverse membership. The promotion and retention of a diverse membership is essential to the success of our organization as a whole as well as our respective professional pursuits. Diversity brings to our organization a broader and richer environment which produces creative thinking and solutions. As such, DRI embraces and encourages diversity in all aspects of its activities. DRI is committed to creating and maintaining a culture that supports and promotes diversity in its organization.

BRAIN SCANNING:
DEFENSE OF A BRAIN INJURY CASE

Lyle W. Ditmars, Esq.
Peters Law Firm, P.C.
233 Pearl Street
Council Bluffs, IA 51503
(712) 328-3157

INTRODUCTION

In cases where mild traumatic brain injury is alleged, the testimony of neurologists, internists, psychiatrists and neuropsychologists have been utilized. Some neuroradiologists also claim that Positron Emission Tomography (PET) can be used to provide objective evidence of brain injury. The purpose of this outline is to give an overview of the subject and one attorney's experience in a case where such evidence was presented.

THE CONCEPT

There are a plethora of articles which can be found on the internet on the subject of PET. A couple of basic explanations are set out below. According to information prepared by Insight Health Services Corp., and appearing on the Sisters of Charity Health System website, Positron Emission Tomography (PET) is:

> a technique for imaging metabolic activity in the human subject. It is different from CT (x-ray computed tomography) and MRI (magnetic resonance imaging) which image anatomy. PET looks at function or physiology.

At the Integral PET Associates website, this explanation is given:

> Radiopharmaceuticals produced in a cyclotron, such as fluor-deoxyglucose, become signal-emitting tracers when injected into the patient. As these tracers move through the body and collect the various organs targeted for examination, a scanner records the signals these tracers produce. A PET scan can easily detect cancer cells, for example, because they are more concentrated and use more glucose than neighboring cells. A computer then reassembles the signals into images that display the distribution of metabolic activity as an anatomic image.

THE LAW

There are two cases dealing with the admissibility of PET scans. The first is *Hose v. Chicago Northwestern Transportation Co.*, 70 F.3d 968 (8th Cir. 1995). Delmas R. Hose (Hose), the plaintiff, files a FELA claim and introduced evidence showing Defendant Chicago Northwestern Transportation Co. (Chicago) did not provide adequate ventilation, warnings, monitoring or safety training in relation to manganese hazards in the work place." His claim was that as a result of these failures, he suffered from manganese encephalopathy . This diagnosis was made by Dr. Carol Angle, the director of clinical toxicology at the University of Nebraska. A neurologist treating the plaintiff, Jan Golnick, M.D., later concurred in the diagnosis. He ordered a PET scan which was done by Dr. Naresh Gupta, "to aid his ability to make a diagnosis."

Defendant Chicago sought to exclude testimony concerning the PET scan through, first, a Motion in Limine (on the first day of trial) and then through an objection which was timely. The district court, however, admitted Dr. Gupta's testimony because it was relevant in terms of excluding other diagnoses of Hose's injuries and was limited to showing consistency with, not diagnostic proof of, manganese encephalopathy. Dr. Gupta further testified to the limited scientific experience and literature about using PET scans in manganese cases. The Court found:

> [9][10] We find the district court did not abuse its direction by allowing Dr. Gupta's testimony based on the PET scan. Dr. Gupta's testimony clearly showed the limited use of the PET scan, but that use was nonetheless relevant. In determining the cause of a person's injuries, it is relevant that other possible sources of his injuries, argued for by the defense counsel, have been ruled out by his treating physicians. Indeed ruling out alternative explanations for injuries is a valid medical method. *See McCullock v. H.B. Fuller, Inc.,* 61 F.3d 1038, 1043-44 (2d Cir. 1995). There is also no question that the PET scan is scientifically reliable for measuring brain function. The fact that Hose's treating physician ordered the PET scan prior to the initiation of litigation is another important indication that this

> technique is scientifically valid. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317 (9th Cir.) (expert testimony based on "legitimate, preexisting research unrelated to the litigation provides the most persuasive basis" for ensuring scientific validity of expert testimony), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995).

The second case is *Penney v. Praxair, Inc.*, 116 F.3d 330 (8th Cir. 1997). The decision insofar as the PET scan issue is quite concise. As noted at page 332:

> Leonard saw several physicians for relief of his ailments. After both an MRI and a CT scan detected no brain injury, [FN3] Leonard was referred to Dr. Wu, the Director of the Brain Imaging Center at the University of California, Irvine. Dr. Wu performed a Positron Emission Tomography (PET) scan of Leonard's brain. A PET scan measures glucose intake in the different sections of the brain; i.e., it measures brain function. *Hose v. Chicago Northwestern Transp. Co.,* 70 F.3d 968, 973 (8th Cir.1995). A person's PET scan is then compared with PET scans from a control group to detect abnormalities in the brain. The control group in Leonard's case consisted of thirty-one persons, with ages ranging from eighteen to seventy. Dr. Wu testified, in a video deposition, that the results of Leonard's PET scan showed brain abnormalities which were consistent with a traumatic brain injury. Plaintiffs intended to use this testimony to prove the existence of a closed head injury.
> FN3. According to the plaintiffs' submissions, closed head injuries are subtle tears in the brain tissue. Because the MRI and CT scans measure structural, not functional changes in the brain, closed head injuries are oftentimes not visible on those tests.
>
> Praxair filed a Motion in Limine to exclude the PET scan evidence. It argued that it was not reliable enough to withstand analysis under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597, 113 S.Ct. 2786, 2798-99, 125 L.Ed.2d 469 (1993) and that the evidence would not be helpful to the jury. The district court excluded the PET scan results, reasoning that the evidence would not be helpful to the jury in deciding the issues when compared with the likelihood that the jury would misapply the evidence.

On appeal, the Court ruled as follows:

> [8][9]The plaintiffs next contend that the district court erred in

excluding the evidence of Leonard's PET scan. Questions regarding the admission of expert evidence are committed to the sound discretion of the district court and will only be reversed upon a finding of an abuse of that discretion. *Westcott v. Crinklaw,* 68 F.3d 1073, 1075 (8th Cir.1995). Applying that standard, we find no abuse of discretion in the district court's decision to exclude the PET scan evidence in this case.

General acceptance in the scientific community is no longer a precondition to the admission of scientific evidence. *Daubert,* 509 U.S. at 597, 113 S.Ct. at 2798-99. However, a trial judge must still ensure that "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 113 S.Ct. at 2796. In this case, plaintiffs failed to establish a sufficient foundation to support the admission of the PET scan evidence.

[10]According to the parties' submissions, PET scan results can be affected by a person's age, medical history and medications. Because Leonard was sixty-six years old at the time of the scan, it is not clear from the record exactly how accurate a comparison this control group could provide. *334 Furthermore, although persons are normally instructed to remain off medication for seven days prior to the administering of a PET scan, Leonard submitted to the test while still taking his regular medications for his heart condition and other maladies. None of the other control-group subjects was on medication at the time of their PET scans. It is not clear whether these factors had any effect on the test results. However, it was plaintiffs' burden to establish a reliable foundation for the PET scan readings. On these facts, plaintiffs did not make such a demonstration and it was within the district court's discretion to exclude the evidence. [FN5]

FN5. As the plaintiffs point out, we have previously upheld the admission of PET scan evidence. *See, e.g., Hose,* 70 F.3d at 973. However, because the admission of scientific evidence in one case does not automatically render that evidence admissible in another case, we assume that *Hose* did not present the same evidentiary problems as does this case.

MEDICAL LITERATURE

The medical literature on PET and its uses number into the thousands. Even articles on the

pos and cons of its use in the diagnosis of mild traumatic back injury are quite numerous and are, quite often, so technical as to be useless to the practitioner. However, one article is extremely helpful in that its authors apparently recognized the potential for abuse in a "forensic" context. This article entitled "Ethical Clinical Practice of Functional Brain Imaging," which appeared in the *Journal of Nuclear Medicine*, Vol. 37 No.7, July 1996, is attached, with permission, hereto in its entirety.

Of great interest to the practitioner defending alleged mild traumatic head brain injury cases, is the cautionary language which appears under the heading of "Forensics":

> When there are few controlled experimental studies and no available sensitivity and specificity rates, the forensic application of nonreplicated, unpublished or anecdotal SPECT or PET observations is inappropriate and has ominous implications.

Also of interest are the "Operational Procedures" suggested by the articles authors as they may provide fertile ground for cross examination.

A CASE STUDY

The plaintiff, a 62 year old man, was involved in an accident which involved a significant impact. There was a claim of low back and cervical soft tissue injuries, as well as a shoulder injury. Treatment was provided by an internist, a chiropractor, and an orthopod. Due to his complaints of forgetfulness and moodiness, his attorney referred him to a psychiatrist who despite admittedly normal results from testing by the psychiatrist, referred him to a neuroradiologist for a PET scan. A copy of the PET scan report is attached. Based upon the complaints and the PET scan, the psychiatrist gave plaintiff a 35% permanent partial disability of the whole person.

At trial, the neuroradiologist was called and testified, inter alia, on direct examination as follows:

1. Certain areas of the brain control certain functions.
2. The image of the brain scan projected on the computer screen is of a much higher quality than the photographic images generated to maintain medical records.
3. Each institution that has a brain PET program has established its own data base which is "commonly verified" with other normal data bases.
4. There are 3 facilities located in the U.S. which do PET scans for brain injury: one in Omaha, one in California, and one in New York.
5. There are no charts or graphs used to categorize the type of brain injury a person may have, but this one is significant.
6. PET can be used not only to determine brain injury, but overall function as well.
7. Unconsciousness is "not an important criteria at all" in determining whether a brain injury has been sustained.
8. Some drugs can actually make a PET scan appear more normal than it is.
9. Brain injuries can get worse with time due to "gliosis" (the replacement of violated brain tissue with scar tissue).
10. His control group was "created" six years previous and he had no idea as to the number of subjects or their breakdown by age or sex, but they were all normal and it must have been done properly because he hired a statistician to help set up the control group.
11. His cross checking with other institutions was informal and none of them "published normals."
12. Scan interpretation is not subjective.

13. The interpretation of a scan does not vary from individual to individual and any person who knew “his” range of normal would come to the exact same conclusion.

14. His range of normal was the same as all others, nothing special about them. He doesn't have a copy of the others, he got them through discussion.

ALEGENT HEALTH SYSTEMS
BERGAN MERCY MEDICAL CENTER OUTPT

PATIENT NAME:		UNIT #: 633752
PATIENT STATUS	OA	SEX: M
WARD/SERVICE:	NUC-	DOB: 27-Mar-1936
ROOM NO:	NUC	AGE: 62
DATE OF EXAM:	03-Feb-1999	
EXAM #-DATE:	162A-020399	ACCT NO:

ORDERING DOCTOR:

REASON FOR EXAM: POST CONCUSSION

Exam; NM BRAIN PET SCAN

POSITIONVEMISSION TOMOGRAPHY FOR BRAIN METABOLISM:
RELEVANT CLINICAL HISTORY AND MEDICATION HISTORY WERE REVIEWED .

THE RADIOPHARMACEUTICAL WAS ADMINISTERED IN A QUIET ENVIRONMENT WITH SUBDUED

LIGHTING.

FOLLOWING THE INTRAVENOUS ADMINISTRATION OF 407 MBq OF FLUORINE-18 DEOXYGLUCOSE, TOMOGRAPHIC IMAGES OF THE BRAIN WERE OBTAINED AND RECONSTRUCTED IN THE CORONAL, TRANSAXIAL, AND SAGITTAL PLANES.

CORTICAL METABOLISM IS MARKEDLY HETEROGENEOUS .

METABOLISM TO THE FRONTAL LOBES OF THE BRAIN IS DIMINISHED AS DETERMINED AS DETERMINED BY COMPARISON WITH A PARTIALLY STIMULATED PRIMARY VISUAL CORTEX.

THERE IS ASYMMETRICAL CORTICAL METABOLISM WITH RELATIVELY DIMINISHED CORTICAL METABOLISM IN THE RIGHT HEMISPHERE WITH COMPARED WITH THE LEFT.

IMPRESSION: GLOBAL ABNORMALITIES OF BRAIN METABOLISM AS DESCRIBED ABOVE COMMONLY ASSOCIATED WITH PORT TRAUMATIC ENCEPHALOPATHY.

signed: M.D.

TRANSCRIBE DATE: 09-Feb-1999

EXIT RM TIME: 12:00

THE EFFECTIVE DEFENSE OF DAMAGES: SYMPATHY AND GORE

David E. Dukes
Nelson Mullins Riley & Scarborough, L.L.P.
1330 Lady Street, 3rd Floor
Columbia, South Carolina 29201
(803) 733-9451
ded@nmrs.com

THE EFFECTIVE DEFENSE OF DAMAGES: SYMPATHY AND GORE

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Iowa Defense Counsel Association

1965 through 2001 Annual Meetings

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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
431 East Locust Street, Suite 300
Des Moines, IA 50309
515/244-2847

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