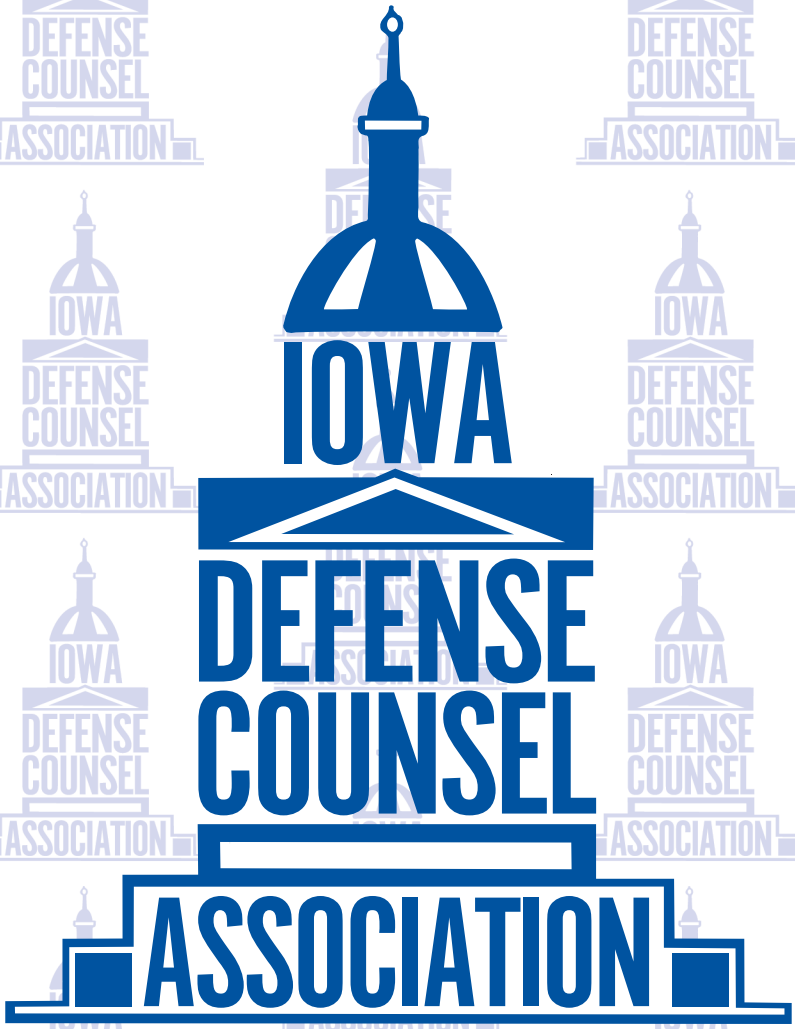
VOLUME I



2005
Annual Meeting & Seminar
September 21-23, 2005

Hotel Fort Des Moines
1000 Walnut Street
Des Moines, IA 50309

2005 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR SCHEDULE

Wednesday, September 21, 2005

10:00 a.m. **Registration Open/Exhibitor Set-up**

11:00 a.m. **Exhibits Open**

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

12:50 - 1:00 p.m. **Welcome and Opening Remarks**
Sharon Greer, IDCA President

1:00 - 1:30 p.m. **Conspiracy, Trade Secrets, and Intentional Interference - New Developments in Business Torts**
Robert Houghton
Shuttleworth & Ingersoll, P.L.C.
Cedar Rapids, IA.

1:30 - 2:30 p.m. **The Future is Now - Practical Tips for Dealing with E-discovery**
Lori Ann Wagner
Faegre & Benson, LLP, Minneapolis, MN

2:30 - 3:00 p.m. **Defending the Latest Plaintiff's Tactic – Deposition Notices of the CEO and Other Apex Witnesses.**
Jeff W. Wright
Heidman, Redmond, Fredregill, Patterson, Plaza, Dkystra & Prahl, L.L.P.
Sioux City, IA.

3:00 - 3:15 p.m. **Break/Exhibits Open**

3:15 - 4:00 p.m. **Appellate Review I (Employment, Commercial, Constitutional, Contracts, Damages & Government)**
Hannah Rogers
Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, IA.

4:00 – 4:30 p.m. **Punitive Damages Since Campbell**
Tom Waterman
Lane & Waterman LLP, Davenport, IA.

4:30 - 5:00 p.m. **Effective Appellate Advocacy - A View from the Iowa Court of Appeals**
Honorable Robert Mahan
Judge, Iowa Court of Appeals, Ames, IA.

5:15 - 8:00 p.m. **Welcome Reception Hosted by the Young Lawyer's Committee**
Heavy hors d'oeuvres and beverages. Bring your appetite! Featuring the music of Lance Eaton. Sponsored by the exhibitors: Blackbox Visual Design, Capital Planning, Inc., IDEX, Inc., Minnesota Lawyers Mutual Ins., Co., Packer Engineering, Skogen Engineering Group, Inc. & Sweeney Reporting

Thursday, September 22, 2005

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

8:00 - 8:30 a.m. **Continental Breakfast/Exhibits Open**

8:30 - 9:15 a.m. **Appellate Case Review II (Civil Procedure, Court Jurisdiction & Trial, Evidence, Insurance, Judgment, Limitation of Action)**
William Miller
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, IA.

9:15 - 9:30 a.m. **The New & Improved IDCA Website**
Brent Ruther
Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C.
Burlington, IA.
Julie Garrison, Associate Director
Iowa Defense Counsel Association
Des Moines, IA.

9:30 - 10:00 a.m. **Class Action Fairness Act of 2005 and Other Developments in Class Action Litigation**
Joseph Gunderson
Gunderson, Sharp & Walke, L.L.P.
Des Moines, IA.

10:00 - 10:15 a.m. **Break/Exhibits Open**

10:15 - 10:30 a.m. **Legislative Update: Issues Impacting the IDCA**
Robert M. Kreamer
IDCA Executive Director & Lobbyist
Des Moines, IA.

10:30 - 11:00 a.m. **Recent Developments in Medical Malpractice Litigation**
Christine Conover
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, IA

11:00 - 12:00 p.m. **The Practical Impact of the New Model Rules**
Honorable David Wiggins, Iowa Supreme Court
Des Moines, IA.
Paul Weick, Commission of Continuing Education
Des Moines, IA.
Charles Harrington, Board of Professional Ethics & Conduct, Des Moines, IA.
Iris Muchmore, Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, IA.

12:00 - 12:20 p.m. **Luncheon/Exhibits Open**

12:20 - 12:30 p.m. **Annual Meeting of IDCA**

12:30 - 1:00 p.m. **Report of the United States District Court**
Honorable Mark Bennett
Chief Judge, United States District Court for the Northern District of Iowa, Sioux City, IA.

1:00 - 1:45 p.m. **Iowa Products Liability: Some Questions Answered and Some Answers Questioned**
Kevin Reynolds
Whitfield & Eddy, Des Moines, IA.

1:45 - 2:30 p.m. **Appellate Case Review III (Negligence, Torts & Indemnity)**
Troy A. Howell
Lane & Waterman LLP, Davenport, IA.

2:30 - 2:45 p.m. **Break/Exhibits Open**

2:45 - 3:30 p.m. **Apportionment, Successive Injuries and Other Emerging Issues in Workers' Compensation**
Coreen Sweeney
Nyemaster, Goode, West, Hansell & O'Brien, P.C.
Des Moines, IA.

3:30 - 4:30 p.m. **Cutting Edge Trial Presentation Technology**
Rick Kraemer
Executive Presentations, Inc., Los Angeles, CA.

4:30 - 5:00 p.m. **Committee Meetings**

4:30 p.m. **Hospitality Room Open**

6:30 - 9:30 p.m. **Reception/Dinner/Banquet - Embassy Club (801 Grand, 40th Floor, Des Moines, IA)**

Friday, September 23, 2005

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

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

8:30 - 9:15 a.m. **Hot Issues and New Developments in Employment Law**
Martha Shaff
Betty Neuman & McMahon LLP, Davenport, IA.

9:15 - 10:00 a.m. **Spoliation - What Every Defense Lawyer Needs to Know**
Paul Burns
Bradley & Riley, P.C., Cedar Rapids, IA.

10:00 - 10:15 a.m. **DRI and the Benefit to the Defense Bar**
J. Michael Weston, Moyer & Bergman
Cedar Rapids, IA.
Dan McCune, DRI Mid-Region Representative
Denver, CO.

10:15 - 10:30 a.m. **Break/Exhibits Open**

10:30 - 11:30 a.m. **Ethics in the Courtroom**
Skip Ames
Hand Arendall, L.L.C., Mobile, AL.

11:30 - 12:00 p.m. **Recent Developments in Attorney Client Privilege and Attorney Work Product**
Honorable Thomas Shields
Magistrate Judge, United States District Court for the Northern District of Iowa, Davenport, IA.

12:00 - 12:30 p.m. **Luncheon/Exhibits Open**

1:00 p.m. **Exhibitor Tear Down**

12:30 - 1:00 p.m. **Report from the Iowa Supreme Court**
Honorable Louis A. Lavorato
Iowa Supreme Court, Des Moines, IA

1:00 - 3:00 p.m. **Bringing Persuasion & Understanding to the Damages Case**
J. Ric Gass
Gass, Weber, Mullins, L.L.C., Milwaukee, WI.

3:00 - 3:15 p.m. **Closing Remarks/Adjourn**

OFFICERS AND DIRECTORS
2004 - 2005

PRESIDENT	PRESIDENT-ELECT	PAST PRESIDENT
Sharon Greer PO Box 496 Marshalltown, IA 50158	**Michael W. Thrall** 700 Walnut Street, Suite 1600 Des Moines, IA 50309	**Richard G. Santi** 100 Court Avenue, Suite 600 Des Moines, IA 50309

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Mark S. Brownlee PO Box 957 Fort Dodge, IA 50501	**Noel K. McKibbin** 5400 University Avenue West Des Moines, IA 50266

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DRI State Representative
J. Michael Weston
PO Box 1943
Cedar Rapids, IA 52101

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*Albert D. Vasey (Hon.), 1983
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Mike McCrary, Treasurer

William J. Hancock

* Edward J. Kelly

*Paul D. Wilson

* Deceased

ANNUAL MEETING PROGRAM CHAIR

Michael W. Thrall

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association from September 2004 through August 2005.

Scott M. Brennan, Des Moines, IA

Corinne Butkowski, Cedar Rapids, IA

Troy A. Howell, Davenport, IA

Michael Paul Jurgens, West Des Moines, IA

Sasha L. Kirk, Cedar Rapids, IA

Gretchen E. Kraemer, Des Moines, IA

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Karin A. Stramel, Des Moines, IA

Matthew E. Thurber, Omaha, NE

Joel J. Yunek, Mason City, IA

IOWA DEFENSE COUNSEL ASSOCIATION
STANDING COMMITTEES 2005

COMMITTEE NAME	CHAIRPERSON
AMICUS CURIAE Monitors cases pending in the Iowa Supreme Court and identifies significant cases warranting amicus curiae participation by IDCA. Prepares or supervises preparation of amicus appellate briefs.	Megan M. Antenucci Whitfield & Eddy PLC 317 Sixth Avenue Suite 1200 Des Moines, IA 50309-4195 Phone: (515) 288-6041 Fax: (515) 246-1474 E-mail: antenucci@whitfieldlaw.com
BOARD OF EDITORS – DEFENSE UPDATE Provide direction and leadership to editorial committee, creating time lines and following up to make sure editors are on time for publication of the quarterly membership newsletter *The Defense Update*.	Michael W. Ellwanger Rawlings Nieland Probasco Killinger Ellwanger Jacobs & Mohrhauser LLP 522 Fourth Street, Suite 300 Sioux City, IA 51101 Phone: (712) 277-2373 Fax: (712) 277-3304 E-mail: mellwanger@rawlingsnieland.com
CLE COMMITTEE Organizes annual meeting events and CLE programs.	Michael W. Thrall Nyemaster Goode Voigts West Hansell & O'Brien PC 700 Walnut Street, Suite 1600 Des Moines, IA 50309-3899 Phone: (515) 283-3189 Fax: (515) 283-8045 E-mail: mwt@nyemaster.com
CLIENT RELATIONS Liaison role with constituent client groups such as insurance companies and businesses. Acts as resource for maintaining and improving satisfactory relations between defense attorneys and clients.	Les V. Reddick Kane Norby & Reddick PC 2100 Asbury Road, Suite 2 Dubuque, IA 52001 Phone: (563) 582-7980 Fax: (563) 582-5312 E-mail: lreddick@kanenorbylaw.com Co-Chair Lyle W. Ditmars Peters Law Firm PC 233 Pearl Street PO Box 1078 Council Bluffs, IA 51502-1078 Phone: (712) 328-3157 Fax: (712) 388-0483 E-mail: LyleDitmars@hotmail.com
COMMERCIAL LITIGATION Monitor current developments in the area of commercial litigation and acts as resource for the Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues.	Daniel B. Shuck Heidman Redmond Fredregill Patterson Plaza Dykstra & Prahl LLP 701 Pierce Street, Suite 200 PO Box 3086 Sioux City, IA 51102-3086 Phone: (712) 255-8838 Fax: (712) 258-6714 E-mail: Dan.Shuck@heidmanlaw.com

COMMITTEE NAME	CHAIRPERSON
EMPLOYMENT LAW Monitor current developments in the area of employment law; act as a resource for the Board of Directors and membership on employment law issues. Advise and assist in newsletter and in amicus curiae participation on employment law issues.	Deborah M. Tharnish Davis Brown Koehn Shors & Roberts PC The Financial Center, Suite 2500 666 Walnut Street Des Moines, IA 50309-3993 Phone: (515) 288-2500 Fax: (515) 243-0654 E-mail: dmt@lawiowa.com
JURY INSTRUCTIONS Monitor activities of 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.	Stephen J. Powell Swisher & Cohrt PLC 528 West 4th Street PO Box 1200 Waterloo, IA 50704-1200 Phone: (319) 232-6555 Fax: (319) 232-4835 E-mail: sjp@s-c-law.com
LEGISLATIVE Monitor legislative activities affecting judicial system; advise Board of Directors on legislative positions concerning issues affecting members and constituent client groups	Michael W. Thrall Nyemaster Goode Voigts West Hansell & O'Brien PC 700 Walnut Street, Suite 1600 Des Moines, IA 50309-3899 Phone: (515) 283-3189 Fax: (515) 283-8045 E-mail: mwt@nyemaster.com Megan M. Antenucci Whitfield & Eddy PLC 317 Sixth Avenue Suite 1200 Des Moines, IA 50309-4195 Phone: (515) 288-6041 Fax: (515) 246-1474 E-mail: antenucci@whitfieldlaw.com
MEMBERSHIP/DRI STATE REPRESENTATIVE Review and process membership applications and communications with new Association members. Responsible for membership roster. To be held by the current State DRI representative.	J. Michael Weston (DRI State Representative) Moyer & Bergman PLC 2720 First Avenue NE PO Box 1943 Cedar Rapids, IA 52406-1943 Phone: (319) 366-7331 Fax: (319) 366-3668 E-mail: mweston@moyerbergman.com Heidi L. DeLanoit American Family Mutual Insurance Company 5500 Westown Parkway, Suite 180 PO Box 65630 West Des Moines, IA 50266 Phone: (515) 223-1145 Fax: (515) 224-1785 E-mail: hdelanoi@amfam.com
PRODUCT LIABILITY Monitor current development in the area of product liability; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on product liability issues.	Jason M. Casini Whitfield & Eddy PLC 317 Sixth Avenue Suite 1200 Des Moines, IA 50309-4195 Phone: (515) 288-6041 Fax: (515) 246-1474 E-mail: casini@whitfieldlaw.com

COMMITTEE NAME	CHAIRPERSON
PROFESSIONAL LIABILITY Monitor legislative activities in the area of professional liability; act as a resource for the Board of Directors and membership on professional liability issues. Advise and assist in newsletter and amicus curiae participation.	Robert V.P. Waterman, Jr. Lane & Waterman 220 North Main Street, Suite 600 Davenport, IA 52801-1987 Phone: (563) 324-3246 Fax: (563) 324-1616 E-mail: Bwaterman@l-wlaw.com
PUBLIC RELATIONS AND WEBSITE DEVELOPMENT Provide assistance with public relation efforts for the organization including media information. Involvement with the website planning and with the jury verdict reporting service. Monitoring the District Representative reporting of jury verdicts in Iowa.	Brent R. Ruther Aspelmeier Fisch Power Engberg & Helling P.L.C. 321 North Third Street P.O. Box 1046 Burlington, IA 52601 Phone: (319) 754-6587 Fax: (319) 754-7514 E-mail: brruther@mchsi.com Randy B. Willman Leff Haupert Traw & Willman LLP 222 South Linn Street PO Box 2447 Iowa City, IA 52244-2447 Phone: (319) 338-7551 Fax: (319) 338-6902 E-mail: rbwlhtw@qwest.net
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.	Martha L. Shaff Betty Neuman & McMahon LLP 600 Union Arcade Bldg 111 East Third Street Davenport, IA 52801-1596 Phone: (563) 326-4491 Fax: (563) 326-4498 E-mail: mls@bettylawfirm.com Darrell J. Isaacson Yunek Isaacson P.L.C. 10 North Washington Avenue, Suite 204 PO Box 270 Mason City, IA 50402 Phone: (641) 424-1933 Fax: (641) 424-1939 E-mail: darrell@masoncitylawyer.com
TORT AND INSURANCE LAW Monitor current developments in the area of tort and insurance law; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on tort and insurance law issues.	James A. Pugh Morain & Pugh P.L.C. 5400 University Avenue West Des Moines, IA 50266 Phone: (515) 225-5654 Fax: (515) 225-4686 E-mail: jpugh@fbfs.com
WORKERS' COMPENSATION Monitor current developments in the area of Worker's Compensation; act as a resource for Board of Directors and Membership on comp issues. Advise and assist in newsletter and amicus curiae issues.	Peter Sand Gislason & Hunter, LLP 666 Grand Avenue, Suite 1800 Des Moines, IA 50309 Phone: (515) 245-3766 E-mail: psand@gislason.com
YOUNG LAWYERS Liaison with law school and young lawyer trial advocacy programs. Planning of Young Lawyer Annual Meeting reception and assisting in newsletter and other programming. Liaison with law school trial advocacy programs and young lawyer training programs.	Christine L. Conover Simmons Perrine Albright & Ellwood PLC 115 Third Street S.E., Suite 1200 Cedar Rapids, IA 52401-1266 Phone: (319) 366-7641 Fax: (319) 366-1917 E-mail: cconover@simmonsperrine.com

2005 ANNUAL MEETING & SEMINAR

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Iowa Appellate Court Update

(Employment, Commercial, Contracts, Damages & Government)

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Hannah Rogers
Nyemaster, Goode, West, Hansell & O'Brien
700 Walnut, Suite 1600
Des Moines, IA 50309
(515) 283-3123

APPELLATE CASE REVIEW III

September 21, 2005

EMPLOYMENT

McElroy v. State, __ N.W.2d __, 2005 WL 1413150 (Iowa June 17, 2005).

Facts: McElroy, a graduate student enrolled in Iowa State University's College of Education, sued Iowa State University ("ISU") and the State of Iowa for sexual harassment in employment and education, alleging that she was subjected repeatedly to grossly inappropriate comments and unwelcome touching by Lynn Glass, a male professor in the College. McElroy worked as Glass's research assistant and Glass taught at least one of her classes. McElroy argued that Glass's behavior was not adequately addressed by the defendants, and alleged that she was retaliated against because of changes in the terms of her employment. Initially, McElroy lost at trial, but after this Court reversed and remanded based on a confusing jury instruction, McElroy won a jury award of over $5 million. In spite of the fact the district court found that state law had also been violated, it determined that McElroy's federal law damages subsumed the majority of her state law damages. The State appealed and McElroy cross-appealed.

Holding: Although the Court determined that McElroy failed to exhaust her administrative remedies with respect to her federal and state retaliation-in-employment claims and that a new trial was required on all surviving claims because the jury returned a general verdict, making it impossible to determine which damages were allocated to which claim, McElroy had the right, on remand, to have her entire case tried to a jury.

Analysis: The Court overruled its decision in *Smith v. ADM Feed Corp.*, wherein the majority determined that, in an action based on the Iowa Civil Rights Act ("ICRA"), the district court "sits as the [Iowa Civil Rights Commission] and is empowered only to grant that relief" which the ICRA has authorized. Ultimately, in *Smith*, the Court determined that the statute should not be interpreted to allow litigants a jury trial under the ICRA. In *McElroy*, the Court noted that such ruling in *Smith* has resulted in allowing a jury trial to plaintiffs bringing ICRA claims in federal court but denying jury trials to those in state court. Thus, the Court determined that a plaintiff seeking money damages under the ICRA is entitled to a jury trial.

Finch v. Schneider Specialized Carriers, Inc., __ N.W.2d __, 2005 WL 1653094 (Iowa July 15, 2005).

Facts: Finch was a truck driver who hauled cargo for Schneider Specialized Carriers, Inc. ("Schneider") under a written agreement. He worked primarily for Schneider, using similar written agreements, until he suffered a neck injury in

January 2000 while trying to unhook a Schneider trailer from his tractor. His claim for workers' compensation against Schneider was granted by the deputy commissioner who determined that Finch was, in fact, an employee of Schneider based on Schneider's right to exercise significant control over the manner in which Finch conducted the details of his work. Schneider appealed and the industrial commissioner reversed, determining instead that, under the facts, Finch was an independent contractor rather than an employee. Finch sought judicial review. The district court found that because Schneider did not establish at least one of the required factors under Iowa Code section 85.61(13)(c) for proving that Finch was an independent contractor, Finch was entitled to benefits. Schneider appealed and the court of appeals reversed, determining that the record showed substantial evidence supporting the industrial commissioner's factual findings in denying benefits. However, at Finch's request, the court of appeals remanded to the commissioner for explanation of "a possible inconsistency between his ruling in this case and two prior cases" based on Iowa Code section 17A.19(10)(h).

Holding: The Court vacated the court of appeals decision remanding this case to the commissioner, reversed the district court's judgment allowing benefits, and remanded for dismissal of Finch's judicial review petition.

Analysis: This case is not controlled by legal standards found in prior agency decisions. Rather, such standards are found in this Court's opinions and in workers' compensation statutes. Because Iowa Code section 17A.19(10)(h) does not establish an independent requirement that other agency's rulings be identified and possible inconsistencies explained, and because the standard of review of the agency's decision is not for abuse of discretion, it is not necessary or appropriate to remand this case to the commissioner for an explanation of possible inconsistencies between the commissioner's ruling in this case and prior cases decided by the commissioner.

Smidt v. Thomas C. Porter, 695 N.W.2d 9 (Iowa Apr. 8, 2005).

Facts: Smidt, an employee of Porter & Associates, P.C. ("P & A"), a public relations firm, was terminated from her employment pursuant to a provision of her employment contract, which provided for termination without cause. Smidt was seven months pregnant at the time of termination and had requested a meeting to discuss taking maternity leave. Smidt's employer fired her at that meeting, basing the firing on poor performance, lack of agency experience, being disruptive and negatively affecting employee morale. Smidt sued for pregnancy discrimination in violation of state and federal civil rights statutes, breach of written and oral contract, fraud, and Fair Labor Standards Act ("FLSA") overtime-pay violations. Smidt later attempted to amend her petition to include common law wrongful discharge. Defendants' moved for summary judgment, which was granted by the district court, resulting in a dismissal of all of Smidt's claims. Smidt appealed.

Holding: The Court affirmed the district court's dismissal for the fraud and FLSA overtime-pay claims as well as the denial of Smidt's request to include a count of wrongful discharge but reversed dismissal of the breach of oral and written contract and pregnancy discrimination claims.

Analysis: The main issue on appeal was whether Smidt was able to show intentional discrimination by defendants based on her pregnancy. The Court concluded that the timing of Smidt's termination—after she requested a meeting to discuss maternity leave—was suspicious. The Court stated: "[O]nce a trier of fact rejects all legitimate reasons as possible reasons for the termination, it may find it more likely than not that the employer based his decision upon an impermissible reason." However, the Court agreed with the district court that Smidt's attempt to include a common law claim for wrongful discharge was preempted by the Iowa Civil Rights Act ("ICRA"). The Court also agreed with the district court's ruling that Smidt was an "exempt" employee based on both the duties and salary test, as well as the fact that her job description was not dispositive of her status.

Catipovic v. Peoples Cmty. Health Clinic, Inc., 401 F.3d 952 (8th Cir. Mar. 30, 2005).

Facts: Catipovic, a physician formerly employed with Peoples Community Health Clinic ("Peoples"), brought suit alleging that IBP, one of the Clinic's largest customers, purposely caused his termination because IBP did not like his medical treatment of injured workers. During the two years of his employment, Catipovic and the Clinic clashed with regard to the standards employed when ordering medical work releases for IBP employees. According to the Clinic, Catipovic was terminated because of problems with his treatment of tuberculosis patients and because of patient complaints. Catipovic sued IBP for tortious interference with contract. The district court denied IBP's motion for summary judgment, but granted IBP's motion for judgment as a matter of law at the close of Catipovic's case.

Holding: The Court affirmed the grant of judgment as a matter of law. Evidence of causation was insufficient.

Analysis: The 8th Circuit determined that it would have been unreasonable for a jury to conclude that the Clinic would have retained Catipovic except for IBP's conduct. Thus, Catipovic's proof as to causation was insufficient.

Concurrence: The district court limited the trial time to thirty hours, fifteen hours for each side. This time limit included jury selection, opening statements, direct and cross examination of witnesses, hearings outside of the presence of the jury, and closing arguments. While the Court held that Catipovic failed to preserve this objection, Judge Gibson noted that the 8th Circuit disapproves of rigid hour limits.

Eliserio v. United Steel Workers of Am. Local 310, 398 F.3d 1071 (8th Cir. Feb. 24, 2005).

Facts: Eliserio, an inspector for Firestone, resigned his membership in Local 310 in 1995 after he crossed the picket line during a strike. In 1997, a coworker and Local 310 member referred to Eliserio as "Taco Bob." Eliserio complained to Firestone and the co-worker was terminated. Local 310 filed a grievance on behalf of the co-worker and, as part of a negotiated agreement, the co-worker was reinstated in 2000. In early 2001, graffiti began to appear on the walls near Eliserio's work area referring to "Taco Bob." Eliserio complained to Firestone supervisors tha the graffiti constituted racial harassment. The divisional chairman of Local 310 was asked to speak to the members of Eliserio's shift to discourage and identify the culprits. In July 2001, Local 310 purchased "No Rat" stickers. Eliserio complained to Firestone stating that the stickers constituted a union endorsement of the graffiti. Firestone ordered all stickers to be removed from Firestone property but Local 310 members still displayed the stickers on personal property in the plant. In September 2001, the Local 310 divisional chairman asked Firestone to get Eliserio out of the area. Firestone disqualified Eliserio from his inspector position and moved him to a lesser-paying job in another area. After Local 310 filed a grievance on behalf of Eliserio, Firestone reinstated him to his former job with back pay. The graffiti continued to appear after the reinstatement. Eliserio left Firestone in 2002, citing stress from the continual racial harassment as the reason. Eliserio filed suit against Firestone and three of its managers, the international union, Local 310, and the chairman of Local 310. He alleged a hostile work environment and retaliation in violation of Title VII, § 1981, and the Iowa Civil Rights Act ("ICRA"). Firestone and its managers settled. The district court granted summary judgment on the federal hostile work environment claims against Local 310 on the grounds that Eliserio had produced no evidence to show that Local 310 instigated or supported the discriminatory conduct. Summary judgment was also granted on the retaliation claim because there was no evidence to suggest an adverse action or retaliatory motive by Local 310. The court then declined to exercise supplemental jurisdiction on the ICRA claims.

Holding: The 8th Circuit reversed the district court's entry of summary judgment in favor of the union and remanded the case. The Court held that a genuine issue of material fact existed as to whether the "No Rat" stickers demonstrated union support for the discriminatory graffiti, thus, summary judgment was precluded on the hostile work environment claim. The request by the Local 310 chairman to get Eliserio out of the area constituted meaningful adverse action. Further, Eliserio established a causal connection between the protected activity and the adverse action and a genuine issue of material fact existed as to whether the union's explanation for the demotion was pretextual. Thus, Eliserio presented a prima facie case of retaliation.

Analysis: Eliserio claimed that the union discriminated against him with respect to terms and conditions of his employment with Firestone. A union has no affirmative

duty under Title VII to investigate and take steps to remedy employer discrimination or discriminatory acts by individual members. However, a union may be held liable under Title VII if the union, itself, instigated or actively supported the discriminatory acts. The timing of the purchase of the "No Rat" stickers supported Eliserio's claim that the stickers supported the discriminatory graffiti and the stickers need not have a direct racial connotation to be perceived as supportive of the graffiti. A reasonable jury could conclude that it was the goal of such purchase to demonstrate union support for the graffiti. Statements by the chairperson that the stickers were directed at Eliserio were made within the scope of his duties as a union official and were considered admissions of a party-opponent. When the retaliation defendant is a labor organization, rather than the employer, any meaningful adverse action is sufficient to support a claim of retaliation. The chairperson's request that Eliserio be moved out of the area constituted a meaningful adverse action. The temporal connection between the graffiti, Eliserio's complaints, and the chairman's complaint supported an initial inference of causation, thus, Eliserio presented a prima facie case of retaliation.

Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040 (8th Cir. Feb. 22, 2005).

Facts: Kratzer brought suit against Rockwell Collins, Inc. ("Rockwell") alleging failure to promote based on age, sex, and disability status in violation of the Americans with Disabilities Act ("ADA"), Title VII, the Age Discrimination in Employment Act ("ADEA") and Iowa law. The district court granted summary judgment to Rockwell on all claims. Kratzer appealed.

Holding: The 8th Circuit affirmed the district court's grant of summary judgment. Kratzer lacked the requisite training for the new position and, therefore, did not establish a prima facie case of disability discrimination. Further, Krazter failed to establish a prima facie case of sex discrimination or retaliation and she was not subjected to a hostile work environment.

Analysis: The breakdown in the interactive process was not Rockwell's refusal to accommodate but rather Kratzer's failure to provide an updated evaluation. Without the updated evaluation, Kratzer could not perform the essential functions of the job. Thus, she failed to establish a prima facie case of disability discrimination. Similarly, Kratzer failed to establish a prima facie case of sex discrimination because she was not qualified for the job. Kratzer's hostile work environment claim failed because she did not subjectively feel harassed—she did not subjectively believe her working conditions were altered. Finally, her claim of retaliation failed because there was no evidence that Rockwell took adverse employment action because Kratzer filed a complaint with the Iowa Civil Rights Commission ("ICRC"). Kratzer presented no evidence that Rockwell's refusal to test was related to her Iowa Civil Rights Act ("ICRA") complaint, rather than her failure to provide the updated evaluation. In addition, Rockwell made a settlement offer, granting the opportunity to test in exchange for dismissing the ICRA complaint. Rockwell's proposal was an offer of valuable consideration—

the opportunity to train and test—in order to settle a disputed claim. Contrary to Kratzer's assertion, her IBEW membership did not entitle her to test for 408B, as she was not qualified nor had the 407B classification at the time of the settlement discussion. Thus, Kratzer did not establish a prima facie case of retaliation.

McBurney v. Stew Hansen's Dodge City, Inc., 398 F.2d 998 (8th Cir. Feb. 16, 2005).

Facts: McBurney, a night service manage, underwent an emergency appendectomy and, due to complications, was forced to take several weeks off work. When he was released to return to work, Stew Hansen's Dodge City, Inc. ("Stew Hansen's") informed McBurney that someone else had been hired to fill his position and that McBurney would be transferred to the position of Quality Control Supervisor. McBurney would receive the same pay and benefits as the night service manager but would be required to work days. McBurney requested that he be returned to the night service manager position but Stew Hansen's refused. After serving as the Quality Control Supervisor for a period of time, McBurney began to experience symptoms of depression, anxiety, and fatigue. In early 2001, Stew Hansen's discontinued the position of Quality Control Supervisor and switched McBurney to the position of Service Advisor, which included longer hours but less pay. McBurney was told that he could go to the Service Advisor position or quit. McBurney's depression, fatigue and anxiety worsened until he suffered a breakdown in April 2001. A doctor opined that the change in McBurney's work aggravated his preexisting mental health problems. McBurney was placed on FMLA for twelve weeks and then was discharged when he failed to return to work. McBurney filed suit against Stew Hansen's alleging violations of the FMLA. The district court granted Stew Hansen's summary judgment motion and McBurney appealed.

Holding: The 8th Circuit affirmed the judgment of the district court. McBurney waived any claim to front pay as an equitable form of damages by asserting it for the first time on appeal and McBurney did not establish a prima facie case of retaliation under the Family and Medical Leave Act ("FMLA"). McBurney was laterally transferred from night service manager to quality control supervisor after he returned from FMLA leave. Further, he failed to show a causal connection between his FMLA leave and the secondary transfer to the service advisor position.

Analysis: McBurney failed to argue the issue of front pay to the district court in response to Stew Hansen's motion for summary judgment. His whole claim for damages relied upon the recovery of front pay, a claim that he has waived by failing to assert it at the district court level. As to the retaliation claim, six months passed between McBurney's return from FMLA leave and his transfer to Service Advisor. In addition, McBurney was not discharged; rather, he was laterally transferred after Stew Hansen's made the business decision to eliminate the Quality Control Supervisor position. McBurney's transfer to Service Advisor actually afforded him the opportunity to make more money. Moreover, Stew

Hansen's honored McBurney's request for FMLA leave. Viewing the facts in the light most favorable to McBurney, the 8th Circuit held that the evidence did not establish a sufficient causal link. Neither time nor discriminatory actions created a link to his secondary transfer to Service Advisor with his FMLA related leave. Accordingly, McBurney failed to make a prima facie case of retaliation."

Villa v. Burlington Northern & Santa Fe Ry. Co., 397 F.3d 1041 (8th Cir. Feb. 7, 2005).

Facts: Villa, an assistant foreman for Burlington Northern & Santa Fe Railway Company ("BNSF"), injured his back while working for BNSF. Shortly after undergoing back surgery, Villa suffered a stroke. The stroke, along with his back problems, rendered Villa unable to work. Had he not suffered the stroke, he would have been able to work light duty jobs. Villa filed suit under the Federal Employer's Liability Act ("FELA") alleging that the pressure had been incorrectly set on the spike puller, causing the accident and his subsequent injuries. BNSF filed a motion in limine to exclude (1) evidence of Villa's lost earnings or earning capacity after the stroke and (2) the internal form used to record information after the incident that would be reported to the Federal Railroad Administration. The court denied the motion. After a verdict in favor of Villa, BNSF appealed, arguing that the district court improperly applied FELA by allowing the introduction of evidence of lost earnings and loss of future earning capacity after the stroke.

Holding: The 8th Circuit affirmed the judgment. The issue of whether, as a railroad employee, Villa's inability to work was caused by workplace injury was for a jury and the railroad's internal form was not subject to the evidentiary privilege afforded to accident or incident reports filed with Federal Railroad Administration ("FRA") by a railroad carrier.

Analysis: When faced with conflicting testimony as to the cause of the employee's inability to work, it is for the jury to determine damages in light of all of the evidence. While evidence relating to a subsequent independent debilitating condition is admissible, it does not necessarily follow, that in light of such evidence, testimony pertaining to potential earnings must be limited. Unless the effects of the work-related injury and the subsequent condition are completely separable, it is a question of fact for the jury in FELA cases whether the injury continues to contribute to an inability to work after the advent of the subsequent condition. Both parties should be permitted to present evidence, cross-examine each other's witnesses, and present to the jury the methodologies that they believe should be applied in the calculation of damages. Also, the Court declined to extend the language of section 20903 to include the internal accident report form as privileged. The plain language of the section did not support BNSF's argument that the internal form was privileged

Knutson v. AG Processing, Inc., 394 F.3d 1047 (8th Cir. Jan. 12, 2005).

Facts: Knutson, a boiler operator, brought suit against AG Processing, Inc. ("AG") alleging discrimination in violation of the Americans with Disabilities Act ("ADA"). The jury rendered a verdict in favor of Knutson and awarded back pay and punitive damages. Knutson moved for reinstatement, injunctive relief, and attorney fees and costs. The district court ordered reinstatement and injunctive relief and AG appealed.

Holding: The 8th Circuit reversed the judgment of the district court and remanded with directions to find in favor of AG and dismiss the complaint. The employer could not have regarded Knutson as unable to perform the major life activity of working when it reassigned Knutson from his regular job to another job at same location for the same pay.

Analysis: Knutson argued that Ag Processing regarded him as having an impairment that substantially limited him in the major life activity of working. At a minimum, Knutson must allege he is unable to work in a broad class of jobs, rather than one specific job. Ag Processing did not regard Knutson as being unable to work in a broad class of jobs when it assigned him to another job at the same location for the same rate of pay. Ag Processing viewed Knutson as unable to perform the job of boiler operator but not as being unable to perform a broad class of jobs.

Chapman v. Lab One, 390 F.3d 620 (8th Cir. Nov. 30, 2004).

Facts: Terminated railroad employees brought action against Lab One, a laboratory that performed the random urinalyses that led to their termination. The Plaintiffs claimed that the test results were inaccurate and brought a state court action alleging negligence, breach of contract, defamation, negligent misrepresentation, fraudulent misrepresentation, interference with business relations, intentional infliction of emotional distress, and invasion of privacy. One of the Plaintiff's brought their action in Nebraska state court and the court dismissed the claim stating that the claims were preempted by the Federal Omnibus Transportation Employee Testing Act ("FOTETA") and that FOTETA did not provide for a private right of action. The other two Plaintiffs brought their claims in Iowa state court. The court dismissed those claims as well, stating that they were preempted by the Federal Railroad Safety Act ("FRSA"). The Plaintiffs appealed the dismissals and findings that their claims were preempted by the FRSA and FOTETA.

Holding: The 8th Circuit reversed the trial courts' dismissals. The claims in the first action were not preempted by the FRSA as amended by FOTETA. The claims in the second action were not entirely preempted by the FRSA and, therefore, the action was not removable on federal-question grounds.

Analysis: FOTETA contains an express preemption clause. In determining whether a federal regulation preempts a state common law claim, the federal regulation must substantially subsume the subject matter of the state common law. The FOTETA preemption provision is both prefaced and succeeded by express savings clauses. The Court concluded that FOTETA did not preempt the common law claims of negligence pleaded by the plaintiffs because the regulations specifically contemplate the existence of a common-law cause of action for negligence. Further, because of the presumption against preemption and the FRA/FOTETA's overall structure and history, the remainder of plaintiffs' common law and state claims were not preempted.

Baker v. John Morell & Co., 382 F.3d 816 (8th Cir. Oct. 29, 2004).

Facts: Baker sued her former employer alleging sexual harassment, hostile work environment, retaliation, disparate treatment, and constructive discharge in violation of Title VII. A jury found in favor of Baker on her sexual harassment, hostile work environment and retaliation claims and found she had been constructively discharged. John Morell & Co. ("Morell") filed a motion for judgment as a matter of law which was denied. Morell then appealed the district court's (1) denial of its motion for judgment as a matter of law, (2) order awarding attorney's fees and costs, and (3) order granting Baker's motion to amend her complaint after the verdict to include a claim under the Iowa Civil Rights Act ("ICRA").

Holding: The 8th Circuit affirmed the district court judgment. Evidence of years of blatant sexual harassment was enough to support a hostile work environment claim and a finding that Baker was constructively discharged. Evidence of supervisor's antagonistic behavior towards Baker was sufficient to establish that Baker had suffered an adverse employment action. Finally, the district court did not abuse its discretion by allowing Baker to amend her pleadings to add claims under the ICRA and she was entitled to recover relief under the ICRA upon prevailing on parallel Title VII claims.

Analysis: The ongoing blatant sexual harassment suffered by Baker was sufficiently severe and pervasive as to create an objectively hostile and abusive work environment. The constant harassment was objectively intolerable and that, coupled with Defendant's refusal to resolve the problem was sufficient evidence to supported Baker's claim of constructive discharge. Baker's supervisor became antagonistic toward her after Baker filed an ICRA complaint. The supervisor limited Baker's breaks, increased her job duties, refused to provide job assistance, yelled at her, withheld privileges, and attempted to discourage Baker from filing other complaints. These retaliatory changes constituted "significant and material disadvantages sufficient to support the retaliation claim." As to the district court's allowing Baker to amend her claim to include a claim under the ICRA, the 8th Circuit noted that the issue sought to be raised in Baker's amendment was not inconsistent with the position taken by Morell in the proceedings. Accordingly,

the district court did not abuse its discretion in this instance by allowing Baker to amend the complaint to include an ICRA claim. Further, the amendment was permitted under Federal Rule of Civil Procedure 54(c).

Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. Oct. 15, 2004).

Facts: Griffith, a Hispanic firefighter with the Des Moines Fire Department, alleged on-going disparate treatment and retaliation by the City of Des Moines, the Fire Chief, and the Assistant Fire Chief, in violation of Title VII, § 2000e-2, §§ 1981 and 1983, and the Iowa Human Rights Act ("IHRA"). Griffith contended that he was suspended, denied retraining, unfairly disciplined, and harassed by co-workers because of his Hispanic background. The district court granted summary judgment dismissing Griffith's Third Amended Complaint.

Holding: The 8th Circuit affirmed the district court's award of summary judgment to the City. The City's alleged conduct of placing Griffith on an unpaid leave of absence did not amount to disparate treatment nor did the City's alleged conduct of denying his request for retaining amount to adverse employment action. The City's conduct of disciplining Griffith for workplace misconduct did not amount to retaliation and the work environment created by alleged derogatory comments by co-workers did not amount to a hostile work environment.

Analysis: As a threshold issue of law, the Court determined that *Desert Palace* did not affect the *McDonnell Douglas* burden shifting analysis or the controlling 8th Circuit precedents. Griffith produced no direct evidence that racial or ethnic discrimination motivated any alleged adverse employment actions against him. Nor did Griffith produce sufficient circumstantial evidence of illegal discrimination under the *McDonnell Douglas* paradigm. Griffith's unpaid leave of absence was not disparate treatment as it is uncontested that Griffith requested the leave of absence. Further, Defendant's failure to retrain Griffith upon his return did not amount to unlawful discrimination. An employer's denial of an employee's request for more training is not, without more, an adverse employment action. Griffith was disciplined for three separate incidents. Griffith presented no evidence creating an inference that his discipline, on any of the three incidents, was the product of race discrimination. Further, Griffith failed to prove that the discipline was illegal retaliation for the discrimination complaints he filed with the Iowa Civil Rights Commission ("ICRC"). Griffith filed his complaints after receiving notices of the pre-disciplinary hearings. Complaints of discrimination do not insulate an employee from discipline for violating the employer's rules and "complaining of discrimination in response to a charge of workplace misconduct is an abuse of the anti-retaliation remedy." As to the hostile work environment claim, Griffith testified to three scattered derogatory comments by two co-workers. The comments were not directed to Griffith and Griffith did not complain to his supervisors about the comments. Griffith failed to show harassment pervasive or severe enough to affect a term, condition, or privilege of his employment. Further, although Griffith perceived that his co-

workers ridiculed and ostracized him as a child molester, discrimination on this ground is not prohibited by Title VII or by the Iowa Civil Rights Act.

Wortham v. Am. Family Ins. Group, 385 F.3d 1139 (8th Cir. Oct. 8, 2004).

Facts: Wortham, an African-American female insurance agent, brought age discrimination, sex discrimination, and race discrimination claims against American Family Insurance Group ("American"). The district court granted summary judgment in favor of Defendant after concluding that Title VII does not protect independent contracts and Wortham did not create a genuine issue as to discrimination.

Holding: The 8th Circuit affirmed the district court's grant of summary judgment in favor of American. Under the 8th Circuit's multiple factor test, Wortham was an independent contractor and was not protected under the Americans With Disabilities Act ("ADEA"), Title VII, or the Iowa Civil Rights Act ("ICRA"). Wortham could pursue a claim under § 1981, but she did not present sufficient evidence to establish a prima face case under § 1981.

Analysis: The 8th Circuit determined that Wortham was an independent contractor because (1) she was an insurance professional; (2) the agreement signed by Wortham expressly identified her as an independent contractor; (3) Defendant did not supervise her daily activities; (4) Wortham worked out of an independent office, hired her own assistants, and paid all office related expense; (5) she was not subject to any formal hour or leave policies; (6) Wortham was paid exclusively by commission; and (7) she was free to terminate her contract at will. Independent contractor status is not protected under the ADEA, Title VII, or the ICRA. However, her status as an independent contractor does not preclude her claims under § 1981. The only evidence of discrimination that Wortham produced was an unauthenticated list of transfers, which did not identify the race of the transferors or transferees. Accordingly, she failed to establish a prima facie case under § 1981.

Hansen v. Seabee Corp., 688 N.W.2d 234 (Iowa Oct. 6, 2004).

Facts: Hansen brought a disability discrimination suit against his employer, Seabee Corporation ("Seabee"), claiming that he was disabled and protected under the Americans with Disabilities Act ("ADA"), because his sore back limited his ability to lift and to perform some jobs he had done earlier in his life. Hansen had initially alleged disability discrimination only under the Iowa Civil Rights Act ("ICRA") and retaliatory discharge but later amended his petition to include the ADA claim. The district court awarded Hansen damages on his claim under the ADA, but granted a directed verdict for Seabee with respect to the retaliatory discharge claim and the ICRA claim. Seabee appealed.

Holding: Hansen failed to produce sufficient evidence to establish that he was disabled under the ADA. Consequently, his disability discrimination claim under the ADA must be dismissed.

Analysis: Hansen claimed that he was both "actually disabled" and "regarded as disabled" due to his lifting limitation. The Court considered both theories and determined that, with respect to lifting, the same analysis applies to both. Both theories required Hansen to show that his impairment substantially limits him in major life activity, either in reality or due to the attitudes of others. Both theories also require a showing that Hansen was precluded from a broad class of jobs or that Seabee regarded him as precluded from a broad class of jobs. In examining whether Hansen's impairment affected "a major life activity" the court assumed that working qualified as a major life activity, and examined whether Hansen was substantially limited in the major life activities of lifting or working. In determining whether Hansen was "substantially limited" in the major life activity of lifting, the Court concluded that there was no evidence in the record that Hansen's impairment impacted lifting tasks central to most people's daily lives, such as household chores, bathing and brushing one's teeth. Thus, the Court found that Hansen's claim of disability could not be upheld in on the basis that he was substantially limited in lifting. In determining whether Hansen was substantially limited in the major life activity of working, the court determined that, based on the evidence presented, there was no evidence that would support a finding that Hansen was unable to work in a broad class of jobs let alone that the positions referred to by Hansen constitute a "class" of jobs—i.e., roofing, painting water towers, working on assembly lines, and operating a straightening machine. Although the Court conceded that expert vocational testimony is not always necessary to establish a substantial limitation on working, the record in this case was insufficient to support the conclusion that Hansen was unable to perform a broad class of jobs. Thus, Hansen failed to present evidence proving that he was substantially limited in working or that Seabee regarded him as substantially limited in working.

Kennedy v. State, 688 N.W.2d 473 (Iowa Oct. 6, 2004).

Facts: Current and former peace officers brought an action against the State of Iowa and the Iowa Department of Natural Resources ('IDNR") for overtime compensation under the Fair Labor Standards Act ("FLSA"). The action was originally filed in federal court, but was dismissed for lack of subject matter jurisdiction. The district court found: (1) the State proved existence of twenty-eight-day work period; (2) the peace officers' travel time should be excluded from their overtime claims; (3) the peace officers' meal time is compensable; (4) there is no liability for overtime wages after January 31, 1996, despite the peace officers' contention that the State's continuing policy of requiring employees to take vacation, sick leave, or other forms of leave for absences of less that a day violates the FLSA's salary-basis test; (5) the peace officers' overtime hours should be reduced by the amount of work-schedule-adjustment hours they have used; (6) the peace officers

are not entitled to interest on their damages from the date of filing their action; and (7) the statute of limitations was tolled by the filing of the federal lawsuit. Later, the trial court awarded the peace officers nearly $70,000 in damages. Both parties appealed.

Holding/
Analysis: The Court affirmed the judgment of the district court in all respects except for its judgment on compensatory time. The case was remanded for a redetermination of damages, if any, to the peace officers.

Bakery, Confectionery, Tobacco Workers & Grain Milliers, Local 100G v. Penford Prods. Co., 106 Fed. Appx. 525 (8th Cir. Aug. 16, 2004).

Facts: The Union argued that its Collective Bargaining Agreement ("CBA") required arbitration of a grievance filed by the Union on behalf of a member who Penford Products Company ("Penford") refused to allow to return to work after she resigned. Two months after the member resigned she claimed that her resignation was an episode of irrational behavior caused by an unspecified illness. The district court granted summary judgment in favor of Penford and the Union appealed.

Holding: The grievance did not relate to the interpretation or application of the CBA and, thus, it was not arbitrable.

Analysis: The CBA provided for arbitration of matters that "relate to the interpretation or application of the provisions of [the CBA]." The Union's principle argument was that the member may rescind her resignation because she made it while unable to make a voluntary and competent decision. This argument does not involve the interpretation or application of the CBA.

Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756 (8th Cir. Aug. 4, 2004).

Facts: Bainbridge, a warehouse manager for Loffredo Gardens, Inc. ("Loffredo"), complained of racial epithets towards Asians and minorities used by the company's owners and operators. Bainbridge's wife is Japanese. In June 2000, three supervisors who worked with Bainbridge stated they would quit if Banbridge was not fired. On June 21, 2000, Defendant sent Bainbridge a letter stating that his employment was terminated because his interpersonal skills with subordinates was problematic. Bainbridge brought this action alleging he was subjected to a hostile work environment based on racial comments and that he was discharged in retaliation for complaining of discrimination and harassment in violation of Title VII, § 1981, and Iowa law. The district court granted summary judgment in favor of Loffredo.

Holding: The 8th Circuit affirmed in part and reversed in part the district court's entry of summary judgment in favor of Loffredo. The Court determined that the

managers' alleged racially offensive remarks, if proven, did not create a hostile work environment. Further, Bainbridge failed to exhaust his administrative remedies for the Title VII and Iowa retaliation claims. However, Bainbridge did establish a causal connection between his complaints about alleged racial slurs and his termination, so as to establish a prima facie case of retaliation under § 1981.

Analysis: Under 8th Circuit case law, the racial slurs made by Loffredo's employees did not render the work environment at Loffredo objectively hostile. The remarks were sporadic, not always made directly to Bainbridge, and not made specifically about Bainbridge, his wife, or their marriage. Because Bainbridge failed to check the box next to "retaliation" on his Iowa civil rights complaint form, the Iowa civil rights investigator did not address retaliation. Consequently, Bainbridge failed to exhaust his administrative remedies with regard to the Title VII and Iowa retaliation claims. Finally, while noting that "the issue [was] close," the 8th Circuit determined that Bainbridge had "enough circumstantial evidence to get his retaliation claim to a jury." A plaintiff can establish a causal connection between a statutorily protected activity and an adverse employment action through circumstantial evidence. Based on the evidence presented, a jury could conclude that Loffredo's stated reason for firing Bainbridge was pretextual.

Lloyd v. Drake Univ., 686 N.W.2d 225 (Iowa Sept. 1, 2004).

Facts: Lloyd, a Drake University security guard, trial to forcibly subdue a black football player at a university-sponsored street painting event, because he thought the football player was assaulting a female student. The security guard's actions were caught on videotape, igniting a media firestorm and inflaming racial passions, ultimately resulting in termination of his employment. Lloyd sued for wrongful discharge, defamation, and fraudulent misrepresentation. His wrongful-discharge claim was based on the theory that, regardless of the fact that his employment was at-will, as a matter of public policy it is wrong for an employer to fire a security guard for upholding the criminal laws of the state. The district court granted summary judgment on all three of Lloyd's claims and he appealed.

Holding: While it may be beneficial to have private citizens take it upon themselves to enforce the criminal laws, there is no well recognized and clearly defined public policy essential to carve out an exception to the at-will employment doctrine that would allow the Court to sustain Lloyd's wrongful discharge claim for simply "upholding the criminal laws."

Analysis: Lloyd did not dispute that he was an at-will employee. As an at-will employee, Drake could fire him for any lawful reason or for no reason at all—except in violation of public policy. To succeed in proving wrongful discharge in violation of public policy, the burden was on Lloyd to prove that: (1) a clearly defined public policy existed that protected the activity in question, (2) the policy would be undermined by a discharge from employment, (3) the discharge being

challenged resulted from participation in the protected activity, and (4) there was no other justification for the termination. Ultimately, Lloyd's claim of wrongful termination failed because there is no clearly defined nor well-recognized public policy against discharge of an employee for simply upholding the law.

Kiesau v. Bantz, 686 N.W.2d 164 (Iowa Sept. 1, 2004).

Facts: Bantz was a deputy sheriff who altered a photograph of Kiesau, a fellow officer, making it appear that she was standing with her K-9 dog in front of her sheriff's vehicle with her breasts exposed. Banz showed and electronically mailed the altered photographs to third persons. Kiesau brought an action against Bantz for defamation and invasion of privacy, and later amended her petition to include claims for negligent hiring, supervision, and retention against the County and the County Sheriff, Leonard Davis. The district court granted summary judgment against Kiesau on her claims for negligent hiring, supervision, and retention because she did not incur a physical injury. In addition, the court found that Kiesau was not entitled to punitive damages against Davis. The remaining claims went to trial. Kiesau appealed dismissal of these claims.

Holding: In a claim based on negligent hiring, supervision, or retention, the injured party need not suffer physical injury, and a genuine issue of material fact exists as to whether Kiesau is entitled to punitive damages. Reversed and remanded.

Analysis: Contrary to the finding of the district court that claims of negligent hiring, supervision and retention do not extend to cases where there are no physical injuries, the Court determined that such claims do not require physical injury. In addition, although the County is immune from any claim for punitive damages, Davis is liable for punitive damages in the performance of his duty upon a showing of actual malice or willful, wanton, and reckless misconduct.

Perillo v. Lumbermens Mut. Cas. Co., 378 F.3d 767 (8th Cir. Aug. 5, 2004).

Facts: Petrillo slipped and fell at work in February 1999. After reporting the injury to her employer, the employer sent Petrillo to a physical therapist. The physical therapist treated Petrillo for two months then discharged her. In November, Petrillo again complained about hip pain and she was sent back to the physical therapist as well as a to physician who diagnosed a broken hip. The physician then referred Petrillo to an orthopedic surgeon who concluded that her pain was a result of a childhood condition. Upon receiving this opinion, the employer's insurance company terminated benefits. Petrillo underwent several surgeries and developed chronic regional pain syndrome. The insurance company requested an IME and the IME physician opined that Petrillo suffered from a preexisting hip condition that was aggravated by the work injury. Consequently, workers' compensation benefits were reinstated and the medical bills were paid. Petrillo commenced this diversity action against the employer and the insurance company asserting various claims, including a bad faith claim against the insurance

company. The district court dismissed all claims against the employer but submitted the bad faith claim against the insurance company to the jury. Over Petrillo's objection, the district court instructed the jury that Iowa law imposes a duty on the carrier to pay for reasonable and necessary medical care provided to an employee for a compensable injury. The jury returned a verdict in favor of the insurance company. Petrillo argued that the jury should have been instructed that the insurance company had a duty to furnish as well as pay for reasonable and necessary medical care.

Holding: Under Iowa law, no claim for bad faith failure to furnish medical services will lie against a workers' compensation insurer where the employer, consistent with the policy, has exercised its statutory duty to furnish reasonable services and its right to choose the care. The district court properly instructed the jury and the 8th Circuits affirmed its verdict.

Analysis: *Boylan v. American Motorists Insurance Co*. limits an insurer's liability to bad faith denial of benefits of the policy. The insurance policy reserved to the employer the discretion to choose the medical provider for the employee. Thus, Petrillo's claim that the insurance company was guilty of bad faith in not overruling the employer's choice of medical provider is not a claim for bad faith denial of benefits of the policy. The Iowa Code, Iowa Administrative Code, and Iowa case law do not establish that an insurer has a duty to supervise and control an employer exercising its right to choose the medical provider.

COMMERCIAL

City of Fairfield v. Harper Drilling Co., 692 N.W.2d 681 (Iowa Jan. 14, 2005).

Facts: As a part of its solicitation of bids for a public improvement, the City of Fairfield's contract-letting documents specified that a successful bidder must file a bond equal to ten percent of its proposal as liquidated damage "in the event that the successful bidder did not enter into a contract with Fairfield within ten days following the award of the contract." Contract-letting procedure is governed by Iowa Code chapter 384, and section 384.97 of such chapter requires this language. Harper Drilling Company ("Harper") submitted a sealed bid and was issued a bond with its bid. Although recommended by the city engineer subject to concurrence by the Iowa Department of Natural Resources ("IDNR"), Fairfield never issued Harper a bid of acceptance, but forwarded the proposal to the IDNR for its review. The IDNR determined that Harper's proposal did not conform to certain requirements and Harper failed to produce documentation of compliance with such requirements. As a result, Harper requested a return of its bidder's bond under a provision in the contract-letting documents providing for such return if Fairfield did not accept the proposal within thirty days. However, Fairfield retained Harper's bond but accepted the second lowest bidder's bid unconditionally. Fairfield alleged that because Harper was awarded the contract but did not enter into it, Fairfield was owed ten percent of Harper's proposal as

liquidated damages. The district court granted Harper and its bonding company, National Insurance Company of Hartford ("National"), summary judgment, exonerating the bidder's bond. The court of appeals reversed and remanded for entry of summary judgment in Fairfield's favor. Harper and National appealed.

Holding: Harper was not a successful bidder as contemplated in the contract-letting documents because Fairfield was prevented from accepting Harper's proposal based on the IDNR's refusal to concur in awarding Harper the contract. As such, Fairfield was not entitled to the bond based on Harper failing to enter into the contract because Fairfield had only conditionally accepted the proposal.

Analysis: The Court determined this issue hinged on its interpretation of the term "successful bidder" as contained in Iowa Code section 384.97. The Court found that, because the statute did not define the words "successful bidder," such words must be given their ordinary meaning by considering the context within which they are used. Ultimately, the Court established that the plain meaning of "successful bidder" requires acceptance of the bidder's bid by the government. Because this Court has previously determined that such acceptance by the government must be "absolute and unconditional to be binding upon the parties," the conditional acceptance by the government in this case did not create a binding award of a contract between the bidder and the government.

State v. Cutty's Des Moines Camping Club, Inc., 694 N.W.2d 518 (Iowa Apr. 1, 2005).

Facts: The State of Iowa brought suit against a Des Moines area campground club, claiming that it was violating Iowa's Consumer Fraud Act ("ICFA") by engaging in an "unfair practice" of attempting to compel payment of dues by hundreds of ex-campers. Cutty's Des Moines Camping Club, Inc. ("Cutty's) argued that the ICFA was inapplicable to this case and that, regardless, it had not engaged in an unfair practice. The district court dismissed the State's case on summary judgment, and the court of appeals affirmed. The State appealed.

Holding: Post-sale conduct may be regulated by the ICFA, and the ICFA does not apply only to sellers of merchandise but to other "persons" connected with the sale of merchandise. In addition, whether or not Cutty's engaged in an "unfair practice" must be determined by a trier of fact.

Analysis: The Court rejected the court of appeals' determination that the ICFA was inapplicable because the campaign to collect dues from ex-campers who had purchased a real estate interest was "later conduct" that was unrelated to the initial sale of the property. The Court determined that the ICFA does not limit the phrase "in connection with" to business practices occurring only at the same time as or prior to the sale. In addition, the Court determined that the ICFA was not limited in its application to only "sellers" of the merchandise. The ICFA uses the term "person" not "seller" and the court declined to limit its application in this fashion.

Comes v. Microsoft Corp., 696 N.W.2d 318 (Iowa May 13, 2005).

Facts: Plaintiffs brought an antitrust suit against Microsoft Corporation ("Microsoft") alleging violation of provisions of the Iowa competition law, Iowa Code sections 553.4 and 553.5. Plaintiffs, as indirect purchasers of Microsoft products, argued that Microsoft artificially inflated its products' cost, including its applications software and licenses for its operating system software. The district court granted class certification, and Microsoft appealed, arguing that plaintiffs failed to show that the class met the "fair and efficient adjudication" and "fair and adequate representation" requirements of certifying a class action.

Holding: The Court affirmed class certification by the district court. The plaintiffs made an adequate showing that allowance of such action was in the interest of fair and efficient administration of justice by demonstrating a predominance of common questions of law or fact. In addition plaintiffs presented sufficient evidence that each adequately represented the class and sufficiently established their ability to provide financial resources.

Analysis: The Court's primary emphasis in its determining of the class certifications at issue reiterated that a showing of predominance of common questions of law or fact was just one of the thirteen factors to be considered by the court. The Court found that common issues predominated in this case because it involved alleged damages and statutory violations that were common to all the class members. In addition, the district court did not abuse its discretion on the issue of predominance by not conducting a "rigorous analysis" of the submitted evidence because it had sufficient information to form a reasonable judgment on the certification issue.

Windway Technologies, Inc. v. Midland Power Coop., 696 N.W.2d 303 (Iowa Apr. 1, 2005).

Facts: Welch Motels, Inc. and Gregory and Beverly Swecker ("plaintiffs"), purchased wind-powered electric generators from Windway Technologies, Inc. ("Windway") to generate their own power in an effort to reduce their energy expenses and sell any excess energy to Midland Power Cooperative ("Midland"). Customers who both buy and sell energy they produce to a utility are called "cogenerators" or "alternate energy producers" ("AEPs"). When the plaintiffs tried to connect their generators to Midland's electric distribution system differences arose as to how the purchases and sales of energy should be measured and billed. Midland wanted purchases and sales to be billed and measured separately; however, the plaintiffs wanted an arrangement wherein only the net purchase or sale is billed—"net metering." Net metering or net billing would allow the amount of energy billed to plaintiffs to be directly offset by the amount of energy sold by plaintiffs to Midland. Under Midland's approach, energy billed to plaintiffs and energy purchased from plaintiffs would each be billed separately, allowing Midland to bill for energy at a higher rate than the rate at which it

purchased energy. Plaintiffs filed suit in federal court alleging, in part, that the rate set by Midland for purchasing energy from cogenerators/AEPs violated the Public Utility Regulatory Policies Act ("PURPA"), a federal statute. Because Midland is a nonrate-regulated utility, the federal court remanded to state court based on lack of subject matter jurisdiction. The parties agreed to submit certain issues—including this particular issue—to the court, and saved the rest for submission to a jury. At the bench trial, the district court held that the parties must use net metering and that Midland was required to file periodic reports with the Federal Energy Regulatory Commission ("FERC") for determination of its avoided costs. Midland sought an interlocutory appeal.

Holding: Neither state nor federal law requires net metering. Thus, the Court concluded that PURPA was not violated by Midland's rates and reversed the district court's order requiring Midland to implement net metering. In addition, although the Court affirmed the district court's decision ordering production of Midland's cost data for examination by the plaintiffs, it modified the decision to the extent that this information need not be filed with FERC. Rather, Midland must make its cost data available at its place of business.

Analysis: The Court found that no regulatory decisions or federal cases hold that PURPA requires net metering. After establishing the lack of an express requirement for use of net metering, the Court then examined whether an implied requirement for use of net metering existed and determined that PURPA has no such implied requirement. In fact, because FERC has given broad discretion to regulatory and nonrate-regulated utilities to implement PURPA, including determining when and whether to use net metering, PURPA cannot be interpreted as requiring Midland to offer net metering to all AEPs in its tariffs. In response to the plaintiffs' argument that the trial court had discretionary authority to impose net metering, the Court determined that such exercise of authority would inadvisably and unnecessarily place the Iowa courts in the position of acting as a regulatory board for such utilities.

Iowa, Chicago & Eastern R.R., Corp. v. Washington County, 384 F.3d 557 (8th Cir. Aug. 25, 2004).

Facts: The interstate rail line of the Iowa, Chicago & Eastern Railroad Corporation ("IC & E") included four bridges in the Washington County, Iowa. The County wanted all four replaced because of their antiquated design, which the County argued resulted in substandard highway safety at all four sites. IC & E agreed to cooperate with the County but refused to pay for the replacement bridges. The County petitioned the Iowa Department of Transportation ("IDOT") for a ruling compelling IC & E to pay for such bridges in compliance with Iowa Code section 327F.2. IDOT referred the petition to the Department of Inspections and Appeals for a hearing to determine, among other issues, what portion of the expense should be paid by each party. IC & E then brought an action against the County and the Director of IDOT seeking a declaratory judgment that section 327F.2 is

preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). The district court found that such section was not preempted. IC & E appealed.

Holding: IC & E failed to establish that ICCTA's preemption provision preempts the state administrative proceedings commenced by IDOT in response to the County's petition that IC & E be ordered to replace the four bridges at its own expense pursuant to Iowa Code section 327F.2.

Analysis: IC & E argued that the ICCTA preempted Iowa Code section 372F.2 because (1) ordering IC & E to pay the cost of replacing four bridges is expressly preempted economic regulation; (2) ordering the replacement of bridges carrying the rail line over highways is expressly preempted regulation of facilities essential to IC & E's rail service; and (3) Congress in ICCTA occupied the field of economic and facilities regulation of railroads. The Court found that the Federal Rail Safety Act of 1970 ("FRSA"), not ICCTA, determines whether a state law relating to rail safety is preempted. ICCTA does not address the problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular. Such silence on the part of the ICCTA cannot reflect the required "clear and manifest purpose of Congress" to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other states. The Court points out, however, that its holding in this case is necessarily narrow as states do not operate in this arena free of federal involvement—such as if the parties obtained federal funding for one or more of the bridge projects. In that case, state laws requiring IC & E to pay or share the costs would be expressly preempted.

Northern Natural Gas Co. v. Iowa Utilities Bd., 377 F.3d 817 (8th Cir. Aug. 11, 2004).

Facts: Northern Natural Gas and Northern Border Pipeline transport and sell natural gas in interstate commerce, and are subject to regulation by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act ("NGA"). When natural gas companies seek to construct, extend, acquire, or operate facilities for the transportation or sale of natural gas in interstate commerce, the NGA requires that such companies must be granted a "certificate of public convenience and necessity" by the FERC. These certificates are only granted when the FERC finds that a company is willing and able to comply with the requirements, rules and regulations of the federal regulatory scheme. Northern Natural Gas wanted to upgrade one of its pipelines in Iowa in 2001 and was authorized to do so under a "blanket certificate" of public convenience and necessity granted by the FERC in 1982. Essentially, a blanket certificate allows pipeline companies to engage in activities such as constructing new facilities without seeking further approval from the FERC. However, all activities taken under such certificate must be consistent with such environmental statutes as the Clean Water and Air Acts. In seeking to upgrade in 2001, Northern Natural Gas also asserted that it intended to abide by the FERC's "Upland Erosion Control, Revegetation and Maintenance

Plan" ("FERC Plan"), which sets a national minimum standard for land restoration, addressing many of the same environmental issues covered by Iowa's land restoration standards. In order to proceed with the project, Northern Natural Gas requested a waiver from the Iowa Utilities Board ("IUB") of certain land restoration rules contained in the Iowa Administrative Code, but the IUB refused, stating that the rules of the FERC Plan were not as good as or better than those provided in the Iowa Administrative Code. Northern Natural Gas and Northern Border Pipeline brought suit in district court seeking injunctive relief and a declaratory judgment that the Iowa statutory and regulatory provision were preempted by various provisions of federal law.

Holding: The Iowa provisions at issue in this case regulate in an area over which the FERC exercises authority granted by Congress, and thus Iowa Code chapter 479A and its implementing administrative code provisions regulate in a field that is occupied by federal law. Thus, such provisions are preempted.

Analysis: The NGA confers authority on the FERC over the issues addressed by the Iowa statutory and regulatory provisions at issue. The NGA specifically provides that the FERC will oversee the construction and maintenance of natural gas pipelines through the issuance of certificates of public convenience and necessity. The FERC has authority to regulate the construction, extension, operation, and acquisition of natural gas facilities, and does so through its extensive and entailed regulations concerning applications for certificates. The FERC's standard conditions for granting blanket certificates of public convenience and necessity include compliance with many environmental statutes and regulations generally and the FERC Plan specifically. Thus, in analyzing the proposed projects of companies under its jurisdiction, the FERC considers environmental concerns, and specifically addresses the issues of soil preservation and land restoration—the very areas which the Board wanted to regulate. In addition, because the Iowa regulations impose additional and more specific requirements in a number of areas than the FERC plan, there is substantial potential for collision between the Iowa provisions and the FERC Plan. Here, the IUB refused to grant Northern Natural Gas's requested waiver for its construction project based partly on the fact that the requirements under the FERC Plan were not as stringent as the Iowa regulations. The broad powers given by Congress to the FERC in regulating the rates and facilities of natural gas companies demonstrate an implicit intent by Congress to preempt state regulation through occupation of the field.

CONSTITUTIONAL

Meyer v. Redmond Jones II, 696 N.W.2d 611 (Iowa May 20, 2005).

Facts: Paul Reid owned certain property in the City of Davenport, which was declared a nuisance by the city, whereupon the city served written notice on Reid ordering him to abate the nuisance. Reid challenged the order and was granted a hearing which the plaintiff, Meyer, attended as an observer. When the hearing officer

filed his decision he did not serve Meyer with a copy of the order. A second hearing was held of which Meyer was given no notice, and, as such, was not present. Following that hearing, the hearing officer ordered Reid to take certain action with regard to his property by a specific date in order to abate the nuisance. Reid neither appealed the order nor did he abate the nuisance. Meyer received no copy of this order either. Meyer ultimately purchased the property at issue from Reid. The city was aware of the change in ownership but did not serve Meyer with a written notice to abate the nuisance. Ultimately, the city accepted an outside bid to abate the nuisance and Meyer granted such contractor temporary access to his property. After the contractor abated the nuisance, the city sent four separate bills to Meyer for the abatement of the property. Meyer requested a hearing, but the hearing officer upheld the billing. Meyer then petitioned for a writ of certiorari with the district court to overturn the hearing officer's decision, but the writ was annulled, with the district court concluding that Meyer was given adequate notice by the city of the alleged nuisance and the city's intent to abate the nuisance. Meyer appealed.

Holding: The city's failure to follow its own code provision denied Meyer's right to due process; thus, the writ of certiorari should have been sustained by the district court.

Analysis: Although the city was aware of Meyer's ownership of the property for at least two months before it accepted the bid to abate the nuisance, it did not give him notice as required under its own statutes to abate the nuisance. Such statutes were in accordance with the requirements of due process and, as such, the city violated Meyer's due process rights by failing to abide by such. Meyer never received a notice to abate the nuisance from the city, so he never failed to abide by the notice to abate the nuisance. Consequently, the city could not charge him with the expense to abate the nuisance under its ordinance.

Doe v. Miller, 405 F.3d 700 (8th Cir. Apr. 29, 2005).

Facts: Sex offenders brought a class action to declare unconstitutional a bill passed by the Iowa General Assembly and signed by the Governor which prohibited persons convicted of certain sex offenses involving minors from residing within 2000 feet of a school or a registered child care facility. The district court declared the statute unconstitutional on several grounds and enjoined the Attorney General of Iowa and the ninety-nine county attorneys in Iowa from enforcing the prohibition. The Iowa Attorney General along with representatives of the class of Iowa county attorneys appeal.

Holding: Because the Constitution of the United States does not prevent the State of Iowa from regulating the residency of sex offenders in this manner in order to protect the health and safety of the citizens of Iowa, the residency restriction is not unconstitutional on its face. In addition, the statute does not amount to unconstitutional *ex post facto* punishment of persons who committed offenses

prior to its enactment because the sex offender appellees were unable to establish by the clearest proof that the punitive effect of the statute overrides the General Assembly's legitimate intent to enact a nonpunitive, civil regulatory measure that protects health and safety. Thus, the 8th Circuit reversed the judgment of the district court.

Analysis: Iowa Code section 692A.2A, which took effect on July 1, 2002, provides that persons who have been convicted of certain criminal offenses against a minor, including numerous sexual offenses involving a minor, shall not reside within 2000 feet of a school or a registered child care facility—but does not apply to persons who established a residence in such restricted areas prior to July 1, 2002 or to schools newly located subsequent to July 1, 2002. Violations of the statute are punishable as aggravated misdemeanors. Such regulation contravenes neither principles of procedural due process or substantive due process under the Constitution and do not punish persons *ex post facto*.

State v. Moorehead, __ N.W.2d __ 2005 WL 736227 (Iowa April 1, 2005).

Facts: A Cerro Gordo County deputy sheriff pulled Moorehead over after clocking him speeding down a Mason City highway. Eighteen-year-old Moorehead still lived at home with his parents, and, in fact, was driving his mother's car. While still at the scene, after having failed several sobriety tests, Moorehead requested to speak to his mother. Although Moorehead's parents arrived at the scene, Moorehead was in the police car with the windows closed and was unable to speak with his mother, even though she was reportedly yelling at him through the closed window. Moorehead did not again ask to call or speak to his mother or anyone else. However, Moorehead testified that later, at the police station, he still wanted to speak to his mother but he assumed that the deputy would not allow him to because he had already asked the deputy earlier. Following the reading of his Miranda rights and the implied consent advisory at the police station, Moorehead took a breath test, answered a written questionnaire and made other incriminating statements. Prior to trial, Moorehead moved to suppress all evidence obtained in this matter, including the breath test results and questions answered without counsel, arguing that his statutory right to contact a family member under Iowa Code section 804.20 had been denied by the deputy. The district court denied the motion, concluding that the statute did not apply because Moorehead made the request at the scene of the stop, not at the police station. During trial, Moorehead once against renewed his suppression argument and it was again denied. The court of appeals found that, although the police had violated section 804.20, it was harmless error. Moorehead appealed.

Holding: The Court reversed, finding that the deputy violated Moorehead's statutory right to talk with his mother. As a result, it was error for the district court to refuse to suppress Moorehead's breath test results and such error was not harmless.

Analysis: In resolving whether Moorehead's rights under Iowa Code section 804.20 attached when he made his request at the scene of the stop, the Court considered whether such request was timed properly and voiced sufficiently. The Court determined that Moorehouse timed his request properly because when he made the request he had already failed three field sobriety tests, a preliminary breath test, made an arguably incriminating statement, and displayed many symptoms of drunkenness when he was placed in the back of the police car. When the deputy placed Moorehouse in the vehicle he told him he was taking him in for one more test. Thus, the investigatory stage of stop had come to an end, and Moorehouse was "restrained of his liberty" as required by the statute. In regard to the sufficiency requirement, the Court determined that Moorehead specifically, separately, and unequivocally requested to talk to his mother in spite of the fact that his request to talk to her arose during a discussion regarding the disposition of his mother's car. As such, the police were obligated to let Moorehouse speak with his mother "without unnecessary delay" after he arrived at the police station, which they did not do. Finally, the Court found that the breath test result was clearly central in the district court's decision and thus, was not harmless error. Ultimately, the Court went one step further and also determined that the State's use of the incriminating statement on remand would be contingent upon a finding by the district court as to whether such statement was spontaneous. Only if the statement is found to be spontaneous will it be admitted into evidence.

Sanchez v. State, 692 N.W.2d 812 (Iowa Feb. 18, 2005).

Facts: Juan and Maria Sanchez brought this action as representatives of the class of illegal, undocumented aliens in the state of Iowa who want to obtain driver's licenses. Plaintiffs John and Jane Doe represent a class advocating licensing of the Sanchez class by the Iowa Department of Transportation ("IDOT") in order to make driving on the state's roads safer for members of the Doe class. Both classes claimed that denial of such drivers' licenses violates the Fifth and Fourteen Amendments of the United States Constitution as well as article I, sections 6 and 22 of the Iowa Constitution. The district court dismissed the action based on the State's contention that the State of Iowa does not provide illegal aliens the right to receive driver's licenses, and that the Doe class lacked standing. The State appealed.

Holding: The statutory and constitutional provisions raised by the classes are not violated by the State of Iowa's practice of denying driver's licenses to illegal aliens. The Court declined to examine the Doe class's standing because the Supreme Court of the United States has held that one party with standing obviates the need to address standing of the other parties when it has no effect on the merits of the case and the Court had already established that the Sanchez class had standing.

Analysis: The Court rejected the plaintiffs' argument that the social security requirements imposed on foreign nationals should be waived because the IDOT is commanded to issue driver's licenses to undocumented aliens under section 321.196(1) of the

Iowa Code. The Court found that (1) section 321.196(1) "does not allow, let alone 'command'" issuance of licenses by the IDOT to any individuals who do not meet 321.196(1)'s requirements and (2) the Sanchez class did not follow the established IDOT procedures for obtaining a social security requirement waiver. The Court then turned its attention to determining whether the state statutory scheme regarding determination of qualification for licenses was constitutional under Equal Protection and Due Process. In pursuing this analysis the Court determined that rational basis was the appropriate level of scrutiny under either the Equal Protection or Due Process clauses of the federal and state constitutions because no fundamental right or suspect class was at issue. Ultimately, the Court concluded that the state's licensing scheme is rationally related to the legitimate state interest of not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens. Finally, the Court found that the plaintiffs' § 1983 claim must fail because their equal protection claim was without merit.

State v. Winters, 690 N.W.2d 903 (Iowa Jan. 14, 2005).

Facts: Winters was arrested for possessing methamphetamine with intent to deliver, conspiring to deliver the methamphetamine, and failing to affix a tax stamp to the methamphetamine, and was charged for the same along with three other individuals. During prosecution of the action, Winters made the district court aware that although he did not want to waive his right to a speedy trial, he wanted to engage in discovery. Two of Winters' codefendants had waived their rights to a speedy trial in order to engage in pretrial discovery. Winters stated that he felt there was sufficient time for discovery to be conducted by both sides within the time allowed for speedy trial, emphasizing that he had been and continued to be incarcerated during the time before trial. Ultimately, the district court continued the case forty-one days beyond the speedy-trial deadline, finding that there was "good cause" to do so. The district court observed that severing Winters' case from the others would not help because the court would not have enough time to rule on pending motions before the speedy-trial deadline, Winters would not be able to complete his discovery, it would create an imposition on the witnesses, and the state would incur greater expense as a result because of duplicative discovery. The district court denied Winters' motion to dismiss based on violation of his right to a speedy trial, and, after being found guilty of all three counts by a jury, Winters was sentenced to three concurrent sentences of seventy-five years for each count. Winters appealed.

Holding: The Court found that Winters' motion to dismiss should based on violation of his right to a speedy trial should have been granted in light of the State's failure to prove good cause for delay.

Analysis: Under Iowa Rule of Criminal Procedure 2.33(2)(b), if a trial is not commenced on a criminal charge within ninety days from filing of the charging instrument, it must be dismissed unless the State can prove that the defendant waived the right

to speedy trial, the delay in commencing such speedy trial may be attributed to the defendant, or there was "good cause" for the delay. Only the existence of "good cause" is at issue in this case. The Court has found that a determination of "good cause" focuses only on the reason for the delay. In the case at bar, the district court's finding of "good cause" was based primarily on the time needed for deposition of the State's witnesses by Winters and the time needed for the court to rule on pending motions. In reviewing these grounds for good cause, the Court emphasized that defendants do not waive their right to be tried within the speedy-trial deadline by filing timely pretrial motions or forfeit their speedy-trial rights by pursuing discovery of the State's evidence. The Court found that the district court did not explain why it did not hear the pending motions before it granted the continuance or why such motions could not be heard within the speedy-trial time remaining. In addition, there was no evidence in the record establishing why Winters' discovery could not be completed within the speedy-trial time remaining. Finally, the Court noted that "the convenience and economic benefits of a joint trial do not alone establish good cause and do not normally take precedence over a defendant's right to a speedy trial . . . [nor does] the waiver of speedy trial by a codefendant . . . constitute a waiver of speedy trial by the other defendants." In sum, "good cause" requires more than that which was presented. As such, the charges must be dismissed.

State v. Allen, 690 N.W.2d 684 (Iowa Jan. 7, 2005).

Facts: Allen was arrested by two Waterloo police officers for public intoxication and charged with third-offense public intoxication—and aggravated misdemeanor—after the prosecutor discovered that Allen had prior convictions for the same crime. The district court separated the public intoxication and enhancement charges out into two stages at trial, and before the trial reached the issue of enhancement, Allen tried to exclude evidence of a prior uncounseled misdemeanor conviction for which no term of incarceration was imposed as unconstitutional under the Iowa Constitution. The district court agreed with Allen's reliance on this Court's decision in *State v. Cooper*, which stated that the unreliability of uncounseled convictions coupled with the importance of counsel should preclude enhancement, and found Allen guilty of a only serious misdemeanor. The State appealed.

Holding: The Court reversed, finding that in cases where a prior conviction, itself, resulted in no term of incarceration, the Iowa Constitution does not prohibit later enhancement through use of prior uncounseled misdemeanor convictions.

Analysis: In considering the state constitutional rights to counsel and due process, the Court declined to interpret the Iowa Constitution to afford more protection than the federal constitution with respect to the use of prior uncounseled misdemeanor convictions. Ultimately, the Court stood by the federal courts' analysis of the issue, determining that such enhancement is not prohibited, as it violates neither state nor federal constitutional rights to counsel or due process. The Court also

noted that a "strong majority" of state courts addressing this issue have followed the same path.

State v. McConnelee, 690 N.W.2d 27 (Iowa Dec. 10, 2004).

Facts: After McConnelee was pulled over by an Evansdale police officer for some minor equipment violations, the officer noticed a small quantity of a leafy-like material located on top of the car stereo. In response to the officer's questioning, McConnelee began to sweep it off, averring that it was tobacco. Ultimately, after requesting McConnelee to exit his vehicle and patting him down, the officer determined that the leafy substance on the stereo was, in fact, tobacco. Following that determination, the officer searched the rest of the vehicle and found drugs and drug paraphernalia, which resulted in McConnelee's arrest. At trial, McConnelee filed a motion to suppress, claiming that the search was not consensual, the contraband was not in plain view, and there was no other basis upon which the officer could constitutionally search the car. The district court overruled McConnelee's motion and a jury found him guilty of all charges. McConneleee appealed.

Holding: The district court erred in failing to suppress the evidence obtained as a result of the search of McConnelee's vehicle. The State did not meet its burden of proving that McConnelee consented to the search of his entire vehicle and there was no probable cause that would allow such search to be extended beyond examination of the leafy material initially observed by the officer.

Analysis: The Court found that McConnelee never expressly or impliedly consented to a search of his entire vehicle. Contrary to the State's claim that McConnelee's gesture toward his vehicle in reference to his claim that the leafy substance was just tobacco and the officer could "check and see" constituted such consent, the Court stated that "[t]he scope of consent is determined by what a 'typical reasonable person [would] have understood by the exchange between the officer and the suspects.'" And, in the context of this situation, the Court was "not persuaded that the officer's recollection of what the defendant said is consistent with what can be confirmed by the videotape [from the police car] or with [its] understanding of human nature." Under the circumstances, the Court determined that because a reasonable person would have understood the consent given was limited in scope to an examination of the leafy substance on the stereo, the officer had no authority to go expand his search any further. The officer had no probable cause, nor did any exigent circumstances exist allowing such search. Thus, the evidence retrieved in the officer's search of the entire vehicle should have been excluded because it violated McConnelee's constitutional right to be free of unreasonable searches and seizures.

In re Detention of Hodges, 689 N.W.2d 467 (Iowa Nov. 19, 2004).

Facts: After Hodges was convicted of third-degree sexual abuse in 1998 and discharged his sentence in December 2002, the State sought to have him deemed a sexually violent predator by filing a petition to have him civilly committed under Iowa Code chapter 229A. The jury found that Hodges, who had a long history of sex offending, was a sexually violent predator under Iowa Code section 229A, and the district court then ordered him committed to a unit for sexual offenders. Hodges appealed, claiming that a civil commitment under chapter 229A based on a diagnosis of antisocial personality disorder violates due process under the United State and Iowa Constitutions.

Holding: Hodges' due process rights under the United States and Iowa Constitutions were not violated by the commitment.

Analysis: The Court determined that antisocial personality disorder can serve as the mental abnormality upon which commitment is based so long as all the elements of the statute are met even though such commitment is not allowed based solely on the existence of his antisocial personality disorder. *See In re Detention of Barnes*, 689 N.W.2d 455 (Iowa Nov. 19, 2004) (determining civil commitment of inmate by the State under Iowa Code section 229A as a sexually violent predator based on (1) conviction of or charge with a sexually violent offense and (2) suffering from a mental abnormality which makes him more likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility, did not violate the inmate's constitutional right of due process); *In re Detention of Goodwin*, 689 N.W.2d 461 (Iowa Nov. 19, 2004) (allowing commitment of inmate as sexually violent predator under chapter 229A because a person with multiple disorders may be committed under the statute as long as the fact finder determines that at least one of the disorders meets the requirements of the statute and the remaining requirements are met); *see also In re Detention of Palmer*, 691 N.W.2d 413 (Iowa Jan. 21, 2005) (affirming commitment of inmate as sexually violent predator under Iowa Code chapter 229A; rejecting inmate's appeal grounds wherein inmate disputed allowance of opinion testimony by the district court and insisted that the jury should have been instructed to presume that inmate was not a sexually violent predator); *In re Detention of Willis*, 691 N.W.2d 726 (Iowa Jan. 21, 2005) (denying inmate's appeal of his commitment as a sexually violent predator under Iowa Code chapter 229A based on his contention that the jurisdiction and authority to consider the commitment petition was lacking in the district court because notice of the petition for commitment was given less than ninety days prior to his anticipated discharge and such late notice does not invalidate the proceedings).

CONTRACTS

Jensen v. Sattler, 696 N.W.2d 582 (Iowa Apr. 29, 2005).

Facts: Three years after purchasing a home, Jensen discovered problems with the roof, attic and electrical wiring as well as improper drainage around the foundation. As sellers, the Sattlers had given Jensen a real estate disclosure form as required under Iowa Code section 558.2, disclosing a crack in the front wall and a faulty master shower valve. Jensen brought suit on common law claims of fraudulent misrepresentation, fraudulent disclosure, and negligent misrepresentation. In addition, he alleged failure to disclose defects as required under Iowa Code chapter 558A. The district court granted most of the Sattlers's motion for summary judgment. It dismissed all claims as to Julie Sattler because she did not sign the disclosure and thus, made no affirmative representations to Jensen regarding the house. It also dismissed the negligent misrepresentation claims against James Sattler. However, it retained the claim of fraudulent misrepresentation under chapter 558A against James Sattler, determining that Jensen must prove the standards of Chapter 558A were violated. Ultimately, the court gave the jury an instruction that blended the common law and statutory claims into one common law claim of fraudulent nondisclosure, and the jury found in favor of Sattler. Jensen appealed.

Holding: The district court erred in holding that a buyer must prove fraud in order to recover under the Iowa Real Estate Disclosure Act. Recovery is allowed upon a showing that, in obtaining the information sought on the form, the seller failed to exercise ordinary care. It was also error for the district court to blend Jensen's statutory and common law claims into one fraudulent nondisclosure claim, as they are distinct causes of action. Jensen should have been allowed to pursue his common law and statutory claims independently. Finally, the district court erred in dismissing Julie Sattler from the suit. She cannot escape liability merely by her failure to sign the disclosure form. Thus, all statutory claims are reinstated against Julie Sattler.

Analysis: Because the language of Iowa Code section 558A states that a seller must "exercise ordinary care in obtaining the information" provided in the required nondisclosure form, it must be read as written; thus, under the plain language of the statute, the seller can be liable for something less than a knowingly inaccurate disclosure. As such, proof of fraud is not required. The Court also determined that Jensen's common law and statutory claims could not be consolidated as one claim for fraudulent nondisclosure because, under Iowa Code section 558A.6, the plaintiff is only required to show actual knowledge, whereas under common law fraud, the plaintiff bears a much higher burden. And, section 558.7 explicitly states that its provisions "'shall not limit or abridge any . . . liability for disclosure created another provision of law.'" For these reasons, Jensen should have been permitted to independently pursue his statutory and common law claims. Finally, Julie Sattler can be defined under Iowa Code section 558A.1(6) as "'a person who

is transferring real property as provided in an instrument containing the power to transfer real estate" because she owned the house with James Sattler and was thus obligated to provide Jensen, as the buyer, a written disclosure. She cannot escape her liability merely by not signing the disclosure form.

Maxim Technologies, Inc. v. City of Dubuque, 690 N.W.2d 896 (Iowa Jan. 7, 2005).

Facts: The City of Dubuque hired Maxim Technologies ("Maxim") to monitor construction of a public parking ramp. Maxim is an independent inspection firm. The terms and conditions of the agreement entered into by the parties were drafted by Maxim in a font small enough to fit sixteen lines and approximately fifteen hundred words on one page. After construction had started, owners of the neighboring buildings found cracks in their buildings and sued the City, Maxim, and others, claiming that the construction had disturbed the soil under their buildings. The plaintiffs claimed that Maxim failed to report problems and improperly monitored certain aspects of the construction. Maxim cross-claimed against the City, alleging the City had agreed to defend and indemnify Maxim even when liability was based on Maxim's own negligence—pointing to one provision of the terms and conditions of their agreement. The City argued that the provision was inapplicable to the present situation and refused to defend or indemnify Maxim. A jury found that Maxim was liable to the plaintiffs and also that the City's contract with Maxim included the disputed provision as well as another provision wherein Maxim generally agreed to indemnify the City. The City moved for judgment notwithstanding the verdict, arguing that the indemnification provision applied only to environmental cleanup and the district court dismissed Maxim's claim. Maxim appealed.

Holding: The Court affirmed dismissal of Maxim's cross-claim, determining that the agreement between the parties did not clearly and unambiguously express the intention that the City indemnify Maxim under the circumstances of this case. In addition, the duty to defend found in the parties' agreement is not broader than the duty to indemnify.

Analysis: The Court determined that because the parties' intent controls and the plain language of the parties' agreement expressly manifests the requisite intent, the only issue to examine is the scope of such intent as expressed in the language used by the parties in their written contract. According to this agreement, the indemnification clause applied only if Maxim was sued by a third party alleging (1) "exposure to or damage from materials, elements or constituents at or from the project site," and (2) the exposure or damages "resulted in or caused any adverse condition to any third party or resulted in claims arising from remedial action, cleanup, uninhabitability of property, or other property damage" and also that Maxim was not grossly negligent and did not commit willful misconduct. All the conditions must be met to obligate the City to defend and indemnify Maxim. The Court ultimately found that the plain language of the contract did not clearly and unambiguously express an intention that the City must indemnify Maxim where

there is no evidence of an environmental-type claim and rejected Maxim's claim that the duty to defend is broader than the duty to indemnify.

Sierra Club v. Wayne Weber LLC, 689 N.W.2d 696 (Iowa Dec. 3, 2004).

Facts: Wayne Weber LLC ("Weber") contracted with Murphy of Iowa, Inc. ("Murphy") for construction of three hog confinement finishing buildings with accompanying manure storage structures. Such facilities were to be used in Murphy and Stoecker Farms's production of hogs. Manure from the storage facilities adjacent to the confinement buildings was applied to croplands near the facility after the crops were harvested. Because the facilities were designed to not discharge manure, the Iowa Department of Natural Resources ("IDNR") concluded that Weber need not obtain a National Pollutant Discharge Elimination System ("NPDES") permit for the project. The Sierra Club and persons owning property near the hog confinement facilities filed suit against Weber, Murphy, and Stoecker Farms, alleging common-law, statutory nuisance, public trust doctrine violation, trespass and negligence claims. A citizens action type claim was also brought under Iowa Code section 455B.111. Hawkeye Fly Fishing Association intervened, joining in the Sierra Club's claims. The permit issue was dismissed by the district court on a summary judgment motion by Weber. The remaining issues commenced, and all the parties participated in mediation approximately three weeks prior to trial. The parties reached an agreement during the course of the mediation and dictated their understanding of such agreement a part of a tape-recorded record. Although the parties agreed that the substance of their mediated agreement was to be incorporated into a consent decree, they disagreed as to what exactly was agreed upon. The district court reviewed the evidence and concluded that the decree proposed by the Sierra Club and Hawkeye Fly Fishing Association best represented the parties' agreement and entered an order corresponding to such. Weber appealed.

Holding/
Analysis: Although the decree is referred to by the district court as a consent decree it clearly was "a decree resolving a dispute concerning the terms of the settlement agreement." General principles of contract law apply to the creation and interpretation of settlement agreements because they are, essentially, contracts. As such, interpretation issues are controlled by the intent of the parties, and, in order to be bound, the contracting parties must manifest mutual assent to the terms sought to be enforced.

Midwest Oilseeds, Inc. v. Limagrain Genetics Corp., 387 F.3d 705 (8th Cir. Oct. 14, 2004).

Facts: Midwest Oilseeds, Inc. ("Midwest"), a former soybean seed breeder, sued Limagrain Genetics Corporation ("Limagrain"), a former joint venture partner, for breach of contract. Midwest and Limagrain had pioneered the marketing of soybean seeds in the 1970's and jointly ventured into the seed-breeding business in the 1980's. Midwest sued Limagrain in federal district court alleging that

Limagrain had made unauthorized use of Midwest's restricted germplasm. Specifically, Midwest alleged that Limagrain breached the parties' 1986 joint venture agreement ("the Agreement") by performing unauthorized breeding with Midwest seeds and their descendants and by licensing Midwest seeds and their descendants to third parties without use restrictions. Midwest sought liquidated damages in the amount of $10 for each bushel marketed in breach of the Agreement. Limagrain brought seven counterclaims, the first of which alleged that Midwest itself breached the Agreement by failing to pay Limagrain royalties due under the agreement. The district court granted summary judgment on Midwest's breach of contract claim and on all of Limagrain's counterclaims—except the first—and ruled that the liquidated damages clause in the Agreement was enforceable. Ultimately, the measure of damages owed to Midwest as well as Limagrain's breach of contract counterclaim proceeded to trial. The court entered final judgment in favor of Midwest in the amount of $40,892,353.67. Limagrain appealed.

Holding: The district court did not err in granting summary judgment for Midwest on its breach of contract claim, in ruling that the liquidated damages provision was enforceable, in finding that the Agreement's restrictions applied retrospectively to Midwest seed received by Limagrain prior to the Agreement's effective date, in granting Midwest's motions for judgment as a matter of law and request for a new trial on Limagrain's first counterclaim, or in dismissing three of Limagrain's other counterclaims. Judgment affirmed in all respects.

Analysis: Under Iowa law, in interpreting a contract a court must first examine the plain language of the contract. In this case, the plain language of the terms of the Agreement demonstrated that Limagrain had breached the Agreement. The Court also determined that Limagrain's conduct revealed that it understood the restrictions of the Agreement. The district court properly found that the liquidated damages provision was enforceable based on the uncontested facts put forward by Midwest showing that the $10 amount for each bushel was reasonable. Because Limagrain conceded that it could not meet the burden of proving that Midwest had breached the Agreement, judgment as a matter of law was appropriate for Midwest.

DAMAGES

Nathan Lane Assoc., L.L.P. v Merchants Wholesale of Iowa, Inc., 698 N.W.2d 136 (Iowa May 20, 2005).

Facts: Plaintiffs, Nathan Lane Associates, L.L.P. and Marmax, Inc. (collectively "Marmax") leased a commercial warehouse to Merchants Wholesale of Iowa, Inc. and its guarantor, Merchants Wholesale, Inc. (collectively "Merchants"). For many years prior to this point, Marmax had been in the grocery-packing business and had leased this commercial warehouse from Nathan Lane Associates. During the time of that particular lease, Marmax had installed a type of "special use"

racking conveyor system for the purpose of transporting grocery-type merchandise throughout the warehouse. After Marmax sold its business, it subleased the building to Merchants, including (with an option to buy) personal property on the premises. Such personal property included the special use racking and conveyor system. Marmax and Merchants entered into a new one-year sublease in December 2000, along with a personal-property purchase agreement ("PPA"), under which Merchants would purchase the previously leased property for $460,000. If Merchants was financially unable to remain in business, it was allowed to terminate the sublease as long as it had paid in full for the property purchased under the PPA. After Merchants paid the PPA balance, it sent Marmax ninety-day notice of its intent to terminate the sublease. Several months later, Merchants received a letter from Marmax's attorneys, outlining "numerous outstanding defaults" which Merchants had allegedly failed to cure and excluding Merchants from possession of the property. After changing the locks on the building, Marmax immediately listed it for sale. A little over a month later, Marmax sued Merchants claiming that Merchants had breached the sublease by holding over, based on Merchants' failure to remove the personal property and its failure to restore the premises. The district court entered summary judgment against Merchants ordering it to pay for cleaning the premises and removing the personal property, which Merchants did. Merchants appealed.

Holding: Judgment against Merchants is reversed as to the ordinary and double rent damages imposed. There can be no damages for a holdover when a former tenant is denied possession of the premises.

Analysis: Under some circumstances it may constitute a holdover if an outgoing tenant fails to remove its personal property. Although the district court found that the size of the special use racking and conveyor system purchased by Merchants constituted a holdover because it severely hindered Marmax's right to take possession, Marmax was the party in control of the property and had excluded Merchants from it. Marmax could have removed the personal property left behind by Merchants and eventually did so at Merchants' expense. Because Merchants did not have the right of possession, it is axiomatic that the duty to pay rent did not arise. As a matter of law, Marmax prevented any holdover by reentering and taking possession of the premises. Merchants could not be a tenant without possession and was therefore not liable for rent. At most, Marmax was entitled to damages for trespass caused by the personal property left behind. No rent, double or otherwise, is allowed when a former tenant is denied possession of the premises.

Tow v. Truck Country of Iowa, Inc., 695 N.W.2d 36 (Apr. 15, 2005).

Facts: After a prospective employee's initial chemical test for drugs and alcohol was inconclusive, his employer denied him employment based on the employee's refusal to pay for a retest. After determining that Truck Country of Iowa, Inc. ("TCI") had violated Iowa Code section 730.5(6)(d) by requiring Tow, as a

prospective employee, to pay for such retesting, the court awarded Tow damages for lost wages and attorney fees. TCI appealed.

Holding: Because under Iowa Code section 730.5(6)(d) TCI was required to pay for Tow's retesting, the district court was correct in awarding damages based upon the wages Tow would have received if he had been hired. In addition, section 730.5(15)(a) authorizes an award of attorney fees; thus, the district court was correct in awarding Tow his attorney fees incurred by this litigation.

Analysis: TCI was incorrect in arguing that it was not legally required to pay for Tow's second test after the first was inconclusive. Section 730.5(6)(b) requires that "[a]n employer shall pay all actual costs for drug or alcohol testing of employees and prospective employees required by the employer." Thus, if TCI intended to use its drug-testing policy as a hiring condition for Tow, it was required to pay the cost of retesting him.

GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning and Refrigeration, Inc., 691 N.W.2d 730 (Iowa Jan. 28, 2005).

Facts: GreatAmerica Leasing Coporation ("GreatAmerica"), brought suit against Cool Comfort Air Conditioning and Refrigeration, Inc. ("Cool Comfort") after Cool Comfort breached its telephone system lease. After obtaining an approximately $17,000 judgment against Cool Comfort, GreatAmercia requested that the district court require reimbursement from Cool Comfort, pursuant to a fee-shifting clause in the parties' agreement, for the approximately $35,000 in attorney fees expended by GreatAmerica in the suit. Approximately $5,000 of that amount was for paralegal work. The bill submitted to GreatAmerica by its law firm indicated that the paralegal work was charged at $80 per hour. Cool Comfort resisted, arguing that because GreatAmerica was only partially successful, it should not recover all of its legal expenses. As a result, the district court granted GreatAmerica only $19,000 in attorney fees, based primarily on the fact that that GreatAmerica was only partially successful. However, the court also subtracted an additional $1,880 from GreatAmerica's claimed litigation expenses for paralegal work, stating that it was troubled by the fact that indigent defense attorneys defending felony defendants in Iowa criminal cases are paid only $50 per hour. Thus, the court effectively reduced the rate for the paralegal work to $50 per hour. GreatAmerica appealed, challenging only the capping of the paralegal hourly rate.

Holding: Adopting a *per se* rule which capped paralegals' rate of pay at $50 per hour was an abuse of discretion by the district court. The Court remanded for reconsideration of that aspect of the award and also for a hearing on appellate attorney fees.

Analysis: The district court did not consider the factors set out by this Court in *Schaffer v. Frank Moyer Construction, Inc.*, in determining whether the attorney fees

requested "were reasonably necessary and that the charges were reasonable in amount." The factors include: (1) the time necessarily spent, (2) the nature and extent of the service, (3) the amount involved, (4) the difficulty of handling and importance of the issues, (5) the responsibility assumed and results obtained, (6) the standing and experience of the attorney in the profession, and (7) the customary charges for similar services. Instead, the district court focused only on the $50 per hour rate paid to some criminal defense attorneys by the State. The analysis used by the district court ignores fact that paralegals in civil litigation and criminal defense attorneys are in different markets. Thus, on remand, the district court was required to determine whether $80 per hour is consistent with market rates and practices for similar work in the community.

GOVERNMENT

Fischer v. City of Sioux City, 695 N.W.2d 31 (Iowa Apr. 15, 2005).

Facts: Seven families residing near the intersection of Sergeant Road and Waldon Avenue in Sioux City, sued the City after an unusually heavy rainstorm resulted in excess surface water running into the intersection and backing up into the families' basements, causing property damage. The plaintiffs sued alleging negligence by the city in connection with its storm-drainage system. The district court ruled that, under Iowa Code section 670.4(8), the city was immune from liability. Plaintiffs appealed.

Holding: Substantial evidence in the record supported the district court's finding that the city was immune from liability based on the fact that the detention ponds maintained in the storm-drainage system in accordance with a generally recognized engineering standard requiring the system to be able to handle a ten-year storm without flooding.

Analysis: Iowa Code section 670.4(8) provides immunity from liability for claims arising out of allegations of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement, as long as it was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. The plaintiffs had the burden to prove that the storm drainage system at issue was not constructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction, which they were unable to do. When the storm-drainage system was installed by the city in 1973, the generally recognized engineering standard used by the city at that time was for the storm-drainage system to be able to handle a ten-year storm without flooding. Ultimately, the City presented substantial evidence that it followed the generally recognized engineering standard. Thus, it was immune from liability.

Emmet County Bd. of Supers. v. Ridout, 692 N.W.2d 821 (Iowa Feb. 25, 2005).

Facts: Lawrence Anderson, a resident of Emmet County, was diagnosed with incurable schizophrenia and bipolar disorder. During the course of Anderson's life, Emmet County paid out numerous sums in mental health benefits on Anderson's behalf, pursuant to its obligation to provide support for persons committed to a state hospital. The County's method of monitoring such payments was to keep an account ledger showing the amount that Anderson or persons legally liable for his support owed the County for the funds it advanced for his care. Anderson's parents entered into a compromise settlement with the County for funds advanced through June 3, 1972, but nothing further was paid past that point. After Anderson's parents died, their estate passed equally to their three sons, including Anderson. However, the will created a trust on Anderson's behalf, containing a spendthrift clause which provided that the "interest of the beneficiary . . . shall not be seized by creditors or said beneficiary or by anyone, by attachment, garnishment, execution or otherwise." The County continued to charge payments to Anderson's account, but at some point became aware of the trust and ultimately entered into an agreement with Anderson and his trustee whereby the County would continue to pay a portion of his costs as long as the trust also paid a portion. Ultimately, the trust paid out $17,020.81 for community-based services, and, at the time of his death, Anderson's trust assets were valued at $123,713.57. The Board of Supervisors filed a probate claim against Anderson's estate for $60,687.89, which represented the amount the County had paid out for Anderson's inpatient services and his community-based services. The district court denied the Board's claim and it appealed.

Holding: The district court was correct in determining that no statutory or common-law authority provides a basis for the County's reimbursement claim for payments it made on Anderson's behalf under Iowa Code chapter 225C for community-based mental health services. In addition, the County is barred by the statute of limitations from recovering any payments made under Iowa Code chapter 230 on Anderson's behalf for inpatient mental health services.

Analysis: Under Iowa Code chapter 225C, any county assistance "is considered a charity to which the recipient is entitled and the county is obligated to provide." Regardless of the County's arguments regarding the type of trust set up on Anderson's behalf by his parents, the Court determined that "the county has neither a statutory nor a common-law right to recover chapter 225C expenses against Anderson or any other person who may be legally responsible for Anderson's expenses." Without such right, the County has no enforceable claim against the trust. Regarding the County's argument that it entered into a contract with the trust, the court noted that no language of any agreement between the trust and the County contained language that would require reimbursement by the trust to the County for any payments made by the County. Finally, although under Iowa Code chapter 230, which requires the County to reimburse the State for a patient's commitment to a state mental hospital, the language stating that "the patient or a person legally

liable for the patient's support remains liable for those expenses" provides statutory authority for recovery by the county of its payments, the statute of limitations barred such claim of recovery.

Molo Oil Co. v. City of Dubuque, 692 N.W.2d 686 (Iowa Feb. 18, 2005).

Facts: The City of Dubuque adopted an amendment to its zoning ordinance as part of its master plan to transform the Ice Harbor area from an industrial area into a pedestrian-oriented environment. Plaintiffs are landowners impacted by the amendment to the zoning ordinance. Prior to adoption of the zoning ordinance amendment, these landowners' properties had been zoned heavy industrial. The amendment reclassified the properties as planned unit development ("PUD"). The terms of the amended ordinance allowed the landowners to continue to operate as nonconforming uses with conditions. The landowners brought an action against the City and city council seeking certiorari, declaratory and injunctive relief, claiming the ordinance was arbitrary, capricious or an unreasonable exercise of the City's police power and that the adoption of the PUD resulted in a taking of their properties without just compensation under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 18 of the Iowa Constitution. The district court concluded the ordinance was a proper exercise of the City's police power and refused to address the takings argument based on the landowners' failure to exhaust their administrative remedies. The landowners appealed.

Holding: The Court affirmed the district court's determination that enactment of the PUD ordinance by the City was a valid exercise of its police power and that the district court did not have authority to hear the landowners' inverse condemnation claim because they had not exhausted their administrative remedies.

Analysis: It is well-settled law that zoning decisions are an exercise of the police powers delegated by the State to municipalities, and that such ordinances are valid if they have any real, substantial relation to the public health, comfort, safety, and welfare, including the maintenance of property values. The Court rejected the landowners' argument that it must balance the possible public good against the landowners rights to determine whether the zoning was unreasonable as applied to the landowners, stating that review of an ordinance is primarily focused on examining the ordinance's general purpose—not any hardship that might result in an individual case. Zoning ordinances are accorded a strong presumption of validity. A party asserting the invalidity of a zoning regulation must prove that it is unreasonable, arbitrary, capricious, or discriminatory, and, a property owner has no vested right in the continuation of a particular zoning classification. The Court relied on the "fairly debatable" standard in reviewing the ordinance. Under this standard, the reasonableness of a zoning ordinance is fairly debatable when, for any reason, it is open to dispute or controversy on any grounds that make sense or point to a logical deduction, and where reasonable minds may differ—or where evidence provides a basis for a fair difference of opinion as to its

application to a particular property. The Court concluded that although the landowners contended that the city rezoned the area to force them to relocate, substantial evidence supported the district court's conclusion that the reasonableness of the zoning ordinance is fairly debatable. Thus, the enactment of the PUD ordinance was a proper exercise of the City's police power. On the issue of whether adoption of the PUD ordinance constituted an inverse condemnation wherein a government body takes an owner's property without instituting formal condemnation procedures as provided for under statute, the Court determined that such issue was not ripe for adjudication. Because exhaustion of administrative remedies is a condition precedent to ripeness, and because the landowners did not exhaust their administrative remedies under the ordinance, the district court had no authority and was correct in dismissing their takings claim.

Gannon v. Bd. of Regents, 692 N.W.2d 31 (Iowa Feb. 4, 2005).

Facts: The petitioners, Gannon and Nichols, are Iowa citizens and taxpayers who requested the Iowa State University Foundation's ("Foundation") records to be opened for the public to see. Petitioners wrote to the Board of Regents ("Board") requesting such records to be opened, and the Board refused their request on the grounds that the Foundation was a private corporation, which the Board did not create or oversee. The petitioners requested the same from the executive director of the Foundation, reiterating that they did not want to see any confidential records. The Foundation declined the request, but did provide a limited amount of information in the following weeks. Ultimately, the petitioners filed a petition for a writ of mandamus in district court pursuant to the Iowa Freedom of Information Act ("IFIA") against the Board, the Foundation, and two of their executive officers. The petitioners alleged the Foundation possessed "public records" that it refused to disclose. The petitioners premised their claim on two theories, namely that (1) the Foundation was a "government body" thus, making its records subject to public disclosure; and (2) in the alternative, the Foundation is, at the very least, a "fiduciary" or "other third party" with records relating to the investment of public funds in its custody. The petitioners requested a writ directing production of the requested records, an injunction to prevent further violations of IFIA, statutory damages, and attorney fees. The district court granted defendants motion for summary judgment, concluding that the Foundation was not a "government body" as contemplated in IFIA and therefore, that its records were not public records. In addition, the court reasoned that funds donated to the Foundation in trust for Iowa State University ("ISU") were Foundation funds and not a matter of public record until dispersed to ISU. The petitioners appealed.

Holding: Summary judgment was improper because the Foundation performs a government function by virtue of its contract with ISU. Therefore, its records are "public records" subject to examination.

Analysis: The Court concluded that ISU is a government body that, with the approval of another government body, the Board of Regents, contracted with a nongovernmental body, the Foundation, to perform a governmental function on behalf of ISU—i.e., fundraising and management. The Court determined that the Foundations performed a governmental function on behalf of ISU because successful fundraising and management is, in fact, "a very important, if not vital, function of the modern university and an integral part of its continuing viability." Therefore, IFIA applies and mandates disclosure of the Foundation's records, regardless of the governmental body's intent in contracting with the Foundation.

Pruss v. City of Cedar Rapids/Hiawatha Annexation Special Local Committee, 687 N.W.2d 275 (Iowa Sept. 15, 2004).

Facts: The City of Hiawatha attempted to involuntarily annex over 1600 acres of unincorporated land in late 1996, sparking a flurry of applications for voluntary annexation to Cedar Rapids, Robins, and Hiawatha. As a result of all the voluntary annexation filings, the City Development Board tabled Hiawatha's petition for involuntary annexation while it decided the pending voluntary annexation proposals because several of the voluntary annexation requests contained common territory with the involuntary annexation request. Francis Pruss was one of the applicants requesting a voluntary annexation of his property to Cedar Rapids. The Board denied Pruss's application for voluntary annexation finding that it would have improperly created an "island" of unincorporated land surrounded by Cedar Rapids, Hiawatha and Robins, but notified him that his application could be "converted" into an involuntary petition. This involuntary petition would then be considered along with Hiawatha's competing involuntary petition. Ultimately, the special committee formed by the Board granted Hiawatha's involuntary annexation of Pruss's property; thus, denying Pruss's "converted" involuntary application for annexation to Cedar Rapids. Pruss and Cedar Rapids appealed.

Holding: The Committee's actions in finding that Pruss's "converted" involuntary annexation application was not entitled to a presumption of validity were legal, and its approval of the annexation to Hiawatha was supported by substantial evidence.

Analysis: The law of annexation is purely statutory; however, a failure to comply literally with every word of the annexation statutes is not fatal—substantial compliance is sufficient. The Court determined that, although Iowa's city development statute manifests a preference for voluntary annexation of land when both voluntary and involuntary annexations compete, such annexation must be denied if it runs afoul of other aspects of the statute—such as the prohibition against the creation of islands of unincorporated territory. As such, the statute strikes a balance between the wishes of the residents of the territory under consideration for annexation against other important policy concerns. Pruss's application for voluntary annexation of his land to Cedar Rapids was denied because it ran afoul of public

policy insofar as it would create an island of unincorporated territory and, thus, the Committee was justified in denying the application. The Court affirmed the Committee's rejection of Pruss's argument that his application should still be afforded a presumption of validity or he would be prejudiced, finding that a better interpretation was that conversion from voluntary to involuntary should not prejudice the applicant's status as a valid participant in the process—which it did not. Such an interpretation would "eviscerate[] the distinction between voluntary and involuntary annexations." Thus, Pruss's petition for involuntary annexation was not entitled to a presumption of validity and therefore, he was not prejudiced within the meaning of the conversion section of Iowa's city development statute when the Board made its decision without applying such a presumption.

Iowa Appellate Court Update

(Civil Procedure, Court Jurisdiction & Trial, Evidence, Insurance, Judgment, Limitation of Action)

Iowa Defense Counsel Association
Annual Meeting
September, 2005

William J. Miller
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309
(515) 243-4191

IOWA APPELLATE CASE REVIEW II

2004-2005

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APPELLATE AND CIVIL PROCEDURE

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COURTS, JURISDICTION, AND TRIAL

***

EVIDENCE

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INSURANCE

***

JUDGMENT AND LIMITATION OF ACTION

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William J. Miller
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
(515) 246-5856 / miller.william@bradshawlaw.com

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APPELLATE AND CIVIL PROCEDURE

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1. RULES OF PROCEDURE

A. APPELLATE PROCEDURE – FILING OF OPINIONS BY THE SUPREME COURT

The Iowa Supreme Court is now issuing opinions every Friday, a departure from its traditional schedule of issuing opinions on the Wednesday after it convenes to hear oral arguments (or roughly every five weeks). According to court spokeswoman Becky Colton, speaking with the *Des Moines Register* about the change, this new approach is meant to speed the distribution of the court's opinions and to alleviate some of the pressure on attorneys who often faced an avalanche of twenty or so new opinions to review and analyze on each traditional filing day. The schedule alteration also makes the court's opinion distribution similar to that of other state high courts and the United States Supreme Court.

* * *

The supreme court exercised its rule-making authority in the appellate and civil procedure areas sparingly this past year, expending most of its efforts on the new Iowa Rules of Professional Conduct. The amendments that were made are of limited scope. The amended rules are provided below, with the amended language struck out and new language underlined.

B. APPELLATE PROCEDURE – PROPER FORM OF REVIEW

Iowa R. App. P. 6.304 (amended and eff. Sept. 16, 2004)

Rule 6.304 Form of review. If any case is brought by appeal, by application to certify an appeal, certiorari, or discretionary review, and the appellate court is of the opinion that another of these remedies was the proper one, the case shall not be dismissed, but shall proceed as though the proper form of review had been sought. Any one of the foregoing remedies may under this rule be treated by the appellate court as the one it deems appropriate. Nothing in this rule shall operate to extend the time within which an appeal may be taken.

Comment: This is merely a technical amendment to incorporate the certification of appeal contemplated by Iowa Rule of Appellate Procedure 6.3 (pertaining

to appeals "not originally tried as a small claim, where the amount in controversy, as shown by the pleadings, is less than $6000").

C. APPELLATE – APPLICATION FOR FURTHER REVIEW

Iowa Ct. R. 21.32 (amended and eff. Nov. 23, 2004)

Rule 21.32 Application to supreme court for further review.
(1) An application for further review shall be deemed submitted for consideration by the supreme court when the time for filing a resistance to the application has expired. In those cases in which a resistance is not allowed unless ordered by the court and no resistance has been ordered, an application for further review shall be deemed submitted when the time for filing an application has expired.

(2) The supreme court en banc shall consider each application for further review and resistance. The affirmative vote of at least four justices shall be required to grant an application for further review. If an application is granted, the supreme court shall determine the scope and manner of submission.

Comment: This rule, found in the court rules pertaining to "judicial administration," seeks to ensure some action by the Iowa Supreme Court on an application for further review to avoid the running of the period for considering further review found in Iowa Code section 602.4102(5).

D. CIVIL PROCEDURE – DISMISSAL FOR WANT OF PROSECUTION

Iowa R. Civ. P. 1.421 (amended Sept. 16, 2004; eff. Dec. 1, 2004)

Rule 1.421 Defenses; how raised; consolidation; waiver.
(1) Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial. The following defenses or matters may be raised by pre-answer motion:

a. Lack of jurisdiction of the subject matter.

b. Lack of jurisdiction over the person.

c. Insufficiency of the original notice or its service.

d. To recast or strike.

e. For more specific statement.

f. Failure to state a claim upon which any relief may be granted.

(2) Improper venue under rule 1.808 must be raised by pre-answer motion filed prior to or in a single motion under rule 1.421(3).

(3) If the grounds therefor exist at the time a pre-answer motion is made, motions under rule 1.421(1)(b) through 1.421(1)(f) shall be contained in a single motion and only one such motion assailing the same pleading shall be permitted, unless the pleading is amended thereafter.

(4) If a pre-answer motion ~~is made under rule 1.421(3),~~ does not contain any matter specified in rule 1.421(1) or 1.421(2) ~~which is not included in the motion is~~ that matter shall be deemed waived, except lack of jurisdiction of the subject matter or failure to state a claim upon which relief may be granted.

(5) Sufficiency of any defense may be raised by a motion to strike it, filed before pleading to it.

(6) Motions under this rule must specify how the pleading they attack is claimed to be insufficient.

Comment: The amendment to (2) may cause some change in practice, although any change should not be significant. The amendment to (4) is purely technical.

2. CIVIL PROCEDURE – VENUE CANNOT BE ESTABLISHED FOR A GROUP OF DEFENDANTS INCLUDING A COMMON CARRIER BASED SOLELY ON THE COMMON CARRIER'S PRESENCE IN THE VENUE.

Richards v. Anderson Erickson Dairy Co., 699 N.W.2d 676 (Iowa 2005).

Facts: Plaintiffs Lorraine and Ward Richards were injured in a vehicular collision in Grundy County and filed a personal injury action against defendants Anderson Erickson Dairy Co. ("AE"), its driver, Gary Link, and two other defendants. The Richards filed their suit in Johnson County, although they were residents of Grundy, Link was a resident of Story, AE is an Iowa corporation with its principal place of business in Polk, and the other defendants were residents of Polk. The Richards asserted venue was proper

in Johnson County "because AE regularly drove its trucks through" the county. AE and Link moved for a change of venue to Grundy County based on it being where the accident occurred. The district court granted the motion and the case proceeded to trial, resulting in a defense verdict. The Richards filed a motion for new trial contending the case should not have been transferred to Grundy County. After the district court denied the motion, the Richards appealed.

Holding: The standard of review for a district court's ruling on a motion for new trial premised on a venue issue is dependent on the rule under which the change of venue is sought. Venue was not proper in Johnson County and the district court correctly granted the defendants' motion to change venue to Grundy County.

Analysis: Review is for errors at law in this case as a change of venue was sought pursuant to Iowa Rule of Civil Procedure 1.808, which *requires* a change of venue where the case has been brought in the wrong county. Comparatively, appellate court review of a venue decision under rule 1.801 is for an abuse of discretion as that rule requires an exercise of discretion on the part of the district court in assessing whether to change venue due to prejudice by the inhabitants of the county against the moving party.

While venue was proper in multiple other counties in this case, it was not proper in Johnson County. At least one defendant lived in Story and Polk Counties making venue appropriate in each pursuant to Iowa Code section 616.17. Of course, this general venue provision provides for exceptions "otherwise provided."

The Richards argued exceptions could be found in Iowa Code sections 616.18 and 616.8. Section 616.18 provides venue is proper in the county in which the injury was sustained, meaning Grundy County was also an appropriate venue. The plaintiffs further asserted section 616.8, Iowa's "common carrier statute," made venue proper in "any county through which" AE as a common carrier, "passes or is operated." After reviewing its prior precedents in the area and noting the important of venue statues as statutes of convenience, the court concludes section 616.18 is meant to apply to a common carrier defendant sued by itself. Because this case included multiple defendants, including a common carrier, venue could not be based on section 616.18, making venue improper in Johnson County.

3. CIVIL PROCEDURE – DEFECTIVE SERVICE OF PROCESS OCCURRING AFTER A FIFTH DEADLINE EXTENSION IS GROUNDS FOR DISMISSAL WITHOUT PREJUDICE.

Brubaker v. Estate of DeLong, _____ N.W.2d _____, 2005 WL 1593397 (Iowa July 8, 2005).

Facts: Plaintiff Brubaker and decedent Arthur DeLong were involved in an auto accident in Waterloo. Fourteen months later, DeLong died. Four months after DeLong's death, Brubaker filed a petition against him seeking damages for injuries suffered in their accident. The district court proceeded to grant Brubaker five extensions of additional time to serve DeLong.

Eventually, an attorney purporting to be the attorney for DeLong's Estate accepted service. Unfortunately, the estate had not yet been opened. The estate was later opened and a second acceptance of service was made. This second acceptance came over three months after the district court's fifth deadline extension, in connection to which it warned that a failure to conform to the new deadline would result in dismissal of the case. The Estate filed a pre-answer motion pursuant to Iowa Rule of Civil Procedure 1.421 contending service was improper. The district court granted the Estate's motion and dismissed Brubaker's case.

Holding: The district court properly dismissed the case (although it should have been dismissed without prejudice) because service of process was untimely.

Analysis: Iowa Rule of Civil Procedure 1.302(5) permits a court to "extend the time for service for an appropriate period" if the filing party shows good cause for such an extension. Brubaker failed to achieve service prior to the last deadline extension provided by the district court. The first acceptance of service was invalid because the Estate had not been opened and the attorney accepting service had not qualified as its administrator. The later, second acceptance, did not cure the defects in the first acceptance because it came after the deadline. Moreover, even assuming the second acceptance could cure any defect in the first, Brubaker could not show good cause for delay. Instead, the record supported "inadvertence, neglect, and half-hearted attempts to obtain service over the defendant" by Brubaker. Dismissal was proper, although the dismissal should have been without prejudice.

4. CIVIL PROCEDURE – IOWA RULE OF CIVIL PROCEDURE 1.904(2) IS INTENDED TO GIVE EACH PARTY A "BITE AT THE APPLE" AND SUCCESSIVE MOTIONS ARE PERMISSIBLE IN SOME CIRCUMSTANCES.

In re Marriage of Okland, 699 N.W.2d 260 (Iowa 2005).

Facts: Timothy and Debra Okland divorced in 1998. Timothy filed a petition seeking a modification of the dissolution decree in 2003. Debra filed a cross-petition for modification. The trial court modified the decree in Timothy's favor. Debra then filed an unresisted motion pursuant to Iowa Rule of Civil Procedure 1.904(2) resulting in the district court amending its modification of the decree. Timothy then filed his own 1.904(2) motion challenging the district court's amendment ruling, which was denied as untimely because it did not come within ten days of the court's first modification order. Timothy then filed a notice of appeal, but the court of appeals dismissed his appeal as untimely because it came thirty days after the modification order. Timothy sought further review.

Holding: Timothy was entitled to file a 1.904(2) motion in response to the district court's order in response to Debra's 1.904(2) motion within ten days of its entry, meaning his 1.904(2) motion was timely. The time for appeal from the district court's denial of his motion was tolled until thirty days after its ruling on his motion and thus also timely.

Analysis: Iowa Rule of Civil Procedure 1.904(2) permits a court "to enlarge or amend its findings and conclusions and to modify or substitute the judgment or decree" entered. A non-moving party is permitted, but not required, to file a resistance. The filing of a rule 1.904(2) motion tolls the period for appeal until thirty days after entry of the district court's ruling on the motion.

After reviewing the language of the rule and its prior cases, the court notes three established principles related to rule 1.904(2): (1) "an untimely or improper rule 1.904(2) motion cannot extend the time for appeal;" (2) "a rule 1.904(2) motion filed by a party following a denial of the party's prior motion is improper and does not extend the time for appeal if the judgment remained unchanged following the first motion;" (3) "a rule 1.904(2) motion filed after a new judgment or decree has been entered by the court in response to a prior rule 1.904(2) motion is permitted under the rule and extends the time for appeal." Ultimately, "[t]he rule applies to give each party a bite at the apple to request a change or modification of an adverse judgment." Applying these conclusions here, both Timothy's rule 1.904(2) motion and notice of appeal were timely. (Note: this case includes some

interesting dicta regarding the multiple and appropriate uses of a rule 1.904(2) motion and a limited attempt to state the proper name for a rule 1.904(2) motion.)

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COURTS, JURISDICTION, AND TRIAL

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5. TRIAL – A PLAINTIFF BRINGING A CLAIM UNDER THE IOWA CIVIL RIGHTS ACT IN STATE COURT IS ENTITLED TO A JURY TRIAL.

McElroy v. State, _____ N.W.2d _____, 2005 WL 1413150 (Iowa June 17, 2005).

Facts: Plaintiff McElroy, a former graduate student at Iowa State University, was subject to repeated instances of sexual harassment and misconduct by her academic advisor. In November 1997, McElroy sued the State of Iowa and ISU contending they failed to adequately address the supervisor's behavior and retaliated against her. On its second journey to the Iowa Supreme Court, almost *thirty* grounds for appeal are presented.

Holding: Overruling *Smith v. ADM Feed Corp.*, 456 N.W.2d 378 (Iowa 1990), the court concludes "plaintiffs under the [Iowa Civil Rights Act (ICRA)] are entitled to have their claims tried to a jury of their peers."

Analysis: On cross appeal, McElroy urges the court to reconsider *Smith* and, believing the issue "will undoubtedly reoccur on remand and involves an issue of substantial public importance," the court does so. It begins its analysis by simply reviewing the *Smith* holding and concludes the statutory analysis in *Smith* was fundamentally flawed. The court then notes the several problems that have arisen since *Smith*, including the "odd situation that plaintiffs bringing ICRA claims in federal court may receive a jury trial, but those in state court will not." The court determines the only basis on which to uphold Smith is *stare decisis*. After reciting general principles related to overruling its precedents, the court determines *Smith* must be overruled and a plaintiff "seeking money damages under the ICRA is entitled to a jury trial."

6. JURISDICTION – ABSENCE OF PERSONAL JURISDICTION IN RELATION TO NAMED CLASS ACTION PLAINTIFFS CANNOT BE ALLEVIATED BY PERSONAL JURISDICTION ARISING FROM CONDUCT RELATED TO OTHER MEMBERS OF PUTATIVE CLASS.

Hammond v. Florida Asset Fin. Corp., 695 N.W.2d 1 (Iowa 2005).

Facts: The plaintiffs brought a proposed class action against Florida Asset Financing Corporation ("FAF") and other defendants premised primarily on breach of contract theories. Each of the putative class members had purchased membership in Thousand Adventures, Inc., ("TAI") a corporation running campground facilities at which the plaintiffs were given access throughout the United States, including in Iowa. These purchases were based on retail installment contracts, which were then assigned to third parties, including FAF, which was later sued based on this relationship and after the plaintiffs grew dissatisfied with TAI's services. FAF filed a motion to dismiss the claims against it arguing Iowa courts lacked personal jurisdiction over FAF.

Holding: Iowa did not have specific personal jurisdiction over FAF as it had not conducted activities in Iowa. The court also concludes the absence of personal jurisdiction in relation to the named members of the putative class was dispositive as it meant the court lacked jurisdiction to consider class action claims brought on behalf of an as-yet-uncertified class of plaintiffs even if personal jurisdiction might be established based on FAF's conduct in relation to the unnamed class members.

Analysis: Although the plaintiffs' contracts had been assigned to other third parties similar to FAF, FAF itself had not taken assignments of the named plaintiffs' contracts. Absent other evidence of contacts with Iowa, no personal jurisdiction exists over FAF.

The court notes its conclusion "appears to violate a principle that this court has previously adopted concerning contravening the merits of a plaintiffs' claim in the adjudication of a challenge to the court's jurisdiction." While reinforcing this principle, the court concludes that it should not hinder a jurisdictional determination affecting the merits where there is no issue of material fact related to the allegations on which jurisdiction is premised.

The court further rejects the plaintiffs' contention that if it does not have personal jurisdiction based on conduct related to the named plaintiffs, it may still have jurisdiction based on the claims of other members of the putative class. The court notes that because no class has been certified in

the case, the only persons that can assert it should proceed as a class action are the named plaintiffs. Yet, "if the court lacks jurisdiction over FAF as to plaintiffs individual claims for relief, it also lacks jurisdiction over FAF for purposes of considering plaintiffs request to certify the litigation as a class action." For this reason, all of the plaintiffs' class action claims against FAF were properly dismissed.

7. TRIAL – DETERMINATION OF WHETHER DOCUMENT IS PREPARED IN ANTICIPATION OF LITIGATION AND PRIVILEGED AS WORK PRODUCT REQUIRES CONSIDERATION OF THE DOCUMENT ITSELF AND THE FACTUAL SITUATION OF THE CASE.

Wells Dairy, Inc. v. American Indus. Refrigeration, Inc., 690 N.W.2d 38 (Iowa 2004).

Facts: In March 1999, one of Wells Dairy's refrigeration systems sprung an ammonia leak resulting in an explosion and fire. Subsequent to this incident, Wells Dairy retained two consultants "'to investigate operations of the . . . refrigeration system.'" Affidavit testimony from Wells Dairy's chief operating officer asserted these consultants were retained to address this issue in anticipation of future legal claims. However, the report they later issued was couched in terms of a business analysis, noting goals of the report such as determining "'Is refrigeration a *core competency* for Wells' Dairy?'"

Two lawsuits later arose out of the explosion and fire during which a request for production of documents was served on Wells Dairy that seemingly included the consultant report it had obtained. Wells Dairy resisted the report's disclosure contending it was work product and privileged pursuant to the self-critical-analysis privilege. The district court granted a motion to compel production of the report and Wells Dairy appealed. After briefing in the appeal was completed, Wells Dairy inadvertently disclosed the report.

Holding: Because "it could not fairly be said that the [consultant's] report was prepared because of impending litigation, it was not protected by work product privilege."

Analysis: The questions presented to the court in this case come in the context of one of the plaintiff's contentions that the inadvertent disclosure of the report waived any work product privilege and mooted the appeal. The court concludes it needs to reach the inadvertent disclosure issue only if it

determines the documents were privileged in the first place. For this reason, it launches into an analysis of the work product doctrine.

The court's analysis begins with a reassessment of its work product cases and ends with a restatement of the proper test to apply in determining whether work product is involved: "[T]he overarching inquiry in determining whether a document was prepared in anticipation of litigation is 'whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" The court concludes that, notwithstanding the affidavit from Wells Dairy to the effect the document was produced in anticipation of litigation, the district court did not abuse its discretion in determining that was not, in fact, the case. For this reason, it affirms the district court's order compelling production and does not reach the inadvertent disclosure issue.

Also notable is a short discussion of the self-critical-analysis privilege, which is not yet recognized under Iowa law. While acknowledging inadvertent disclosure as "'a specter that haunts ever document intensive case,'" the court determines it is not its place to recognize the privilege and its extension is instead a question for the legislature.

8. COURTS – CONSOLIDATION IS IMPROPER WHERE COMMON LAW AND STATUTORY CLAIMS ARE DISTINCT.

Jensen v. Sattler, 696 N.W.2d 582 (Iowa 2005).

Facts: Prior to closing, the Sattlers provided plaintiff Jensen a real estate disclosure form that failed to disclose three serious defects in the home. Jensen later sued the defendants on common law and statutory bases, arguing the nondisclosures were fraudulent and negligent and violated Iowa Code chapter 558A, Iowa's Real Estate Disclosure Act.

Holding: The plaintiff's causes of action for fraud and a statutory violation were distinct and should not have been consolidated.

Analysis: A plaintiff does not need to prove fraud to recover under Iowa Code section 558A.6, extending liability for a violation of chapter 558A. For this reason, Jensen's claims of common law fraud and a statutory violation were distinct and consolidation of the claims by the district court was improper.

9. COURTS – ADMINISTRATIVE HEARING WAS TIMELY AS THE ONLY EVENTS DELAYING THE HEARING WERE THOSE ARISING OUT OF THE PLAINTIFFS' PRIOR APPEAL.

Kennedy v. Civil Serv. Comm'n, 694 N.W.2d 532 (Iowa 2005).

Facts: Plaintiffs Venditte and Kennedy were Council Bluffs police officers who were disciplined in the course of their employment. Both appealed their discipline and subsequently challenged (all the way up to the Iowa Supreme Court) the appellate process under which their appeals were considered. On remand, the officers challenged the process once again, contending the Council Bluffs civil service commission failed to timely set a hearing in the matter. This issue worked its way back up to the supreme court.

Holding: The plaintiffs' civil service commission hearings were held in a timely fashion in conformity with the Iowa Code.

Analysis: Iowa Code section 400.23 mandates that a hearing in a commission appeal must occur no less than five and no more than twenty days after specifications of charges are filed against an individual. Looking at the timing of the various filings in the case, the court concludes the initial filings were timely and any delay was the result of the officers challenging the overall process. With these factors in mind, the hearings were timely.

10. COURTS – DISTRICT COURT LACKED AUTHORITY TO DETERMINE PLAINTIFFS' CLAIM AS THEY FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Molo Oil Co. v. City of Dubuque, 692 N.W.2d 686 (Iowa 2005).

Facts: In the course of developing a river front development project, the City of Dubuque implemented a master plan for the river front area and then reclassified the plaintiff land owners' properties from "heavy industrial use" to "planned unit development." This reclassification made the plaintiffs' businesses non-conforming uses and subjected them to additional regulation. The plaintiffs sought relief claiming the ordinance was an arbitrary and capricious exercise of the city's police power and resulted in a taking of their property.

Holding: The land owners assertion of inverse condemnation by the city was not ripe for adjudication due to their failure to exhaust administrative remedies.

Analysis: The land owner plaintiffs asserted the city's action amounted to an inverse condemnation, which occurs "when a government body takes an owner's property without the institution of formal condemnation proceedings under our statutes." Analyzing Dubuque's general zoning ordinance, the court concludes there were several steps in place for aggrieved land owners to pursue prior to bringing a cause of action in the district court. Because the land owners failed to take these steps, they also failed to exhaust their administrative remedies. For this reason, their claim was not ripe for adjudication and the district court was without authority to determine it.

11. COURTS – SUPREME COURT REMAINS EVENLY DIVIDED ON QUESTION OF APPROPRIATE JURY INSTRUCTION FOR A PREMISES LIABILITY CAUSE OF ACTION.

Anderson v. State, 692 N.W.2d 360 (Iowa 2005).

Facts: Plaintiff Anderson was injured as she walked home on an icy sidewalk on the University of Northern Iowa campus. Anderson later claimed the state was negligent in failing to close the library due to bad weather and failing to clear the sidewalks of ice. The state defended by asserting these were decisions that fell under the discretionary function exception.

Holding: On a related issue, the supreme court divides evenly on the question of the appropriate jury instruction to be submitted on the duty owed a lawful entrants on land.

Analysis: Anderson sought an instruction on premises liability that would have instructed the jury "that the possessor of land must exercise reasonable care under all the circumstances existing at the time and place of the injury for the protection of lawful entrants." The district court instead submitted the State's requested instruction, which was based on the three traditional premises liabilities distinctions (invitee, licensee, trespasser). The court divides evenly on this issue, affirming the district court's submission of an instruction applying the traditional distinctions.

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EVIDENCE

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12. EVIDENCE – TREATING PHYSICIAN NEED NOT BE DESIGNATED AS AN EXPERT WITNESS WHERE HER TESTIMONY ON CAUSATION RELATES DIRECTLY TO HER TREATMENT OF THE PLAINTIFF.

Hansen v. Central Iowa Hosp. Corp., 686 N.W.2d 476 (Iowa 2004).

Facts: Marlys Hansen was hospitalized at Iowa Methodist Medical Center (IMMC) for back pain. Although placed on "fall precautions," the hospital placed Marlys' commode beneath her bed, requiring she get out of bed to use it. While attempting to do so, Marlys fell and injured herself. These injuries developed into chronic back pain leading, eventually, to the implantation of a morphine pump by Dr. Kenneth Pollack.

Marlys and her husband later sued IMMC. The Hansens eventually designated their expert witnesses, but did not designate Dr. Pollack. Shortly prior to trial, the Hansens indicated their intent to call Dr. Pollack as a witness. IMMC moved in limine to prevent his testimony as he was not designated as an expert witness. The district court sustained IMMC's motion to strike Dr. Pollack's testimony on causation. The jury returned a verdict finding IMMC negligent but determining its negligence was not a proximate cause of the Hansens' damages. After the district court overruled the Hansens' motion for new trial and reaffirmed its earlier decision to exclude Dr. Pollack's testimony, the Hansens appealed.

Holding: The district court erred in striking Dr. Pollack's testimony.

Analysis: The court starts its analysis by reviewing two prior cases in the expert designation area: *Cox v. Jones*, 417 N.W.2d 23 (Iowa 1991), cited by IMMC in support of its position, and *Carson v. Webb*, 486 N.W.2d 278 (Iowa 1992), cited by the Hansens. The court explains that the latter of these two, *Carson*, "makes clear that disclosure under section 668.11 may be required when a treating physician gives an opinion about reasonable standards of medical care." This is the case "because the physician ordinarily is not required to formulate such an opinion in order to treat the patient."

"However, as *Carson* points out, that is not the case with respect to causation because some conclusions concerning causation relate directly to the treatment of the patient and for that reason are outside the scope of

668.11." Ultimately, the "paramount criteria" in cases of this type "is whether this evidence, irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation." The court concludes Dr. Pollack's testimony constituted the former. On a related issue, the court also concludes Dr. Pollack's testimony was sufficient to create a fact question on causation.

13. EVIDENCE – OBJECTION TO ULTIMATE ISSUE TESTIMONY MUST TARGET THE LEGAL NATURE OF THE INQUIRY AND SPECIFY THE LEGAL TERMS MAKING THE INQUIRY OBJECTIONABLE.

In re Detention of Palmer, 691 N.W.2d 413 (Iowa 2005).

Facts: Carol Palmer is a pedophile. The State filed a petition to have him declared a sexually violent predator subject to civil commitment. At trial, it offered expert witness testimony related to the likelihood Palmer would engage in predatory acts of a sexually violent nature if not confined. This question echoed the statutory elements that must be established for a civil commitment. Palmer objected to this testimony on the grounds it "'invades the province of the jury and it touches on an ultimate issue that is for the jury.'" The jury found Palmer was a sexually violent predator and he appealed, resting primarily on the "ultimate issue" objection noted above.

Holding: Error was not preserved because Palmer's objection "did not address the state's use of two distinct legal terms in its question as ground for error and did not 'alert the trial court to the principle sought to be involved.'"

Analysis: The issue before the court is couched in terms of error preservation and the determination of whether Palmer's objection was sufficient to apprise the court of the issue raised. After a lengthy discussion of the "Ultimate Issue Rule," the court determines the true problem underlying a question such as that which was posed to the State's expert is "not that the opinion 'invades the province of the jury' but rather that it '"invade[s] the province of the court to determine the applicable law and instruct the jury as to that law."'" Thus, "whether an opinion couched in legal terms is excludable on this basis depends on 'whether the terms used by the witness have a separate, distinct and specialized meaning under the law different from that present in the vernacular. If they do, exclusion is appropriate.'"

The State's expert's testimony was related to whether Palmer's "mental abnormality" made him "likely to engage in predatory acts constituting

sexually violent offenses if not confined in a secure facility." This statutory standard encompasses three terms. One of these terms is "likely," a word with the same meaning in both law and the vernacular. However, the terms "predatory" and "sexual violent offense" have a distinct and specialized meaning in law making expert testimony on each objectionable.

Nevertheless, Palmer's objection was insufficient to preserve error, as it should have been stated "that the question called for a legal conclusion, for an opinion that was not the proper subject of expert testimony, or for an opinion whose probative value would be substantially outweighed by the danger of misleading the jury." "More importantly, Palmer was required to identify the specific legal terms that rendered the question objectionable." Despite the fact that error was not preserved, the court goes on to conclude that the result would have been the same if it had because no prejudice resulted from the expert testimony.

14. EVIDENCE – DOCUMENT ACCUMULATING INFORMATION ON POLICE DISPATCHES IN REPORT FORM IS INADMISSIBLE HEARSAY NOT SUBJECT TO AN EXCEPTION AS A PUBLIC RECORD.

Herold v. Shagnasty's, Inc., 690 N.W.2d 699 (table), 2004 WL 2002433 (Iowa Ct. App. Sept. 9, 2004).

Facts: Herold was injured after he scuffled with a security guard at the defendant's place of business. He then brought several claims arising out of his injuries and the alleged negligence of the defendant.

Holding: An exhibit providing a summary of police dispatches to the defendant's place of business was hearsay and should not have been admitted into evidence.

Analysis: Herold offered a summary report from the Cedar Rapids Police Department that evidenced a number of prior dispatches to the defendant's location for "types" of offenses including assault. Herold claimed this listing was relevant as showing evidence of "crimes and non-violent instances on the premises" probative of the foreseeability of his injuries. He further contended the report was an admissible public record under Iowa Rule of Evidence 5.801(8) or as a summary under rule 5.1006.

The court of appeals rejected Herold's assertion of an exception under rule 5.801 because it determined the document was an "investigative report" and thus fell under the exception to the exception for public records for "[i]nvestigative reports by police and other law enforcement personnel."

The document was an investigative report because it "summarizes data recorded as a result of the Cedar Rapids Police Department gathering information from a caller and based on the information gathered, determining if a police officer needed to be dispatched." The court further determined rule 5.1006 does not "allow a summary of evidence not otherwise admissible," making it inapplicable.

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INSURANCE

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15. INSURANCE – NO BAD FAITH WHERE INSURER FAILED TO PAY UIM LIMITS BASED ON ITS REASONABLE EVALUATION OF PLAINTIFF'S DEMAND AND WHERE DUTY TO CONSENT TO SETTLEMENT WAS DEBATABLE.

Bellville v. Farm Bureau Mutual Insurance Co., ___ N.W.2d ___, 2005 WL 1790609 (Iowa July 29, 2005).

Facts: Sue Ellen Bellville was killed when the motorcycle on which she was riding, driven by her husband, Roger, collided with a motor vehicle driven by Guy Schueler in Cedar Rapids. Schueler had an automobile policy with liability limits of $50,000 and few other assets. Bellville had underinsured motorist (UIM) coverage through Farm Bureau Mutual Insurance Co. with limits of $300,000. In early 2000, Bellville sought Farm Bureau's consent to settle with Schueler for the limits of his liability policy. Bellville also demanded the UIM policy limits. Farm Bureau's investigation of the accident, which was more or less limited to a review of the police report, had led it to ascribe 30% fault to Roger Bellville for the accident. It refused to pay Bellville's demand or consent to the settlement. Bellville soon sued Farm Bureau, alleging bad faith.

Holding: The insurer did not act in bad faith because its refusal to pay the plaintiffs' demand had a reasonable basis and it was debatable as to whether it had a duty to consent to the plaintiffs' settlement with the underlying tortfeasor.

Analysis: Bellville contended the primary issue "rest[ed] on Farm Bureau's allegedly 'unreasonably low offer, deriving from an excessive allocation of fault and improperly low valuation of death damages.'" In assessing this issue, the court found it necessary to reframe it as "whether there was no reasonable basis for Farm Bureau's denial of the plaintiff's demand." If there was

sufficient proof of this element, the court noted, "the remaining issue is whether Farm Bureau had actual or constructive knowledge that its refusal to pay had no reasonable basis."

On the first element, the court concluded there was insufficient evidence to conclude Farm Bureau's evaluation was faulty or that it "lacked a reasonable basis for its refusal to pay the plaintiff's settlement demand." The court observed that Bellville's evidence of bad faith consisted largely of expert witness testimony: "Of course the fact experts disagreed with Farm Bureau's valuation of its insured's claim is insufficient to establish bad faith. Similarly, testimony by these experts that Farm Bureau's valuation was, in their judgment, 'unreasonable' is also inadequate to permit recovery of extracontractual damages." Juxtaposed with this evidence was evidence of Farm Bureau's reliance on the investigating officer's report in evaluating Bellville's demand, a practice the court condoned. In doing so, it rejected Bellville's contention the report should not be considered in assessing the claim because it would be inadmissible at trial.

The court then went on to conclude that Bellville's bad faith claim could not rest on Farm Bureau's failure to value Bellville's claim at the level necessary to prompt a payment of the claim. In addressing this issue, the court rejected Bellville's contention prior settlements in wrongful death cases could not be used for valuation purposes. Nevertheless, the court cautioned all parties, "Jury verdict figures are relevant only insofar as the facts of a particular case are similar to the fact of the case being valued, and even then comparisons are of little predictive value." Still, all of the available evidence indication "the value of the plaintiffs' claim was clearly subject to debate." As the court saw it, "An insurance company simply cannot be expected, at its peril, to predict the exact amount a jury will award."

After resolving the failure-to-pay-the-demand aspect of Bellville's bad faith claim, the court went on to consider whether a finding of bad faith could be premised on "Farm Bureau's refusal to consent to Bellville's settlement with the underinsured motorist." The court's analysis of this issue hinged on its interpretation of a standard consent-to-settlement clause in Bellville's UIM policy. The court noted this type of clause imposes a duty to seek consent on an insured and determined it also gives rise to a reciprocal duty by the insurer "to consent to its insured's settlement with the tortfeasor when there is no reasonable basis to believe the tortfeasor has any assets or other ability to contribute toward satisfaction of the insurer's subrogation rights." Despite this duty, the court concluded Farm Bureau did not act in

bad faith in regard to Bellville because the existence of the duty was in question when it was asked to consent to settlement.

16. INSURANCE – AN INSURER MAY ACT TO CONFIRM SETTLEMENT AND OTHER INFORMATION PRIOR TO PAYING UNDERINSURED POLICY LIMITS WITHOUT COMMITTING BAD FAITH.

Galbraith v. Allied Mut. Ins. Co., 698 N.W.2d 325 (Iowa 2005).

Facts: Galbraith was injured in a vehicular collision with an underinsured driver and brought a personal injury suit against the driver, his wife, his employer, and Allied, Galbraith's underinsured carrier. The underinsured driver's liability insurer later offered to pay its policy limits ($100,000) to settle Galbraith's claim. Allied was further informed that it was likely no other liability insurance was applicable to the claim.

Because Galbraith's damages exceeded the $100,000 offer from the underinsured driver's liability carrier, payment was demanded of Allied pursuant to the underinsured policy. Allied sought depositions related to the existence of additional liability insurance. Galbraith amended his original petition to include a bad faith claim against Allied based on its failure to tender its policy limits. Allied was subsequently informed that the final settlement with the underinsured's liability carrier was near completion and Galbraith offered an affidavit from Galbraith's employer stating no other liability insurance existed. Allied then tendered its policy limits. Allied filed a motion for summary judgment in the bad faith action, which was later granted on the basis the underlying settlement agreement with the underinsured motorist's liability carrier was not final until three days after Allied tendered its policy limits, undermining any claim of bad faith on its part.

Holding: An "insurer is not required to accept the insured's word" as to the resolution of underlying tort litigation and the determination as to whether other liability insurance was available "and may demand adequate documentation" prior to tendering its policy limits.

Analysis: Despite indications that Galbraith had an enforceable oral settlement agreement with the underinsured's liability carrier, Allied was entitled to investigate the settlement and other factors prior to tendering its policy limits. Ultimately, "[t]he timing of the negotiations and the settlement were such as to preclude a determination of bad faith on Allied's part with respect to the time at which it paid the Galbraiths' underinsured-motorist claim."

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JUDGMENT AND LIMITATION OF ACTIONS

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17. LIMITATION OF ACTIONS – FRAUDULENT CONCEALMENT IS A SPECIES OF EQUITABLE ESTOPPEL PROHIBITING ASSERTION OF A STATUTE OF LIMITATIONS DEFENSE.

Christy v. Miulli, 692 N.W.2d 694 (Iowa 2005).

Facts: In 1998, defendant Miulli performed a brain biopsy on plaintiff Christy's husband to check on a suspected brain tumor. During this operation, the husband developed a brain hemorrhage, although Miulli later stated in his surgical report that the procedure had been performed without complication. The husband later died after additional complications arose.

Miulli told Christy of the bleeding that had taken place during the course of the surgery, "but wrongly represented to her that the hemorrhage occurred some distance away from the biopsy site." This false report was repeated in the medical records and reinforced by a false diagnosis of viral encephalitis as causing the death.

The Mayo Clinic later examined the husband's brain and issued a report, given to Christy, herself a doctor, that did not include a viral encephalitis diagnosis. Christy did not question the absence of this diagnosis as she did not believe the tests run by Mayo would have identified encephalitis even if it were present.

In August 1999, Christy was contacted by the Iowa Board of Medical Examiners, which was investigating Miulli. She stated Miulli had provided excellent care to her husband and later told Miulli about the interview. Miulli indicated he was being investigated due to a report by a competing neurosurgeon. He also suggested to Christy he would like to pursue research related to viral infections and brain tumors, apparently inspired by his experience in caring for Christy's husband.

In July 2001, nearly three years after her husband's death, Christy was told by a friend that an anesthesiologist involved with her husband's biopsy had witnessed care inconsistent with Miulli's description of the events. With this information in hand, Christy filed a medical malpractice action against Miulli. This action included a claim for wrongful death and loss of

consortium claims on Christy's own behalf and on behalf of the her minor children. Miulli, his hospital, and his medical group all filed motions for summary judgment contending the suit was time barred. Christy defended by asserting Miulli's fraudulent concealment tolled the statute of limitations and the children's loss-of-consortium claims were timely pursuant to the statute of limitations for claims by minors.

Holding: The district court erred in granting Miulli and this employer clinic's motions for summary judgment on their statute-of-limitations defenses related to the discovery rule and claims brought on behalf of minors.

Analysis: The court begins its analysis by noting it has developed two lines of authority on fraudulent concealment, one based on equitable estoppel and the other similar to discovery rule although otherwise unnamed. The court concludes fraudulent concealment, however previously described, should henceforth be considered a matter of equitable estoppel: "By adhering to this foundation for fraudulent concealment, the indispensable elements of this doctrine can be uniformly identified and consistently applied." Moreover, "Under this view, fraudulent concealment does not affect the running of the statutory limitations period; rather, it estops a defendant from raising a statute-of-limitations defense."

Applying the elements of equitable estoppel, the court concludes Christy cannot maintain a claim against the hospital as there was no allegation it concealed any information. The same cannot be said for Miulli and his clinic employer. Nevertheless, Miulli insists Christy's claim is barred given she was on inquiry notice when she received the Mayo Clinic report and should have discovered her cause of action in the exercise of due diligence. This prompts the court to state "the discovery rule and inquiry notice are distinct from the doctrine of fraudulent concealment and the plaintiff's duty to exercise diligence to discover the defendant's concealment."

The court moves on to confirm "a claim brought by an executor or administrator on behalf of [a] minor for loss-of consortium damages falls within the scope of" Iowa Code section 614.1(9)(*b*). This conclusion is premised on an examination of the statutory language, "which encompasses medical malpractice actions 'brought on behalf of a minor' with no qualifications or exceptions." Further, the "feasible joinder rule," which "requires that consortium claims be brought with the primary injury or death claim unless the plaintiff can show it was not feasible for the consortium claim to be joined with the primary claim," does not affect the minor consortium claim as "a loss-of-parental-consortium claim is

independent of the wrongful death claim and belongs to the child," thus warranting application of the statute of limitations applicable to minors.

18. LIMITATION OF ACTIONS – FIVE-YEAR STATUTE OF LIMITATIONS FOR CLAIMS BASED ON UNWRITTEN CONTRACTS APPLIES IN CASES INVOLVING ACCOUNT LEDGER ENTRIES.

Emmet County Bd. of Supervisors v. Ridout, 692 N.W.2d 821 (Iowa 2005).

Facts: Lawrence Anderson was a mental health patient who received care paid for in part by Emmet County. Anderson received these benefits despite being the beneficiary of a sizable trust created by his mother. After Anderson died in 2002, the county pursued a claim in probate for reimbursement for the costs it paid on his part.

Holding: The five-year statute of limitations for claims arising out of unwritten contracts bars the county's cause of action against the Anderson Estate.

Analysis: Anderson first received benefits under Iowa Code chapter 230. The last entry on an account ledger maintained pursuant to this chapter was five years prior to the county's claim in probate and thus untimely. The county later paid benefits pursuant to chapter 225C, but there is no right of reimbursement under this chapter. In addition, a later application for benefits by Anderson did not serve as a novation reviving the county's "debt for payments it made on Anderson's behalf for inpatient mental health services under chapter 230."

19. LIMITATION OF ACTIONS – FEDERAL DOCTRINE OF EQUITABLE TOLLING APPLIES IN CASES INVOLVING JURISDICTIONAL DEFECTS.

Raper v. State, 688 N.W.2d 29 (Iowa 2004).

Facts: The plaintiffs are a class of current and former peace officers employed by the Iowa Department of Public Safety that filed an action in 1994 in the United States District Court for the Southern District of Iowa claiming they were entitled to overtime compensation under the federal Fair Labor Standards Act. The State later moved to dismiss this action, essentially prompting the plaintiffs' 1996 filing of a state FLSA action. This state action was later amended to include additional causes of action. The federal action was then dismissed by the federal district court.

Holding: The plaintiffs are entitled "to recover damages for the three-year period preceding the date the action was filed in federal court" because the federal doctrine of equitable tolling applies to encompass this period even where the remaining claims are in state court.

Analysis: The federal common law doctrine of equitable tolling provides that a federal statute of limitations is tolled when a claim is "dismissed in one forum and promptly refiled in the proper forum as long as the defendant has proper service of process and the service adequately informed the defendant of the claim in the original forum." The State argues the doctrine does not apply here because it only applies in cases involving dismissals "for improper venue, not jurisdictional defects." The court disagrees, citing federal cases in which equitable tolling was applied in jurisdictional claims. Further, the court determines the state's consent to being sued on FLSA claims in state court serves as a waiver of sovereign immunity permitting the application of the equitable tolling doctrine.

Iowa Appellate Court Update

(Negligence, Torts & Indemnity)

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Troy A. Howell
Lane & Waterman LLP
220 North Main Street, Suite 600
Davenport, IA 52801
(563) 333-6633

IOWA APPELLATE COURT UPDATE

Negligence, Other Torts & Indemnity

Troy A. Howell
Lane & Waterman LLP
220 N. Main St., Ste. 600
Davenport, IA 52801-1987
(563) 333-6633
thowell@l-wlaw.com

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I. NEGLIGENCE: DUTY

Benham v. King, 700 N.W.2d 314 (Iowa 2005)

Facts: There was testimony at the trial that Plaintiff was at Defendant's dental office, seated in a reclining dental chair for a routine teeth cleaning. Following the cleaning, a dental assistant attempted to raise the chair when the chair collapsed flipping Plaintiff up against a sink and cabinet behind the chair. It was learned that a defective plastic housing unit in the chair caused the chair to collapse. Following Plaintiff's case, Defendant moved for a directed verdict arguing no evidence was presented that he knew or should have know of the defective plastic housing unit that caused the chair to collapse. The District Court granted the directed verdict motion. The Court of Appeals reversed holding Defendant had a legal duty to inspect the chair for any dangerous condition and a jury question was generated on the issue of whether an inspection would have revealed the apparent defect in the plastic housing unit.

Holding: Upon further review, the Supreme Court vacated the Court of Appeals and affirmed the District Court's directed verdict dismissal. Defendant had a duty to use reasonable care to maintain his office in a reasonably safe condition to protect Plaintiff against foreseeable risks of harm. Liability is not imposed unless the possessor "knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm." Liability is not imposed in the absence of such actual or constructive knowledge of a dangerous condition because this knowledge is essential to establish a breach of the duty. While the law recognizes a duty to exercise reasonable care to inspect, this does not mean there is a duty to inspect for every possible defect. If there is a dangerous condition on the land that is not foreseeable in the exercise of reasonable care, then it cannot be said that a possessor of land breached a duty to the invitee to discover and repair or otherwise take measures to protect the invitee against the harm. In this case, there is no evidence to indicate Defendant should have known he was exposing Plaintiff to an unreasonable risk of harm; therefore, Plaintiff cannot establish that Defendant breached his duty of reasonable care. Although Defendant had a duty in this case to use reasonable care to discover the condition of the chair, there was no evidence he could have discovered the particular defect that caused the harm to Plaintiff through the exercise of reasonable care. The important inquiry is not whether Defendant should have been aware of some general potential for harm, but whether he should have been aware of the dangerous condition that resulted in the harm.

Clinkscales v. Nelson Securities, Inc., 697 N.W.2d 836 (Iowa 2005)

Facts: While Plaintiff, a marine, was at a Davenport bar a fire broke out on a grill on the patio located just outside the bar. The owner of the bar and another bar employee made general announcements to the bar patrons to leave the bar. Plaintiff came out to the patio and, upon asking if anyone had turned the gas to the grill off, was told the gas handle was too hot. Plaintiff took off his shirt, wrapped it around one of his hands, and turned the gas off. No one asked Plaintiff to do so. As Plaintiff was turning off the gas, the fire flared up. Plaintiff received burns to his face, neck, chest, arms, and legs. Plaintiff sued the bar and the owners of the land for negligence under several specifications of negligence and also pled res ipsa loquitur to show general negligence. The District Court granted Defendants' motion for summary judgment. The District Court ruled Defendants were not liable because (1) Plaintiff's injuries were caused by a known and obvious danger and (2) the Defendants' alleged negligence was not the proximate cause of Plaintiff's injuries. The District Court also concluded res ipsa loquitur was not applicable because grease fires can occur without negligence. The Court of Appeals affirmed declining to apply the rescue doctrine and holding, as a matter of law, Plaintiff "suffers from a self-inflicted wound."

Holding: Under the rescue doctrine, those who negligently imperil life or property may not only be liable to their victims, but also to the rescuers. When a rescue attempt is involved, matters are particularly thorny and a court should be especially wary to grant a defendant's motion for summary judgment. So long as the rescuer's response is "normal," the negligent actor will not escape liability for the rescuer's injuries. What constitutes normal or natural conduct depends upon the circumstances and "is in most cases a question to be decided by the jury." If the jury determines the rescuer's actions are a normal or natural result of the defendant's actions, the defendant's actions were a proximate cause of the rescuer's injuries. The Supreme Court held there is a jury question on the issue of proximate cause. Significantly, the Supreme Court stated:

> Exhortations to leave do not, as a matter of law, preclude liability in all cases. If a defendant sets into course a series of events that induces a rescue attempt, the defendant does not necessarily insulate itself from liability when it tells the rescuer to leave.

It is well settled that generally "[t]he possessor of land…is not liable when the injuries sustained by a business invitee were caused by a known or obvious danger." However, in a rescue case such as this, this principle of law does not apply as it is axiomatic that the danger approached is obviously dangerous. To rule the presence of a known and obvious dangerous condition would, as a matter of law, negate any duty to invitee-

rescuers would completely eviscerate the rescue doctrine where the rescuer happened to be an invitee of the defendant when the condition first occurred. Finally, the Supreme Court ruled that res ipsa loquitur was applicable in this case as "[g]rease fires do not just happen."

Estate of Pearson v. Interstate Power and Light Co., 700 N.W.2d 333 (Iowa 2005)

Facts: Plaintiffs, the separate estates of a married couple, brought wrongful death claims against Defendant natural gas utility regarding an explosion and fire at decedents' home which resulted in decedents' deaths. The explosion was caused by a faulty piece of brass tubing, known as a cobra connector, connecting the natural gas line to a stove in the basement of the decedents' house. Defendant, a seller of electricity and natural gas, provided the natural gas to decedents' home. Plaintiffs alleged that a compound inserted into the natural gas by Defendant corroded the cobra connector causing the gas leak which ultimately led to the explosion. A jury returned a verdict against Defendant natural gas utility on two wrongful death claims arising from the natural gas explosion. The District Court denied Defendant's post trial motions.

Holding: Defendant had a duty to exercise reasonable care to inform its customers, including decedents, of the dangers inherent in using its gas with a cobra connector and Defendant failed to exercise reasonable care to provide the decedents with an adequate warning of the dangers. Furthermore, Plaintiffs' claims regarding Defendant's common-law duty to warn the decedents of the dangers inherent with using Defendant's gas are not precluded by Defendant's tariff filed with the regulatory authorities.

Klobnak v. Wildwood Hills, Inc., 688 N.W.2d 799 (Iowa 2004)

Facts: Plaintiffs injured motorists brought a negligence action against Defendants, ranch owners, whose horses roamed out onto a highway abutting ranch property and were struck by motorists' vehicle. The District Court granted Defendants' motion to dismiss on the ground that Iowa no longer has a statute prohibiting animals from running at large; therefore, Defendants owned no duty of care to Plaintiffs.

Holding: Defendants owed a duty of care to motorists to prevent its horses from roaming onto the highway that abutted the ranch property despite the absence of a fencing-in statute. As our cases have made clear, extinguishment of the statutory duty does not affect the duty to exercise ordinary care.

Reiter v. Hendricks, 2005 WL 159156 (Iowa Ct. App. 2005)

Facts: Plaintiff and her husband sued Defendant owner of land where Plaintiff fell and broke her leg. Plaintiff alleged she was injured when she stepped in a hole in Defendant's yard. Defendant moved for summary judgment asserting that she owed no legal duty to Plaintiffs at the time of the injury because she was not in possession of the premises at the time of the injury. Defendant presented evidence that she owned the property where the injury occurred, but she did not live there. She presented further evidence the property was leased to Defendant's daughter. The District Court granted Defendant's summary judgment motion concluding Defendant retained no control over the leased premises which would subject her to liability.

Holding: Affirmed. The mere fact of ownership is an insufficient basis for imposing liability for a defect in the premises on an absentee owner of rental property. The Plaintiffs failed to present any evidence that Defendant retained any control over the premises where Plaintiff was injured.

Stotts v. Eveleth, 688 N.W.2d 803 (Iowa 2004)

Facts: Plaintiff high school student brought a negligence claim, among other claims, against Defendant junior high school teacher, Defendant community school district and other Defendants relating to Defendant teacher's sexual relationship with Plaintiff student. At the time of the sexual relationship, Plaintiff was eighteen years old and was not and had not been a student of Defendant teacher. When the couple engaged in sex, it was always away from the school premises, and it was always consensual. Plaintiff alleged Defendant teacher was negligent in initiating and continuing a sexual relationship with her. The District Court granted Defendant teacher's summary judgment motion dismissing Plaintiff's negligence claim finding Defendant teacher did not owe a duty to Plaintiff.

Holding: The District Court's summary judgment dismissal is affirmed. Defendant teacher did not owe a common law duty to Plaintiff because Plaintiff was an adult student that never had a student-teacher relationship with Defendant teacher. "While [Defendant teacher's] behavior in having sexual relations with a student is offensive, that offensiveness is not enough to create a duty on the part of [Defendant teacher] to refrain from such relations with [Plaintiff]."

II. NEGLIGENCE: DEFENSES

A. Discretionary function immunity

Anderson v. State, 692 N.W.2d 360 (Iowa 2005)

Facts: Plaintiff student brought personal injury action against Defendants state and state university staff member in connection with injuries Plaintiff sustained in a slip and fall on ice on the university campus. Plaintiff alleged Defendants were negligent in failing to close the library early due to the weather conditions. Plaintiff also claimed Defendant state was negligent for failing to remove ice from the walkway where she fell. The District Court directed a verdict for Defendants on Plaintiff's claim that Defendants were negligent in failing to close the library early because the decision to keep the library open was a discretionary function to which Defendants were immune. The jury returned a verdict in favor of Defendant state on the remaining claim. The Court of Appeals reversed the directed verdict dismissal on discretionary function immunity.

Holding: The Court of Appeals opinion is vacated and the District Court is affirmed. We utilize a two-step test for determining whether a challenged action falls within the discretionary function exception, and thus is entitled to statutory immunity from tort liability. The test requires the court to consider whether the action is a matter of choice for the acting employee and when the challenged conduct involves an element of judgment, to determine whether that judgment is of the kind the discretionary function exception was designed to shield. Applying this test, the District Court correctly concluded Defendants were entitled to discretionary function immunity.

B. Exclusivity provision of Workers' Compensation Act

Willms v. Associated Mat. Inc., 2004 WL 2578969 (Iowa Ct. App. 2004)

Facts: Plaintiff sued Defendants for personal injuries when his hand was crushed between a bundle of tubing and a boom attached to a forklift. Defendants moved for summary judgment arguing Plaintiff's action was barred by the exclusive remedy provision of Iowa's workers' compensation law. The District Court granted Defendants' summary judgment motion.

Holding: Iowa Code section 85.20 precluded any action other than workers' compensation against an employer of an employee for injuries arising out of and in the course of employment. The threshold determination in deciding whether a worker falls into the workers' compensation scheme is whether the worker entered into a contract of hire, express or implied. The District Court correctly ruled that Plaintiff had entered into an implied contract of employment at the time of Plaintiff's injury; therefore, the exclusive remedy provision applies.

C. Immunity to city for constructing/reconstructing public improvement or facility in accordance with a generally recognized engineering theory

Fischer v. City of Sioux City, 695 N.W.2d 31 (Iowa 2005)

Facts: Plaintiffs homeowners sued Defendant city under several theories of gross and ordinary negligence for damage to their property after storm sewer overflowed. The District Court ruled Defendant was immune from liability under Iowa Code section 670.4(8) which grants immunity to a city if the city constructed or reconstructed a public improvement or other public facility in accordance with a generally recognized engineering standard, criteria or design theory in existence at the time of the construction or reconstruction.

Holding: The Supreme Court affirmed the District Court because substantial evidence supports the conclusion that Defendant was immune from liability. Evidence was sufficient to support a finding that the city constructed the storm-drainage system in accord with the existing engineering standard. Evidence was also sufficient to support a finding that the detention ponds maintained the city's storm-drainage system in accordance with a generally recognized engineering standard.

D. Lack of requisite expert testimony

Bolt v. ABCM Corp., 2004 WL 2952609 (Iowa Ct. App. 2004)

Facts: Plaintiff estate executor sued Defendant physician and other Defendants for medical malpractice. Defendant filed a motion for summary judgment citing Plaintiff's failure to timely designate an expert witness supporting her malpractice claim. The District Court denied Plaintiff's request for additional time to designate an expert finding Plaintiff failed to show good cause for failing to timely designate an expert. The District Court concluded Plaintiff's medical malpractice claim therefore failed as a matter of law and granted Defendant's summary judgment motion.

Holding: In considering whether a plaintiff has shown good cause for an expert designation extension, we look to three factors: (1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant's counsel's actions. Under the facts of this case, the District Court did not abuse its discretion in denying Plaintiff's request for an extension of time to designate an expert.

E. Statute of limitations

Camp v. Ludens, 2005 WL 156821 (Iowa Ct. App. 2005)

Facts: Plaintiff sued Defendant oral surgeon claiming negligence in dental treatment. Plaintiff asserted that Defendant was negligent in removing five abutments from Core-Vent implants in Plaintiff's mouth instead of three as intended by the referring dentist. The injury occurred December 13, 1999. Defendant was sued on February 27, 2003. The District Court granted Defendant's motion for summary judgment on the ground the two-year statute of limitations barred recovery.

Holding: The statutory time begins to run from when Plaintiff knew of the injury, not from when Plaintiff learned that a negligence suit was possible. Plaintiff knew of the injury when it happened and even inquired of Defendant whether it was proper to extract five abutments. The District Court is affirmed despite the fact that, at the time of the operation, Defendant affirmed to Plaintiff that five extractions was correct. Furthermore, the doctrine of fraudulent concealment does not apply since there was no concealment of any injury by Defendant.

Christy v. Miulli, 692 N.W.2d 694 (Iowa 2005)

Facts: Plaintiff executor of patient's estate brought wrongful death action against Defendants hospital, surgeon, and surgeon's employer. Plaintiff executor also brought actions for loss of spousal consortium and loss of parental consortium on behalf of patient's minor children. Plaintiff alleged in her Petition that Defendant surgeon's representations concerning the cause of patient's death misled her and caused her to belatedly discover the actual cause of the decedent's death. The District Court granted Defendants' summary judgment on statute of limitations grounds.

Holding: The Supreme Court held the discovery rule tolling the two-year limitations period governing a wrongful death action had no bearing on whether Defendant surgeon was estopped from asserting a limitations defense based on fraudulent concealment of facts surrounding patient's injury and death. Equitable estoppel has nothing to do with the running of the limitations period or the discovery rule; it simply precludes a defendant from asserting the statute as a defense when it would be inequitable to permit the defendant to do so. It should not matter what particular fact is concealed so long as the defendant's conduct prevents the timely filing of the claim and the other prerequisites for equitable estoppel are established. The Court further held that a genuine issue of material fact remained regarding whether Plaintiff executor had knowledge of facts sufficient to put her on notice of Defendant surgeon's fraud more than two years before suit was filed. Finally, the Court held the statute of limitations governing actions brought on behalf of minors in the context of a medical malpractice claim governed the loss of parental consortium claim brought by Plaintiff on behalf of patient's children.

Marshall-Lucas v. Goodwill, 2005 WL 2085952 (Iowa Ct. App. 2005)

Facts: Plaintiff and her family sued Defendant physician, Defendant's practice group and Defendant hospital alleging injuries caused by Defendant physician's malpractice. Defendant filed a motion for summary judgment arguing the action was time-barred under Iowa Code section 614.1(9). The District Court agreed granting summary judgment to Defendants.

Holding: The Court of Appeals reversed stating:

> The issue in this case is simply stated. Have the defendants proven that all undisputed material facts require a conclusion, as a matter of law, that Marshall-Lucas was placed on inquiry notice more than two years before she filed her suit? After reviewing the unique facts of this case, *see Vachon*, 514 N.W.2d at 446, we think not. Rather, we conclude reasonable minds may differ as to this point and, for that reason, summary judgment is not proper.

Ratcliff v. Graether, 697 N.W.2d 119 (Iowa 2005)

Facts: Plaintiff patient brought medical malpractice action against Defendants eye surgeon and eye clinic following surgeon's performance of LASIK surgery on Plaintiff's left eye which allegedly resulted in Plaintiff experiencing blurry vision. The District Court granted Defendant's motion for summary judgment concluding the two-year statute of limitations for medical malpractice actions barred Plaintiff's claims.

Holding: The statute of limitations "begins to run when the patient knew, or through the use of reasonable diligence should have known, of the injury for which damages are sought." "Injury" for the purposes of this discovery rule means physical harm rather than the wrongful act that caused the injury. In affirming the District Court, the Supreme Court held the statute of limitations began to run, at the latest, when an ophthalmologist told Plaintiff that LASIK surgery was the cause of Plaintiff's vision problems. The Supreme Court also held the continuous treatment doctrine did not apply to toll the statute of limitations. In so doing the Court stated:

> We need not decide whether we should reject the continuous treatment doctrine outright in all circumstances. However, we do think the doctrine does not apply when the plaintiff, as here, is on inquiry notice, a concept that underlies the discovery rule that is now part of Iowa Code section 614.1(9)(a).

F. Statute of limitations-continuous treatment and fraudulent concealment doctrines

Camp v. Ludens, 2005 WL 156821 (Iowa Ct. App. 2005)

See above.

Christy v. Miulli, 692 N.W.2d 694 (Iowa 2005)

See above.

Ratcliff v. Graether, 697 N.W.2d 119 (Iowa 2005)

See above.

III. OTHER TORTS

A. Bad faith

Bellville v. Farm Bureau Mut. Ins. Co., _ N.W.2d _, 2005 WL 1790609 (Iowa 2005)

Facts: Plaintiffs were involved in an automobile accident. At the time of the accident, the driver of the other vehicle involved in the accident had an automobile insurance policy with a policy limit of $50,000.00. Although this policy provided coverage for the driver's liability arising out of the accident, the driver of the other vehicle had few other assets. Plaintiffs carried underinsured motorist coverage with Defendant insurer with limits of $300,000.00. Prior to Plaintiffs filing suit, Defendant refused to pay Plaintiffs' reduced demand for a $270,000.00 payment under the UIM coverage and also refused to consent to Plaintiffs' settlement with the driver of the other vehicle involved in the accident. Defendant asserted it had no duty to consent to such a settlement. Plaintiffs then sued Defendant to recover under the UIM coverage and for bad faith. Plaintiffs' contractual claim was tried first, resulting in an award of the full $300,000.00 in UIM coverage. The bad faith action was then tried to a jury based on two grounds: 1) Defendant's undervaluation of Plaintiffs' UIM claim and 2) Defendant's refusal to consent to Plaintiffs' settlement with the underinsured motorist. The jury found in favor of Plaintiffs on both bad faith grounds and awarded compensatory and punitive damages. The Court of Appeals reversed the judgment ruling the District Court erred in failing to grant Defendant's motion for directed verdict as there was insufficient evidence to prove Defendant lacked a reasonable basis for its valuation of Plaintiffs' claim or for refusing to consent to settlement. The Court of Appeals held that Defendant had no specific duty to consent to a reasonable settlement, only a general duty of good faith.

Holding: The Iowa Supreme Court first outlined the following standards in assessing a bad faith claim:

> To establish Defendant's bad faith, Plaintiffs were required to prove Defendant had no reasonable basis for denying Plaintiffs' claim or for refusing to consent to settlement and Defendant knew or had reason to know that its denial or refusal was without reasonable basis. The first element is an objective one; the second element is subjective. A reasonable basis exists for denial of policy benefits if the insured's claim is fairly debatable either on a matter of fact or law. A claim is "fairly debatable" when it is open to dispute on any logical basis. Stated another way, if reasonable minds can differ on the coverage-determining facts or law, then the claim is fairly debatable. The fact that the insurer's position is ultimately found to lack merit is not sufficient by itself to establish the first element of a bad faith claim. The focus is on the existence of a debatable issue, not on which party was correct. Whether a claim is fairly debatable can generally be decided as a matter of law by the court. [I]f it is disputed that evidence existed creating a genuine dispute as to the negligence of an uninsured or underinsured motorist, the comparative fault of the insured, the nature and extent of the insured's injuries, or the value of the insured's damages, a court can almost always decide that the claim was fairly debatable as a matter of law.

The Iowa Supreme Court agreed with the Court of Appeals' reversal of the judgment for different reasons concluding as a matter of law that Defendant had a reasonable basis for not paying the sum demanded by Plaintiffs because the extent of Plaintiffs' comparative fault and Plaintiffs' damages were both fairly debatable. In so concluding, the Court stated the possible inadmissibility of an investigating police officer's report and conclusions regarding the automobile accident did not prevent Defendant from considering them in evaluating Plaintiffs' claim for UIM benefits. Furthermore, an insurance company simply cannot be expected, at its peril, to predict the exact amount a jury will award. Finally, the Court held that a consent-to-settlement clause not only imposes an express duty on the insured to obtain the insurer's consent to settlement but also imposes an implied reciprocal duty on the insurer to consent unless it has a reasonable basis for refusing to do so. A UIM insurer has a good faith duty to consent to its insured's settlement with the tortfeasor when there is no reasonable basis to believe the tortfeasor has any assets or other ability to contribute toward satisfaction of the insurer's subrogation rights. However, in this case, this duty was not so evident that Defendant could not fairly debate whether such a duty existed. Therefore, Defendant had a reasonable basis to refuse to consent to Plaintiffs' proposed settlement with the underinsured motorist.

Galbraith v. Allied Mut. Ins. Co., 698 N.W.2d 325 (Iowa 2005)

Facts: Plaintiff was injured in an automobile accident through the fault of another driver. Plaintiff and his wife later sued the other driver and the other driver's employer arguing the other driver was acting within the course of his employment at the time of the accident. Plaintiff also later added Defendant insurer to the suit based on a claim that the other driver and his employer were underinsured. The District Court severed the claim against Defendant insurer to be tried after the claims against the other Defendants were resolved. Defendant insurer was then informed by Plaintiffs' counsel that the other driver's liability insurer had offered its policy limits to settle. Plaintiffs' counsel demanded payment of Defendant insurer's underinsured policy limits and subsequently asserted that "if Allied did not tender its policy limits when that settlement [with the other Defendants] was concluded, the [Plaintiffs'] petition against Allied would be amended to assert a bad-faith claim." In response, Defendant insurer offered half of its policy limits. In a response letter, Plaintiffs' counsel declined the offer, indicated for the first time that a signed affidavit had been obtained from the other driver's employer stating the employer had no liability coverage for the other driver and indicated Plaintiffs intended to proceed with the prosecution of their bad-faith claim. Defendant insurer then tendered its UIM policy limits to Plaintiffs. Three days later the settlement between Plaintiffs and the other Defendants and their insurance carrier was completed. Plaintiffs proceeded with their bad faith claim. In granting Defendant's summary judgment motion, the District Court concluded that Defendant insurer had no obligation to make payments under its UIM coverage until final settlement of the claims against the alleged tortfeasors. The Court of Appeals reversed the summary judgment dismissal concluding that it was not proper to rely on the date of the signed settlement agreement in the underlying tort action in determining when Defendant insurer became responsible for paying Plaintiffs the benefits to which they were entitled under their UIM insurance.

Holding: On further review, the Iowa Supreme Court vacated the Court of Appeals opinion and affirmed the District Court's summary judgment dismissal. The Supreme Court stated:

> In situations in which an underinsured-motorist claim has been paid by the insurer but a bad faith claim is made with respect to the time of the payment, factors other than the strength of the underlying tort suit may be of crucial significance on the issue of the insurer's bad faith. That is the situation here. An underinsured-motorist carrier cannot be expected to make payment to its insured prior to the time that the underlying tort litigation has been fully resolved and a determination has been made concerning the presence or absence of liability insurance available for payment

of the claim. The insurer is not required to accept the insured's word as to such matters and may demand adequate documentation….As the district court correctly concluded, the timing of the negotiations and the settlement were such as to preclude a determination of bad faith on Allied's part with respect to the time at which it paid the [Plaintiffs'] underinsured-motorist claim.

B. Co-employee gross negligence

LaFleur v. Campos, 2005 WL 1630472 (Iowa Ct. App. 2005)

Facts: Plaintiff was injured at work when his hand was caught in an auger located in a meat-grinding machine that was he operating. Plaintiff sued his Defendant co-employee asserting his injury was proximately caused by Defendant's gross negligence.

Holding: Reversed because the District Court applied an incorrect legal standard in assessing one of the elements Plaintiff was required to establish under Iowa Code section 85.20(2). The District Court found Defendant knew the auger presented a danger to the operator of the machine. This is sufficient to meet Plaintiff's burden under the first element of section 85.20. The District Court erroneously required Plaintiff to further prove Defendant knew the machine was dangerous even if the operator took the precaution of attempting to keep his or her hand out of the chute.

C. Consumer Credit Code

Chrysler Financial Co. v. Bergstrom, 2004 WL 2952671 (Iowa Ct. App. 2004)

Facts: Plaintiff sued Defendant for an alleged violation of Defendant's vehicle lease agreement. After venue was changed to a different county, Defendant filed a counterclaim alleging Plaintiff's conduct in filing the action in the wrong county was an unfair debt collection practice under the Iowa Consumer Credit Code. In response, Plaintiff asserted that the violation "was not intentional and resulted from a bona fide error as contemplated in Code of Iowa § 537.5201(7) (2003)." Following a bench trial, the District Court agreed with Plaintiff's defense to the counterclaim and granted judgment for Plaintiff on its Petition.

Holding: The District Court is reversed. Defendant is correct that Iowa Code section 537.5201(7) plainly and unambiguously requires a person raising this affirmative defense to prove the violation (1) was not intentional, (2) resulted from a bona fide error, and (3) occurred notwithstanding the maintenance of procedures reasonably adapted to avoid the error. Plaintiff's bona fide error defense fails as a matter of law. There is no

dispute that Plaintiff filed it Petition in the wrong county and that this incorrect filing was a violation of the Iowa Consumer Credit Code, absent a viable bona fide error defense; therefore, Defendant is entitled to judgment on his counterclaim.

D. Consumer Fraud

State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc., 694 N.W.2d 518 (Iowa 2005)

Facts: Plaintiff brought action under Consumer Fraud Act alleging that Defendant camping club engaged in unfair practices under Act with respect to its attempts to collect club dues from hundreds of ex-campers who had purchased undivided interests in a campground. The District Court granted Defendant's motion for summary judgment. The Court of Appeals affirmed holding the Act did not regulate Defendant's collection campaign because the campaign was "later conduct…unrelated to the sale."

Holding: Upon further review, the Supreme Court vacated the Court of Appeals opinion and reversed the District Court. The Court held the Consumer Fraud Act applies to post-sale conduct. The Court further held that in order to show an unfair practice is "in connection with" the sale of merchandise, as necessary to establish a violation of the Act, the Plaintiff need only show some relation or nexus between the two. Furthermore, genuine fact issues precluded summary judgment. Finally, the Court held the Act does not apply only to sellers of merchandise.

E. Conversion

Johnson v. Dalchow, 2004 WL 2952563 (Iowa Ct. App. 2004)

Facts: Plaintiff sister brought an action against her Defendant brother and his wife alleging conversion based on Plaintiff's belief that Defendant and his wife took money left for Plaintiff in their mother's safe at the time of their mother's death. After a bench trial, the District Court ruled that Plaintiff did not prove her claim.

Holding: Affirmed. A conversion occurs when a person or entity exercises wrongful control or dominion over the property of another in denial of or inconsistent with the other's possessory right to the property. The District Court correctly concluded Plaintiff failed to prove Defendant exercised wrongful control or dominion over her property.

F. Dramshop

Berte v. Bode, 692 N.W.2d 368 (Iowa 2005)

Facts: Plaintiff estate of deceased bar patron brought dramshop action against Defendant bar owner alleging patron was raped and killed by another, intoxicated patron. Defendant brought summary judgment motion contending the intoxicated patron's action in raping and killing the other patron was, as a matter of law, an intervening and superceding cause thereby relieving it of any liability to the deceased patron's surviving minor son. After the District Court denied Defendant's summary judgment motion, the Supreme Court granted Defendant's application for interlocutory appeal.

Holding: The District Court correctly denied Defendant's summary judgment motion because the dramshop action alleged death "inflicted by" an intoxicated patron thus cause in fact but not proximate cause was an issue. Defendant made no showing as a matter of law that the intoxication did not in fact contribute to the intoxicated patron's actions. The Court stated:

> …when the injury is inflicted *by* an intoxicated person, the only question, as it relates to causation in fact, is whether the intoxicated person committed the injurious act. We do not even reach the proximate cause issue because the legislature made the policy decision to impose liability on the one who furnished the intoxicating beverage to the one who inflicted the injury. Proximate cause is therefore not an issue.

Smith v. Shagnasty's, Inc., 688 N.W.2d 67 (Iowa 2004)

Facts: Plaintiff injured bar patron brought action against Defendant bar under dramshop statute for injuries sustained when unidentified intoxicated patron hurled beer bottle into bar patron's face. The District Court granted Defendant's motion for summary judgment finding Plaintiff failed to generate a genuine issue of fact as to whether Defendant (1) sold and served an intoxicating liquor to the unidentified patron or (2) knew or should have known the unidentified patron was or would become intoxicated at the time of service. The Court of Appeals affirmed concluding the record contained insufficient evidence on the second element.

Holding: Upon further review, the Supreme Court vacated the Court of Appeals' opinion and reversed the District Court. The Court held a fact issue remained as to whether the Defendant sold and served beer to the unidentified patron. The Court also held a fact issue remained as to

whether the Defendant knew or should have known that the unidentified patron was or would become intoxicated at the time she was served.

G. Fraudulent misrepresentation

Bender v. Wise, 2004 WL 2952623 (Iowa Ct. App. 2004)

Facts: Plaintiffs filed suit against Defendant motel. During the litigation, Defendant answered interrogatories regarding the existence and amount of its liability insurance. However, Defendant's counsel later became aware of additional liability insurance covering Defendant but failed to inform Plaintiffs or their counsel. Defendant's counsel only informed Plaintiffs' counsel of the additional liability insurance covering Defendant after the lawsuit had proceeded to jury verdict. Plaintiffs later filed a separate lawsuit against Defendant alleging fraudulent misrepresentation. The District Court granted Defendant's motion for summary judgment finding Plaintiffs failed to establish any reliance on the alleged misrepresentation.

Holding: The District Court is affirmed. The District Court correctly concluded that Plaintiffs' claim of fraudulent misrepresentation must fail because the Plaintiffs cannot show they acted in reliance on a misrepresentation by the Defendant.

Sharp v. Tamko Roofing Products, Inc., 2004 WL 2579638 (Iowa Ct. App. 2004)

Facts: Plaintiffs were the first purchasers of homes built by Defendant builder. Plaintiffs filed suit against Defendants alleging the shingles on their homes were defective in their design and manufacture. Plaintiffs sought relieve on several legal theories, including fraudulent misrepresentation. The District Court denied Defendants' motion for summary judgment on Plaintiffs' fraudulent misrepresentation claim.

Holding: To establish a claim of fraudulent misrepresentation, a plaintiff must prove: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage. The District Court ruling is reversed as Plaintiffs did not show they relied upon a false representation. Defendants are entitled to summary judgment on Plaintiffs' fraudulent misrepresentation claim.

Wilson v. Vanden Berg, 687 N.W.2d 575 (Iowa 2004)

Facts: Plaintiffs purchased a house only to later find out the lot on which the house sat was not as large as advertised. Plaintiffs met with Defendant attorney and were assured by Defendant attorney that he had no conflict of interest in representing Plaintiffs on their potential lawsuit against a local real estate agent. Plaintiffs signed an attorney fee contract with Defendant

and provided Defendant with a retainer. During the next several months, Plaintiffs had concerns regarding Defendant's representation. Plaintiffs decided to hire a new attorney but before they could do so, Defendant wrote Plaintiffs a letter terminating his representation of them. Defendant cited his potential conflict with suing realtors in the area as the reason for the termination and sent Defendant a bill for services rendered. Plaintiffs were "appalled" at the bill and sued Defendant in small claims court for misrepresentation, among other claims. The Magistrate found Defendant had committed fraudulent misrepresentation based on his assurances to the Plaintiffs that he had no conflict of interest that would prevent him from representing their interests. The Court ordered Defendant to fully refund Plaintiffs' retainer and also awarded punitive damages to Plaintiffs. The District Court affirmed the Magistrate's ruling.

Holding: Upon discretionary review, affirmed. The Supreme Court stated:

> The evidence…supports a finding that [Defendant] knew his assurances were false. No one better than the defendant himself would know whether he had a relationship with [the realtor] that would create a conflict of interest sufficient to interfere with his advocacy of the [Plaintiffs'] claim.

H. Fraudulent misrepresentation under Iowa Code section 558A

Jensen v. Sattler, 696 N.W.2d 582 (Iowa 2005)

Facts: Plaintiff purchaser of home brought action against Defendants sellers for misrepresentation and violation of the Real Estate Disclosure Act found at Iowa Code section 558A. The District Court ruled Plaintiff had to prove fraud to recover and consolidated his claims. The District Court also dismissed one of the sellers from the suit because she did not sign a disclosure form. The jury rendered a verdict in favor of the only remaining Defendant seller.

Holding: The Supreme Court reversed for new trial on Plaintiff's claim of violation of the Real Estate Disclosure Act against both Defendants. Plaintiff's claims for misrepresentation and violation of the Real Estate Disclosure Act were separate and distinct causes of action. The Act only required a plaintiff to show actual knowledge of a problem that was required to be disclosed, not the elements of fraud overruling *Sedgwick v. Bowers*, 681 N.W.2d 607. The Court affirmed the District Court's dismissal of Plaintiff's negligent misrepresentation claim. Defendants were not in the business or profession of supplying information to Plaintiff; this was an arms-length and adversarial transaction. Therefore, Defendants did not know owe Plaintiff a duty of care. Finally, Defendant seller was subject to the Act even though she did not sign the disclosure statement.

I. Interference with contract

Chemical Methods, Ltd. v. Cue, 2005 WL 1750406 (Iowa Ct. App. 2005)

Facts: Plaintiffs, two businesses, sued Defendant, a former employee of one of the businesses, for intentional interference with a service contract one of the Plaintiffs had with a separate business after separate business terminated service contract with Plaintiff and subsequently entered into new service contract with Defendant. Following bench trial, the District Court issued a ruling dismissing the Plaintiffs' claim.

Holding: Affirmed. Nothing in the records suggests Defendant acted improperly in obtaining the employment contract with the separate business.

J. Interference with custody rights

Wolf v. Wolf, 690 N.W.2d 887 (Iowa 2005)

Facts: Plaintiff ex-husband filed suit for damages against Defendant ex-wife claiming Defendant had tortiously interfered with Plaintiff's custody rights to their child. Defendant had taken their child out of the state without the consent of Plaintiff who had primary physical care/custody of their child. The District Court awarded Plaintiff actual and punitive damages on his claim.

Holding: The District Court is affirmed as substantial evidence supported the District Court's finding that Defendant had tortiously interfered with Plaintiff's custody rights to their child. This Court has previously recognized the tort claim of intentional interference with custody. To establish a claim of tortious interference with custody, a plaintiff must show: 1) the plaintiff has a legal right to establish or maintain a parental or custodial relationship with his or her minor child; 2) the defendant took some action or affirmative effort to abduct the child or to compel or induce the child to leave the plaintiff's custody; 3) that abducting, compelling, or inducing was willful; and 4) the abducting, compelling, or inducing was done with notice or knowledge that the child had a parent whose rights were thereby invaded and who did not consent.

K. Interference with prospective business advantage

Tompkins Lawncare, Inc. v. Buchholz, 697 N.W.2d 126 (Iowa Ct. App. 2005)

Facts: Defendants hired Plaintiff to landscape the shoreline of property Defendants own on a lake. After the project was completed, Defendants noticed erosion on the shoreline and concluded the landscaping job was to blame. After complaints from Defendant, Plaintiff made attempts to stop

the erosion to no avail. When no further action was taken by Plaintiff, Defendants sued Plaintiff's landscaping service in small claims court but lost. Frustrated with the outcome, Defendants disseminated one hundred fliers essentially stating Plaintiff's landscaping service was to blame for the erosion and Plaintiff's landscaping service "saw no problem" with the erosion. Plaintiff and his landscaping service sued Defendants for intentional interference with prospective business advantage, among other claims. A jury returned a verdict in favor of Plaintiffs on the claim.

Holding: The jury verdict in favor of Plaintiffs is affirmed as substantial evidence supports the jury's determination that the Defendants intentionally interfered with a prospective business advantage.

L. Malicious prosecution

Foley v. Argosy Gaming Co., 688 N.W.2d 244 (Iowa 2004)

Facts: Plaintiffs sued Defendant for malicious prosecution. Plaintiffs claimed Defendant had wrongfully sued one of the Plaintiffs in federal court in Illinois for alleged false statements that Plaintiff had made about Defendant. Defendant had voluntarily dismissed the Illinois suit before it came to trial. Plaintiffs claimed they lost insurance coverage, lost financing on a real estate deal and suffered stress and other physical problems as a result of the Illinois suit. The case was removed from District Court to federal court. The federal court certified four questions to the Iowa Supreme Court regarding the requirements for a claim of malicious prosecution under Iowa law.

Holding: To prove a malicious prosecution claim under Iowa law, a plaintiff must show arrest of person, seizure of property, or other special injury. Specific to this case, special damages must be proved and non-renewal of insurance, loss of financing, or stress do not constitute “special injury.”

M. Negligent misrepresentation

Jensen v. Sattler, 696 N.W.2d 582 (Iowa 2005)

See above.

N. Nuisance

Harms v. City of Sibley, 2004 WL 2677531 (Iowa Ct. App. 2004)

Facts: Plaintiffs initiated a nuisance action against several Defendants alleging a ready-mix plant across the street from their house constitutes a nuisance. Plaintiffs have owned their house for over thirty-five years. After a bench

trial, the District Court determined the ready-mix plant was a nuisance and awarded Plaintiffs damages.

Holding: A private nuisance is an actionable interference with a person's interest in the private use and enjoyment of the person's land. The existence of a nuisance is not affected by the intention of its creator not to injure anyone. Rather, it depends on the following three factors: (1) priority of location, (2) the nature of the neighborhood, and (3) the wrong complained of. In determining whether a property owner's use of his land is a nuisance, we use an objective, normal-person standard. Whether a lawful business is a nuisance depends on the reasonableness of conducting the business in the manner, at the place, and under the circumstances in question. The District Court's determination that the ready-mix plant was a nuisance is affirmed as it is supported by substantial evidence.

O. Real Estate Disclosure Act

Jensen v. Sattler, 696 N.W.2d 582 (Iowa 2005)

See above.

P. Trespass

Krotz v. Sattler, 2004 WL 2297151 (Iowa Ct. App. 2004)

Facts: Plaintiff filed a Petition claiming Defendant illegally entered his property for purposes of extending a sanitary sewer, storm sewer, and water line to property Defendant was developing. Plaintiff made a claim of trespass, among other claims. The District Court granted a directed verdict for Defendant concluding there was no evidence that Plaintiff or his property had suffered any damage.

Holding: The gist of a claim for trespass is the wrongful interference with one's possessory rights in property. One is subject to liability to another for trespass, irrespective of whether he thereby caused harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land. The District Court is affirmed because, while substantial evidence was presented that Defendant did not have a possessory interest in the right of way and therefore the jury could have found a trespass did occur, there is no evidence to establish that Plaintiff sustained any damages in any manner due to the alleged trespass.

Nichols v. Evansdale, 687 N.W.2d 562 (Iowa 2004)

Facts: After city and landowner exchanged parcels of land, landowners discovered sewer lines running under property. Landowners brought suit asserting, among other claims, that the presence of the sewer lines constituted a trespass. Following a bench trial, the District Court rejected Plaintiffs' claim of trespass finding the presence of sewer lines did not constitute a trespass.

Holding: The Iowa Supreme Court reversed the District Court's decree regarding Plaintiffs' trespass claim. A person is liable for trespass if he or she "fails to remove from the land a thing which he is under a duty to remove." Because Defendant city has no legal right to have its sewer lines on Plaintiffs' property and has failed to remove them, Defendant is committing a continuing trespass.

IV. INDEMNITY

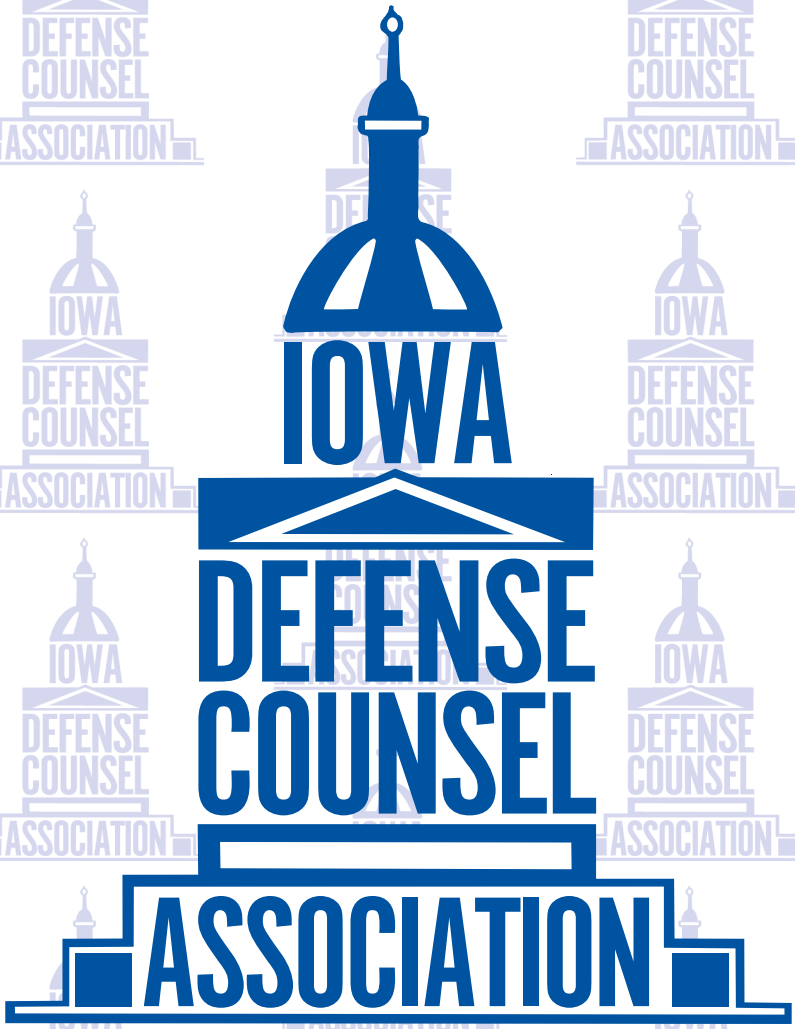
A. Contribution

Hansen v. Lanes, 2004 WL 2947947 (Iowa Ct. App. 2004)

Facts: Plaintiff sued Defendant Lanes and several medical Defendants alleging she sustained injuries in a fall at the bowling alley and during follow-up treatment. The medical Defendants moved for summary judgment on the ground that Plaintiff did not timely designate expert witnesses. Plaintiff and Defendant Lanes entered into a covenant not to execute, whereby Plaintiff agreed not to execute on any judgment obtained from Defendant Lanes and Defendant Lanes agreed to move to amend its answer to allege a cross-claim for contribution against the medical Defendants. The District Court granted the medical Defendants summary judgment motion and denied Defendant Lanes' motion to amend.

Holding: Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds. Common liability between two actors does not exist where it has been determined that one is not at fault. The District Court's summary judgment dismissal of the medical Defendants extinguished any common liability between Defendant Lanes and the medical Defendants and, accordingly, also extinguished any right of contribution Defendant Lanes might have had against the medical Defendants. As Defendant Lanes had no right of contribution, the District Court correctly denied Defendant Lanes' motion to amend.

VOLUME II



2005 Annual Meeting & Seminar

September 21-23, 2005

Hotel Fort Des Moines
1000 Walnut Street
Des Moines, IA 50309

2005 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR SCHEDULE

Wednesday, September 21, 2005

10:00 a.m. **Registration Open/Exhibitor Set-up**

11:00 a.m. **Exhibits Open**

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

12:50 - 1:00 p.m. **Welcome and Opening Remarks**
Sharon Greer, IDCA President

1:00 - 1:30 p.m. **Conspiracy, Trade Secrets, and Intentional Interference - New Developments in Business Torts**
Robert Houghton
Shuttleworth & Ingersoll, P.L.C.
Cedar Rapids, IA.

1:30 - 2:30 p.m. **The Future is Now - Practical Tips for Dealing with E-discovery**
Lori Ann Wagner
Faegre & Benson, LLP, Minneapolis, MN

2:30 - 3:00 p.m. **Defending the Latest Plaintiff's Tactic – Deposition Notices of the CEO and Other Apex Witnesses.**
Jeff W. Wright
Heidman, Redmond, Fredregill, Patterson, Plaza, Dkystra & Prahl, L.L.P.
Sioux City, IA.

3:00 - 3:15 p.m. **Break/Exhibits Open**

3:15 - 4:00 p.m. **Appellate Review I (Employment, Commercial, Constitutional, Contracts, Damages & Government)**
Hannah Rogers
Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, IA.

4:00 – 4:30 p.m. **Punitive Damages Since Campbell**
Tom Waterman
Lane & Waterman LLP, Davenport, IA.

4:30 - 5:00 p.m. **Effective Appellate Advocacy - A View from the Iowa Court of Appeals**
Honorable Robert Mahan
Judge, Iowa Court of Appeals, Ames, IA.

5:15 - 8:00 p.m. **Welcome Reception Hosted by the Young Lawyer's Committee**
Heavy hors d'oeuvres and beverages. Bring your appetite! Featuring the music of Lance Eaton. Sponsored by the exhibitors: Blackbox Visual Design, Capital Planning, Inc., IDEX, Inc., Minnesota Lawyers Mutual Ins., Co., Packer Engineering, Skogen Engineering Group, Inc. & Sweeney Reporting

Thursday, September 22, 2005

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

8:00 - 8:30 a.m. **Continental Breakfast/Exhibits Open**

8:30 - 9:15 a.m. **Appellate Case Review II (Civil Procedure, Court Jurisdiction & Trial, Evidence, Insurance, Judgment, Limitation of Action)**
William Miller
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, IA.

9:15 - 9:30 a.m. **The New & Improved IDCA Website**
Brent Ruther
Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C.
Burlington, IA.
Julie Garrison, Associate Director
Iowa Defense Counsel Association
Des Moines, IA.

9:30 - 10:00 a.m. **Class Action Fairness Act of 2005 and Other Developments in Class Action Litigation**
Joseph Gunderson
Gunderson, Sharp & Walke, L.L.P.
Des Moines, IA.

10:00 - 10:15 a.m. **Break/Exhibits Open**

10:15 - 10:30 a.m. **Legislative Update: Issues Impacting the IDCA**
Robert M. Kreamer
IDCA Executive Director & Lobbyist
Des Moines, IA.

10:30 - 11:00 a.m. **Recent Developments in Medical Malpractice Litigation**
Christine Conover
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, IA

11:00 - 12:00 p.m. **The Practical Impact of the New Model Rules**
Honorable David Wiggins, Iowa Supreme Court
Des Moines, IA.
Paul Weick, Commission of Continuing Education
Des Moines, IA.
Charles Harrington, Board of Professional Ethics & Conduct, Des Moines, IA.
Iris Muchmore, Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, IA.

12:00 - 12:20 p.m. **Luncheon/Exhibits Open**

12:20 - 12:30 p.m. **Annual Meeting of IDCA**

12:30 - 1:00 p.m. **Report of the United States District Court**
Honorable Mark Bennett
Chief Judge, United States District Court for the Northern District of Iowa, Sioux City, IA.

1:00 - 1:45 p.m. **Iowa Products Liability: Some Questions Answered and Some Answers Questioned**
Kevin Reynolds
Whitfield & Eddy, Des Moines, IA.

1:45 - 2:30 p.m. **Appellate Case Review III (Negligence, Torts & Indemnity)**
Troy A. Howell
Lane & Waterman LLP, Davenport, IA.

2:30 - 2:45 p.m. **Break/Exhibits Open**

2:45 - 3:30 p.m. **Apportionment, Successive Injuries and Other Emerging Issues in Workers' Compensation**
Coreen Sweeney
Nyemaster, Goode, West, Hansell & O'Brien, P.C.
Des Moines, IA.

3:30 - 4:30 p.m. **Cutting Edge Trial Presentation Technology**
Rick Kraemer
Executive Presentations, Inc., Los Angeles, CA.

4:30 - 5:00 p.m. **Committee Meetings**

4:30 p.m. **Hospitality Room Open**

6:30 - 9:30 p.m. **Reception/Dinner/Banquet - Embassy Club (801 Grand, 40th Floor, Des Moines, IA)**

Friday, September 23, 2005

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

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

8:30 - 9:15 a.m. **Hot Issues and New Developments in Employment Law**
Martha Shaff
Betty Neuman & McMahon LLP, Davenport, IA.

9:15 - 10:00 a.m. **Spoliation - What Every Defense Lawyer Needs to Know**
Paul Burns
Bradley & Riley, P.C., Cedar Rapids, IA.

10:00 - 10:15 a.m. **DRI and the Benefit to the Defense Bar**
J. Michael Weston, Moyer & Bergman
Cedar Rapids, IA.
Dan McCune, DRI Mid-Region Representative
Denver, CO.

10:15 - 10:30 a.m. **Break/Exhibits Open**

10:30 - 11:30 a.m. **Ethics in the Courtroom**
Skip Ames
Hand Arendall, L.L.C., Mobile, AL.

11:30 - 12:00 p.m. **Recent Developments in Attorney Client Privilege and Attorney Work Product**
Honorable Thomas Shields
Magistrate Judge, United States District Court for the Northern District of Iowa, Davenport, IA.

12:00 - 12:30 p.m. **Luncheon/Exhibits Open**

1:00 p.m. **Exhibitor Tear Down**

12:30 - 1:00 p.m. **Report from the Iowa Supreme Court**
Honorable Louis A. Lavorato
Iowa Supreme Court, Des Moines, IA

1:00 - 3:00 p.m. **Bringing Persuasion & Understanding to the Damages Case**
J. Ric Gass
Gass, Weber, Mullins, L.L.C., Milwaukee, WI.

3:00 - 3:15 p.m. **Closing Remarks/Adjourn**

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2004 - 2005

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Mark S. Brownlee PO Box 957 Fort Dodge, IA 50501	**Noel K. McKibbin** 5400 University Avenue West Des Moines, IA 50266

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DRI State Representative
J. Michael Weston
PO Box 1943
Cedar Rapids, IA 52101

IOWA DEFENSE COUNSEL ASSOCIATION STAFF

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* Edward J. Kelly

*Paul D. Wilson

* Deceased

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Michael W. Thrall

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association from September 2004 through August 2005.

Scott M. Brennan, Des Moines, IA

Corinne Butkowski, Cedar Rapids, IA

Troy A. Howell, Davenport, IA

Michael Paul Jurgens, West Des Moines, IA

Sasha L. Kirk, Cedar Rapids, IA

Gretchen E. Kraemer, Des Moines, IA

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Karin A. Stramel, Des Moines, IA

Matthew E. Thurber, Omaha, NE

Joel J. Yunek, Mason City, IA

IOWA DEFENSE COUNSEL ASSOCIATION
STANDING COMMITTEES 2005

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BOARD OF EDITORS – DEFENSE UPDATE Provide direction and leadership to editorial committee, creating time lines and following up to make sure editors are on time for publication of the quarterly membership newsletter *The Defense Update*.	Michael W. Ellwanger Rawlings Nieland Probasco Killinger Ellwanger Jacobs & Mohrhauser LLP 522 Fourth Street, Suite 300 Sioux City, IA 51101 Phone: (712) 277-2373 Fax: (712) 277-3304 E-mail: mellwanger@rawlingsnieland.com
CLE COMMITTEE Organizes annual meeting events and CLE programs.	Michael W. Thrall Nyemaster Goode Voigts West Hansell & O'Brien PC 700 Walnut Street, Suite 1600 Des Moines, IA 50309-3899 Phone: (515) 283-3189 Fax: (515) 283-8045 E-mail: mwt@nyemaster.com
CLIENT RELATIONS Liaison role with constituent client groups such as insurance companies and businesses. Acts as resource for maintaining and improving satisfactory relations between defense attorneys and clients.	Les V. Reddick Kane Norby & Reddick PC 2100 Asbury Road, Suite 2 Dubuque, IA 52001 Phone: (563) 582-7980 Fax: (563) 582-5312 E-mail: lreddick@kanenorbylaw.com Co-Chair Lyle W. Ditmars Peters Law Firm PC 233 Pearl Street PO Box 1078 Council Bluffs, IA 51502-1078 Phone: (712) 328-3157 Fax: (712) 388-0483 E-mail: LyleDitmars@hotmail.com
COMMERCIAL LITIGATION Monitor current developments in the area of commercial litigation and acts as resource for the Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues.	Daniel B. Shuck Heidman Redmond Fredregill Patterson Plaza Dykstra & Prahl LLP 701 Pierce Street, Suite 200 PO Box 3086 Sioux City, IA 51102-3086 Phone: (712) 255-8838 Fax: (712) 258-6714 E-mail: Dan.Shuck@heidmanlaw.com

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JURY INSTRUCTIONS Monitor activities of 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.	Stephen J. Powell Swisher & Cohrt PLC 528 West 4th Street PO Box 1200 Waterloo, IA 50704-1200 Phone: (319) 232-6555 Fax: (319) 232-4835 E-mail: sjp@s-c-law.com
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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.	J. Michael Weston (DRI State Representative) Moyer & Bergman PLC 2720 First Avenue NE PO Box 1943 Cedar Rapids, IA 52406-1943 Phone: (319) 366-7331 Fax: (319) 366-3668 E-mail: mweston@moyerbergman.com Heidi L. DeLanoit American Family Mutual Insurance Company 5500 Westown Parkway, Suite 180 PO Box 65630 West Des Moines, IA 50266 Phone: (515) 223-1145 Fax: (515) 224-1785 E-mail: hdelanoi@amfam.com
PRODUCT LIABILITY Monitor current development in the area of product liability; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on product liability issues.	Jason M. Casini Whitfield & Eddy PLC 317 Sixth Avenue Suite 1200 Des Moines, IA 50309-4195 Phone: (515) 288-6041 Fax: (515) 246-1474 E-mail: casini@whitfieldlaw.com

COMMITTEE NAME	CHAIRPERSON
PROFESSIONAL LIABILITY Monitor legislative activities in the area of professional liability; act as a resource for the Board of Directors and membership on professional liability issues. Advise and assist in newsletter and amicus curiae participation.	Robert V.P. Waterman, Jr. Lane & Waterman 220 North Main Street, Suite 600 Davenport, IA 52801-1987 Phone: (563) 324-3246 Fax: (563) 324-1616 E-mail: Bwaterman@l-wlaw.com
PUBLIC RELATIONS AND WEBSITE DEVELOPMENT Provide assistance with public relation efforts for the organization including media information. Involvement with the website planning and with the jury verdict reporting service. Monitoring the District Representative reporting of jury verdicts in Iowa.	Brent R. Ruther Aspelmeier Fisch Power Engberg & Helling P.L.C. 321 North Third Street P.O. Box 1046 Burlington, IA 52601 Phone: (319) 754-6587 Fax: (319) 754-7514 E-mail: brruther@mchsi.com Randy B. Willman Leff Haupert Traw & Willman LLP 222 South Linn Street PO Box 2447 Iowa City, IA 52244-2447 Phone: (319) 338-7551 Fax: (319) 338-6902 E-mail: rbwlhtw@qwest.net
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.	Martha L. Shaff Betty Neuman & McMahon LLP 600 Union Arcade Bldg 111 East Third Street Davenport, IA 52801-1596 Phone: (563) 326-4491 Fax: (563) 326-4498 E-mail: mls@bettylawfirm.com Darrell J. Isaacson Yunek Isaacson P.L.C. 10 North Washington Avenue, Suite 204 PO Box 270 Mason City, IA 50402 Phone: (641) 424-1933 Fax: (641) 424-1939 E-mail: darrell@masoncitylawyer.com
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YOUNG LAWYERS Liaison with law school and young lawyer trial advocacy programs. Planning of Young Lawyer Annual Meeting reception and assisting in newsletter and other programming. Liaison with law school trial advocacy programs and young lawyer training programs.	Christine L. Conover Simmons Perrine Albright & Ellwood PLC 115 Third Street S.E., Suite 1200 Cedar Rapids, IA 52401-1266 Phone: (319) 366-7641 Fax: (319) 366-1917 E-mail: cconover@simmonsperrine.com

2005 ANNUAL MEETING & SEMINAR

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Conspiracy, Trade Secrets, and Intentional Interference – New Developments in Business Torts

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Robert D. Houghton
Shuttleworth & Ingersoll PLC
115 3rd Street SE Suite 500
PO Box 2107
Cedar Rapids, IA 52406-2107
(319) 365-9461

Conspiracy, Trade Secrets, and Intentional Interference…
New Developments in Business Torts

Robert D. Houghton
Shuttleworth & Ingersoll, P.L.C.
115 Third Street SE, Suite 500
Cedar Rapids, Iowa 52401
Phone: 319-365-9461
Fax: 319-365-8564
rdh@shuttleworthlaw.com

I. Conspiracy

A. Elements and Proof

1. A conspiracy is "a combination of two or more persons to accomplish, through concerted effort, an unlawful end or a lawful end by unlawful means." The New Uchtorff Co., Inc. v. Johnson Mfg., 683 N.W.2d 126, 2004 WL 899636 at *4 (Iowa Ct. App. 2004); Wright v. Brooke Group Limited, 652 N.W.2d 159, 171 (Iowa 2002).
2. The principal element of conspiracy is an "agreement or understanding to effect a wrong against another." Robbins v. Heritage Acres, 578 N.W.2d 262, 265 (Iowa Ct. App. 1998); Adam v. Mt. Pleasant Bank and Trust Co., 387 N.W.2d 771, 773 (Iowa 1986). See generally Ellis Yacht Club, Inc. v. River Moon, L.L.C., 2002 WL 31640600 at *6 (Iowa Ct. App. 2002) (evidence supported a finding of a conspiracy to defraud).
3. Civil conspiracy is not in itself actionable. Rather, it is the acts causing injury taken in furtherance of the conspiracy that give rise to the action. Wright v. Brooke Group Ltd., 652 N.W.2d 159, 172 (Iowa 2002).
4. A plaintiff can seldom prove an express agreement to commit conspiracy. Adam, 397 N.W. 2d at 773.
5. A conspiracy is typically proven through circumstantial evidence. Adam, 387 N.W.2d at 773.

6. Iowa courts are "liberal" in admitting circumstantial evidence to prove a conspiracy. Adam, 387 N.W.2d at 773; Countryman v. Mt. Pleasant Bank and Trust Co., 357 N.W.2d 599, 606 (Iowa 1984).

B. Damages

1. When a conspiracy is proven, vicarious liability is imposed on a party "for the wrongful conduct of another with whom the party has acted in concert." Wright, 652 N.W.2d at 172.
2. Actual and punitive damages are recoverable based upon the underlying tort, not the conspiracy itself. See Wright, 652 N.W.2d at 172.

C. Defenses

1. Some jurisdictions recognize the intracorporate immunity doctrine. Under that doctrine, a corporation cannot conspire with its subsidiaries or its employees acting within the scope of employment. Cunningham v. PFL Life Ins. Co., 42 F. Supp. 2d 872, 884 (N.D. Iowa 1999). However, the Iowa Supreme Court has not adopted the intracorporate immunity doctrine in the context of business torts. See Cunningham, 42 F.Supp.2d at 884. In addition, the "personal gain exception" to the intracorporate immunity doctrine limits the applicability of the doctrine. "When a corporation's agents have an independent stake in achieving the corporation's illegal objective of the conspiracy,

whether for a personal motive or for personal economic gain, intracorporate immunity does not apply." Cunningham, 42 F.Supp.2d at 884.

2. Statute of Limitations. The applicable statute of limitations is that of the underlying tort. See Wright, 652 N.W.2d at 172.

II. Trade Secrets

A. Statutory definition of trade secrets.

1. In 1990, the Iowa General Assembly enacted the Uniform Trade Secrets Act. (Iowa Code Chapter 550).
2. Iowa Code section 550.2(4) defines trade secrets as follows: '"Trade secret' means information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process that is both of the following: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use, and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."
3. The determination as to whether information constitutes trade secrets under the law is a "mixed question of law and fact." Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 648 (Iowa 1995). The legal question is whether information

is of a type that might be a trade secret. Id. The factual aspect is whether the information has economic value and has been treated as confidential. Id.

4. The Iowa Supreme Court has interpreted the "economic value" requirement as "information kept secret that would be useful to a competitor and require cost, time and effort to duplicate …" U.S. West Communications, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993).

B. Items constituting trade secrets

1. Business data and facts unique to certain customers may constitute trade secrets if they protect "the owner's competitive edge or advantage." PFS Distribution Co. v. Raduechel, 332 F. Supp 2d. 1236, 1249 (S.D. Iowa 2004) (citing Olson v. Nieman's, Ltd., 579 N.W.2d 299, 314 (Iowa 1998)).
2. The Iowa Supreme Court has noted that a customer list, under certain conditions, can be a trade secret. Basic Chem., Inc. v. Benson, 251 N.W.2d 220, 230 (Iowa 1977). See Lemmon v. Hendrickson, 559 N.W.2d 278, 280 (Iowa 1997). See also White Pigeon Agency v. Madden, 2001 W.L. 855366 (Iowa App. 2001). However, the Lemmon court made clear that it is not prohibited to call upon customers of a former employer recalled from memory. Id. at 280-81 (quoting Restatement (Second) of Agency § 396).

3. The Iowa Supreme Court has observed that "there is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret." U.S. West Communications, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993). But see Diversified Fastening Systems, Inc. v. Rogge, 786 F.Supp. 1486, 1491 (N.D. Iowa 1991).

C. Damages & Injunctive Relief

1. Actual Damages. "Damages may include the actual loss caused by the misappropriation, and the unjust enrichment caused by the misappropriation which is not taken into account in computing the actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a person's unauthorized disclosure or use of a trade secret." Iowa Code § 550.4(1)
2. Punitive Damages. "If a person commits a willful and malicious misappropriation, the court may award exemplary damages in an amount not exceeding twice the award made under [Iowa Code § 550.4(1)]." Iowa Code § 550.4(2).
3. Attorney Fees. Reasonable attorney fees may be awarded to the prevailing party if (1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted

in bad faith, or (3) a person acts willfully and maliciously in the misappropriation. Iowa Code § 550.6.

4. Injunctive Relief.

    a. "The owner of a trade secret may petition the district court to enjoin an actual or threatened misappropriation. Upon application to the district court, an injunction shall be terminated when the trade secret has ceased to exist. However, the injunction may be continued for an additional reasonable period of time in order to eliminate a commercial advantage that otherwise would be derived from the misappropriation." Iowa Code § 550.3(1).

    b. "In exceptional circumstances, an injunction may condition future use of a trade secret upon payment of a reasonable royalty. The payment of a royalty shall continue for a period no longer than the period for which use of the trade secret may be prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position of the person prior to acquiring knowledge of a misappropriation that renders a prohibitive injunction inequitable." Iowa Code § 550.3(2).

5. In 205 Corp. v. Brandow, 517 N.W.2d 548 (Iowa 1994) (en banc), the Iowa Supreme Court held that the remedies under

Chapter 550 are not exclusive and the statute does not preempt a tort cause of action. 517 N.W.2d at 551-52. The court found significant the Iowa General Assembly's decision not to incorporate Section 7 of the uniform statute which "would have specifically displaced all other trade secret recoveries." Id. at 551.

D. Defenses.

1. "It shall be a complete defense that the person disclosing a trade secret made the disclosure with the implied or express consent of the owner of the trade secret." Iowa Code § 550.5.
2. Statute of Limitations. An action for misappropriation of trade secrets must be brought within three years after the misappropriation is discovered or should have been discovered by the exercise of reasonable diligence. A continuing misappropriation constitutes a single claim. Iowa Code § 550.8.

E. Recent cases of interest

1. PFS Distribution Co. v. Raduechel, 332 F. Supp 2d. 1236, 1249 (S.D. Iowa 2004). Defendants were management employees at plaintiff's food distribution center. Defendants terminated their employment with plaintiff and established a competing business with plaintiff. Defendants allegedly used plaintiff's sales data, financial data, customer lists, and price lists to obtain bank loans and effectively solicit plaintiff's customers and suppliers to

transfer their business to the defendant's new company. The plaintiff claimed that they lost significant business volume and incurred large financial losses due to the actions of the defendants. Plaintiffs were granted a preliminary injunction prohibiting defendants from soliciting or accepting business from plaintiff's customers or suppliers and from contacting, soliciting, or hiring plaintiff's employees.

Mediacom Iowa, L.L.C. v. Incorporated City of Spencer, 682 N.W.2d 62 (Iowa 2004) involved a request for production of documents. Spencer objected to several of Mediacom's requests on the grounds of trade secrets. Mediacom responded by filing a motion to compel discovery. The district court ruled that the information sought by Mediacom constituted trade secrets and protected such information from discovery. The Supreme Court of Iowa reversed, holding that "a district court ruling denying access to trade secrets must be reversed for abuse of discretion when the party resisting the motion makes no showing on [the factual questions]." Id. (citing State ex. rel. Miller v. Nat'l Dietary Research, Inc., 454 N.W.2d 820, 822 (Iowa 1990)). The Supreme Court also explained that once a court makes the determination that the information sought in discovery is a trade secret, the court must then determine whether good cause has been shown for the protective order. Mediacom 682 N.W.2d at

67. The Supreme Court concluded that no factual showing had been made in this case.

III. Intentional Interference

A. Intentional Interference with Contract

1. Elements. The elements necessary to establish a claim of intentional interference with contract are: (a) plaintiff had a contract with third party, (b) defendant knew of the contract, (c) defendant intentionally and improperly interfered with the contract, (d) defendant's interference caused either third party or plaintiff not to perform contract, and (e) plaintiff incurred damage. Catipovic v. People's Community Health Clinic, Inc., 401 F.3d 952, 957 (8th Cir. 2004).

2. Recent Cases of Interest. In Tenge v. Phillips Modern Ag Co., 2005 WL 1277798 (N.D. Iowa 2005), the plaintiff sued her former corporate employer, the business owner, and the owner's wife. The plaintiff asserted that the owner's wife improperly interfered with her employment / business relationship. The defendant had passed notes of a suggestive, sexual nature to the business owner. The owner's wife terminated plaintiff's at-will employment upon discovering the note. The court found that that the owner's wife's actions were *not improper* and granted summary judgment in favor of defendant on the intentional

interference with business relationship claim. Id. at *2 (emphasis added).

B. Intentional Interference with Prospective Business Relations

1. Elements

a. The elements necessary to establish a claim of intentional interference with prospective business relations are: (a) plaintiff had a prospective business relationship with a third person, (b) defendant knew of the prospective business relationship, (c) defendant intentionally and improperly interfered with the relationship, (d) the interference caused the third party not to enter the relationship, or prevented plaintiff from entering the relationship, and (e) plaintiff suffered damages. Keegan v. City of Blue Grass, 2004 WL 139069, (Iowa Ct. App. 2004), *citing* Willey v. Riley, 541 N.W.2d 521, 527 (Iowa 1995).

b. The prospective business relationship is demonstrated by "a reasonably likely business relationship of financial benefit to the plaintiff." Tompkins Lawncare, 697 N.W.2d 126, 2005 WL 597016 at * 2 (Iowa Ct. App. 2005).

c. The defendant must have actual knowledge of the prospective business relationship. Schaefer v. Cerro Gordo Abstract Co., 525 N.W.2d 844, 847 (Iowa 1994).

d. Plaintiff must show that the defendant intended to "financially injure or destroy them". Schaefer, 525 N.W.2d at 847 (internal citation omitted).

2. Recent cases of interest

a. Tompkins Lawncare, Inc. v. Buchholz, 697 N.W.2d 126, 2005 WL 597016 (Iowa Ct. App. 2005). The plaintiff, a relatively small landscaping company, filed suit alleging intentional interference with a prospective business relationship. The defendants were husband and wife who had contracted with Tompkins to perform certain landscaping work at their property on Lake Ponderosa. The defendants found the work to be unsatisfactory and sued the company in small claims court and lost. The defendants then disseminated one hundred fliers with photos of the work and the following description "… [defendants] would like you to take a look at the shoreline renovation by Tompkins Landscaping – In less than 6 months the 'shoreline for protection of water' had started to erode. Tompkins Landscaping and Small Claims Magistrate… saw no problem. Now, 6 months later what do you think? Don't let this happen to you – Come See for Yourself." Testimony showed that Tompkins Lawncare's business decreased markedly after the dissemination of the

flyers. Tompkins was awarded actual & punitive damages under the intentional interference claim. The fact that the small claims court had found the work not to have been in breach of contract appears to have been one critical factor in this case.

b. Poor v. Flores, 2003 WL 23006539 (Iowa Ct. App. 2003). A contract vendor of a real estate parcel sued the purchaser's successors and their real estate agent for intentional interference with contract and intentional interference with prospective business relations after the purchaser's successors fulfilled the terms of the purchase contract. The contract vendor asserted he was entitled to recovery because he expected the original purchaser to default. The vendor further asserted that when the purchaser's successors fulfilled the contract, they interfered with the original contract and the prospective business advantage. The trial court held that the plaintiff was not entitled to recovery. The Court of Appeals agreed with the trial court's conclusion that "Iowa law does not recognize a cause of action against one whose legal actions enable another to perform that party's contractual duties." Id. at *1 - 2.

C. Damages.

1. Actual Damages. Past and future lost income may be recovered. Tompkins Lawncare, Inc. v. Buchholz, 697 N.W.2d 126, 2005 WL 597016 (Iowa Ct. App. 2005).
2. Punitive Damages are also available. Id. at **3.

D. Statute of Limitations.

The statute of limitations for intentional interference with contract and intentional interference with prospective business relations is five years. Iowa Code section 614.1 governs unwritten contracts, injuries to property, fraud, and other actions and specifies that actions must be brought within five years. See, e.g. Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336, 339 (Iowa 1977).

The author wishes to acknowledge the assistance of summer associate Ryan T. Carey in preparing this outline.

The Future in Now – Practical Tips for Dealing with E-discovery

Iowa Defense Counsel Association
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Lori Ann Wagner
Faegre & Benson, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7910

DISCOVERY AND RECORDS MANAGEMENT IN THE DIGITAL AGE

Lori Ann Wagner

INTRODUCTION

> A lawsuit is supposed to be a search for the truth . . . and tools employed in that search are the rules of discovery. Our adversary system relies in large part on the good faith and diligence of counsel and the parties abiding by these rules and conducting themselves and their judicial business honestly. The judicial system prefers to resolve controversies on the merits . . . In the ordinary course, lawsuits should not be resolved based on who did what to whom during discovery. Indeed, a result driven by discovery abuse is justified only on the rarest of occasions and then only after the miscreant has demonstrated unquestionable bad faith and has had a last clear chance to comply with the rules.

Metropolitan Opera Association, Inc. v. Local 100, 212 F.R.D. 178, 181 (S.D.N.Y. 2003) (citations omitted.)

Anecdotally much civil litigation today seems to focus less on who did what to whom and which legal rule allows for redress (*i.e.* the merits or "a search for the truth") than on the sideshow of who failed to turn off the e-mail janitor program, what custodians or databases were overlooked, or which back-up tapes were recycled. Modern judges find themselves playing referee to more and more technically complex discovery disputes, often to their great distaste. In one recent example, the Chief Judge of the District Court in South Carolina described "refereeing contentious discovery disputes [as] . . . perhaps the most unwelcome aspect of a trial judge's work. *Network Computing Services Corp. v. Cisco Systems, Inc.*, 223 F.R.D. 392, 399 (D.S.C. 2004).

I. The Statistical Reality of Electronic Discovery

We lack current statistics to support the impression that contemporary lawsuits are more concerned with discovery disputes and less with "real" legal issues than they were in the past.

However statistics from the latter decades of the twentieth century illustrate that this is more than impressionistic.

One author reported that federal district courts and courts of appeals dealt with discovery disputes in the 1990's in almost three times as many cases as they did in the 1980's, and in the five years from 1994-1998 at a rate of twenty-one times more in reported opinions than in the five years from 1974-1978. *John S. Beckerman, Confronting Civil Discovery's Fatal Flaws, 84 Minn. L. Rev. 505, 508 (2000).*

Additionally in a survey of lawyers conducted by the Federal Judicial Center, about half (48%) reported problems with discovery, with document production generating the most reported problems (44%). *Thomas E. Wilging et al., Federal Judicial Center, Discovery and Disclosure Practice, Problems and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Cases (1997).* According to Wilging, et al., complaints about problems with document production increased significantly as the stakes in the cases increased, with over fifty percent (50%) of lawyers reporting such problems in cases with stakes ranging between $500,000 to $2,000,000 and seventy five (75%) percent reporting problem where the stakes were in excess of $2,000,000. Cases viewed as "more complex" had a similar increase in reported production problems.

While the statistics did not measure it directly, it is more than coincidental that this rise in discovery disputes coincides with the advent of the personal computer and the dramatic increase in the use of computers by businesses. Office workers exchange billions of e-mails per day. It is presently estimated that 99.997% of all documents are created and stored electronically and it is generally thought that some seventy percent (70%) of this electronic information is never reduced to hard copy. One survey showed that forty percent (40%) of adults use instant messaging, some fifty three million, with twenty four percent (24%) saying they use it more often than e-mail. Approximately eleven million people reported using instant messaging at work. *Eulynn Shiu and Amanda Lenhard, "How Americans Use Instant Messaging" Pew Internet American Life Project, September 1, 2004.* A University of California Berkeley study in 2000 estimated that this by this year corporations will be generating more than 17.5 trillion

electronic documents annually. *Peter Lyman & Hal Varian, "How Much Information?" (2000) at http://info.berkeley.edu/how-much-info.*

Today much civil litigation is about discovery and discovery is about electronically-produced information.

II. The Reality of Corporate Preparedness

Despite overwhelming evidence that electronic records are here to stay and becoming increasingly important in litigation, an ABA membership survey in 2000 reported that eighty three percent (83%) of respondents said that their clients did not have effective programs to deal with requests for production of electronic data. *"Before the Fall," Corporate Counsel, November 2002, p. 80.* And these lawyers' impressions are not far off from what their corporate clients are reporting.

Cohasset Associates, Inc. has reported that forty one percent (41%) of records managers surveyed rated their programs in the lowest categories given ("marginal" or "fair"); thirty eighth percent (38%) reported that their organizations don't follow their retention schedules regularly; forty six percent (46%) of the organizations surveyed do not include electronic records in their retention schedules; fifty nine percent (59%) don't have any formal e-mail retention policy; forty six percent (46%) don't have in place a formal system for records holds; and sixty five percent (65%) reported that electronic records are not included in their records holds. Of the respondents, sixty two percent (62%) aren't confident that their records management program is legally defensible. *Cohasset/EMC White Paper, "The Eternal Charter: Improving Corporate Governance through Compliance and Assured Records Management" (May 2005).*

III. The Scope of the Electronic Discovery Problem

When the glut of electronic information that is created and received by employees in corporate America collides with poor records management practices and then litigation rears its ugly head, the challenges for counsel can be enormous.

A. What Is Discoverable?

Federal Rule of Civil Procedure 26 defines the scope of what parties are entitled to discover from each other in civil litigation. It allows for the discovery of *information relevant to the claim or defense of any party*, and *for good cause any information relevant to the subject*

matter involved in the action. Relevant information need not be admissible at trial if the discovery appears likely to lead to the discovery of admissible evidence.

The Supreme Court has made it clear that the rule is to be interpreted very broadly, recognizing that the "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512, (2002).* Under this system claims are relatively easy to bring and it often takes extensive *and expensive* discovery to sort out what the case is really about and whether it has any merit. Never has this been more true than in the digital age. As noted by two different jurists on one district court dealing with electronic discovery issues:

> "The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, 'discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to discover.'"

Zubulake v. UBS Warburg LLC, et al., 217 F.R.D. 309, 311 (S.D.N.Y. 2003) ("Zubulake I"), citing *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002).

1. The General Problem

The breadth of this rule can cause trouble for companies when their employees substitute their own understanding of what they need to "give the lawyers," for what the rule actually requires. One can sometimes be a long way down the discovery road, only to learn that an employee had *private documents* which he never viewed as *corporate records*, so he never mentioned them to the lawyer or paralegal collecting documents for the litigation. If the law views our corporate squirrel's stash of documents as belonging to his employer, the company can be knee deep in discovery sanctions before it knows what hit it.

This disconnect between discovery reality and employee perceptions lands companies, their lawyers and their employees in trouble with the judge, and maybe even with the jury. Such trouble can go straight to the heart of their credibility in the courtroom, a commodity that may be very difficult to regain.

2. Electronics Making the Problem More Complicated

Problems related to finding, preserving and producing discovery materials have plagued lawyers since the days of file cabinets and photocopy machines, but those problems have been magnified by the ubiquitous use of computers in the business world.

The new proposed amendments to the Federal Rules of Civil Procedure explicitly recognize the importance of electronic discovery in modern-day litigation. A new term "electronically stored information" is used to describe one aspect of discoverable material, which is distinct from "documents." *See* Proposed Rule 34(a) at http://www.uscourts.gov/rules/. The intent is to force lawyers to specify whether they seek production of paper documents, electronically stored information or both. If the rule goes into effect, it will no longer be sufficient to seek "documents" and rely on the case law (or involved definitions of what "documents" means) to get electronically stored information.

However, this amendment is unlikely to have significant substantive effects on the discovery process. While many feel it is long past time to bring Federal Rules into the digital age by doing away with terms like "phono-records" and to force litigants into the open about what they are seeking, the commentary to Rule 34 (*see Advisory Committee Note to Fed. R. Civ. P. 34*) and the case law that has developed around the rule makes it clear that under the rules as presently written "documents" means much more than simply hard copy, and has for a long time. Since 1970, the definition of "document" in Federal Rule of Civil Procedure 34 has included electronic data. And in the last ten years, parties – and courts – have begun to realize that this is where most information is stored today.

Litigators have long struggled to help clients understand that we really do need <u>all</u> the paper copies of all the relevant documents in their office related to a particular product embroiled in litigation. In the digital age the struggle is convincing them that we also need the responsive information on their desktop computers, laptops, home computers, PDA's, network files, electronic team rooms, floppy disks, CD ROM's, etc. We also have to know where to look for the things the employees don't remember, that are difficult to access or that were left behind by people who left the company. Worse yet, many courts are willing to say that the right to obtain electronic documents is not limited to electronic documents currently in use by the company, but

also electronic documents which have been deleted and reside only on backup media. *See eg. Zubulake I, 217 F.R.D. at 317.*

Does this mean that in every case we are facing a free-for-all of discovery relating to electronic documents? Hopefully not, as courts seem to be trying to create a balance of reasonableness. As recognized by District Court Judge Shira Scheindlin, corporations cannot be required to preserve every "shred of paper, every e-mail or electronic document, and every backup tape," for to do so would "cripple large corporations" who are almost always involved in litigation. *Zubulake v. UBS Warburg, LLC, et al., 220 F.R.D. 212, 217 (S.D.N.Y 2003) ("Zubulake IV").* As noted by *The Sedona Priniciples: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2004) ("The Sedona Principles"),* "a reasonable balance must be struck between (1) an organization's duty to preserve relevant data, and (2) an organization's need, in good faith, to continue operations." *See Comment 5a, The Sedona Principles.*

However, it is clear that effectively responding to discovery requests in the digital age requires knowing your client, their business processes and their systems. And it is best executed where the client has well thought out plans and procedures for managing their records and electronic discovery when it comes to pass. Failure in these areas, can result in serious consequences.

IV. Judicial Power Relating to Discovery Failures

Rule 37 (b) (2) of the Federal Rules of Civil Procedure gives courts certain powers to impose sanctions for discovery failures. These include an order establishing certain factual matters; an order prohibiting the presentation of certain claims or defenses or the use of certain evidence; an order striking out pleadings or parts thereof, staying proceedings, dismissing the action or rendering a default judgment or an order finding the party in contempt. The Rule also authorizes an award of expenses, including attorneys' fees.

In addition, federal courts have the inherent power to impose sanctions in an effort to control and supervise a case to allow for "an orderly and expeditious disposition of the litigation." *United States ex. rel. William I. Koch v. Koch Industries, Inc., 197 F.R.D. 463, 482*

(N.D. Okla. 1998). This power includes the authority to impose sanctions in the event of spoliation of evidence[1], which authority is "confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis." *Zubulake IV, 220 F.R.D. at 216, citing Fujitsu Ltd. V. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001).*

A. What Is Spoliation?

According to *Black's Law Dictionary*, spoliation is:

> The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.

Id., 7th Ed. (1999).

This definition is probably missing some important details (including a nod to the electronic world) and is probably too lenient in its use of the term "intentional." While the specifics vary by jurisdiction, a review of the case law indicates a more realistic definition is: The alteration, destruction or concealment of information which is relevant to pending or threatened litigation, when a party knows or should know[2] that the information is relevant and is on notice of the litigation or potential litigation, which denies the party's opponent access to such information to its detriment.[3]

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[1] In addition, serious consequences can be imposed by statute in many jurisdictions. For example, Section 802 of the Sarbanes-Oxley Act of 2002, at 18 U.S.C. § 1519, makes it illegal for any person to knowingly alter or destroy records with the intent to "impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States" or in any bankruptcy case. *See also*, 18 U.S.C. §1520(a)(2); 18 U.S.C. §1520(c); 18 U.S.C. §1512; and Section 1102, at 18 U.S.C. §1512

[2] There is some debate about whether there is a requirement of intent or culpability necessary for a spoliation sanction to be imposed. One federal appellate court has said that it does not support imposition of such sanctions in the "should know" context. *See Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 745-49 (8th Cir. 2004) (adverse inference instruction (sanction) should not be given on the basis of negligence alone; there must be a finding of bad faith or some other culpable conduct, such as the ongoing destruction of documents during litigation and discovery even after they have been specifically requested). Another has set up a pure negligence standard. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (holding that sanctions may be appropriate for negligent failure to take adequate steps to preserve and produce documents in a timely manner). These cases are discussed in more detail later in this paper.

[3] The 2nd Circuit, which has seen its fair share of spoliation cases, defines spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).*

If proved, spoliation may result in a variety of sanctions, including an instruction that the evidence would have been unfavorable to the party responsible for the spoliation or even a default judgment against the spoliator.

B. The Judicial Response

Courts are not particularly sympathetic to those organizations which do not have their information systems under control or otherwise fail to preserve discoverable information when they are on notice of threatened or pending litigation. Legal alert newsletters, case reporters and even the *Wall Street Journal* are reporting more and more situations where judges have imposed significant sanctions on parties who have failed to conduct electronic discovery in line with the court's view of full and fair disclosure.

2. Records Management at the Core of the Problem

The court in *United States ex. rel. Koch* found that Koch "had no formal document retention policy and no formal policy or procedure for notifying its employees of imminent or pending litigation and the concomitant need for those employees to preserve [related] evidence…" *197 F.R.D. at 484.* While the court found that the plaintiffs had failed to show that Koch intentionally acted to thwart discovery of relevant information through purposeful destruction of evidence, it found Koch's "uncoordinated approach to document retention, especially documents potentially relevant to litigation, denied Plaintiffs potential evidence…" *Id. at 482.*

The court held that plaintiffs would be allowed to inform the jury as to which relevant computer tapes were destroyed and the impact that the destruction had on Plaintiffs' proof. The jury was left to draw its own inferences without a specific "adverse inference" instruction from the Court. *Id. at 486.*

The *Koch* court's focus on records retention and the consequences of uncoordinated and badly enforced policies, has found support with other courts. In the case of *In re the Prudential Insurance Company of America Sales Practices Litigation, 169 F.R.D. 598 (D.N.J. 1997),* the court entered an extremely broad order requiring all parties to "preserve all documents and other records containing information potentially relevant to the subject matter of this litigation." *Id. at 600.* After discovering that documents had been destroyed at four different Prudential offices and records were removed from another to avoid audit, the court ordered very severe sanctions.

Id. at 616-17. Though the court found that there was no proof that there was any intent to thwart discovery through purposeful destruction of documents, it held that "haphazard and uncoordinated approach to document retention indisputably denie[d] its party opponents potential evidence to establish facts in dispute." *Id. at 615.*

The *Prudential* court imposed severe sanctions, including a $1 million fine, reimbursement of all of plaintiffs' attorneys' fees and costs associated with the discovery disputes, issued a finding that certain documents that were destroyed would have contained information to support the plaintiffs' claims, and left open the door for additional sanctions. *Id. at 616-17.* It also required that Prudential mail every employee a copy of the court's order, provide to the court a written document preservation policy manual within 30 days, and provide a dedicated telephone "hotline" for reporting any future document destruction. *Id. at 617.*

While the sanctions imposed on Prudential were significant, given that no willful conduct was found, the court did find that "throughout the pendency of this litigation Prudential's preservation of documents has been a pervasive issue." *Id. at 600.* The court further noted that e-mail notices concerning the obligation to preserve documents were not circulated in hard copy despite the fact that nearly half the employees did not have access to e-mail and that even those that had email testified they ignored it.[4] *Id. at 612-13.* This was in contrast to a self-serving announcement concerning the litigation that Prudential sent to employees by e-mail and in hard copy. *Id. at 613.*

3. The Ordinary Negligence Standard

The Court of Appeals for the Second Circuit has held that where the nature of the breach of a discovery obligation is the non-production of evidence (in this case e-mail), discovery sanctions, including an adverse inference instruction, can be imposed *simply for negligence in meeting discovery obligations*.[5] *Residential Funding Corporation, Inc. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002).* The district court had denied DeGeorge's motion for

[4] This is not to say that e-mail is a wholly inappropriate way to distribute litigation hold notices or court orders regarding document preservation due to litigation, simply that one must know their organization well enough to determine whether it is a sufficient way to distribute such information to all who need to receive notice.

[5] Previous decisions in that Circuit had supported spoliation standards of "intentional destruction" – *Kronisch v. United States, 150 F.3d 112 (2nd Cir. 1998)*; "bad faith destruction" – *Berkovich v. Hicks, 922 F.2d 1018 (2nd Cir. 1991)*; and "gross negligence" – *Reilly v. Natwest markets Group, Inc., 181 F.3d 253 (2nd Cir. 1999).*

sanctions requesting an adverse inference instruction for Residential Funding's failure to produce certain e-mails in time for trial.[6] The district court had found that Residential Funding had shown "purposeful sluggishness," but concluded there was no evidence of "bad faith or gross negligence," and determined there was no showing of prejudice by DeGeorge.

The Second Circuit vacated the district court's order denying DeGeorge's motion for sanctions and remanded the case with instructions that the district court reconsider the sanctions motion. The Second Circuit's reversal held that the district court had applied the wrong standard by considering only whether Residential Funding acted with bad faith or gross negligence. It noted that the case of *Byrnie v. Town of Cromwell, 243 F.3d 93 (2d Cir. 2001)* found that the "culpable state of mind" factor necessary for a discovery sanction to accrue could be satisfied without intent. The Second Circuit specifically held that:

> … discovery sanctions, including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence…

Residential Funding Corp., 306 F.3d at 113.

Despite this broad pronouncement that negligence alone is sufficient to have sanctions imposed, the court still seemed to be focusing on whether Residential Funding had acted in bad faith or was grossly negligent, made unreasonable decisions, or carelessly or intentionally mislead DeGeorge and the district court. It said:

> … the District Court should vacate judgment and order a new trial if DeGeorge establishes that RFC acted with a sufficiently culpable state of mind (as described above) and that DeGeorge was prejudiced by the failure to produce the e-mails.

Id. at 112.

What is surprising about this case is that a well-respected appellate court would overrule a district judge who had lived with the case, suffered the conduct complained of firsthand, and determined that it did not warrant sanctions. The case clearly sends the message that discovery obligations must be met in a timely manner and that the failure to meet these obligations can result in the very harshest of sanctions if the failure results in prejudice to the opponent. More

[6] As the Second Circuit noted this was not a typical spoliation case. There was no evidence (or even allegation) that Residential Funding destroyed or purposefully concealed any e-mails, but rather it failed to produce the e-mails in time for trial.

broadly it stands for proposition that having trouble producing electronic records can lead you into more serious trouble.

3. Higher Standards

Other courts have been reluctant to impose certain types of sanctions for conduct that is merely negligent. The Court of Appeals for the Eighth Circuit addressed the issue of the appropriate standard to issue an adverse inference instruction in light of spoliated evidence in the case of *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739 *(8th Cir. 2004).* The case involved a serious injury and a fatality at a car-train crossing. The plaintiffs filed a motion for sanctions for Union Pacific's destruction of a voice tape conversation between the train crew and dispatcher at the time of the accident and track maintenance records from before the incident. Union Pacific opposed the motion on the grounds that the materials had been destroyed in good faith pursuant to the company's routine document retention policies. The district court imposed sanctions of an adverse inference instruction concerning the destroyed evidence and an award of costs and attorneys' fees. The district court also denied Union Pacific the opportunity to rebut the adverse inference by putting in evidence of its document retention policy as an innocent explanation for the destruction of the materials. The jury returned a verdict in excess of two million dollars and the court awarded costs and fees of over $160,000.

The Eighth Circuit reversed the case in part and remanded it for a new trial and for reconsideration of the attorneys' fees award. The Eighth Circuit found that the district court had imposed the adverse inference instruction after concluding that the railroad destroyed the voice tape in bad faith and destroyed the track maintenance records under circumstances where it "knew or should have known that the documents would have become material" and it "should have preserved them" and analyzing the evidence under the factors set forth in the *Lewy v. Remington Arms Co. 836 F.2d 1104 (8th Cir. 1988)* case.

In the *Lewy* case the pre-litigation destruction of records pursuant to a routine document retention policy was considered, but the evidence was not sufficient for the court to determine if the trial court had erred in giving an adverse inference instruction. Thus, the Eighth Circuit remanded the case setting forth guidelines to assist the district court in

determining whether the policy had been adopted or applied in bad faith. In what the *Stevenson* court described as dicta, the *Lewy* used as an example a situation where a corporation "knew or should have known that the documents would become material at some point in the future then such documents should have been preserved." *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 746 *(8th Cir. 2004), citing* Lewy v. Remington Arms Co., 836 F.2d at 1112.

The Eighth Circuit went on to say:

> … while in dicta we articulated a "knew or should have known" negligence standard, such a standard standing alone, would be inconsistent with the bad faith consideration and the intentional destruction required to impose an adverse inference for the prelitigation destruction of documents. We have never approved of giving an adverse inference instruction on the basis of a prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.

Stevenson, 354 F.3d at 746-47.

The court found that with regard to the destruction of the voice tapes, there was just barely enough evidence to uphold a bad faith determination. The court based this on the seriousness of the accident which the railroad was held to know would likely result in litigation and the fact that the tapes were such important evidence, being the only contemporaneous recording of conversations at the time of the accident. Union Pacific was not helped by the finding that it had in prior cases preserved voice tapes where they proved beneficial to the railroad. *Id. at 748.*

As to the track maintenance records, the Eighth Circuit did not find the prelitigation destruction to be in bad faith, although destruction that occurred after the lawsuit began was sanctionable. *Id. at 749.* Finally, the Eighth Circuit found that Union Pacific should have been allowed to put in evidence of its document retention program in an effort to rebut the adverse inference instruction. Because the instruction permitted, but did not require, the jury

to draw an adverse inference from the destruction of the materials, the jury should have been permitted to hear Union Pacific's argument as to why the destruction was innocent. *Id. at 750.*

4. Sometimes It All Goes Wrong

For a reading on how NOT to respond to discovery, and a course of discovery abuse that the court found involved such "utter and complete disregard for the rules of the truthseeking process in civil discovery" as to transcend into "gross negligence, recklessness, willfulness and lying," see *Metropolitan Opera Ass'n, Inc. v. Local 100, 212 F.R.D. 178 (S.D.N.Y. 2003).* The *Metropolitan Opera* case is cited above for the court's insightful discussion of the purpose of the civil justice system. The judge, who came to the bench from private civil practice, cited familiarity with the usual discovery practice of hotly-contested civil cases, including "sharp elbows, speaking objections, rude responses and with the ever-popular much-cited Rambo litigation tactics." *Metropolitan Opera, 212 F.R.D. at 181.* She found, however, that the discovery abuse in the case before her went far beyond the worst of these tactics and was thus "qualitatively different:"

> It presented the unfortunate combination of lawyers who completely abdicated their responsibilities under the discovery rules and as officers of the court and clients who lied and, through omission and commission, failed to search for and produce documents and, indeed, destroyed evidence – all to the ultimate prejudice of the truth-seeking process.

Id.

In entering a default judgment against the defendant union, the court recognized that there were discovery failings on behalf of the Metropolitan Opera as well. But the court found that to the extent they existed they "… were well within the normal hurly-burly of the discovery process and, in any event, were promptly addressed." *Id. at 182.* The conduct of the Union and its counsel was perceived to be of a different quality, devolving into "gross negligence, recklessness, willfulness and lying." *Id.*

The court's opinion reflects its disgust with a multitude of the Union's and its lawyer's actions. *Id.* The Union's counsel repeatedly represented to the Court that all

documents responsive to Metropolitan Opera's requests had been produced, when a thorough search had never been made and counsel had no basis for making the representation. *Id.* Counsel knew that the Union's files were in disarray and that it had no document retention policy, but did not see that such a policy was put in place to prevent the destruction of paper and electronic documents. *Id.* There was also a non-lawyer in charge of document production for the Union, who failed to do a complete job and never received complete instructions on how to properly do the job. *Id.* Also, the Union's counsel lied to the court and a Union officer lied in his deposition. *Id.* Further, the Union replaced its computers without notice to the court or Metropolitan Opera, after Metropolitan Opera's counsel stated it would seek permission to examine the computers to retrieve deleted e-mails. *Id.*

The court acknowledged that while any one of the items listed would perhaps be sufficient to cause some sanction or remedy to issue, none standing alone would likely move a court to issue a default judgment. However, in combination, this most severe sanction was appropriate to "(1) remedy the effect of the discovery abuses . . . (2) punish the parties responsible, and (3) deter similar conduct by others." *Id.*

B. Who Is Responsible

1. Senior Management is Responsible

In connection with its holding that the failure to have a coordinated records retention program caused sanctionable conduct, the court in *United States ex. rel. Koch* also had some things to say about who is responsible for preserving relevant evidence.

> … [T]he obligation to preserve evidence that is potentially relevant to imminent or ongoing litigation is an affirmative duty that rests squarely on the shoulders of senior corporate officers. When senior management fails to establish and distribute a comprehensive document retention policy, which has been communicated to and which is accessible to its employees, management cannot shield a corporation from responsibility because an employee routinely destroyed information relevant to imminent or ongoing litigation.

Id., 197 F.R.D. at 484.

And again the *Prudential* court agreed, finding it to be the "obligation of senior management to initiate a comprehensive document preservation plan and to distribute it to all employees." *Id.* The court also found it to be senior management's obligation to distribute a

copy of the court's order, advise employees of the pending litigation and explain to them the potential sanctions that could result from violation of the order. *Id.* Here too, the court emphasized, "[t]he obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers." *Id.*

2. Lawyer's are responsible

However, lawyers cannot simply assume that their clients are solely responsible for carrying out preservation obligations. In *Zubulake v. UBS Warburg LLC*, No. 02-Civ. 1243, 2004 WL 1620866, at *7-8 (S.D.N.Y. July 20, 2004) ("*Zubulake V*"), the court faulted counsel for failing to take adequate steps to preserve data, including failure to interview key players in the litigation about the storage of their documents and failure to take steps beyond issuing the litigation hold to ensure documents were preserved. In the fifth written opinion in a case she described as "a relatively routine employment discrimination dispute," Judge Scheindlin was considering the following question in connection with a sanctions motion: "Did UBS fail to preserve and timely produce relevant information and, if so, did it act negligently, recklessly, or willfully?" *Id. at *1*. But the implications of the decision go much further, as is indicated by the very next sentence in the opinion: "This decision addresses counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions." *Id.*

Further along Judge Scheindlin devotes an entire subpoint in her discussion to "Counsel's Duty to Monitor Compliance." *Id. at *7.* According to the judge the implementation of a litigation hold is only the beginning of a party's discovery obligations and it is counsel's role to oversee compliance with the hold by "monitoring the party's efforts to retain and produce relevant documents." *Id.* Further, according to Judge Scheindlin, it is counsel's duty to "make certain that all sources of potentially relevant information are identified and placed 'on hold'" by becoming "fully familiar" with the client's document retention policies and data retention architecture. *Id. at *8*. She then sets forth a laundry list of activities that counsel should engage in to fulfill these responsibilities. *Id.* Counsel also has a continuing duty to ensure preservation, and again the judge sets forth a number of steps that counsel should take to ensure compliance with preservation obligations, including (1) issuing a litigation hold at the outset; (2) reissuing the litigation hold periodically; (3) communicating directly with "key players" in the litigation;

(4) reminding "key players" of their preservation obligations; (5) instructing all employees to produce electronic copies of their relevant active files; (6) and making sure that all backup media subject to the preservation obligation is identified and safely stored (including in some cases taking physical possession of the media). *Id. at *9-10.*

At the end of the day Judge Scheindlin found that UBS's counsel had failed to communicate the litigation hold to all key players and failed to learn about each of the key player's document management routines, and that UBS's employees ignored the instructions they were given by counsel. She found that the failure to communicate, which lay at the heart of the discovery failings, was both the fault of counsel and the client. *Id. 12.*

V. Avoiding Spoliation Claims Up Front

At least one commentator has noted that "[t]he existence of a document policy may, under certain circumstances, be deemed a mitigating factor in litigation when documents are destroyed pursuant to it, while a company's failure to have a coherent policy may be an aggravating factor." *See, Ian C. Ballon, Spoliation of E-Mail Evidence: Proposed Intranet Policies and a Framework for Analysis, CYBERSPACE LAWYER (March 1999), p. 4 and fn. 19.*[7] The recent *Stevenson v. Union Pacific* case discussed above lends support to this position.

A. The Reasonableness Test

The central factors considered in evaluating the destruction of documents pursuant to a document retention policy were articulated by the Eighth Circuit in *Lewy v. Remington Arms, 836 F.2d at 1112*, where the court presented a three-part test for the trial court to use in determining whether the document retention policy used by defendant was reasonable:

1) Was the policy reasonable considering the facts and circumstances surrounding the relevant documents? (*reasonableness test*)

[7] Noting the comparison of: Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892, 921, 48 Cal. Rptr. 2d 607, 625 (1995) ("good faith disposal pursuant to a bona fide consistent and reasonable document retention policy could justify a failure to produce documents in discovery"), citing Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 481-82 (S.D. Fla. 1984); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 76 (SDNY 1991) (destruction pursuant to a document policy evidenced negligence, rather than intentional conduct, but because destruction occurred after litigation was commenced sanctions under the facts were warranted); with Telectron, Inc. v. Overhead Door Corp., 116 FRD 107, 123 (SD Fla. 1987) ("The absence of a coherent document retention policy during the pendency of this lawsuit" was cited as leading to "possibly damaging document destruction occurring in both routine and non-routine manners . . ." where "flagrant and willful destruction of records specifically called for in a production request" were destroyed.).

2) Have lawsuits concerning a complaint about the product or related complaints been filed, and what have been the frequency and magnitude of such complaints? (*notice/foreseeability test*)

3) Was the document retention policy instituted in bad faith? (*bad faith test*)

The *Lewy* court noted that despite finding a document retention policy reasonable in light of the above factors, a court may still levy sanctions if the particular circumstances suggest that certain documents should have been retained notwithstanding the policy. *Id. at 1112*. One such example is *Reingold v. Wet 'N Wild Nevada, Inc., 944 P.2d 800 (Nev. 1997),* in which the Nevada Supreme Court found a waterpark's records management policy to be unreasonable and thus permitted a spoliation instruction. In the personal injury case before it, the court determined that the company's policy of keeping accident reports for less than one year and destroying them "even before the statute of limitations has run on any potential litigation for that season" amounted to the suppression of evidence. *Id. at 802.*

Some commentators have suggested that storage issues may be different for electronic documents than for paper, and therefore the reasonableness standard with respect to retention periods may be different for electronic records. *See, Christopher V. Cotton, "Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era," 24 J. Corp. L. 417, 423 (Winter 1999).* However, to date no court has ruled on this question, so we are left analogizing from the paper world.

VII. Taking Control in Litigation

Credibility is a litigant's capital in the courtroom and the litigator's job is to maintain her own credibility and that of her client, while undermining that of her opponent and her opponent's client. Litigators are trained to exploit weaknesses in the other side. In discovery one place to look for such weaknesses and damage an opponent's credibility is its management of electronic records and its ability to respond to discovery requests.

Morgan Stanley's recent discovery problems in Florida state court have made the front page of the *Wall Street Journal* and other national publications. In that case, after months of frustration, a judge simply had "had enough" and instructed the jury that it should simply assume that Morgan Stanley had helped to defraud the plaintiff, who was seeking damages of at least

$485 million stemming from its failed $2.7 billion acquisition. *Coleman Holdings Inc. v. Morgan Stanley & Co., Inc., No. 502003CA005045XXOCAI, (Fla. Cir. Court. March 23, 2005).* The ruling allowed the plaintiff's attorney to argue in closing that "Morgan Stanley hid evidence, Morgan Stanley destroyed evidence, Morgan Stanley filed false certifications, Morgan Stanley lied to the court and Morgan Stanley sought in every way possible to cover up its wrongdoing." *The Associated Press, Morgan Stanley told to pay $850 million, May 18, 2005.* The jury awarded $604.3 million in compensatory damages and $850 million in punitive damages. *Id.*

The list of Morgan Stanley's shortcomings in the discovery phase of the case is long. It suffered from inadequate searches of its offices after being ordered to produce e-mails from back-up tapes and seemingly bad litigation support efforts. But in hindsight, and from the court's reported decisions, the real problem seems to have revolved around failures of Morgan Stanley and its lawyers to dig deeply enough into the company's electronic media, and to come forward as they learned problems existed or that an untrue statement had been made and inform opposing counsel and the court or take curative steps.

Shortly after the case was filed in 2003, plaintiff sought to discover communications, including e-mail, from thirty-six individuals who had worked on the transaction at issue in 1997-1998. When Morgan Stanley reported that such information had not been preserved on active systems, an agreed order was worked out requiring Morgan Stanley to search the oldest full backup tape for each of the thirty-six employees, review e-mails from February 15 to April 15, 1998 and e-mails containing specified terms regardless of their date, produce responsive non-privileged documents, provide a privilege log, and certify compliance with the order. *Coleman, No. 502003CA005045XXOCAI, slip op. at 2 (Fla. Cir. Court. March 23, 2005).* The required certification was provided late, and was sworn to by an employee who knew at the time he signed it that it was untrue, because over 1,400 tapes had been discovered that had not been searched. *Id. at 3.* The problem was compounded when that individual confirmed that those tapes contained e-mail from the relevant time period, but Morgan Stanley did nothing to withdraw the certification or inform its opponent about the potential that additional relevant e-mail existed. *Id.* The tapes were not processed to make them available for searching until eight months after their discovery. *Id.* Additional tapes

found later at other locations presented the same problem, but again the certification was not withdrawn and Morgan Stanley took no steps to inform its opponent or the court. *Id.* It was not until *six months* after the false certification was filed that Morgan Stanley informed its opponent that it had discovered additional tapes. *Id. at 5.*

The individual who filed the false certification was replaced for reasons that are opaque in the reported court decisions. The person who was then given responsibility for litigation discovery efforts was not informed of the existence of the *Coleman* case until five months later, and then was not given sufficient information to appreciate the importance of the project. *Id. at 4.* Moreover, even though Morgan Stanley did not have the appropriate in-house resources to handle the newly discovered tapes, no outside vendor was hired. *Id.* Further, again reflecting the classic "failure to communicate," Morgan Stanley's lawyers produced e-mails and attachments in November 2004 representing them to be from those newly discovered tapes, when in fact Morgan Stanley would not figure out how to upload and search those new tapes until two months later in January 2005. *Id. at 5.*

In January 2005, Morgan Stanley's response to a letter inquiring as to the circumstances surrounding the newly discovered tapes failed to answer the questions and stonewalled on the details of the restoration process and the timing of recovery. *Id. at 6.* At a February hearing Morgan Stanley's counsel continued to obfuscate about when the e-mail production would be complete, misrepresented the date that recoverable e-mail was found on one of the sets of late-discovered tapes and the timing of the discovery of others, and failed to inform the court about additional late-discovered tapes. *Id. at 7.* During a February evidentiary hearing related to discovery matters, none of Morgan Stanley's witnesses was knowledgeable about an issue of keen interest to the court and they could not answer questions the judge posed. Their testimony, however, did raise new concerns about the adequacy of the production and shortly thereafter seventy-three bankers' boxes of additional back up tapes were found. *Id. at 8-9.*

The court's opinions manifest that, throughout the process, a lack of candor by Morgan Stanley and its counsel frustrated the court and opposing counsel's ability to be fully and timely informed. *Id. at 9.* The court detailed Morgan Stanley's and its counsel's many failings, but in summary said:

> In sum, despite [Morgan Stanley's] affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails,[8] [Morgan Stanley] failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check [Morgan Stanley's] work and the [Morgan Stanley's] attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

Id. at 10.

Having lost all credibility with a court, Morgan Stanley stood little chance of coming out of this case unscathed. In fact, the jury awarded $604 million in compensatory damages and another $850 million in punitive damages.

The court's frustration with Morgan Stanley and its counsel is quite similar to the frustration the judge in the Metropolitan Opera case expressed, resulting in a default judgment being entered. The following are suggestions to help other companies avoid similar fates.

A. Define a Litigation Response/Preservation Plan

One important aspect of a sound information and records management program is the procedure for suspending normal destruction practices for relevant information and records when litigation or investigation is pending or imminent. *See Guideline 5, The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (Public Comment Draft) (September 2004).*

Many companies find it useful to develop a full blown Litigation Response Plan as an adjunct to their information and records management program. The Litigation Response Plan sets forth a process for defining the discovery response scope and procedures for identifying and

[8] As an investment banking firm, Morgan Stanley was required under SEC regulation to maintain all e-mails in readily accessible form for two years. See 17 C.F.R. § 240.17a-4 (1997).

collecting information – including electronic information – which can be implemented at the first notice that litigation is imminent. Developing a Litigation Response Plan prior to litigation, and deploying it consistently when litigation occurs will assure the quality of the data collection process and provide an ongoing gauge for these efforts, improving the representations one makes to the court when one's credibility is challenged.

1. Understand and Embrace the Duty

Companies must recognize that the obligation to preserve relevant information is an affirmative and active duty, and cannot be discharged without being fully embraced at the highest corporate levels. As noted above, the case law is clear that the duty to preserve relevant information rests with senior corporate management. Thus, senior management, with the advice of legal counsel, must establish an early and effective means of preservation when litigation is commenced or awareness of potential claims is obtained, and must effectively communicate the preservation obligation to all affected employees. It is not sufficient to merely articulate that a duty to preserve documents exists; rather management must take affirmative steps to ensure compliance. This may require the active participation of senior management in the development and distribution of notice to the affected employees. At a minimum it requires the delegation of implementation and follow up with those employees to a reasonable and well-suited team of individuals with appropriate levels of authority and accountability.

2. Form a "Litigation Response Team"

Generally a Litigation Response Plan identifies those who will form the "Litigation Response Team" ("LRT") by job responsibility. Ideally the LRT will include a representative from the "affected business unit"; a representative from the legal department (assuming one exists); one or more representatives from outside counsel who will defend the case (possibly both a "lead" lawyer, whose strategy input is necessary, and a lawyer, paralegal or project manager who will be responsible for much of the day-to-day supervision of the collection and discovery responses); a representative from the Information Technology Department (hopefully the same person who will serve as the 30(b)(6) witness if necessary, as described below); and a representative from the records management function of the corporation (again, hopefully someone who can serve as deponent or affiant if necessary). *See Comment 5d, The Sedona Guidelines.*

3. Define and Document Procedures for Preservation and Collection

The LRT should begin identifying possible sources of responsive information and implementing a plan for preserving and collecting this information as soon as the corporation is on notice of a dispute that is reasonably likely to result in litigation or investigation. *See Comment 5e, The Sedona Guidelines.* This often starts with a checklist of potential sources of information that identifies key players, types of data and locations where it may be stored.[9] The LRT should identify a collection team which will undertake to follow through on the actual collection efforts which the LRT determines are necessary. The LRT should periodically review its own membership to determine whether any additional members need to be added for a particular matter.[10]

Documentation of the procedures followed to preserve, collect, review and produce documents is critical to defending this process against attack. *See Comment 5g, The Sedona Guidelines.* This premise is no different in the electronic world than the paper world, but the details of the documentation can be more complex. Significant challenges are presented by: the unfamiliarity of many lawyers with technology details, the constantly changing landscape of the data (both the data's dynamic nature and the ever changing technology being employed), and the uncertainty of the common law legal environment and a regulatory environment that has seen heightened sensitivity to document management issues. The risks associated with these challenges can be minimized by seeking appropriate input from IT (IS) personnel and corporate records mangers in the process. They can also be minimized by having an accurate and realistic assessment of the costs and burdens associated with electronic preservation, collection, review and production.

4. Develop an Effective Notification Procedure

The preservation (or "legal hold") notice should describe the kinds of information that must be preserved in a way that allows those who have relevant information to identify segregate and preserve affected records. *See Comment 5f, The Sedona Guidelines.* It should not simply

[9] Appendix A contains a suggested format for a Litigation Response Team checklist.

[10] The seriousness of the litigation to the company may affect the membership of the LRT, with major litigation requiring attention by higher level employees and perhaps broader participation.

regurgitate the requests for production served.[11] Recitation of the requests for production with no analysis, summary or simplification is likely to result in a notice that is so long and detailed that employees will be confused or simply ignore it.

The preservation notice should clearly state that the duty to preserve applies not only to "documents" per se (*i.e.* paper records and their electronically stored counterparts), but to all kinds of computer data (*e.g.*, e-mails, data bases, spreadsheets, network files, website information, etc.) The preservation notice should direct employees to preserve information in all the places it might exist (*e.g.* on the network, on a personal computer, on a laptop, on PDA's, etc.) over which they reasonably have control.

While the preservation obligation should not, absent extraordinary circumstances, require the suspension of all normal document retention policies and guidelines, the notice should indicate that *with regard to the information required to be preserved*, the normal document retention policies defer to the preservation notice. *See Comments 5a, 5b and 5e, The Sedona Guidelines.*

The notice should be distributed in a manner calculated to reach all employees who are likely to have relevant information. Thus, the notice must be distributed in the form or forms reasonably designed to provide effective notice to affected employees based on the nature of the company and the culture of its workforce. The notice may be by e-mail *if* e-mail is an accepted format for conveying important information within the organization *and* all employees likely to possess relevant information have access to e-mail. However, one must keep the *Prudential* case in mind and realistically assess whether additional or alternate means of communication are necessary.

The notice should be repeated periodically. If as a result of changed circumstances in the litigation the preservation obligation changes, updated notices should clearly identify how the obligation has changed. *See Comment 5f, The Sedona Guidelines.*

[11] If a specific preservation order has been entered by a court, one should consider whether to circulate a copy of the order along with this more generalized description in order to meet the concerns articulated in the *Prudential* case discussed above.

5. Develop Contingency Procedures for the Preservation Plan

The Plan should address procedures for identifying any affected employees who leave the company or move to another job assignment, so that appropriate steps are taken to preserve relevant documents. The Team should work to assure that these procedures are implemented in the particular case.

The obligation to produce pursuant to Fed. R. Civ. P. 34 extends to documents in the "control" of a party. Therefore it may be necessary to distribute a preservation notice to third parties, such as contractors and vendors. *See Comment 5f, The Sedona Guidelines.* If corporations have data hosted by third parties it likely constitutes information that is in the control of a party, and a notice may be necessary to tell the third party to preserve any affected data. It is a good idea to discuss any issues related to a third party's custody of data as early as possible in the litigation, so that rights and obligations are defined and any disputes resolved. Most of these third party relationships are contractually defined and clarifying preservation obligations quickly will help prevent problems.

6. Confer and Define the Scope of the Obligation

Outside litigation counsel should seek to confer with the opponent's counsel as early as reasonable once litigation has begun to discuss each party's expectations concerning the preservation and production of electronic data.[12] This will help to crystallize early on what will and will not be at issue. Disputes regarding the failure to properly preserve evidence often occur simply because the scope of the preservation obligation is unclear or poorly understood by one party. By seeking agreement on and clarification of preservation obligations to the greatest extent possible as early as possible in the litigation, one can hope to avoid some of the risks and

[12] Some local rule require such discussions. See e.g. *U.S. Dist. Ct. Ark. L. R. 26.1* ("The Fed. R. Civ. P. 26(f) report filed with the court must contain the parties' views and proposals regarding … [w]hether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so [the report must also specify details on the anticipated electronic discovery]."); *U.S. Dist. Ct. N.J. L. R. 26.1(d)* ("During the Fed. R. Civ. P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters."); *U.S. Dist. Ct. Wyo. L. R. 26.1(d)(3)(B))* ("The parties shall meet and confer regarding the following matters during the Fed. R. Civ. P. 26(f) conference: (i) Computer-based information (in general) … (ii) E-mail information … (iii) Deleted information … and (iv) Back-up data."). The proposed amendments to the Federal Rules of Civil Procedure dealing with electronic discovery mandate such early discussions.

costs of motion practice. This discussion should include the potential scope and realistic costs of preserving, collecting and reviewing relevant information, with the goal of narrowing these obligations whenever possible; explaining to the opponent what the limits of reasonableness are; and determining when unreasonable positions should be taken to the court for resolution.

B. Prepare the Custodian of Records

One important step in understanding how a records management system relates to electronic documents is to identify and prepare a witness or witnesses who can support the company's records management program and litigation response efforts. In the electronic age, this person or these persons are likely to be information technology and/or records professionals.[13] In some companies it may be possible to identify a person or persons who will regularly serve in this role for all litigation in which the company is involved.

Obviously, depositions of records custodians are not a new tactic. They are authorized by Fed. R. Civ. Proc. 30(b)(6), and it is standard discovery fare to seek the deposition of an individual who is responsible for maintaining corporate records related to various subjects in a lawsuit. What is "new" is the extent to which such a deposition may involve highly technical issues concerning the company's information system architecture; policies and procedures of the information technology department concerning hardware, software, back up media, archiving, distributed data, legacy systems; and a myriad of other subjects which deal very little with the substance of the case and very much with the way in which a corporation manages and stores its information.

As a part of the Litigation Response Plan, companies should consider who is going to respond to the 30(b)(6) notice related to electronic information. Then, in cooperation with

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[13] The Cohasset Associates survey from 2002 reported that 73% of respondents did not believe that their IT departments understand the life-cycle concept of records management, yet 72% stated that the primary responsibility for the day-to-day management of electronic records in their organization was with the IT department. And, while 97% of the respondents believed that the process by which electronic records are managed will range from "important" to "very important," only 47% thought their IT departments understand that they will have to migrate records to comply with retention schedules, and only 25% believe that their IT departments have policies and procedures to migrate older records so that they will be accessible throughout the appropriate retention schedule period. *Robert F. Williams, Cohasset Associates, Inc. and AIIM International, "Realizing the Need and Putting the Key Components in Place to 'Getting it Right' in Records Management," 2002*. The 2004 survey reported that 53% of the respondents did not believe their organization's information technology staff realized the need to migrate electronic records to comply with corporate retention policies. *Cohasset/EMC Whitepaper, The Eternal Charter at 20.*

outside litigation counsel, this individual should be engaged in the process of designing the plan and preparing for the day when a deposition or affidavit will be necessary.

VIII. Conclusion

No one who has the slightest insight into records management and discovery in the electronic age would seriously contend that there are quick or easy answers that promise results that are free from risk. What is obvious to everyone is that ignoring the problem will not make it go away.

It is simply not reasonable – not possible – to save every scrap of information that is ever created within a corporation. Some documents, some pieces of data, some information will be destroyed and credibility can be challenged as a result. The answer is not either "Throw it all away" or "Don't throw anything away." The answer is to have a plan, to make sure the plan is well thought out, well executed, audited and supportable.

We may never see a case in which a court affirmatively "blesses" a corporate records program, but there are many in which the programs have been found lacking, including those where the response to litigation undermined one party's credibility with the court.

Appendix A
Litigation Response Team Checklist

- ❑ Identify potential list of data custodians

    1. List of current employees with direct contact to subject matter
    2. List of former employees with direct contact to subject matter
    3. List of current and former employees with indirect contact to subject matter
    4. List of IT system administrators or designated company data custodians
    5. Third parties (Contractors, Vendors)

- ❑ Identify types of potentially relevant data

    1. Email
    2. Standard office suite documents (Microsoft Office Suite, Corel WordPerfect Suite)
    3. Commercial database platforms (Microsoft Access, Sequel, Oracle, Fulcrum, etc.)
    4. Proprietary applications
    5. Industry specific forms of data (Computer Aided Design)

- ❑ Identify potential locations of data

    1. Servers
    2. Desktop/Laptop Computers
    3. Removable Media (Backup or Archive tapes, DVD, CD, JAZ disk, Zip disk, external hard drive)
    4. PDAs
    5. Other digital forms (cell phones, pagers, voicemail systems)
    6. Third parties

- ❑ Draft and circulate appropriate "Do Not Destroy/Delete" Notice ("Preservation Notice", "Hold Notice," "Legal Hold")

    1. Follow established protocol for method of circulation, but evaluate perceived effectiveness based on nature of preservation obligation and likely custodians and modify as necessary.
    2. If specific preservation order exists, circulate a copy of the order itself.
    3. Make sure that notice is clear that it supercedes any normal document management policies regarding relevant information.

- ❑ Create list of suggested search terms.

    1. Be sufficiently inclusive.

- ❑ Discuss whether to make image copies of hard drives of affected employees.

    1. Upon "notice" of reasonable likelihood that litigation will occur and simultaneously with "Do Not Destroy/Delete Notice."
    2. Upon receipt of court mandated preservation order or document request.

- ❑ Determine appropriate time and protocol for meet and confer with opponent.

Appendix B
30(b)(6) Witness Interview

- Are there written policies concerning the running of the IT Department and the management of hardware, software, data and legacy data?

  - If so, are the policies consistent in all divisions, departments, units or locations?
  - If so, what, if any, interplay do they have with the company's document retention program?
  - When was the last time these policies were reviewed and updated?
  - How are the policies communicated to employees?

- Outline the corporation's system hardware, including opportunities that exist for corporate information to have been distributed outside the traditional notion of "the company" (*i.e.* ended up on a laptop computer, personal digital assistant, home computer, etc.)

  - What are the operating systems for all of the networks?
  - Do different divisions, departments, units or locations have different systems?
  - What are the operating systems for any mainframe or non-client/server environments?
  - How does data synchronization works within the corporation for remote/portable devices?

- Outline what software is used and how the various systems interrelate.

  - Differentiate between software used to create a record or piece of information (Word and Access) versus systems or infrastructure software (virus or VPN software).

  - How is e-mail provided (internally or via a third party vendor)?
    - Are there published guidelines regarding the management of e-mail by employees?
      - If so, how are they enforced?
      - Is there any electronic means of reviewing compliance? (e.g., janitor programs, capacity limits.)
    - Has the system or how it is provided changed during the relevant time period?
    - If so, do back-ups of the old system's information still exist and how could they be accessed if necessary?
    - If the system changed, when did it change and who was responsible for seeing that the change was implemented?
    - If the system was changed, were e-mails migrated automatically or manually by employees?
    - Are there "nested" users on the system (i.e., users who have been authorized to send and receive information on behalf of another) (e.g., an assistant who sends e-mail for a boss or a committee secretary who sends e-mail on behalf of a committee.)

  - Does the company utilize an enterprise resource planning ("ERP") application which accesses a company data warehouse?
    - Does the ERP product produced custom reports for either the company as a whole or for individual business units (e.g. human resources, inventory, marketing, sales, accounting)?
    - Are there static reports that are maintained and run regularly, or are all reports custom?
    - Who has access to the application?
    - Who has access to the data warehouse?
    - Are reports that are created in various departments retained in any systematic manner or is data simply re-accessed when needed?

  - Is there data that might still be stored in a software application format that the corporation no longer uses and perhaps is not even available?

- What major conversions of hardware or software have occurred over time? (Be particularly aware of major platform shifts like Unix or Novell to Microsoft.)
  - Who is responsible for maintaining records integrity during and after conversion?
  - What criteria, if any, was used to determine what data was brought forward through any conversions?

- Who is responsible for the ongoing maintenance, expansion, backup and upkeep of the computer system, software and databases? (Record this information both in the form of individual names and by position.)

- Are passwords or encrypted files used on any of the company's computers or files?
  - Are there rules to protecting files? (If so, learning who can protect and what kind of information they can protect are important.)

- What back up processes are employed by the IT Department?
    - When are back-ups are made?
    - How are back-ups made? (Specifics on the type of software.)
    - Is the back-up process automated? (Specifics on the type of software.)
    - What type media is used to back up the data? (Specifics on the type of media.)
    - Is there a rotation schedule?
    - If there is a rotation schedule, is it always followed?
    - How is data on the rotated tapes destroyed?
    - Are back-ups run from a catalog or from stand-alone tapes?
    - Are audits are run?
    - Are logs kept to track failures?
    - Where are the back-up tapes kept and how are they identified?
    - What is the structure of the back-up and are certain systems run to certain tapes or jobs?

- Is there a policy for modifying or overriding the standard protocols regarding data handling due to litigation or threatened litigation?
    - How quickly does the staff respond to a notice to modify procedures?
    - Are special back-ups made?
    - If there is a standard rotation of back-up tapes, are tapes sets pulled pending instructions due to litigation or threatened litigation?

- Where are all the potential storage locations that individual users have access and might store information?
    - Are there private directories on servers?
    - Are there "team room" directories or other sorts of shared files with no single custodian?

- What happens to the computers of individuals who leave the company?
    - Is there a policy covering the transfer of records that individual might hold on their computer as the records custodian?
    - How is this handled if there is pending or reasonably anticipated litigation about which this individual may have some information?

Defending the Latest Plaintiff's Tactic – Deposition Notices of the CEO and Other Apex Witnesses

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Jeff W. Wright
Heidman Redmond Fredregill Patterson Plaza Dykstra & Prahl LLP
701 Pierce Street, Suite 200
PO Box 3086
Sioux City, IA 51102-3086
(712) 255-8838

DEFENDING THE LATEST PLAINTIFF'S TACTIC – DEPOSITION NOTICES OF THE CEO AND OTHER APEX WITNESSES

Jeff W. Wright
Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P.

I. INTRODUCTION

The use of a corporate designee deposition under Iowa Rules of Civil Procedure 1.707(5) can streamline discovery and can prove advantageous to both parties. Patterned after Federal Rule 30(b)(6), the rule reduces the taking of unnecessary depositions of multiple employees or agents in an attempt to ascertain who in the organization holds the knowledge sought by the plaintiff. However, for the rule to be effective, a delicate balance must be struck between the parties' reciprocal obligations. Consequently, if you are the responding party to a Rule 1.707(5) notice, you need to intimately acquaint yourself with the language used in the notice and make certain the appropriate person is designated to be deposed.

This outline will introduce you to some of the issues which arise in defending a notice to take a deposition of a corporation, partnership, association or government agency. Particularly, how to ensure the proper designee is testifying on matters requested in the plaintiff's notice.[1]

[1] Significant Information for this outline was gleaned from the following articles: Sidney I. Schenkier, *Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)*, Litigation, Vol. 29, Number 3, pp. 20-26 (Winter 2003); Walt Auvil, *Affirmative Uses for the Corporate Designee Deposition*, The Brief, pp. 63-64 (Fall 1998).

II. RULE 1.707(5) NOTICE FOR ORAL DEPOSITION – CORPORATIONS, PARTNERSHIPS, ASSOCIATIONS OR GOVERNMENTAL AGENCY DEPONENT

Iowa Rule of Civil Procedure 1.707(5) states as follows:

> "A notice or subpoena may name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth for each person designated the matters on which the witness will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This rule does not preclude taking a deposition by any other procedure authorized in the rules in this chapter."

III. WHAT QUALIFIES AS REASONABLE PARTICULARITY?

The rule requires that the subject matter on which testimony is being sought must be described with "reasonable particularity". The notice must describe the information being sought in a way that allows the corporation to determine who is best qualified, whether it be the CEO or other personnel, to be deposed and adequately prepare them. Consequently, if the notice fails to meet this threshold standard and is either overbroad or difficult to interpret, you may have legitimate objections to file a motion to prevent or limit the oral deposition. See I.R. Civ. P. 1.504; Mitsui & Co. (U.S.A.) v. P.R. Water Res. Auth., 93 F.R.D. 62, 66 (D.P.R. 1981)(notice is sufficient if it informs the corporation "of the matters which will be inquired into at the deposition" so corporation can "determine the identity and number of persons whose presence will be necessary"); see also Reed v. Nellcor Puritan et al., 193 F.R.D. 689, 692 (D. Kan. 2000)(notice stating "the area of inquiry

will include, but [not] limited to, 'the areas specifically enumerated" was overbroad because listed areas of inquiry were not exclusive); Operative Plasterers' & Cement Masons' Int'l Ass'n v. Benjamin, 144 F.R.D. 87, 89-90 (N.D. Ind. 1992)(finding notice was defective because it did not describe the subject matter of the proposed examination).

IV. THE CORPORATE DESIGNEE WITNESS

Who should be designated to represent the corporation? Does it have to be an officer, supervisor or employee? How many individuals have to be deposed? These are all critical considerations that arise when contemplating a response to a Rule 1.707(5) notice. A plain reading of the rule gives the defending counsel considerable leverage as to who to designate. The sole guideline listed is "the person so designated shall testify as to matters known or reasonably available to the organization." I. R. Civ. P. 1.707(5). Responding counsel's only duty is to make certain the corporate witness is prepared to give complete, knowledgeable and binding answers that are unevasive. Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (N.D. N.C. 1989); Mitsui, 93 F.R.D. at 67. So long as the responding party makes a "conscientious, good-faith effort to designate knowledgeable persons and prepares them fully and unevasively to answer questions about the designated subject matter, they are free to designate any qualified person – whether they be the most knowledgeable, reasonably knowledgeable, or even a former employee. See Dwelly v. Yamaha Motor Corporation, USA, 214 F.R.D. 537 (D. Minn. 2003)(citing Starlight Intern., Inc. v. Herlihy, 186 F.R.D. 626, 639 (D. Kan. 1999));

United States v. Taylor, 166 F.R.D. 356, 362 (M.D. N.C. 1996)(corporation with knowledge must designate officer, employee, agent, "or other" individual to present company's position).

Rule 1.707(5) notices can be advantageous for purposes of defending depositions. First, you get to know exactly the areas of inquiry. During the deposition, you should be diligent in restricting Plaintiff's counsel to those areas. Second, you get to put your "ace on the mound." Rule 1.707(5) notices allow you to pick the witness or witnesses to respond. When faced with such a notice, take some time to select who will respond and do not let the client dictate it to you. Make sure the responding witnesses are knowledgeable, but as important, presentable. Then, spend the time to prepare them to respond only to the things for which they are being designated.

V. DISTINCTION BETWEEN TESTIMONY AS A CORPORATE DESIGNEE AND AS AN INDIVIDUAL

The responding counsel must elucidate on record the capacity in which the witness is testifying in a Rule 1.707(5) deposition. Often when a party requests a corporate designee they are also interested in deposing the same person in an individual capacity. If this situation arises, it is imperative that responding counsel clarify as to which capacity the witness is answering certain questions. In fact, the better solution is to have the witness deposed at a different time in an individual capacity. This is necessary because a witness testifying in an individual capacity is testifying based on *personal* knowledge, while a witness testifying as a corporate

designee is propounding testimony on behalf of the corporation. Thus, if the president of the corporation is testifying as the corporate designee but erroneously makes statements based on personal rather than corporate knowledge, the significance of that testimony could take on a whole new meaning and prove damaging to the corporation. Sidney I. Schenkier, *Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)*, Litigation, Vol. 29, Number 3, p. 25 (Winter 2003). Questioning counsel is unlikely to make any distinctions during the deposition and, more importantly, at the time of trial. Therefore, you must be diligent.

As the title indicates, Plaintiffs' lawyers like to depose the company CEO. Many times, the CEO is chosen to respond to a Rule 1.707(5) deposition when they should not be. That can open pandora's box because most CEO's do not necessarily know the day-to-day operations. A CEO's job is to set the course of the company and delegate the tasks to accomplish it. Rule 1.707(5) notices must be specific and detailed. CEO's rarely have the necessary detail. Allowing the CEO to testify in this circumstance can only damage your case.

If your CEO is noticed in an individual capacity, preparation is the key. The CEO must be limited to personal knowledge, no matter how frustrated Plaintiff's counsel gets during the deposition. Another common problem is the desire of the CEO to talk. Many CEOs are rightfully proud of their companies and want to talk about it. Don't let them. Rest assured that Plaintiff's counsel will use the CEO's statements to bind the company.

The more the CEO focuses solely upon his/her personal knowledge, the better off his company will be. CEO's often think they know every detail about the company and the events leading up to the lawsuit. They do not. Make sure the CEO understands his/her role and, if he/she has to say "I don't know," that is a good answer.

VI. CONCLUSION

A Rule 1.707(5) notice of oral deposition on a corporation does not give the plaintiff an absolute right to demand the presence of the CEO or other apex witnesses to be deposed regarding corporate activities. Essentially, the rule gives the *responding* party the power to designate whom they feel is most qualified to testify to the matters in question. Care should be taken by defense counsel to guarantee that the CEO or other high ranking officials are deposed only if they have particular knowledge regarding the subject matter contained in the notice and if the information cannot be discovered by any less intrusive means.

Punitive Damages Since Campbell

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Thomas D. Waterman
Lane & Waterman LLP
220 North Main Street, Suite 600
Davenport, IA 52801-1987
(563) 324-3246

PUNITIVE DAMAGES AFTER *STATE FARM MUT. AUTO. INS. CO. V. CAMPBELL* *AN UPDATE*

By Thomas D. Waterman, Lane & Waterman LLP, Davenport[1]

The United States Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) was hailed as a long-awaited panacea for runaway punitive damages verdicts. *Campbell* unquestionably altered the legal landscape favorably for defendants and limited punitive awards in countless cases nationwide. Initial enthusiasm for the decision has waned, however, because *Campbell* has proven to be a less-than perfect antidote to punitive damages claims. Indeed, a survey of cases decided in the first six months of 2005 shows that numerous awards for punitive damages survive post-*Campbell* scrutiny intact or with smaller reductions than sought by defendants.

Campbell elaborated on three "guideposts" for reviewing punitive damages previously set forth in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996): 1) the reprehensibility of defendant's misconduct; 2) the ratio between the plaintiffs compensatory damages (or potential harm) and the punitive damages awarded; and 3) comparable civil penalties. *Campbell* limited the types

[1] S. Renee Dotson (2L, Univ. of Ia. College of Law) researched and co-authored the survey of 2005 cases below.

of evidence allowed for punitive damage claims; deemphasized defendant's wealth as a factor; provided guidance for jury instructions; and most significantly, dramatically bolstered use of ratios to reduce or vacate awards found excessive. The early promise of *Campbell* is described in this author's attached article published in the September, 2003 IDCA DEFENSE UPDATE, entitled "New Assistance for Defending Punitive Damage Claims in Iowa -- The "Marching Orders" of *State Farm Mutual Automobile Insurance Company v. Campbell*."

Campbell comes into play at several stages in the defense of a punitive damages case. First, *Campbell* can limit evidence of a defendant's other "bad acts," particularly conduct in other states or conduct that did not harm the specific plaintiff. Thus, *Campbell* may support motions in limine, or reversal of trial outcomes if prejudicial evidence is admitted erroneously. Second, *Campbell* mandated revisions to jury instructions that can help limit punitive damages awards. The ISBA modified IUCJI 210.1, effective December, 2004, in response to *Campbell*, as discussed in detail in this author's attached article entitled "*State Farm v. Campbell* Mandates Revisions to the Iowa Uniform Civil Jury Instruction on Punitive Damages," published in Defense Update in December, 2004. Jury instructions inconsistent with *Campbell* may lead to reversal.

Third, the *Campbell* guideposts are used by district courts on post-trial motions and on appeal by reviewing courts to determine whether punitive damage awards are unconstitutionally excessive.

The following outline surveys state and federal decisions applying *Campbell* throughout the first half of 2005. Defendants have had mixed success.

I. EVIDENTIARY RULINGS

A. Cases Supporting Exclusion of Evidence

1. *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005) (reversing district court's certification of nationwide mandatory limited fund punitive damages class of cigarette smokers). The Second Circuit reversed class certification based in part on the inadmissibility of types of evidence under *State Farm*, stating:

> with respect to the evidence to be considered at the punitive damages stage, *State Farm* indicates that a jury could not consider the acts of as broad a scope as the district court in this case anticipated
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> ****
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> *State Farm* made clear that conduct relevant to the reprehensibility analysis must have a nexus to the specific harm suffered by the plaintiff, and that it could not be independent of or dissimilar to the conduct that harms the plaintiff. Harmful behavior that is not "correlatable" with class members and the harm or potential harm to them would be precluded under *State Farm*.

407 F.3d at 139.

2. *FCM Corp., Inc. v. Helton*, 2005 WL 256475 (Ark. Feb 03, 2005) (insecticide damage to crops). The Arkansas Supreme Court reversed a jury's punitive damages award for insecticide damage to crops in Arkansas, stating,

“FMC’s due process rights were violated in the instant case by introduction of the evidence regarding the use of Fury in Mississippi. Therefore, on remand, any evidence regarding any events relating to the use of Fury in Mississippi may not be introduced into evidence.” [Publication pages not available.]

3. *Gober v. Ralphs Grocery Co.*, 27 Cal. Rptr. 3d 298 (Ct. App. 2005) (sexual harassment action against employer). The appellate court affirmed an order granting a new trial on punitive damages. The court stated that "the concept of recidivism addressed in *Campbell* refers to similar events occurring *before* the acts complained of by the plaintiff. Introducing evidence of Ralphs' *subsequent* misconduct toward nonparties that was not presented during the liability phase of the trial increases the chance that the new jury will punish Ralphs for conduct directed toward these nonparties, leading to the possibility of multiple punitive damages awards for the same conduct because nonparties are usually not bound by judgments obtained by other plaintiffs." *Id.* at 308.

4. *Shugart v. OEA, Inc.*, 2005 WL 1503812 (Cal. Ct. App. June 27, 2005) (employee's personal injury action against employer's parent corporation). The appellate court vacated the trial court's judgment and remanded the case for a new trial, but agreed with the trial court's exclusion of evidence of hazardous waste infractions, which would have "invite[d] the jury to punish the defendant for actions that bore no relation to the plaintiff's harm." *Id.* at *17.

5. *Grefer v. Alpha Technical*, 901 So. 2d 1117 (La. Ct. App. 2005) (property contamination). The appellate court reduced a jury punitive damages verdict of $1 billion to $112,290,000, stating that contributing to the "exorbitant punitive damages" was the "presentation of substantial evidence of the potential and/or alleged actual harm to others who were not parties to this suit and whose claims were not before the jury." *Id.* at 1150.

6. *Webb v. CSX Trans. Inc.*, 2004 WL 3392996 (S.C. June 20, 2005) (RR crossing accident). The South Carolina Supreme Court reversed a punitive damages award and remanded with instructions for retrial that the "evidence sought to be admitted . . . should be closely scrutinized for its relationship to the particular harm suffered by the Plaintiff" because "evidence of acts in other jurisdictions . . . and of acts unrelated to crossing safety in South Carolina admitted in this trial is not constitutionally permissible under *Campbell*." *Id.* at *9.

B. Cases Supporting Admissibility of Evidence

1. *Rose Care Inc. v. Ross*, 2005 WL 1283679 (Ark. Ct. App. June 01, 2005) (tort action against care facility). The appellate court affirmed a $1.6 million compensatory judgment, reversed the trial court's refusal to submit the issue of punitive damages to the jury, and reversed rulings excluding survey evidence, stating that "the survey contains numerous incidents that are substantially similar and relevant to the appellee's claim for punitive damages" and therefore, on remand, the survey should be admitted. [Publication pages not available.]

2. *Johnson v. Ford Motor Co.*, 29 Cal. Rptr. 3d 401 (Cal. 2005) (vehicle purchasers' fraud action for concealing prior repairs). The jury awarded compensatory damages of $17,811 and $10 million in punitive damages, which the Court of Appeals reduced to $53,435, "approximately three times the compensatory damages." The California Supreme Court reversed the Court of Appeals, and remanded "for that Court to conduct again the independent due process review required under *State Farm* [,]" stating:

> a defendant's recidivism is relevant to the reprehensibility of its conduct. To the extent the evidence shows the defendant had a practice of engaging in, and profiting from, wrongful conduct similar to that which injured the plaintiff, such evidence may be considered on the question of how large a punitive damages award due process permits.

[Publication pages not available.]

3. *Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638 (Ct. App. 2005) (tobacco liability; lung cancer death). The jury awarded $5.5 million compensatory damages and $3 billion in punitive damages which was reduced to $100 million by the trial court. The appellate court further reduced the punitive award to $50 million, stating:

> Philip Morris contends that its conduct in other states consisted solely of lawfully selling cigarettes, and that it was not shown to be similar to that which injured Boeken, because there was no evidence that it caused any injury to *specific* persons in other states. We find nothing in *State Farm* that requires proof of injury to specific

> persons other than the plaintiff, wherever they reside, when the conduct in question is identical, as it was here, since the conduct that injured Boeken was not confined to California."

Id. at 679.

4. *Davidson v. Bailey*, 826 N.E. 2d 80 (Ind. Ct. App. 2005) (personal injury action against intoxicated driver). The appellate court affirmed the judgment stating that "the trial court did not err in admitting evidence of prior DUI convictions" because "an award of punitive damages is predicated on the intentional conduct of a defendant and asks the fact find-finder to focus on the defendant's state of mind. [Accordingly,] the four previous DUI convictions, and the fact he was on probation for the fourth DUI conviction when the accident occurred," does bear on his state of mind. *Id.* at 86.

5. *Steel Technologies, Inc. v. Estate of Congleton*, 2005 WL 1490330 (Ky. Ct. App. June 24, 2005) (truck accident). The appellate court affirmed the district court's allowance of evidence of prior episodes, which Steel Technologies claimed were dissimilar acts condemned by *Campbell*, but which the court concluded "served to show that Steel Technologies was on notice that steel coils could break free from trailers when their drivers had to stop or swerve suddenly." *Id*. at *3.

6. *Grefer v. Alpha Technical*, 901 So. 2d 1117 (La. Ct. App. 2005) (property contamination). The appellate court reduced the punitive damages award but rejected Exxon's argument that “the conduct that allegedly put ITCO's employees at risk had no place whatsoever in the punitive damages analysis [of property damage claims] because harm to third parties cannot be punished." The court stated that Exxon's position:

> is an incorrect and exceedingly narrow reading of *Campbell*. In reviewing an award of punitive/exemplary damages, we have the responsibility of looking to the callous, calculated, despicable and reprehensible conduct of Exxon during the time period in question. Even though this case is not a personal injury claim by the ITCO workers, the mindset of Exxon should be considered in deciding whether the sum awarded was appropriate. The fact that Exxon showed no regard for ITCO's workers, i.e., no concern for human safety, certainly demonstrates

> that it had even less concern for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct.

901 So. 2d at 1154-55.

II. JURY INSTRUCTIONS

1. *Boerner v. Brown & Williamson Tobacco Co.,* 394 F.3d 594 (8th Cir. 2005) (tobacco liability; lung cancer death). The Arkansas jury awarded $4 million in compensatory damages on a cigarette design defect theory and $15 million in punitive damages. The Eighth Circuit remitted the punitive award to $5 million. B & W contended the district court erred by refusing to give its requested instruction that the jury could "only award punitive damages based on conduct . . . which had some connection to the harm claimed by the plaintiff." Id. at 606. The district court instead gave the Arkansas Model Instruction on punitive damages (not quoted in the opinion). The panel majority disagreed, stating:

> The district court's instructions properly limited the jury's inquiry to only those facts relevant to Boerner's claimed injuries, which has the practical effect of preventing the jury from punishing B & W for conduct unrelated to his claims. Additionally, there is no indication in the record that B & W's conduct would have been lawful elsewhere, so we need not be concerned with the possibility that B & W was punished for conduct that would have been legal where it occurred.

Id. at 604.

Judge Bye, concurring in result, stated, "I do not believe the punitive damages instruction given by the district court sufficiently limited the jury's consideration to the damages suffered by Mrs. Boerner." *Id.* at 606.

2. *Osborn v. Leader Ins. Co.*, 129 Fed. Appx. 379 (9th Cir. 2005) (first party insurance bad faith action - UIM). The appellate court affirmed the jury verdict for the insured, and in response to insurer's contention that "the jury was instructed to consider its financial condition for an improper purpose under *State Farm*," the court stated that "the district court gave a *State Farm* instruction with input from Leader, and without objection . . . therefore, no new trial is warranted." *Id.* at 380.

3. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 613 S.E.2d 673 (Ga. Ct. App. 2005) (nuisance and trespass action against lower riparian landowner). The appellate court affirmed the jury award, stating "the factors for punitive damages outlined in *BMW* [*v. Gore*] are designed for use by an appellate court in reviewing punitive damages awards, not for use by a jury in determining the awards." *Id.* at 685. [Not citing *Campbell*]

III. RATIO OF COMPENSATORY TO PUNITIVE DAMAGES

A. Cases Reducing or Vacating Punitive Damages Awards

1. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005) (cigarette smoker's lung cancer death case). The jury awarded $4 million in compensatory damages and $15 million in punitive damages; the Eighth Circuit applied the *State Farm* guideposts to remit the punitive award to $5 million -- "a ratio of approximately 1:1." *Id.* at 603. The Eighth Circuit identified "the degree of reprehensibility" as the "most important indicium of the reasonableness of a punitive damage award," quoting *State Farm*. 394 F.3d at 602. The Eighth Circuit panel majority reviewed evidence of the reprehensibility of B &W's conduct, but nevertheless supported its reduction to a 1 to1 ratio as follows:

> Notwithstanding the absence of a simple formula or bright-line ratio, the general contours of our past decisions lead to the conclusion that a low ratio is called for here. *See Williams v. ConAgra Poultry Co*., 378 F.3d 790 (8th Cir. 2004) (remitting the punitive damages award to an amount equal to the compensatory damages award of $600,000); *Stogsdill*, 377 F.3d at 834 (approving a ratio of 1:4 compensatory damages to punitive damages as an upper limit where the compensatory award was $500,000); *Morse v. Southern Union Co*., 174 F.3d 917, 925-26 (8th Cir. 1999) (upholding close to a 1:6 ratio where the compensatory award was only $70,000).
>
> Factors that justify a higher ratio, such as the presence of an "injury that is hard to detect" or a "particularly egregious act [that] has resulted in only a small amount of economic damages," are absent here. *See Gore*, 517

> U.S. at 582, 116 S.Ct. 1589. We also note that, despite evidence that American Tobacco exhibited a callous disregard for the adverse health consequences of smoking, there is no evidence that anyone at American Tobacco intended to victimize its customers. *Cf. Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (affirming an award of punitive damages approximately 4.5 times greater than the compensatory damages award where the defendant had devised a scheme of fraud and evinced an intent to "f***" and "kill" the plaintiff's business).

394 F.3d at 603.

Judge Bye concurred in the result based on what he found to be instructional error, but disputed the panel majority's application of the *Gore/State Farm* guideposts. Judge Bye asserted that the ratio of "less than four to one" was not unconstitutionally excessive based on the evidence, and found the majority's reduction to a one to one ratio difficult to reconcile with its affirmance of a 4.5:1 ratio in *Eden Electrical, Ltd. v. Amana Co.* 370 F.3d 824, 829 (8th Cir. 2004) (a business tort fraud case involving only economic damages appealed from the Northern District of Iowa). 394 F.3d at 604-05. (Bye, J., concurring in result).

2. *Bains LLC v. Arco Products Co.*, 405 F.3d 764 (9th Cir. 2005) (minority-owned supplier's racial discrimination action against oil refiner). The Ninth Circuit vacated a punitive award, stating that "the controlling Supreme Court authority therefore implies a punitive damages ceiling in this case of, at most, $450,000 (nine times the compensatory damages) -- not anywhere near the $5,000,000 (100 times the compensatory damages) that was awarded by the jury." *Id.* at 776. Therefore, "the district court must, to comply with *State Farm* . . . and *BMW*, reduce the amount of punitive damages to a figure somewhere between $300,000 and $450,000." *Id.* at 777.

3. *Konvitz v. Midland Walwyn Capital, Inc.*, 2005 WL 697053 (9th Cir. March 28, 2005) (employee action for fraud against employer). The Ninth Circuit affirmed the district court's reduction of a jury's punitive damages award from a 22:1 ratio to a 5:1 ratio, stating that the jury's award was "well beyond the single-digit benchmark discussed in *State Farm*[.]" *Id*. at 347.

4. *Hines v. Grand Casino of Louisiana, L.L.C.—Tunica-Biloxi Indians*, 358 F. Supp. 2d 533 (W.D. La. Jan 26, 2005) (employee's sexual harassment action). The district court reduced a punitive damages award to $30,000 stating that the "degree of reprehensibility is not significant enough to support $170,000 in punitive damages." *Id.* at 552.

5. *CGB Occupational Therapy, Inc. v. RHA Pennsylvania Nursing Homes*, 2005 WL 1595428 (E.D. Pa. July 5, 2005) (action for tortious interference with contractual relationships). The district court denied the defendant's motion for a new trial but reduced punitive damages from $30 million to $2 million, stating that the punitive award reduction from a 275:1 ratio to a 19:1 ratio was still "not constitutionally excessive given the facts of this case (including the wealth of the Defendant and the state's interest in punishment and deterrence). Given the hardships Defendant imposed on Plaintiff . . . the true ratio, could the harm caused by Defendant be expressed as a simple dollar value, would be closer to three to one." *Id.* at *4.

6. *Simon v. San Paolo U.S. Holding Co., Inc.*, 2005 WL 1404425 (Cal. June 16, 2005) (action for specific performance of commercial real estate contract). The California Supreme Court determined that $50,000 was the maximum punitive damages award that would satisfy due process and ordered the judgment reduced accordingly, stating that:

> The disputed $1.7 million punitive damages award to Simon was 340 times his $5,000 award of compensatory damages. This qualifies as a 'breathtaking' multiplier far outside the ‘single digit neighborhood’ suggested by the high court in *State Farm*. Nor can the 340-to-one ratio here be justified on the ground that a particularly egregious act has resulted in only a small amount of economic damages . . .

Id. at *13.

7. *Johnson v. Ford Motor Co.*, 29 Cal. Rptr. 3d 401 (Cal. 2005) (car purchasers' fraud action for concealing prior repairs). The jury awarded compensatory damages of $17,811 and $10 million in punitive damages, which the Court of Appeals reduced to $53,435, "approximately three times the compensatory damages." The California Supreme Court reversed the Court of

Appeals, and remanded "for that Court to conduct again the independent due process review required under *State Farm* [,]" stating:

> We agree with the Court of Appeal that the $10 million punitive damage award may not, under the circumstances of this case, constitutionally be justified on the basis of disgorgement of profits earned by Ford through its entire course of wrongful conduct toward other consumers. In reducing the punitive to a small multiple of the relatively modest compensatory damages award, however, the Court of Appeal apparently failed to adequately consider that Ford's fraud was more reprehensible because it was part of a repeated corporate practice rather than an isolated incident. [Publication pages not available.]

The California Supreme Court further observed:

> Although the scale and profitability of a corporate practice is related to its reprehensibility, gains made over some period of time and the harm or potential harm to an individual plaintiff are not necessarily related. An award of disgorgement of all profits from a group of transactions similar to that which harmed the plaintiff (but not defined through the procedural limits of a class action) is therefore likely to be disproportionate to the individual plaintiff's compensatory award.
>
> … [A]n individual plaintiff resting his or her claim for a large punitive damages award on profits earned from transactions with a large class of similar claimants by proceeding without the formalities of a class action, can hope to recover without ever proving the specifics of those "hypothetical claims."

[Publication pages not available.]

8. *Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638 (Ct. App. 2005) (tobacco liability). The jury awarded $5.5 million in compensatory damages; lung cancer death, and $3 billion in punitive damages, which the trial court reduced to $100 million. The appellate court further reduced the punitive award to $50 million but

concluded that the reprehensibility of the conduct justified a ratio of at least 9 to 1. *Id*. at 686-87.

9. *Lowe Excavating Co. v. Int'l Union of Operating Engineers*, 2005 WL 1714163 (Ill. Ct. App. July 8, 2005) (business defamation action against union). The appellate court applied *Campbell* to reduce the trial court's bench award of punitive damages from $525,000 to $325,000, with a compensatory award of $4,280. The appellate court justified its 75 to 1 ratio as follows:

> In sum, the *Campbell* Court carved out several instances where a ratio exceeding 10 to 1 may be appropriate: (1) where a particularly egregious act has resulted in small amount of economic damages; (2) where the injury is hard to detect; and (3) where the monetary value of the harm is difficult to determine.
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> ****
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> Defamation actions, like in the present case, involve injury to reputation. Injury to reputation may result in a small amount of economic damages. The value of such damage is hard to determine. The injury itself is even hard to detect. Thus, we believe that the trial court was justified in exceeding a single-digit ratio. In fact, a punitive damages award in the single-digit ratio would be so paltry in this case that the Union, with all of its assets, would hardly be punished or deterred. That said, we believe that 115 to 1 is an exceedingly disproportionate ratio. Courts in other jurisdictions have struck down similar and even smaller ratios. [citations omitted]

Id. at *8.

To apply the third guidepost ("the disparity between punitive damages awarded and civil penalties authorized in comparable cases"), the appellate court examined other Illinois defamation awards that had been affirmed on appeal. *Id*. at *9 (citations omitted). The appellate court criticized the trial court for expressly increasing the punitive award based on attorneys fees incurred, noting an award of $325,000 "takes into consideration a reasonable amount of attorneys fees[.]" *Id*.

10. *Grefer v. Alpha Technical*, 901 So. 2d 1117 (La. Ct. App. 2005) (action against oil company for radioactive contamination of property). The appellate court reduced a jury verdict of $1 billion for punitive damages to $112,290,000 in order to comply with due process, stating that the substantial compensatory damages of $56,145,000 for a piece of property worth at most $1,500,000, requires a "lesser single-digit ratio." *Id.* at 1151.

11. *Rosenberg, Minc & Armstrong v. Mallilo & Grossman*, 2005 WL 901218 (N.Y. Sup. Ct. March 24, 2005) (action against law firm for unjust enrichment and misappropriation). The New York trial court concluded that the $343,750 punitive damages award had to be reduced to comport with due process, stating that "in light of the fact that Pimsler's misconduct was particularly reprehensible and outrageous, the Court will use a ratio of 10:1, which is the upper limit." *Id.* at *6.

B. Cases Affirming or Approving Punitive Damages Awards

1. *Wolf v. Wolf*, 690 N.W.2d 887 (Iowa 2005) (tortious interference with child custody). As of July 2005, this is the only Iowa Supreme Court decision applying *Campbell*. The father in this bitter, inter-state child custody dispute was awarded physical custody by the Iowa District Court. The mother violated court orders by taking their daughter to Arizona. The father sought punitive damages but only requested compensatory damages of $1. The district court awarded the $1 in compensatory damages and $25,000 in punitive damages, which the mother challenged on appeal as unconstitutionally excessive under *Campbell*. *Id*. at 894. The Iowa Supreme Court affirmed the punitive award on its de novo review applying *Campbell*. The Iowa Supreme Court rejected the mother's ratio argument, stating:

> In this case, the harm done to the plaintiff clearly exceeded the amount of compensatory damages awarded because the plaintiff waived all amounts over one dollar. Although the amount of compensatory damages awarded was nominal, the actual harm to the plaintiff was substantial. We need to attempt to quantify the potential damages that could have been allowed here. Suffice it to say that the deprivation of a parent's relationship with a child, over several years, with the attendant costs such as attorney fees spawned by the defendant's contumacious conduct are sufficient potential damages to make the

> award of $25,000 in punitive damages well within constitutional parameters.

Id. at 895-96.

The *Wolf* Court then cited *Gore* rather than *Campbell* in discussing the third guidepost under the heading "[*c*]*omparing the punitive-damage award to civil or criminal penalties authorized in comparable cases.*" *Id*. at 896. *Campbell*, however, limited the third guidepost to comparisons of *civil* (not criminal) penalties. The *Wolf* court noted the availability of contempt penalties and that "the Iowa Legislature has provided for a jail term of up to thirty days for violation of a custody decree." *Id*. (citing Iowa Code §598.23).

2. *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005) (first party insurance bad faith). The Third Circuit affirmed the judgment from a bench trial awarding $2,000 in compensatory damages, $150,000 in punitive damages and $135,447 in attorney costs and fees. The court stated that "attorney fees and costs awarded pursuant to [statute] are compensatory damages for *Gore*/*Campbell* ratio purposes [and therefore] creates an approximate 1:1 ratio in this case. Further, we consider the relationship between the punitive and compensatory damages here to be reasonable given the degree of reprehensibility of PSM's conduct." *Id.* at 237.

3. *Pollard v. E.I. Dupont De Nemours, Inc.*, 2005 WL 1500862 (6th Cir. June 22, 2005) (action against employer for hostile work environment, sexual harassment and outrageous conduct). The Sixth Circuit concluded that a $2.5 million dollar punitive damages award and $2.2 million dollar compensatory award was "within the *Campbell* due process standard." *Id.* at *9.

4. *Estate of Moreland v. Dieter*, 395 F.3d 747 (7th Cir. 2005) (excessive force action against sheriff's deputies). The Seventh Circuit upheld a $27.5 million punitive award and $29 million compensatory award, stating "the ratio between compensatory and punitive damages in this case does not test the limits of constitutionality, although we acknowledge that both the compensatory and punitive damage award are very large." *Id.* at 757.

5. *Bosley v. Special Devices*, 2005 WL 1006775 (9th Cir. May 2, 2005) (securities fraud). The Ninth Circuit concluded that "the award of $150,000 in punitive damages was not disproportionate to the $175,000 in rescission damages awarded." *Id.* at *2.

6. *Steel Technologies, Inc. v. Estate of Congleton* 2005 WL 1490330 (Ky. Ct. App. June 24, 2005) (truck accident). The appellate court concluded that a ratio of 1 to 1.5 was well within the constitutional limits. In response to Steel Technologies' contention that substantial compensatory damages require a lesser ratio for punitive damages, the court stated that:

> [a]lthough we agree the compensatory damages are substantial in this case, the injury suffered was the most serious harm that can befall an individual. The Supreme Court has stressed that we "must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." The trilogy of cases in which the Supreme Court has delineated due process jurisprudence in regard to punitive damages all involved non-physical harm and punitive damages that exceeded compensatory damages more than a hundredfold.

Id. at *8.

7. *EEOC v. E.I. Dupont De Nemours & Co.*, 2005 WL 1400430 (E.D. La. June 06, 2005) (ADA). The district court rejected Dupont's objection that the punitive damages award was excessive, stating that the 1 to 1 ratio "is a far cry from the ratios of punitive to actual damages that the Supreme Court has found questionable." *Id.* at *23.

8. *Bogle v. Summit Investment Co., LLC*, 107 P.3d 520 (N.M. Ct. App. 2005) (real estate broker action against purchaser for breach). The appellate court affirmed a punitive damage award "equal to one and one-half times the compensatory award," stating that "based on the general lack of guidance on what constitutes an appropriate ratio between compensatory and punitive damages and the relatively small ratio in this case, we find that the amount of punitive damages awarded by the district court did not violate due process." *Id.* at 532.

9. *Mission Resources, Inc. v. Garza Energy Trust*, 2005 WL 1039648 (Tex. Ct. App. May 05, 2005) (trespass action against gas well operator). The appellate court approved a 20 to 1 ratio, stating:

> [a]dmittedly, it exceeds the "single-digit multipliers," which according to the Supreme Court, "are more likely comport with due process," Campbell, 538 U.S. at 542; however, the Supreme Court has clarified that such "ratios are not binding . . . [but] instructive."
>
> Thus, the precise award in any case must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff, not a bright line rule forbidding ratios exceeding 10 to 1. Although the harm suffered by appellees may have been compensated by the jury's award of damages, the highly unlawful nature of Coastal's conduct (it being breach of conduct, an intentional tort, and felony theft) prevents this Court from concluding that the ratio 20 to 1 was grossly excessive.

Id. at *10.

10. *Bunton v. Bentley, III*, 2005 WL 673938 (Tex. Ct. App. March 23, 2005) (judge's defamation action against host and cohost of television talk show). The appellate court affirmed the jury's award of $1 million in exemplary damages, which was a "three and one third ratio between punitive and compensatory damages," stating that the "repeated acts of defamation constitute such reprehensibility as to warrant the imposition of exemplary damages." *Id.* at *2.

11. *Schwigel v. Kohlmann*, 694 N.W.2d 467 (Wis. Ct. App. 2005) (misrepresentation action against business associate). The appellate court affirmed a judgment on a jury verdict awarding $12,000 in compensatory damages and $375,000 in punitive damages even though the ratio of compensatory to punitive damages was just over 30 to 1, stating that "Kohlmann's profoundly egregious conduct was disproportionate to the relatively small amount of economic loss incurred by Schwigel. Accordingly, a comparison of the punitive damages award to the compensatory damages award does not defeat the jury's verdict." *Id.* at 474.

III. CASES ADDRESSING USE OF DEFENDANTS' WEALTH

1. *Simon v. San Paolo U.S. Holding Co., Inc.*, 2005 WL 1404425 (Cal. June 16, 2005) (action for specific performance of commercial real estate contract). The California Supreme Court determined that $50,000 was the maximum punitive damages award that would satisfy due process and ordered the judgment reduced

accordingly, stating that "in determining whether a lesser award could have satisfied the State's legitimate objectives, a reviewing court may nonetheless give some consideration to the defendant's financial condition. [Because the] reprehensibility of the defendant's conduct is relatively low, the state's interest in punishing it and deterring its repetition is correspondingly slight. Here, neither the interest in deterrence nor San Paolo Holding's substantial wealth can conceivably justify enforcing the jury's award of $1.7 million for a false promise that caused only a $5,000 injury." *Id.* at *15.

2. *Boeken v. Philip Morris, Inc.*, 26 Cal. Rptr. 3d 638, (Ct. App. 2005) (tobacco liability action). The jury awarded $5.5 million in compensatory damages and $3 billion in punitive damages in this lung cancer death case. The trial court reduced the punitive award to $100 million, and the Court of Appeals further reduced the punitive damages to $50 million. The appellate court, in declining to reduce the punitive damage award below $50 million, reviewed the evidence at trial that Philip Morris had a net worth of $30-35 billion dollars. The court observed that "[o]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Id*. at 681 (quoted citation omitted). The *Boeken* court further observed that both "California and federal authorities agree that profits earned from tortuous activity which supports an award of punitive damages are appropriately considered in the amount awarded." *Id*. at 681-82. The appellate court specifically addressed *State Farm* as follows:

> *State Farm* did not disavow the use of wealth in assessing punitive damages. The principle of federalism remains in play: "[E]ach State may make its own reasoned judgment about what conduct is permitted or proscribed within its orders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." (*State Farm, supra*, 538 U.S. at p. 422, 123 S.Ct. 1513). What State Farm does say is: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*Id*. at p. 427, 123 S.Ct. 1513). And *State Farm* recognizes that deterrence is one of the primary purposes of punitive damages. (*Id*. at p. 416, 123 S.Ct. 1513).

26 Cal. Rptr. 3d at 682.

3. *Sheedy v. City of Philadelphia*, 2005 WL 375657 (E.D. Pa. Feb. 15, 2005) (false arrest). The district court on post-trial motion reduced that the jury's punitive damages award of $500,000 to $200,000 based in part on the individual defendant's "ability to pay." *Id.* at 5. The Defendant was a lawyer "earning about $200,000 per year, as a partner in a large law firm. He is now a sole practitioner, and there is some suggestion in the post-trial briefs that his financial fortunes have declined somewhat." *Id*.

4. *CGB Occupational Therapy, Inc. v. RHA Pennsylvania Nursing Homes*, 2005 WL 1595428 (E.D. Pa. July 5, 2005) (action for tortuous interference with contractual relationships). The district court denied the motion for a new trial but reduced punitive damages from $30 million to $2 million, stating that the punitive award reduced from a 275:1 ratio to a 19:1 ratio was no longer "constitutionally excessive given the facts of this case (including the wealth of the Defendant and the state's interest in punishment and deterrence)." *Id.* at *4.

IV. Other Matters

A. Calculating "Amount in Controversy" for Diversity Jurisdiction

Williams v. Tutu Park Ltd., 2005 WL 1313431 (D. Virgin Islands May 11, 2005) (tort action against Mall owners and security officer). The district court concluded that plaintiff suffered no actual damages and granted the defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, stating that even if the plaintiff is "entitled to nominal damages of one dollar, he would have to recover $74,999 in punitive damages, a ratio of approximately 75,000 to 1, to meet the jurisdictional requirement. That approach to federal jurisdiction, however, is something not permitted by law." *Id.* at *3.

B. Class Actions

1. *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005) (tobacco liability) District Court Judge Jack Weinstein certified a nationwide mandatory (non opt out) limited fund class action of cigarette smokers seeking punitive damages from tobacco companies. The Second Circuit vacated class certification for multiple reasons, including that certification ran "afoul of the Supreme Court's admonitions in *State Farm*, because:

> [i]n certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages, the district court's Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms.

407 F.3d at 138.

2. *In re Napster, Inc. Copyright Litigation*, 2005 WL 1287611 (N.D. Cal. June 1, 2005) (action for copyright infringement). The district court granted class certification, stating that the defendant's "attempt to introduce concerns about extensive statutory damages into the class certification process would be impracticable as well as logically flawed" because "[a]t this stage in the proceedings, there is simply nothing in the record that would permit the court to apply these *Gore* factors in an informed manner." *Id.* at *11.

3. *Coburn v. Daimler Chrysler Services North America, L.L.C.*, 2005 WL 736657 (N.D. Ill. March 31, 2005) (consumer class action for racial discrimination). The district court rejected Chrysler's argument that the Plaintiffs' "inability to show actual damages should result in summary dismissal of their suits." *Id.* at *21. The court stated that "all of [Campbell's and Gore's] teaching[s] may bear on the question of whether punitive damages for Plaintiffs would be appropriate, or if so, in what amount, but failure to show actual damages does not under ECOA preclude a plaintiff from proceeding at all." *Id.* n.17.

4. *In re Chevron Fires Cases*, 2005 WL 1077516 (Cal. App. 1 Dist. June 27, 2005) (tort action against insurer). The appellate court affirmed an order denying certification of shelter-in place and punitive damage classes. In response to appellants' claim that *State Farm* "weigh[s] in favor of certifying the punitive damages class here," the court stated that "nothing in *State Farm* suggests that the Supreme Court intended to obviate the proportionality requirement in order to allow the wholesale aggregation of multiple, individual claims into punitive damage classes." *Id.* at *14.

STATE FARM V. CAMPBELL MANDATES REVISIONS TO THE IOWA UNIFORM CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES

By Thomas D. Waterman, Lane & Waterman LLP, Davenport, IA.

On November 5, 2004 the Iowa State Bar Association ("ISBA") Jury Instruction Committee unanimously approved revisions to the Iowa Uniform Civil Jury Instruction ("IUCJI") 210.1 to comply with *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).[2] The revised IUCJI 210.1 was unanimously approved by the ISBA Board of Governors ("BOG") at its December 7, 2004 meeting. This article discusses the constitutionally mandated changes to the Iowa punitive damages instruction and reviews *Campbell* and its progeny to rebut anticipated objections to the revised instruction.

Campbell has been widely haled for reining in punitive damage awards. *See* "New Assistance For Defending Punitive Damage Claims In Iowa -- The 'Marching Orders' of *State Farm Mut. Auto. Ins. Co. v. Campbell*." DEFENSE UPDATE, September, 2003. As elaborated there, *Campbell* provides three "guideposts" for determining the constitutionality of a punitive damages award: 1) the reprehensibility of the defendant's conduct that harmed the plaintiff; 2) the relationship (ratio) between plaintiff's actual damages and the punitive damages awarded; and 3) civil penalties allowed in comparable cases. *Campbell* significantly curtailed use of evidence of out-of-state conduct and dissimilar bad acts to support punitive awards. *Id.* at

[2] The Jury Committee Chair, Judge Paul Huscher, appointed this author to chair a subcommittee to revise IUCJI 210.1 based on *Campbell*. This author worked primarily with David Baker of Riccolo & Baker PC, Cedar Rapids. On November 18, 2004 Baker was appointed by Governor Vilsack to the District Court bench. Other subcommittee members were Guy Cook of Grefe & Sidney PLC, Des Moines; and Mike Jacobs of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, Sioux City. The proposed update to IUCJI 210.1 was vetted by the entire ISBA Jury Instruction Committee at three separate semi-annual meetings.

1522-24. Moreover, *Campbell* dramatically limited the extent to which punitive awards can exceed actual damages. *Id*. at 1524 ("In practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.") *Campbell* also deemphasized the defendant's wealth as a factor for determining the amount of punitive damages. *Campbell* rendered IUCJI 210.1 unconstitutional.

A year-long review by the ISBA Jury Instruction Committee, guided by input from ISBA leadership and case law applying *Campbell*, culminated in this proposed revision to IUCJI 210.1, set forth in redline version here:

> **210.1 Punitive Damages**. Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.
>
> Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future**.** You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries.
>
> There is no exact rule to determine the amount of punitive damages, if any, you should award. You may consider the following factors:
>
> 1. The nature of defendant's conduct that harmed the plaintiff.
>
> 2. The amount of punitive damages which will punish and discourage like conduct by the defendant. You may consider the defendant's financial condition or ability to pay. You may not, however, award punitive damages solely because of the defendant's wealth or ability to pay.
>
> 3. The plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the plaintiff.

Deleted: In fixing the amount of punitive damages, y

Deleted: all of the evidence including

Deleted: in view of [his]

Deleted: [her] [its] financial condition.

4. The existence and frequency of prior similar conduct. *If applicable, add*: You may not, however, award punitive damages to punish the defendant for out-of-state conduct that was lawful where it occurred, or any conduct by the defendant that is not similar to the conduct which caused the harm to the plaintiff in this case.

Each of the Committee's revisions to IUCJI 210.1 is supported by specific language in *Campbell* and its progeny, as set forth below. Nevertheless, because the *Campbell*-mandated revisions to this instruction will make recovery of punitive damages more difficult, objections to the revised instruction are anticipated and dealt with here categorically.

1. The *Campbell* Guideposts Are For *Both* Judicial Review and Jury Instructions.

A threshold objection to revising IUCJI 210.1 made by plaintiff's counsel is that the *Campbell* guideposts are simply for Judges reviewing punitive awards (on appeal or post-trial motions), rather than matters for jury instruction. This objection lacks merit. The *Campbell* Court itself stated, "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish the defendant for action that was lawful in the jurisdiction where it occurred." 123 S.Ct. at 1522-23. Moreover, subsequent cases confirm that the *Campbell* guideposts are constitutionally required for *both* jury instructions and judicial review.[3] Indeed,

[3] *See, e.g. Roth v. Farner-Bocken Co.*, 677 N.W.2d 651, 671 (S.D. 2003)("This case is remanded for a new trial on punitive damages. In order to properly calculate a punitive damage award, the jury should be instructed in accordance with this opinion regarding the three guideposts outlined by the United States Supreme Court [in Campbell]); *In re the Exxon Valdez*, 296 F. Supp.2d 1071, 1091 (D. Alaska 2004) (reducing $5 billon dollar jury verdict to $4.5 billion on remand in light of *Campbell* rather than vacating award for new trial, because the jury had been instructed on the *Campbell* factors; "The Supreme Court punitive damages jurisprudence has consistently emphasized the role of adequate jury instructions in ensuring punitive damage awards that comport with due process.")(also noting in footnote 59 that the Ninth Circuit pattern jury instructions on punitive damages were inadequate in light of *Campbell*); *Romo v. Ford Motor Co.*, 113 Cal.App.4th 738, 753, 6 Cal. Rptr.3d 793, 804-05 (Cal. App. 2003)(jury's punitive damages award of $290 million reduced to $23.7 million on post-*Campbell* remand – concluding in light of *Campbell* that jury had been "fundamentally misinstructed concerning the *amount* of punitive damages it could award" where general deterrence instruction given had failed "to

the Eighth Circuit and other appellate courts reviewing punitive damage awards under *Campbell* specifically consider the adequacy of the jury instructions. *See, e.g., Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811, 824 (8th Cir. Aug. 27, 2004)("Therefore we begin by noting that the district court gave correct and distinct instructions relating the purpose and standard for punitive damages, and turn our focus to the reprehensibility of [defendant's] conduct."); *Alberts v. Franklin*, 2004 WL 1345078, * 29 (Cal. App. June 16, 2004)(affirming jury's award of punitive damages about four times greater than compensatory damages; concluding that jury instructions satisfied *Campbell*).

Commentators have also recognized the need to revise pattern jury instructions in light of *Campbell*. *See* A. Frey, "No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions," 29 LITIGATION Summer 2003 at 24-28. No reported decisions applying *Campbell* have concluded that the *Campbell* guideposts were exclusively for reviewing courts and not for jury instructions. To the contrary, *Campbell* and its progeny make

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restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process.")(Court's emphasis; footnotes omitted)(citing *Campbell*, 123 S. Ct. at 1523-24); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 74 (Cal. App. 2004)(observing that the constitutional soundness" of the California pattern instruction "has been rendered uncertain by Campbell's seemingly categorical rejection of the Utah Supreme Court's reliance on the defendant's 'massive wealth' as one justification for the award there"); *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 165-66 (Ky. Aug. 26, 2004)("In light of *State Farm* [*v. Campbell*], however, this case must be remanded for a new determination of the amount of any punitive damages awarded using an instruction… which sets forth the purpose of punitive damages and provides a safeguard from extraterritorial punishment[.]"); *Roberei v. Vonbokern*, 2003 WL 22976126 (Ky. App. Dec. 19, 2003)(vacating punitive damage award because, "We see no indication that trial court instructed the jury regarding these [*Campbell*] guideposts or considered them in reviewing the punitive damages awarded by the jury"); *Planned Parenthood of the Columbia-Williamette, Inc. v. American Coalition of Life Activists*, 300 F. Supp. 2d 1055, 1059 (D. Ore. 2004)(entering judgments on punitive damage verdicts and denying defendants' post-trial motions challenging amounts; "I specifically instructed the jury to consider the degree of reprehensibility of each defendant's conduct and the relationship of any award to actual harm inflicted.")

clear that juries must be instructed on the *Campbell* guideposts, and that punitive awards by juries that were not so instructed can be challenged on that basis.

Plaintiff's counsel have contended that the need to instruct juries on the *Campbell* guideposts is excused by the *Campbell* Court's failure to expressly overrule *Pacific Mutual v. Haslip*, 111 S.Ct. 1032 (1991), because *Haslip* rejected a challenge to a jury instruction that omitted reference to *Campbell*-type guideposts. *See Haslip*, 111 S.Ct. at 1037 n. 1, 1044. This argument fails because the guideposts were enunciated five years after *Haslip*, in *BMW of North America v. Gore*, 116 S.Ct. 1589 (1996). *Campbell* gave further shape and meaning to the *Gore* guideposts. *Haslip* should be regarded as overruled *sub silencio* to the extent that its approval of a pre-guidepost jury instruction conflicts with *Gore* or *Campbell*.

2. An Annotated Guide To The *Campbell*-Mandated Revisions To IUCJI 210.1.

The Committee's first addition to IUCJI 210.1 states, "You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries." This addition is based on the following conclusion of the *Campbell* Court:

> It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should ***only*** be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

123 S.Ct. at 1521. In keeping with Iowa's "plain language" approach to jury instructions, the Committee rephrased the *Campbell* Court's language to avoid use of the term "reprehensible."

Next, the Committee revised IUCJI 210.1 to comply with the requirement that punitive damages be based on the defendant's conduct that harmed the plaintiff, rather than dissimilar conduct involving non-parties. The *Campbell* Court stated:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis….

123 S. Ct. at 1523. Thus, the Committee modified the first factor for the jury to consider -- "the nature of defendant's conduct" -- by adding "that harmed the plaintiff." For those cases involving evidence of out-of-state conduct, the Committee added language based on the *Campbell* Court's explicit directive that:

> A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

123 S.Ct. at 1522-23. The Committee concluded that *Campbell* requires such language in the final jury instructions, not simply in a limiting instruction given at the time such evidence was introduced, as plaintiff's counsel have suggested. Indeed, other state supreme courts have taken this language in *Campbell* at face value. In *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. Aug. 26, 2004), the Kentucky Supreme Court stated:

> After reviewing *State Farm[v. Campbell]* and the evidence of the defendant's out-of-state conduct presented to the jury in *Sand Hill*, we vacate the punitive damages award and remand the case for a new determination of the amount of punitive damages because the trial court's jury instructions failed to include a limiting instruction concerning extraterritorial punishment.

Id. at 155-56.

The Committee also revised numbered paragraph 2 of IUCJI 210.1 to deemphasize wealth as a factor for determining the size of the punitive damage award. The *Campbell* Court rejected the Utah Supreme Court's reliance on State Farm's "enormous wealth" as a justification for the size of a punitive damage award, and addressed use of wealth evidence as follows:

> The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S. at 585, 116 S.Ct. 1589 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business"); see also *id*. at 591, 116 S.Ct. 1589 (BREYER, J., concurring) ("[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy…. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct").

123 S.Ct. at 1525. The Committee thus modified IUCJI 210.1 to permit the jury to consider a defendant's financial condition or ability to pay while instructing against awarding punitive damages "solely" based on wealth. *See Eden Electrical, Ltd. v. Amana Co., L.P.*, 258 F.Supp.2d 958, 971-75 (N.D. Iowa 2003)(applying *Campbell* to review punitive damage award; concluding that wealth remains a factor to consider), *aff'd* 370 F.3d 824 (8th Cir. 2004).[4]

The Committee further concluded that the second *Campbell* guidepost -- the ratio between punitive and actual damages awarded -- supported adding to IUCJI 210.1 the instruction that "the amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the plaintiff." As the *Campbell* Court itself held, "Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of

[4] The *Campbell* Court's discussion of wealth evidence further supports bifurcation of trials to exclude prejudicial evidence of a defendant's wealth unless and until the jury finds the requisite

harm to the plaintiff and to the general damages recovered." 123 S.Ct. at 1524. Nevertheless, plaintiff's counsel have objected to the "reasonably related" language on grounds that *Campbell* recognized that the permissible ratio can vary with the facts of each case and declined to set a fixed formula. *See Campbell*, 123 S.Ct. at 1524. It is precisely for that reason that the Committee declined to include a multiplier or ratio in revising IUCJI 210.1. No court has held that jurors should ***not*** be instructed that punitive damages must bear a reasonable relationship to actual damages. To the contrary, precedent clearly supports telling juries that the amount of punitive damages awarded should be "reasonably related" to actual damages.

A California appellate court recently held the second *Campbell* guidepost was satisfied by a jury instruction that "the punitive damages must bear a reasonable relation to the injury, harm or damages actually suffered by the plaintiff." *Alberts v. Franklin*, 2004 WL 1345078, * 29 (Cal. App. June 16, 2004). In *Sherman v. Kasotakis*, 314 F.Supp.2d 843 (N.D. Iowa 2004), Chief Judge Mark Bennett instructed the jury in a race discrimination case as follows:

> In determining the amount of punitive damages, if any, to award, you should consider how offensive the defendants' employees' conduct was; whether the amount of punitive damages bears a **reasonable relationship** to the actual damages awarded on a particular plaintiff's claim….

Id. at 865 (emphasis added). Chief Judge Bennett denied post trial motions challenging the punitive damages awarded, stating, "the Court finds no plain error in the manner in which the jury was instructed…as to punitive damages." *Id*. at 866.

As the Supreme Court in *Gore* recognized, "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."

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misconduct occurred to support an award of punitive damages. IUCJI 210.1 requires

116 S.Ct. at 1601. Thus, even before *Campbell*, Judge Ronald Longstaff in the Iowa tobacco litigation appropriately concluded:

> Furthermore, the Court agrees with plaintiffs that any punitive damages awarded could be determined in the aggregate. The jury instructions during the damages phase of the litigation could be tailored to ensure the punitive damages bore a "***reasonable relationship***" to compensatory damages awarded, *see, e.g., BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). (Emphasis added).

Estate of Mahoney v. R. J. Reynolds Tobacco Co., 204 F.R.D. 150, 160 n. 17 (S.D. Iowa 2001).[5] *See also Aken v. Plains Elec. Generation & Trans. Coop, Inc.*, 49 P.3d 662, 667 (N.M. 2002)(holding that *Gore* satisfied by jury instruction that "punitive damages must relate to actual damages and the injury sustained").

In *Farmers Ins. Exchange v. Shirley*, 954 P.2d 1040 (Wy. 1998), the Wyoming Supreme Court read *Gore* to require a jury instruction that punitive damages "should bear a reasonable relationship" to the harm. *Id*. at 1052. The *Shirley* Court aptly observed:

> *BMW* [v. *Gore*] demands that we articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review. Otherwise, we hazard litigants in our courts to future reversal by the Supreme Court of the United States because of the denial of due process of law resulting from the application of our current process.

Id. at 1045. Similarly, the Supreme Court of Appeals of West Virginia has directed trial courts instructing juries on punitive damages to "carefully explain the factors to be

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modification by the trial court for use in bifurcated trials.

[5] Because Judge Longstaff denied Plaintiffs' motion to certify a state-wide class of lung cancer victims on other grounds, his comments regarding punitive damage instructions are *dicta*. He nevertheless correctly recognized the importance, consistent with the second guidepost, of instructing the jury that the amount of punitive damages awarded should be reasonably related to compensatory damages awarded.

considered…[including that] punitive damages should bear a reasonable relationship to compensatory damages." *Boyd v. Goffoli*, 2004 WL 2727556, court's syllabus 4(4)(W.Vir. Nov. 29, 2004).

Common sense should prevail. Due process is served by giving the jury more guidance, rather than less. It is difficult to see the harm in telling jurors that the amount of punitive damages awarded should be reasonably related to the compensatory damages awarded. Citizens of Iowa serving as jurors would be justifiably angry if they were *not* instructed that their punitive damage award should be reasonably related to actual damages awarded, only to learn later that the amount they awarded was set aside as excessive. The jury is more likely to return a punitive damage award that can withstand a constitutional excessiveness challenge if it is instructed that the punitive award is to bear a reasonable relationship to compensatory damages, as *Campbell* requires.

3. The Third Guidepost -- Civil Penalties in Comparable Cases -- Supports A Jury Instruction In Some Cases.

The Committee initially proposed a final paragraph in IUCJI 210.1 allowing the jury in "applicable cases" to consider "civil or administrative penalties authorized or imposed in comparable cases." *See Campbell*, 123 S.Ct. at 1526 ("The third guidepost in *Gore* is the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases'"). This language was deleted based on objections that the third guidepost is more appropriately applied on judicial review of punitive awards. The Committee's cautious approach, however, need not preclude practitioners from proposing such language for jury instructions in particular cases.

In *Shirley*, an insurance bad faith case, the Wyoming Supreme Court stated:

> In arriving at an appropriate amount of punitive damages with respect to insurance carriers, it would be appropriate to give as an instruction WYO. STAT. § 26-1-107 (1997), pertaining to general criminal and civil penalties…. While the [*Gore*] Court stops short of requiring these factors to be given to the jury as instructions, we are satisfied that the only sensible approach is to tell the arbiter of punitive damages what the rules are. Consequently such instructions should be given.

958 P.2d. at 1052. Thus, in cases where a statute or administrative rule prescribes a civil penalty for comparable conduct well below the amount of punitive damages sought by the plaintiff, defense counsel should consider requesting an instruction thereon to help guide the jury.

NEW ASSISTANCE FOR DEFENDING PUNITIVE DAMAGES CLAIMS IN IOWA -- THE "MARCHING ORDERS" OF *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. CAMPBELL*

By Thomas D. Waterman, Lane & Waterman, Davenport

The decision this Spring in State Farm Mutual Automobile Insurance Co. v. Campbell, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), has been hailed by defense counsel as "a momentous … victory for insurers, corporations, and wealthy individuals throughout the land who face exposure to punitive damages."[6] Campbell marks only the second time the U.S. Supreme Court has reversed a judgment on a jury verdict for punitive damages as unconstitutionally excessive.[7] In Campbell, a six-three decision, the majority opinion authored by Justice Kennedy[8] held that a punitive damages award of $145 million on bad faith claims violated the Due Process Clause of the U.S. Constitution where the compensatory damage judgment was only $1 million. 123 S.Ct. at 1517, 1526. The majority opinion clarified the guidelines for appellate de novo review of punitive damages awards under the federal constitution. Id. at 1520-26. Indeed, Victor Schwartz, general counsel for the American Tort Reform Association, described Campbell as "the most significant punitive damages decision the supreme court has ever issued because it contains specific guidelines" lacking in the Court's earlier cases.[9] Justice Ginsberg's dissent noted acerbically that the Campbell majority's

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[6] Michael J. Brady, "A New Predictability in Punitive Damages?" FOR THE DEFENSE, June, 2003 at 10.

[7] The first time was in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (rejecting a $2 million punitive damages award accompanying a $4,000 compensatory damage award).

[8] Chief Justice Rehnquist, and Justice Stevens, O'Connor, Souter, and Breyer joined the majority decision. Justices Scalia, Thomas and Ginsburg filed separate dissenting opinions.

[9] Quoted by John Gibeaut, "Pruning Punitives -- High Court Stresses Guidelines for Deciding Damages." ABA JOURNAL, June, 2003 at 26.

guidelines "begin to resemble marching orders." Id. at 1531. This article reviews Campbell and examines the assistance its "marching orders" can provide to Iowa practitioners defending punitive damages claims.

The underlying facts in Campbell involve a classic case of an insurer's bad faith refusal to settle a liability claim within policy limits. State Farm's insured, Curtis Campbell, attempted to pass a six-van caravan on a two-lane Utah highway, forcing an oncoming driver off the road and into a collision with another vehicle, killing one driver and crippling the other (the Campbell's car avoided any impact). Id. at 1517. State Farm declined opportunities to settle the resulting lawsuits for Campbell's policy limits of $50,000, and denied liability, even though its own investigators had quickly concluded Campbell's unsafe pass caused the accident. Id. at 1518. Disregarding "the overwhelming likelihood of liability and the near-certain probability" of an excess judgment, id. at 1521, State Farm took the case to trial, telling Campbell his assets were not exposed and that he did not need separate counsel. Id. at 1518. The jury found Campbell 100 percent at fault and returned a verdict of $185,000 against him. Id. State Farm initially refused to pay the judgment or post an appeal bond, and instead suggested to Campbell that he sell his home. Id. At that point, Campbell hired his own lawyer, who settled with the tort victims by assigning to them ninety percent of any recovery on bad faith claims Campbell agreed to pursue against State Farm. Id. After the original tort judgment was affirmed on appeal, State Farm paid it, including the amount in excess of policy limits. Id.

Campbell's bad faith claims proceeded in Utah state court. Extensive evidence was introduced over State Farm's objection as to its national claims handling practices and conduct; essentially, State Farm was put on trial as a corporate bad actor. Id. at 1521-22. Justice Ginsburg's dissent painstakingly reviewed the evidence of State Farm's nationwide misconduct.

Id. at 1527-31. The majority observed that the case "was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." Id. at 1521. The evidence apparently resonated with the bad faith jury, which returned a verdict against State Farm of $2.6 million in compensatory damages and $145 million in punitive damages. Id. at 1519. The trial judge reduced the compensatory award to $1 million and the punitive award to $25 million. Id. The Utah Supreme Court however, reinstated the jury verdict of $145 million in punitive damages. 65 P.3d 1134. The U.S. Supreme Court granted certiorari and reversed the Utah Supreme Court, remanding the case with instructions to enter a new punitive award, "at or near" the $1 million compensatory award. Id. at 1526.

Campbell makes clear that both state and federal appellate courts are constitutionally required to conduct a de novo review of punitive damages awards under the due process clause. Id. at 1520-21. The Campbell majority reiterated three "guideposts" for reviewing punitive damages awards:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 1520, citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The Campbell majority then applied these criteria to reverse the Utah Supreme Court, stating "this case is neither close nor difficult." Id. at 1521. The majority's detailed discussion of the guideposts provides the "marching orders" for lower courts (state and federal) as well as ample fodder for defense counsel's advocacy in punitive damages cases.

The First "Guidepost": The Reprehensibility of the Defendant's Conduct

The Campbell majority elaborated as follows on the first "guidepost" for due process review of punitive damages awards:

> "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Campbell, 123 S.Ct. at 1521 (quoted internal citations omitted). The majority then made passing reference to State Farm's mishandling of the claims against Campbell, found that some punitive damages were justified, and concluded that "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." Id.

Significantly, the Campbell majority held that the state high court erred in relying "upon dissimilar and out-of-state conduct evidence." Id. at 1521-22. The U.S. Supreme Court noted that States generally can not punish the defendant through punitive damages for conduct that may have been lawful where it occurred, or for "unlawful acts committed outside of the State's jurisdiction." Id. at 1522. Moreover, the Court concluded that out-of-state conduct may

be probative as to "the deliberateness and culpability of the defendant's action in the State" only where the extraterritorial conduct has "a nexus to the specific harm suffered by the plaintiff." Id. Specifically, the Court admonished that a defendant's "dissimilar" bad acts cannot be considered in awarding punitive damages:

> For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here.

Id. at 1523.

Practice Pointers

Iowa practitioners defending punitive damage claims should capitalize on the Campbell Court's "marching orders" that limit the types of evidence that can be considered in awarding punitive damages. The Campbell analysis – which under the Supremacy Clause of the U.S. Constitution is binding upon state and federal courts alike – supports motions in limine and new jury instructions in defending punitive damage claims.

First, defense counsel should consider motions in limine to exclude several separate, but overlapping, categories of evidence: (1) out-of-state conduct; (2) conduct that was legal where it occurred; (3) conduct that did not harm the specific plaintiff; and (4) dissimilar bad acts. A fact-sensitive analysis will be required to determine the admissibility of evidence in these categories. For example, the strongest case for exclusion may be made for evidence of lawful, dissimilar out-of-state conduct with no nexus to the plaintiff. Other permutations may be

admissible in a given case (such as illegal out-of-state conduct connected to defendant's mistreatment of plaintiff that demonstrates the "deliberateness" of the conduct). Defense counsel should object to the admission of evidence subject to these challenges and preserve error for appellate review. Defense counsel should be wary of "opening the door" to evidence of dissimilar bad acts by offering evidence of the defendant's good deeds or good character.

In addition, defense counsel should consider submitting proposed jury instructions directing jurors to refrain from considering specific types of inappropriate evidence in determining whether to award punitive damages or in calculating the amount to award. Indeed, one of the marching orders given by the Campbell majority is that the "jury must be instructed… that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." 123 S.Ct. at 1522-23 (emphasis added). Similar instructions could be proposed as to evidence of dissimilar bad acts, illegal out-of-state conduct, or conduct not harming the plaintiff.

The Second "Guidepost": The Ratio Between Harm To The Plaintiff And The Punitive Damage Award

The Campbell majority dramatically bolstered the use of "ratios" to determine whether punitive damages awards are unconstitutionally excessive:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

123 S.Ct. at 1524 (emphasis added). The Court found "instructive" a "long legislative history… providing for sanctions of double, treble, or quadruple damages to deter and punish." Id. The

Court also noted its own precedent that a 4-to-1 ratio is "close to the line of constitutional impropriety." Id.

Immediately after the Campbell decision, scholars and courtwatchers speculated whether the high court would tolerate a far higher ratio of punitive to compensatory damages where the plaintiff suffered fatal or catastrophic injuries from defendant's misconduct, noting that the Campbells suffered only economic and perhaps emotional harm from State Farm's bad faith. A bellweather case submitted May 19, 2003 was Ford Motor Co. v. Romo, 123 S.Ct. 2072 (2003), with a $290 million punitive damages award in a triple fatality, Ford Bronco crashworthiness case.[10] The U.S. Supreme Court remanded that case with instructions to reconsider the punitive award in light of Campbell. Romo, 123 S.Ct. 2072 (2003). A spate of similar orders by the U.S. Supreme Court on April 21, 2003 granted certiorari and vacated punitive damage awards, remanding a variety of types of cases "for further consideration in light of State Farm [v. Campbell]."[11] Accordingly, the Campbell guidelines apply to punitive damages award regardless of the theory of liability.

Practice Pointers

Campbell clearly bolsters the likelihood of success of post-trial motions or appellate review to vacate or reduce punitive damages awards that are ten times or more greater then the compensatory award. Pre-Campbell Iowa Supreme Court precedent had downplayed

[10] ABA Journal June 2003 at 27.

[11] See, e.g., Anchor Hocking, Inc. v. Wadill, 123 S.Ct. 1781 (2003) (personal injury-products liability case with punitive damages awarded at more than ten times compensatory damages); Key Pharmaceuticals, Inc. v. Edwards, 123 S.Ct. 1781 (2003) (same); San Paolo U.S. Holding v. Simon, 123 S.Ct. 1828 (2003) (property sale dispute with 340:1 ratio); DeKalb Genetics Corp. v. Bayer CropScience, S.A., 123 S.Ct. 1828 (2003) (patent infringement case with 3.3:1 ratio).

the significance of ratios,[12] but Campbell is now the law of the land. Although both sides have room to argue different ratios should apply under different facts, post-Campbell punitive damage verdicts with a double digit or greater ratio to compensatory damages are far more vulnerable to challenge. Defense counsel should consider proposing jury instructions that any punitive damages award must bear a reasonable relation or proportion to the plaintiff's damages actually caused by the defendant's punishable misconduct.

Language in the Campbell majority opinion also diminishes the significance of a defendant's wealth in supporting a larger punitive damages award. The majority pointedly observed, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 123 S.Ct. at 1525. The majority also observed parenthetically, "[Wealth] cannot make up for the failure of other facts, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." Id. (quoting Justice Breyer's concurrence in Gore, 517 U.S. at 585). The majority rejected the Utah Supreme Court's reliance on State Farm's "enormous wealth" as a justification for the size of the punitive damage award, noting that those assets "are what other insured parties . . . must rely upon for payment of claims [and] had little to do with the actual harm sustained by the Campbells." 123 S.Ct. at 1525.

Campbell thereby undermines Iowa appellate precedent allowing consideration of a defendant's size and wealth to support a higher punitive damage award.[13] Accordingly, defense

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[12] See, e.g., Wilson v. IBP, Inc., 558 N.W.2d 132, 148 (Iowa 1996) ("Of minor significance is the ratio between the compensatory and punitive damages assessed"); Ryan v. Arneson, 422 N.W.2d 491, 496 (Iowa 1988) (expressly rejecting use of a mathematical ratio in examining punitive damages); see also, Condon Auto Sales Service, Inc. v. Crick, 604 N.W.2d 587, 595 (Iowa 1999) (affirming judgment for punitive damages with a 43 to 1 ratio to actual damages).

[13] See, e.g., McClure v. Walgreen Co., 613 N.W.2d 225, 231-33 (Iowa 2000) (approving consideration of defendants "worldwide" financial condition in setting punitive damage award, and approving Iowa Civil Uniform Jury Instruction No. 210.1); Wilson v. IBP, Inc., 558 N.W.2d 132, 148 (Iowa 1996) (defendant's financial position is proper factor for assessing imposition of punitive damages); Midwest Homes Distributor, Inc. v. Domco Industries, Ltd., 585 N.W.2d 735, 743 (Iowa 1998) (affirming $750,000

counsel should consider submitting a proposed jury instruction that a larger punitive award should not be imposed simply because of a defendant's size or wealth. Moreover, after Campbell, defense counsel probably can object to jury instructions that allow consideration of the defendant's financial condition in determining the amount of punitive damages to award. See Iowa Uniform Civil Jury Instruction 210.1 (allowing jurors to consider "all of the evidence including… the amount of punitive damages which will punish and discourage like conduct by the defendant in view of [his] [her] [its] financial condition."); but see Eden Electrical, Ltd. v. Amana Co., L.P., 258 F.Supp.2d 958, 971-75 (N.D. Iowa 2003) (analyzing Campbell to conclude wealth remains a factor).[14] Furthermore, defense counsel should consider moving in limine to preclude plaintiff's counsel from arguing defendant's wealth in support of a larger punitive award (i.e., "How much money does it take to send this multi-billion dollar corporation a message?")

The Third "Guidepost": The Disparity Between The Punitive Damages Award And Civil Penalties Allowed In Comparable Cases

The Campbell Court spent little time on this factor, noting that "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, . . . an amount dwarfed by the $145 million punitive damages award." 123 S.Ct. at 1526. The Campbell majority admonished the Utah Supreme Court for speculating about State Farm's potential loss of licensure and disgorgement of profits based on out-of-state and dissimilar conduct the Utah court erroneously considered in determining the amount of punitive damages, as discussed above. Id. The Campbell majority also backed away

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punitive damages award, noting absence of "glaring disparity between that amount and defendant's assets exceeding $250 million).

[14]Presumably the Iowa Jury Instruction Committee will revisit uniform punitive damages instructions in light of Campbell.

from precedent considering criminal penalties in reviewing the propriety of a punitive damage award:

> When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal
>
> process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Id.

Practice Pointers

The foregoing language supports a motion in limine to preclude plaintiff's counsel from referring to criminal penalties in arguing for a punitive damage award. For example, in a wrongful death case, plaintiff's counsel might otherwise refer to penalties of imprisonment and fines for vehicular manslaughter. Such argument should not be allowed in the post-Campbell world. Motions in limine and proposed jury instructions precluding use of evidence of dissimilar and out-of-state conduct could also forestall efforts by plaintiff's counsel to rely on the greater civil penalties based thereon in justifying a higher punitive damage award.

CONCLUSION

Anecdotal reports suggest that Campbell is already facilitating settlement of punitive damage awards in Iowa. Courts in Iowa are only beginning to apply Campbell in adjudicating punitive damages claims. See, e.g., Baker v. John Morrell & Co., ___ F.Supp.2d ____, 2003 WL 21355198, *44-46 (N.D. Iowa June 11, 2003) (applying Campbell to approve punitive damage award in employment case after reduction to statutory cap of $300,000, three times the compensatory award); Eden Electrical, 258 F.Supp.2d at 975 (applying Campbell to

reduce punitive damage award in dealer termination case from $17.875 million to $10 million on fraud claims with compensatory damages of $2.1 million). Defense counsel should take full advantage of the Campbell "marching orders" to help shape the development of punitive damages jurisprudence in the months and years ahead.

Effective Appellate Advocacy – A View from the Iowa Court of Appeals

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Hon. Robert E. Mahan
Iowa Court of Appeals
1111 East Court Avenue
Des Moines, IA 50319

EFFECTIVE APPELLATE ADVOCACY

A VIEW FROM THE IOWA COURT OF APPEALS

I. INTRODUCTION TO THE IOWA COURT OF APPEALS.

II. EFFECTIVE APPELLATE ADVOCACY.

A. The Top Ten List.

10. Do Not Read Your Argument.

This is not a big problem but does occur at times. It is very difficult to follow an argument that is read to the court. It is also difficult for the lawyer. Court questioning is similar to interrupting telemarketers.

9. No Need to Be Nervous - Keep Your Composure.

Lawyers are often nervous at the start of oral arguments. Many even call attention to their nervousness. Expect to be met at the court of appeals with courteous and attentive judges who are familiar with the case.

Keep you composure – an anecdote.

8. Professional or Conversational Tone.

The judges are familiar with the case at the time of oral argument. Obviously, the judges have formed some initial impressions on the merits of the appeal. Oral argument is an excellent chance to bolster support for your individual argument. Oral argument also presents an excellent opportunity to change those initial impressions.

There is, quite obviously, nothing wrong with a totally professional tone and approach to oral argument. I personally prefer a more casual tone and conversational give-and-take to oral argument. As a judge, I have certain questions I would like to discuss and may be confused on an issue. A conversational give-and-take is much more helpful than a legal dissertation. But – this is simply a suggestion!

7. Highlight Specific Facts – Don't Dwell on General Facts.

Each lawyer is given 10 minutes to argue his or her case. The appellant is given an extra 5 minutes for rebuttal. Many lawyers spend one-third to one-half of their entire argument time outlining the facts of the case. THE COURT KNOWS THE FACTS!

Therefore, it is very important for lawyers to spend the argument time wisely and focus on the legal argument. Only highlight specific facts that are important to the legal argument.

6. Allow Time For Questions.

As a general rule, members of the court will always have questions. In preparing and planning oral argument, allow sufficient time for questions from the court.

5. Focus on Your Best Issues.

THIS IS A SUGGESTION ONLY! Include in your appeal your best issues and abandon a shotgun approach. Each month we have appeals in which the lawyer has raised 7-10 issues. If these issues are vital to the appeal – put them in. However, if they are doomed to failure – do not put them in the appeal. Issues without merit can be a distraction to the appeal. It also puts the lawyer in a bad position by acknowledging at oral argument that he or she will only focus on certain
issues and will not even speak to other "important" issues.

4. Cite Authority for Your Arguments.

Always cite authority for an issue. A litigant's random mention of an issue, without elaboration or supportive authority, is not sufficient to raise the issue for the court's review. Thus, a party's failure in a brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue.

3. Clarify the Appendix Pages.

Probably the biggest mechanical problem for the court is reading an appendix that is not clear in the numbering of the pages. One of the best ways to help the court is to make sure the numbering of the appendix pages (especially those dealing with witness testimony) are correct and any omissions of testimony are made clear to the court.

2. **Pay Attention to the Briefs.**

   The briefs submitted by the lawyers' are the court's first impression in any appellate case. Pay particular attention to the content and quality of the brief. A poor brief is not a good start to an appeal.

1. **Don't Mislead the Court.**

   NEVER MISLEAD THE COURT!!! AT ANY COURT LEVEL!!! The most important asset any lawyer has with the court is his or her honesty, integrity and straight-forwardness. Judges know when they are being misled. And judges talk among themselves.

B. Question and Answer Session.

C. Closing Remarks.

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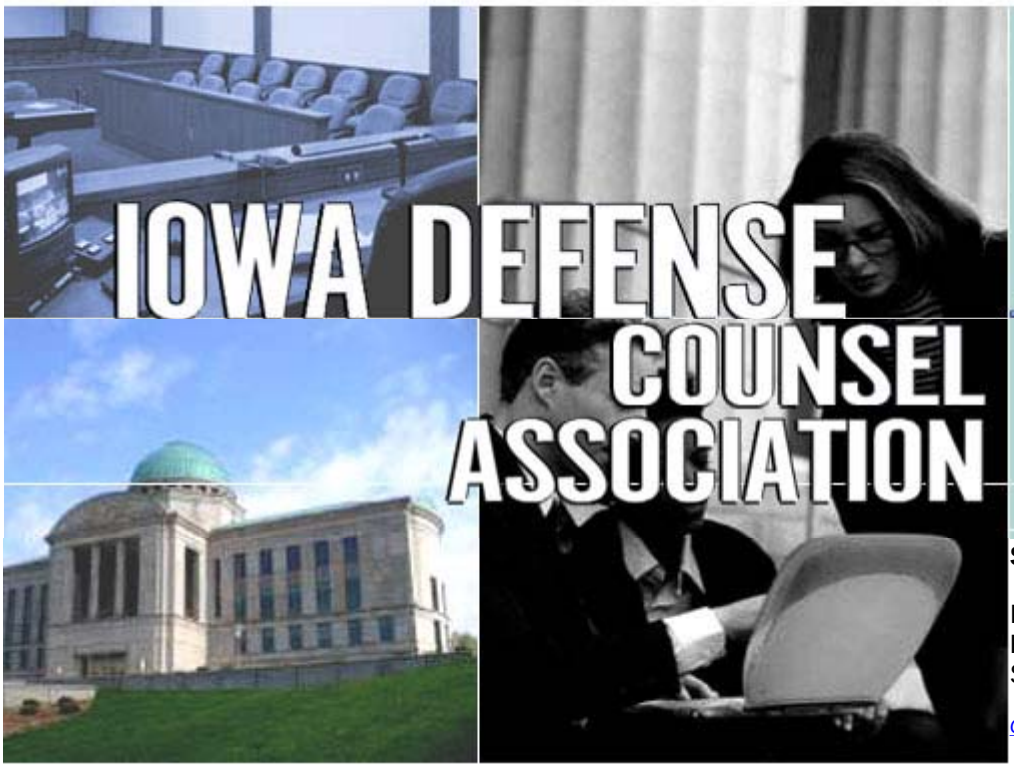
Brent R. Ruther
Aspelmeier Fisch Power Engberg & Helling P.L.C.
321 North Third Street
P.O. Box 1046
Burlington, IA 52601
(319) 754-6587

Julie A. Garrison
Associate Director
Iowa Defense Counsel Association
431 East Locust Street, Suite 300
Des Moines, IA 50309
(515) 244-2847



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Class Action Fairness Act of 2005 and Other Developments in Class Action Litigation

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Gunderson, Sharp & Walke, P.C.
317 Sixth Avenue, Suite 600
Des Moines, IA 50309
(515) 288-0219

LITIGATED ISSUES UNDER

THE CLASS ACTION FAIRNESS ACT

("CAFA")

Joseph R. Gunderson, Esq.
Gunderson, Sharp & Walke, LLP
Des Moines, Iowa
August 2005

I. Introduction

There are countless issues to be litigated in connection with CAFA, starting with numerous textual ambiguities and proceeding all the way through Tenth Amendment and federalism challenges. For a general overview of CAFA and some of the issues yet to be litigated, *see* Rick Knight, *The Class Action Fairness Act of 2005: A Perspective*, 52 Fed. Law. 46 (June 2005); *A New Road to Resolution--The Class Action Fairness Act of 2005*, 41 Tenn. Bar J. 16 (Apr. 2005); and Joseph M. Callow Jr., *The Class Action Fairness Act of 2005: Overview and Analysis*, 52 Fed. Law. 26 (May 2005). [1] Only litigated issues will be addressed in this outline. CAFA is young; the list is short.

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[1] *See generally,* Michael J. Mueller & Tobias E. Zimmerman, *The Brave New World of Removal Practice Under the Class Action Fairness Act,* 12 No. 3 Andrews Class Action Litig. Rep. 18 at p. 25 (2005); Guy V. Amoresano and Michael R. McDonald, *Class Litigants Face Tougher Forum--Will Closer Scrutiny By Federal Judges Curb Costs?* 180 N.J.L.J. 282 (Apr. 25, 2005); *Class Action Fairness Act--A Panel of Experts Discusses Whether the New Law Governing Class Actions is a Needed Fix or a Bad Idea,* Nat'l L.J., May 16, 2005, at 18; and Robert E. Bartkus, *Back to the Future? Federal Class Action Reforms Leave Many Questions Unanswered,* 180 N.J.L.J. 284 (Apr. 25, 2005). *See also* Construction and Application of Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), 2005 A.L.R. Fed. 2d 2, (2005).

CAFA's general analytical framework is straightforward. To trigger original jurisdiction under CAFA, the court must find that (a) the substantive requirements of CAFA have been satisfied, (b) removal is timely under 28 U.S.C. section 1446(b), and (c) the action was "commenced" after February 18, 2005, the effective date of CAFA. The substantive requirements include (1) at least 100 putative class members, (2) an aggregate amount in controversy of $5,000,000 or more [2], and (3) any class member whose citizenship is diverse from that of any defendant. 28 U.S.C. sections 1332(d)(2), (d)(5) and (d)(6). *See Schwartz v. Comcast Corp.*, 2005 WL 1799414 *4-5 (E.D. Pa. July 28, 2005); and *Natalie v. Pfizer, Inc*., 2005 WL 1793451 at *2-3 (D. Mass. July 28, 2005).

CAFA exempts certain "securities" and "corporate governance" class cases from its grasp. The more likely CAFA exceptions to face immediate judicial scrutiny include the "home state controversy" and the "local controversy" exceptions. *See generally*, *Schwartz v. Comcast Corp.*, 2005 WL 1799414 *2 (E.D. Pa. July 28, 2005); and *Adams v. Federal Materials Co*., 2005 WL 1862378 (W.D. Ky. July 28, 2005). None of these exceptions are the subject of Eighth Circuit reported decisions.

The effective date for CAFA was February 18, 2005. The initial question is which cases are subject to CAFA: only those cases filed after February 18, 2005 or does

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[2] The complaint in *Waitt v. Merck & Co*., 2005 WL 1799740 (W.D. Wash. July 27, 2005) was filed April 6, 2005, well *after* the effective date of CAFA, February 18, 2005. Defendant removed the case and plaintiffs moved to remand, claiming it was defendant's burden to establish federal jurisdiction under CAFA, not plaintiffs'. The Court conducted an initial analysis of legislative history and determined that Congress intended to shift the traditional removal burden away from defendants and onto plaintiffs for actions invoking CAFA. Having determined that plaintiffs bear the burden, the Court found that amount in controversy exceeded $5,000,000 (the jurisdictional minimum under CAFA) and denied the motion to remand. *Id*. at *1-2. When a removed action "commenced" was not an issue in *Waitt*.

CAFA also govern cases filed before February 18, 2005, depending upon the circumstances and the definition ultimately given to "commencement". It comes down to jurisdiction and removal. The federal courts in Iowa are addressing at least two such CAFA issues at present. *Jeffrey Varboncoeur, et. al. v. State Farm Fire and Casualty Company*, Case NO 3:05-CV-00095 RP-TJS, United States District Court, Southern District of Iowa (CAFA removal based upon motion to amend and proposed amended complaint) (briefing in this case is the source of this outline); and *Brown v. Kerkhoff, et. al*., Case NO 4:05-CV-00274, United States District Court, Southern District of Iowa (satisfaction of state filing requirements as determining "commencement" and CAFA jurisdiction).

Given the speed with which CAFA jurisprudence is developing, the focus may actually shift between the date of the writing of this outline and the date of the presentation. The author will provide an oral update. Again, Eighth Circuit CAFA case law is scant. *See generally, Massey v. Shelter Life Ins. Co*., 2005 WL 1950028 (W.D. Mo., Aug. 15, 2005) (motion to dismiss denied. Court rejects comity arguments, in part, based upon purposes of CAFA); *Becnel v. KPMG, LLP*, 2005 WL 2016246 (W.D. Ark., Jun 21, 2005) (remand denied on other grounds. CAFA jurisdiction not reached); and *Lander and Berkowitz, P.C. v. Transfirst Health Services, Inc*., 374 F.Supp.2d 776 (E.D. Mo., May 19, 2005) (the effective date of CAFA is February 18, 2005, the date the President signed the bill into law, not February 17, 2005, the date Congress passed the bill. Remand granted).

II. CAFA Jurisdiction and Removal

A. <u>General Requirements and Burden of Proof under CAFA</u>

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 199 Stat. 4 (2005), is codified in pertinent part at 28 U.S.C. sections 1332(d) and 1453. The application of CAFA to cases filed *after* February 18, 2005 has not been materially litigated. That leaves defendants who prefer federal court to state court under circumstances where the case was first filed in state court *before* February 18, 2005. Removal authority under CAFA is found in Section 5 and codified as 28 U.S.C. section 1453.

> (b) In general.--A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. section 1453(b) (2005).

With respect to CAFA jurisdiction, the burden of proof is unresolved in the Eighth Circuit. One line of authority holds that the burden of proof is upon the party resisting remand to establish original federal court jurisdiction. *Schwartz v. Comcast Corp.*, 2005 WL 1799414 *4-7 (E.D. Pa. July 28, 2005) (discussing legislative history and interpreting CAFA to retain the burden of proof previously applicable to remand motions) (citing at *4, *In re Expedia Hotel Taxes and Fees Litig.*, 2005 WL 1706920, at *1 (W.D. Wash. Apr. 15, 2005); *Sneddon v. Hotwire, Inc.*, 2005 WL 1593593, at *1 (N.D. Cal. Jun. 29, 2005)). The essence of the Court's holding in *Schwartz* is that Congress is presumed to know the current law on the burden of proof for removal and remand. If Congress had wanted to shift that burden to the non-removing party under CAFA, it could have said so directly. Congress chose not to; the burden, therefore, remains the same. *Schwartz, Id*. at *4-7.

The other line of authority places the burden of proof on the party seeking remand. *See Berry v. Am. Express Publ'g Corp*., No. 05-0302, Central District of California (June 16, 2005) (Stotler, J.) (unpublished); *Waitt v. Merck & Co*., 2005 WL 1799740 at *1-2 (W.D. Wash. July 27, 2005); and *Natalie v. Pfizer, Inc*., 2005 WL 1793451 at *4 (D. Mass. July 28, 2005) (citing *Berry, supra*). This line of authority basically relies on the notion that Congress did not directly speak to burden-shifting in the statutory text; however, certain committee reports and floor debate records provide support for the notion that at least some members of Congress wanted to shift the burden to the non-removing party on removal and remand.

One case seems to split the difference. *See also Harvey v. Blockbuster, Inc*., 2005 WL 1868936 at *2 (D.N.J. Aug. 9, 2005) (finds a defendant removing an action generally bears initial burden of demonstrating that an action should not be remanded to state court. But party opposing removal under Section 1332(d) bears the initial burden of demonstrating that an action should be remanded).

B. <u>Pleading As Basis For CAFA Jurisdiction</u>

One case holds essentially that the same filed pleading that would be the basis for removal in any non-CAFA case would also be the basis for removal in any CAFA case. *See Schwartz v. Comcast Corp.*, 2005 WL 1799414 *3 (E.D. Pa. July 28, 2005) (state class action removed under CAFA, then plaintiffs amend complaint to alter the class definition to "clarify" a lack of diversity and court denies remand based upon only original complaint).

> "Generally speaking, the nature of plaintiff's claim must be evaluated, and the propriety of remand decided, on the basis of the record as it stands at the time the petition for removal is filed." *Westmoreland Hosp. Ass'n v. Blue Cross of W. Pa.*, 605 F.2d 119, 123 (3d Cir.1979) *citing Pullman Co. v. Jenkins,* 305 U.S. 534, 59

> S.Ct. 347, 83 L.Ed. 334 (1939). I will therefore base my determination "about subject matter jurisdiction after removal on the plaintiff's complaint as it existed at the time that the defendant filed the removal petition." *Briones v. Bon Secours Health Sys.*, 69 Fed. Appx. 530, 535 (3d Cir.2003) *quoting Prince v. Rescorp Realty*, 940 F.2d 1104, 1105 n. 2 (7th Cir.1991). In other words, I will determine whether federal subject matter jurisdiction exists in this case according to the allegations set forth in Schwartz's original complaint.

Id. at *3. *Accord, In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d 922, 928-29 (8th Cir 2005) (citing *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir.2000)) (subject matter jurisdiction determined based only on *filed* amended complaint in non-CAFA case).

C. <u>When an Action "Commences" under CAFA</u>

The final requirement under Section 9 of CAFA is that the action be "commenced" on or after February 18, 2005. *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805 (7th Cir. 2005).

Much of the early CAFA removal litigation centered upon whether litigation "commenced" for purposes of CAFA jurisdiction on the date of the initial state court filing or on the date the case was removed to federal court pursuant to CAFA. *See Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805 (7th Cir. 2005); *Prichett v. Office Depot, Inc.*, 404 F.3d 1232 (10th Cir. 2005); and *Natalie v. Pfizer, Inc*., 2005 WL 1793451 at *2-3 (D. Mass. July 28, 2005) (question certified to circuit court pursuant to 28 U.S.C. 1292 (b), 1332 and 1453). Although not yet specifically addressed in the Eighth Circuit, this issue appears to be resolved exclusively in favor of the date of the initial state court filing and not the date of CAFA removal itself.

Case law suggests that it is state law and practice regarding "commencement" of a case that informs "commenced" under CAFA. *See Pfizer, Inc. v. Lott*, 2005 WL 1840046

*2 (7th Cir. August 4, 2005) (Judge Posner); and *Schorsch v. Hewlett-Packard Company*, 2005 WL 1863412 at *2-3 (7th Cir. August 8, 2005) (Judge Easterbrook). Under Iowa law, "[a] civil action is commenced when a petition is filed in the district court. Iowa R. Civ. P. 1.301(1)(2002)." *Wilson v. Ribbens*, 678 N.W.2d 417, 420 (Iowa 2004). Under Iowa R. Civ. P. 1.402(5), "[a]ll amendments must be on a separate paper, *duly filed*, without interlining or expunging prior pleadings."(emphasis added).

A separate issue is whether a case can be removed based upon a "new" CAFA "commencement" date pursuant to a filed amended complaint in state court that (a) adds a federal claim, (b) adds parties, or (c) simply changes (or even broadens) the class definition.

Amending pleadings to add a defendant may be the basis for removal under CAFA. The court in *Adams v. Federal Materials Co*., No. 2005 WL 1862378 (W.D. Ky. July 28, 2005) denied the motion to remand. Briefly, a class action was filed in state court on March 11, 2004. One of the defendants filed a third party complaint on February 25, 2005, and the plaintiffs on April 1, 2005 filed an amended complaint to add the newly identified third party defendant as a named defendant in the underlying lawsuit. (Whether the amended complaint was the subject of a motion to amend or whether that motion had been granted prior to CAFA removal is not addressed in the published decision.) Defendants and third party defendant removed the entire action on May 2, 2005, claiming CAFA jurisdiction. Plaintiffs sought remand, arguing that the action "commenced" before the effective date of CAFA, February 18, 2005, and in any event, the "home state controversy" exception to CAFA applied. 28 U.S.C. 1332(d)(4)(B). *Id*.

at *1-2. *Adams* addresses those narrow circumstances involving CAFA removal based upon later-added defendants.

In *Adams*, the Court essentially adopted defendants' argument: with respect to any suit filed against a later-added defendant after February 18, 2005, the later-added defendant's right to remove should be governed by the jurisdictional statutes as amended by CAFA. The *Adams* Court described the "significant change" test first articulated in *Knudsen* as permitting CAFA removal where there is an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before) or adds a new defendant. *Adams, Id*. at *3-4.

> Defendants, however, cite a Seventh Circuit decision which deals with the possibility of exceptions to this general rule of interpretation, although ultimately rejecting the exception proposed by the defendants in that case. *Knudsen v. Liberty Mutual Insurance Co.,* 411 F.3d 805, 2005 WL 1389059 (7th Cir. 2005). In that case, the defendant "contend[ed] that any substantial change to the class definition 'commences' a new case." *Id.* at *1. The *Knudsen* court, in rejecting a "significant change" test for determining whether or not a new case has commenced, drew a distinction between changes of the kind made by the plaintiffs in that case (changing the class definition) and changes that could in fact constitute a new case. It suggested that
>
> > a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes.
>
> *Id.* at *2. The *Knudsen* court further noted that "[r]emoval practice recognizes this point: an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal." *Id.*, citing 28 U.S.C. § 1446(b) and Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 14C *Federal Practice & Procedure* § 3732 at 311-348 (3d ed.1998).

Adams, Id. at *3.

The *Adams* Court goes on to address the narrow circumstances where a new defendant is added to an existing state court case. Analogizing treatment of a later-added defendant for removal purposes in the Sixth Circuit, as well as the application of the "relation back doctrine" for statute of limitations purposes under Rule 15(c) of the Federal Rules of Civil Procedure, the *Adams* Court finds that the addition of a new defendant "presents precisely the situation in which it can and should be said that a new action has 'commenced' for purposes of removal pursuant to the CAFA." *Adams, Id*. at *3-4.

Adding a defendant or another plaintiff is not the same as simply broadening a class definition. Putative class members are not "parties". *See Schorsch v. Hewlett-Packard Company*, 2005 WL 1863412 at *1-3 (7th Cir. August 8, 2005) ("The proposed amendment certainly does not add *parties* to the suit: there were and are only two, Schorsch and HP. Class members are represented vicariously but are not litigants themselves. (citations omitted)… This is still just one suit, between the original litigants. Litigants and judges regularly modify class definitions; *Knudsen* holds that such changes do not "commence" new suits.")

CAFA has been the basis for a whirlwind of attempted removals of class actions filed in state district court to federal court. For the most part, those attempts at removal of pre-February 18, 2005 cases have failed, and in the Seventh Circuit in particular, have also started to frustrate Judges Easterbrook and Posner.

The most interesting proposed basis to assert a new CAFA "commencement" date is the "significant change" test first articulated in *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805, 806-808 (7th Cir. 2005). *See also Schorsch v. Hewlett-Packard*

Company, 2005 WL 1863412 at *1-3 (7th Cir. August 8, 2005). CAFA does not mention or directly countenance the judicially created "significant change" test first articulated in *Knudsen*.

Remand was granted in *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805 (7th Cir. 2005) (Judge Easterbrook). In *Knudsen*, plaintiffs sought to amend the class definition to include a previously unidentified and non-existent corporate entity which plaintiffs apparently believed did exist and was affiliated with the existing named defendant. The plaintiffs did not at the same time move to add the new non-existent corporate entity as a named party defendant. *Knudsen, Id*. at 807-808. The Court noted that should plaintiffs move to add the previously unidentified (and nonexistent) corporate entity as a party defendant (and not merely as an entity included in the class definition), then defendant could remove under CAFA because the suit against the new entity would have "commenced" after February 18, 2005. *Knudsen, Id*. at 807-808. With that said, the analysis of the *Knudsen* Court is illuminating:

> Instead of arguing that removal equals "commencement," Liberty Mutual contends that any substantial change to the class definition "commences" a new case. Now as a matter of normal language (and normal legal practice) a new development in a pending suit no more commences a new suit than does its removal. Plaintiffs routinely amend their complaints, and proposed class definitions, without any suggestion that they have restarted the suit--for a restart (like a genuinely new claim) would enable the defendant to assert the statute of limitations. Liberty Mutual concedes that routine changes do not allow removal but insists that a "substantial" or "significant" change must do so. Yet significance is not the measure of a new claim; a plaintiff may assert an entirely novel legal theory in midsuit without creating a "new" claim in the sense that the defendant could block it by asserting that it had been propounded after the period of limitations expired. Moreover, "significance" often lies in the eye of the beholder; it is not a rule of law so much as it is a cast of mind or an assessment of likely consequences, which may be difficult if not impossible to foresee. A doctrine of "significant change" thus would go against the principle that the first virtue of any jurisdictional rule is clarity and ease of implementation. See, e.g., *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03, 108 S.Ct. 1717, 100 L.Ed.2d 178

(1988); *Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 740 (7th Cir.2004) (collecting authority).

> Liberty Mutual paints a picture of crafty lawyers tending a garden of pre-2005 class actions, in which they plant new claims by amendment so that the 2005 Act never comes into play. As we have already hinted, however, a new claim for relief (a new "cause of action" in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. Removal practice recognizes this point: an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal. 28 U.S.C. § 1446(b). See Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 14C *Federal Practice & Procedure* § 3732 at 311- 48 (3d ed.1998). We imagine, though we need not hold, that a similar approach will apply under the 2005 Act, perhaps modeled on Fed.R.Civ.P. 15(c), which specifies when a claim relates back to the original complaint (and hence is treated as part of the original suit) and when it is sufficiently independent of the original contentions that it must be treated as fresh litigation. See also *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986); *Arendt v. Vetta Sports, Inc.*, 99 F.3d 231 (7th Cir.1996). This possibility does Liberty Mutual no good, however, because the change in class definition does not present a novel claim for relief or add a new party.

Knudsen, Id. at 806-807.

The above comments in *Knudsen* are explained in *Schorsch v. Hewlett-Packard Company*, 2005 WL 1863412 (7th Cir. August 8, 2005), where a motion to remand was granted for the third time by the Seventh Circuit. *Schorsch* appears to involve a second amended complaint in state court that would expand the putative class. The defendant removed under CAFA claiming the new class definition or expansion of the class "commenced a new suit". *Id* at *1.

> *Knudsen* holds that a case is "commenced" when it begins, and that a routine amendment to the complaint does not commence a new suit. Amendments could in principle initiate litigation, however: a defendant added after February 18 could remove because suit *against it* would have been commenced after the effective date, and tacking a wholly distinct claim for relief onto an old suit likewise might commence a new proceeding. Hewlett-Packard (HP) seeks to take advantage of these provisos.

***

HP contends that the new class definition adds both parties (those class members who purchased cartridges but not drum kits) and claims (for HP sells many more ink or toner cartridges than drum kits). The proposed amendment certainly does not add *parties* to the suit: there were and are only two, Schorsch and HP. Class members are represented vicariously but are not litigants themselves. (citations omitted)

***

This is still just one suit, between the original litigants. Litigants and judges regularly modify class definitions; *Knudsen* holds that such changes do not "commence" new suits.

HP insists that *this* change does, because litigation based on EEPROM chips in toner or ink cartridges is so different from litigation based on EEPROM chips in drum kits that the second amended complaint does not relate back to the first. On that view two periods of limitation apply: one (for drum kits) measured from the original complaint in October 2003, and the other (for cartridges) measured from the proposed amendment in May 2005. That would be the sort of addition that, we conjectured in *Knudsen*, might "commence" a new action. But HP does not really believe this. It removed the *whole* suit, not just the claim based on cartridges--though its theory of removal supposes that Schorsch commenced a piece of litigation distinct from the drum-kit claim. Likely the reason HP tried to remove the whole shebang is that drum kits and cartridges are consumables for printers made by one firm and subject to one set of legal rules; it would be silly to handle drum kits in state court and toner or ink cartridges in federal. Yet to say this is effectively to say that there is only one "claim" to begin with.

Although we used Fed.R.Civ.P. 15(c) in *Knudsen* to illustrate the difference between claims that relate back and those that do not (and so may be treated as commenced when added to the suit), state rather than federal practice must supply the rule of decision. Federal law makes the date of "commencement" important, but different legal systems understand that term differently. Federal practice deems a suit "commenced" when the complaint is filed, see Fed.R.Civ.P. 3, but some states may deem it commenced when the filing fee is paid, or when the clerk finds the complaint procedurally sufficient (states may allow clerks to reject papers that are not in proper form, as the Clerk of the Supreme Court does), or when the first (or last) defendant is served with process. Cf. *Pace v. DiGuglielmo,* --- U.S. ----, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (looking to state law to determine when a pleading has been "properly filed" for purposes of a federal time limit). Illinois has a relation-back rule that is functionally identical to Rule 15(c), however, so we need not fret over fine points. See 735 ILCS 5/2- 616(b); see also *Zeb v. Wheeler,* 111 Ill.2d 266, 279-80, 95 Ill.Dec. 478, 489 N.E.2d 1342,

1348-49 (1986) (relying on cases under Rule 15(c) to elucidate the meaning of the state relation-back statute).

> In Illinois, a claim relates back when it arises out of the same transaction or occurrence as the one identified in the original complaint. (citations omitted) An amendment relates back in Illinois when the original complaint "furnished to the defendant all the information necessary ... to prepare a defense to the claim subsequently asserted in the amended complaint." *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill.2d 88, 102, 212 Ill.Dec. 267, 656 N.E.2d 1101, 1107 (1995) (internal quotation marks omitted). The October 2003 complaint did this.

Schorsch, Id. at *1-3.

III. New Developments Since Outline Submitted

Legislative Update: Issues Impacting the IDCA

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Robert M. Kreamer
Executive Director
Iowa Defense Counsel Association Kreamer Law Office
5835 Grand Avenue Suite 104
Des Moines, IA 50312-1437
(515) 271-0608

2005 LEGISLATIVE REPORT

BY

ROBERT M. KREAMER

The 2005 Iowa legislative session was the most difficult and unique session in my 37 years of involvement in the Iowa political process. Not since 1933 had the Iowa voters in a general election elected the identical number of Republicans and Democrats to seats in the Iowa Senate. For several days after the general election, negotiations were conducted between the parties over how the operation and business of the Iowa Senate would be conducted. The final agreement provided that one party would provide the presiding officer of the Senate for one week and during this same week the other party would provide the Senate floor leader with these leadership positions alternating every week between the parties. Furthermore, each Senate committee had a person from each party serving as co-chairs and an equal number of Republicans and Democrats as committee members. Because of this political gridlock in the Iowa Senate, each party leader had a virtual veto over what bills would be considered with the result being that most controversial issues were never given serious consideration. This is demonstrated by the fact that most bills considered by the Iowa Senate were passed unanimously or with little dissent.

The 2004 general election results also failed to provide either political party in the Iowa House of Representatives with a clear mandate. The Republicans controlled the Iowa House of Representatives by the narrowest of possible margins, 51-49. An absent or dissenting member of the Republican House caucus could possibly prevent the passage of legislation or even the adjournment of the House of Representatives.

With this background, it should be readily apparent why this was such a difficult and unique legislative session in 2005 for not only the Iowa Defense Counsel Association but all interest groups supporting controversial legislation. Legislative priorities of the Iowa Defense Counsel Association for 2005 included the following:

1. <u>Comparative Fault Caps:</u>
   The Iowa State Defense Counsel Association opposes the current cap on the ability of a jury to assess fault in actions brought under the Iowa Comparative Fault Act. The Iowa Defense Counsel Association supports the elimination of the 5% cap on the jury's ability to reduce the amount of a plaintiff's recovery when the plaintiff's failure to wear a safety belt or safety harness in violation of Iowa law contributes to the plaintiff's claimed injury or injuries. This issue was contained in House Study Bill 70 and was considered by the House Judiciary Committee but was deferred on when it became clear to the committee chair that, while there were sufficient committee votes for committee

approval, there would not be sufficient support on the House floor for passage of this legislation.

2. Consistent, Fair Interest Rates on Judgments:
The interest rate applied to Worker's Compensation judgments is separate and higher than the interest rate imposed on other judgments. The Iowa Defense Counsel Association supports the elimination of the separate, higher interest rate so that interest on Worker's Compensation judgments would bear the same rate of interest as other judgments in the State of Iowa. This issue was contained in House Study bill 113 and was the subject of three subcommittee meetings of the House Commerce, Regulation and Labor Committee but a vote was never taken.

3. Offer to Confess Judgment:
Iowa law has long recognized the benefits of an Offer to Confess Judgment, statutorily precluding a party who rejects an Offer to Confess Judgment from recovering court costs after the date of the offer if that party fails to recover more than that amount at trial. In addition to court costs, a party who fails to recover more than the amount of the Offer to Confess Judgment at trial should not recover prejudgment interest from the date of the offer. The Iowa Defense Counsel Association in 2004 supported this legislation contained in House File 2396. This legislation was highly controversial and narrowly passed the Iowa Senate and Iowa House of Representatives but was vetoed by Governor Tom Vilsack at the urging of the plaintiff's bar, the Iowa State Bar Association, and numerous labor organizations. This legislation was reintroduced in 2005 as House Study Bill 67 but was not given consideration because of last year's veto and its controversial history in the Iowa Legislature.

4. Equitable Assessment of Court Costs:
The cost of a supersedeas bond required to stay execution on appeal is not currently taxed as court costs to the unsuccessful party. The Iowa Defense Counsel Association supported House Study Bill 281 which would assess the expense of a supersedeas bond required by an Appellee to stay execution as court costs to the losing party unless otherwise ordered by the court. This legislation was drafted late by the Legislative Services Agency and received no consideration by the House Judiciary Committee prior to the legislative funnel deadline.

5. Funding of Iowa's Courts:
The Iowa judicial system had experienced budget cuts of approximately $21 million over the past five years. The

2005 Iowa Legislature provided Iowa courts with an extra $12 million for fiscal year 2006 over the current lean budget of $121 million. This will allow vacancies for magistrates to be filled, plus 15 new magistrates to be named statewide, and will allow the judicial system to return to normal working hours. Much of the $12 million will come from the new law raising the speed limit from 65 to 70 miles per hour on interstate highways outside of cities. With the higher limits, the Legislature raised fines and court costs with courts getting costs in all misdemeanor cases, which have been raised to $30 from $17. The Iowa Defense Counsel Association supported this increased funding for Iowa's judicial system.

There were several legislative issues that the Iowa Defense counsel Association, in conjunction with other interest groups, successfully opposed. These issues opposed in the 2005 legislative session included the following.

1. Private Cause of Action for Certain Consumer Fraud Violations:
   Senate Study Bill 1075 creates a private cause of action to recover actual damages for certain consumer fraud violations, allows temporary and permanent injunctive relief, and provides attorney fees and costs for a prevailing consumer.

2. Cap Awards of Non-economic Damages:
   Senate Study Bill 1118 would cap the award of non-economic damages in all civil cases to an amount not to exceed $250,000 unless there was a finding of actual malice on the part of the defendant.

3. Cap Attorney Fees in Worker's Compensation Cases:
   House Study Bill 116 would cap the maximum amount of an attorney fee in Worker's Compensation cases to 25% of an award or settlement.

It should be noted that all of the above-referenced legislation remains alive and eligible for further debate and consideration in 1006.

While working with such an evenly divided Legislature was difficult and often frustrating, the Iowa Defense Counsel Association did enjoy another successful legislative session in 2005. It did also give me the opportunity to meet and work with newly elected Iowa legislators and educate them on the views and positions of IDCA and to provide answers and information to all legislators so that they might better serve their constituents.

Finally, I want to sincerely thank Michael Thrall, our legislative chair for the past several years, for his constant support, his leadership and organizational ability and most of all his availability - he was always there when needed and I know that he will do an excellent job as IDCA President. Also, thank you very much to you, the members of IDCA, for allowing me the opportunity to represent you at the capitol. Thank you very much!

RMK:cc

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Erickhorn -ch
Maddox
Jochum

HSB 70
JUDICIARY

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON PAULSEN)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act eliminating the limitation on the reduction in damages awarded to plaintiffs who fail to wear a motor vehicle safety belt or safety harness.

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

TLSB 2039HC 81
rh/sh/8

S.F. _____ H.F. _____

Section 1. Section 321.445, subsection 4, paragraph b, subparagraph (2), Code 2005, 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 motor vehicle 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 2039HC 81
rh:rj/sh/8

STRUYK, SH
FREEMAN
PETTENGILL

HSB 113

COMMERCE, REGULATION & LABOR

HOUSE FILE _____

BY (PROPOSED COMMITTEE ON COMMERCE, REGULATION AND LABOR BILL BY CHAIRPERSON JENKINS)

Passed House, Date _____ Passed Senate, Date _____

Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____

Approved _____

A BILL FOR

An Act relating to the payment of interest on certain workers' compensation benefit payments.

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

TLSB 1783YC 81
av/gg/14

S.F. _____ H.F. _____

Section 1. Section 535.3, subsection 1, Code 2005, is amended to read as follows:

1. Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13~~,~~ ~~except for~~. However, interest due pursuant to section 85.30 ~~for which the rate shall be ten percent per year~~ shall accrue from the date each compensation payment is due at a yearly rate equal to the one-year treasury constant maturity published by the federal reserve in the H15 report settled immediately prior to or on July 1 plus two percent. This rate is applicable to all such compensation payments due during each fiscal year beginning on July 1 and ending the following June 30.

Sec. 2. APPLICABILITY DATE. This Act is applicable to compensation payments due for personal injuries arising out of and in the course of employment under chapters 85, 85A, and 85B that occur on or after July 1, 2005.

EXPLANATION

This bill amends Code section 535.3 to provide that the interest rate on overdue payments of weekly workers' compensation benefits pursuant to Code section 85.30 shall accrue from the date each such payment is due at a yearly rate equal to the one-year treasury constant maturity published by the federal reserve in the H15 report settled immediately prior to or on July 1 plus 2 percent. This is the same rate of interest that is allowed on judgments and decrees of courts. Previously, the interest rate for such overdue payments was 10 percent per year.

The bill also provides that the interest rate is applicable to all such compensation payments due during each fiscal year beginning on July 1 and ending the following June 30 for personal injuries arising out of and in the course of employment that occur on or after July 1, 2005.

Anderson - cvr
Paulsen
Swaim

HSB 67
JUDICIARY

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON PAULSEN)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to recovery of prejudgment interest in relation to an offer to confess judgment.

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

TLSB 2040HC 81
rh/cf/24

S.F. _____ H.F. _____

Section 1. NEW SECTION. 677.10A PREJUDGMENT INTEREST.

If any offer to confess judgment is made under this chapter and is not accepted, and a subsequent trial results in a judgment which is less than the offer to confess judgment, prejudgment interest shall not be calculated or be subject to recovery after the date of the offer to confess judgment.

EXPLANATION

This bill limits recovery of prejudgment interest in any pending or proposed action where an offer to confess judgment is made, but is not accepted, and a subsequent trial results in a judgment that is less than the amount in the offer to confess judgment. In such a case, no prejudgment interest is to be calculated or is recoverable after the date of the offer to confess judgment.

HSB 281
JUDICIARY

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON PAULSEN)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to the cost of procuring a supersedeas bond.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 3266HC 81
rh/gg/14

S.F. _____ H.F. _____

Section 1. Section 625A.9, Code 2005, is amended by adding the following new subsection:

NEW SUBSECTION. 4. The amount paid by the judgment debtor to procure a supersedeas bond required by the judgment creditor to stay execution of the judgment shall be taxed as costs to the unsuccessful party unless otherwise ordered by the court.

EXPLANATION

This bill provides that the amount paid by a judgment debtor to procure an appeal bond to prevent the judgment creditor from taking action to collect a money judgment entered against the judgment debtor while the appeal is pending shall be taxed as costs to the losing party unless otherwise ordered by the court.

Zaun co-chair
Warnstadt co-chair
Larson
Hancock

SSB# 1075
Judiciary

SENATE/HOUSE FILE _____
BY (PROPOSED ATTORNEY GENERAL BILL)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act creating a private cause of action for certain consumer fraud violations.

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

TLSB 1153DP 81
rh/gg/14

S.F. _____ H.F. _____

Section 1. NEW SECTION. 714F.1 TITLE.

This chapter shall be known and may be cited as the "Private Remedy for Consumer Fraud Act".

Sec. 2. NEW SECTION. 714F.2 DEFINITIONS.

1. "Advertisement" means the same as defined in section 714.16.

2. "Agricultural merchandise" means merchandise sold to be used in the production of agricultural, horticultural, viticultural, or dairy products; of livestock, wildlife, poultry, bees, or fish, or products thereof; or of any and all products raised or produced on farms.

3. "Consumer" means any of the following:

a. A natural person or the person's legal representative.

b. In connection with the advertisement, sale, lease, or rental of agricultural merchandise or office supplies or services, or the solicitation of contributions for charitable purposes, a partnership, corporation, company, trust, business entity or association, political organization as defined in section 13C.1, religious organization as defined in section 13C.1, public or nonpublic school, college, university, or a fraternal benefit society as defined in section 512B.3.

4. "Consumer merchandise" means merchandise offered for sale, lease, or rental, or sold, leased, or rented, primarily for personal, family, or household purposes, agricultural merchandise, and office supplies and services.

5. "Deception" means the same as defined in section 714.16.

6. "Merchandise" means the same as defined in section 714.16.

7. "Office supplies and services" means any goods, or services incident to the use of such goods, including but not limited to supplies and equipment and promotional advertising, to be used in the operation of any office. "Office supplies and services" does not include goods or services purchased for the purpose of resale.

8. "Person" means the same as defined in section 714.16.

9. "Sale" means any sale or offer for sale of consumer merchandise for cash or credit.

10. "Unfair practice" means the same as defined in section 714.16.

Sec. 3. NEW SECTION. 714F.3 PROHIBITED PRACTICES.

1. A person shall not engage in an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with the intent that others rely upon the concealment, suppression, or omission, in connection with the advertisement, sale, lease, or rental of consumer merchandise or the solicitation of contributions for charitable purposes.

2. A person shall not engage in any practice that is in violation of any of the following:

a. Chapter 126.

b. Section 321.69.

c. Chapter 516D.

d. Chapter 555A.

e. Section 714.16, subsection 2, paragraphs "b" through "n".

f. Chapter 714A.

Sec. 4. NEW SECTION. 714F.4 PRIVATE CAUSE OF ACTION.

1. A consumer who suffers damage or injury as the result of a practice declared to violate this chapter may bring an action at law to recover actual damages. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief.

2. The court shall award to a prevailing consumer the costs of the action and the prevailing consumer's reasonable attorney fees. Reasonable attorney fees shall be determined by the value of the time reasonably expended by the attorney.

3. Any claim under this section shall be required to be

proved by a preponderance of the evidence.

4. Reimbursement awarded to the attorney general pursuant to section 714.16 on behalf of a plaintiff who has filed an action pursuant to this section concerning the same set of facts shall be deducted from any damages awarded to the plaintiff in an action filed under this section.

5. If the finder of fact finds that a practice declared to violate this chapter is willful, in addition to an award of actual damages, punitive damages of up to twice the amount of actual damages shall be awarded to a prevailing plaintiff.

6. This section shall not affect a consumer's right to seek relief under any other theory of law.

Sec. 5. NEW SECTION. 714F.5 CLASS ACTIONS BARRED.

A class action lawsuit alleging violations of this chapter shall not be available. This section shall not affect a consumer's right to bring or participate in a class action lawsuit under any other theory, and shall not affect a right to joinder of claims or parties.

Sec. 6. NEW SECTION. 714F.6 ATTORNEY GENERAL NOTIFICATION.

1. Except for appeals in small claims court described in subsection 2, a party filing a claim, counterclaim, or other pleading alleging a violation under this chapter shall provide a copy of the pleading to the attorney general within seven days following the filing of such pleading and, within seven days following entry of any final judgment in the action, shall provide a copy of the judgment to the attorney general.

2. In an appeal from small claims court to district court involving an issue raised under this chapter, the party filing the notice of appeal shall provide a copy of the notice of appeal, the pleading raising the issue, and the small claims order to the attorney general within seven days of the filing of the notice of appeal from small claims court. Upon application to the court wherein the matter is pending, the attorney general may intervene as a party at any time, or may

be heard at any time. The attorney general's failure to intervene as a party or otherwise participate in the action shall not preclude any later action by the attorney general.

3. The party appealing an order or judgment under this chapter shall provide a copy of the notice of appeal to the attorney general within seven days following the date such notice is filed with the court. Upon application to the appellate court wherein the matter is pending, the attorney general may intervene as a party at any time or may be heard at any time.

4. All copies of petitions, pleadings, judgments, and notices of appeal shall be sent by certified mail to the attorney general and shall be accompanied by a written statement identifying the copied document as pertaining to an action under this chapter. Proof of mailing may be by affidavit or return receipt. Failure to provide the required copies to the attorney general shall not be grounds for dismissal of an action under this section, nor provide a defense to an action under this chapter, but shall be grounds for a subsequent action by the attorney general to vacate or modify the judgment.

EXPLANATION

This bill creates a private remedy for certain consumer fraud Act violations.

The bill creates a private cause of action for consumer fraud violations. The bill provides that a consumer who suffers damage or injury as a result of a prohibited practice declared to violate the bill may bring an action at law to recover actual damages, and may seek court protection from further violations, including temporary and permanent injunctive relief. In addition, a prevailing consumer in such an action may be awarded costs and reasonable attorney fees.

The bill defines a prohibited practice to include an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or

omission of a material fact with the intent that others rely on the concealment, suppression, or omission, in connection with the advertisement, sale, lease, or rental of consumer merchandise or the solicitation of contributions for charitable purposes.

The bill authorizes the attorney general to oversee private consumer fraud actions, including small claims court actions, by requiring a party filing a claim, counterclaim, or other pleading alleging a violation under the bill to provide a copy of the relevant documents, including judgments and notices of appeal, to the attorney general. In addition, the attorney general may intervene as a party in a private consumer fraud action at any time, or may be heard in such an action at any time.

The bill further provides that failure to provide all copies of pleadings, judgments, and notices of appeal to the attorney general shall not be grounds for dismissal and shall not provide a defense to an action under this chapter, but shall be grounds for a subsequent action by the attorney general to vacate or modify the judgment.

McKibben co chair
Dearden co-chair
Seymour
Courtney

SSB# 1118

Business & Labor

SENATE FILE _____
BY (PROPOSED COMMITTEE ON
BUSINESS AND LABOR RELATIONS
BILL BY CO-CHAIRPERSON WIECK)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to awards of noneconomic damages in civil cases.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 1778SC 81
rh/sh/8

S.F. _____ H.F. _____

Section 1. NEW SECTION. 668B.1 CITATION.

This chapter may be cited as the "Noneconomic Damage Awards Act".

Sec. 2. NEW SECTION. 668B.2 DEFINITION.

As used in this chapter, unless the context otherwise requires, "noneconomic damages" means subjective, nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment, mental anguish, emotional pain and suffering, loss of companionship, loss of consortium, and other nonpecuniary damages.

Sec. 3. NEW SECTION. 668B.3 DAMAGE AWARDS.

In any action for damages for injury or death whether based in tort, contract, or otherwise, the injured plaintiff shall be entitled to recover noneconomic damages, but such damages shall not exceed two hundred fifty thousand dollars, except upon a finding of actual malice on the part of the defendant.

Sec. 4. APPLICABILITY. This chapter applies to cases filed on or after July 1, 2005.

EXPLANATION

This bill establishes the noneconomic damage awards Act.

The bill provides that in any action for noneconomic damages for injury or death, whether based in tort, contract, or otherwise, the injured plaintiff shall be entitled to recover noneconomic damages not to exceed $250,000, except that an award of noneconomic damages in such a case may exceed $250,000 upon a finding of actual malice on the part of the defendant. The bill defines "noneconomic damages" to include damages arising from pain, suffering, inconvenience, physical impairment, mental anguish, emotional pain and suffering, loss of companionship, loss of consortium, and other nonmonetary losses.

The bill applies to civil cases filed on or after July 1, 2005.

LSB 1778SC 81
rh/sh/8

HORBACH, CH
STRUYK
KRESSIG

HSB 116

COMMERCE, REGULATION & LABOR

HOUSE FILE _____

BY (PROPOSED COMMITTEE ON COMMERCE, REGULATION AND LABOR BILL BY CHAIRPERSON JENKINS)

Passed House, Date _____ Passed Senate, Date _____

Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____

Approved _____

A BILL FOR

An Act relating to the regulation of attorney fees in workers' compensation cases.

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

TLSB 1785YC 81

av/sh/8

S.F. _____ H.F. _____

Section 1. Section 86.39, Code 2005, is amended to read as follows:

86.39 FEES -- APPROVAL.

1. All fees or claims for legal, medical, hospital, and burial services rendered under this chapter and chapters 85, 85A, 85B, and 87 are subject to the approval of the workers' compensation commissioner. For services rendered in the district court and appellate courts, ~~the attorney's fee is~~ attorney fees are subject to the approval of a judge of the district or appellate court.

2. Attorney fees for services rendered under this chapter and chapters 85, 85A, 85B, and 87 on behalf of an employee shall be limited to the maximum amounts of twenty-five percent of an award or settlement. Attorney fees shall be paid by the employee from the proceeds of an award or settlement. All attorney-client employment contracts for services rendered under this chapter and chapters 85, 85A, 85B, and 87 that are entered into and signed on or after January 1, 2006, shall be subject to the conditions of this subsection.

EXPLANATION

This bill relates to the regulation of attorney fees in workers' compensation cases under Code chapters 85, 85A, 85B, 86, and 87. The bill provides that attorney fees in such cases are limited to the maximum amounts of 25 percent of an award or settlement. The attorney fees are to be paid by the employee from the proceeds of the award or settlement. The provisions of the bill apply to attorney-client employment contracts, for services rendered in workers' compensation cases, that are entered into and signed on or after January 1, 2006.

Recent Developments in Medical Malpractice Litigation

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Christine L. Conover
Simmons Perrine Albright & Ellwood PLC
115 Third Street S.E., Suite 1200
Cedar Rapids, IA 52401-1266
(319) 366-7641

IOWA DEFENSE COUNSEL

ANNUAL MEETING
SEPTEMBER 2005

MEDICAL MALPRACTICE UPDATE

Christine L. Conover
Simmons, Perrine, Albright & Ellwood, P.LC.
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401-1266

CONTINUOUS TREATMENT DOCTRINE / DISCOVERY RULE

Ratcliff v. Graether, 697 N.W. 2d 11((Iowa 2005)

Plaintiff had initial eye surgery on his right eye on April 30, 1996. Plaintiff underwent a second surgery on his right eye on April 9, 1997. Because the procedures were successful, he had surgery on his left eye on April 30, 1997. The plaintiff's vision in his left eye was "clouded" and "terrible," however, compared to his vision in his right eye. Dr. Graether told plaintiff in May 1997 that the left eye may have been over corrected and that a cataract was forming coincidentally to the surgery.

In 1997, Dr. Graether no longer treated patients at his Cedar Falls office. Instead, Dr. Graether moved to the Marshalltown office and Dr. Gothard treated Dr. Graether's patients in Cedar Falls.

On December 23, 1997, plaintiff sought a second opinion and left his visit with Dr. Mauer with the understanding that the April 30, 1997, LASIK procedure caused his vision problems in his left eye. Plaintiff continued to treat with Dr. Mauer from December 1997 through February 2002. He saw Dr. Gothard on November 18, 1998.

Plaintiff filed suit on November 16, 2000. Defendants moved for summary judgment on statute of limitations grounds and plaintiff asserted that the continuous treatment doctrine tolled the statute of limitations.

The Supreme Court agreed with the defendant's position and once again declined to adopt the continuous treatment doctrine. That doctrine, as adopted in other states provides:

> If the treatment by the doctor is a continuing course and the patient's disease or condition is of such a nature as to impose on the doctor a duty continuing treatment and care, the statute does not commence running until treatment by the [doctor] for the particular disease or condition involved has terminated, *unless during the course of treatment the patient learns or should reasonably have learned of the harm, in which case the statute runs from the time of knowledge, actual or constructive.*

Ratcliff, 697 N.W. 2d at 124-125 (quoting *Waldman v. Rohrbaugh*, 241 Md.137, 215 A.2d 825, 827-28 (1966)).

Pursuant to the discovery rule in Iowa Code §614.1(9)(a), the plaintiff was clearly on inquiry notice more than two years prior to when he filed his petition. As a result, the court found that his action was time-barred.

FRAUDULENT CONCEALMENT DOCTRINE

I. *Christy v. Miulli*, 629 N.W.2d 694 (Iowa 2005)

Dr. Miulli, a neurosurgeon, performed a biopsy on the plaintiff's husband's brain on September 21, 1998. During the procedure, the patient developed a brain hemorrhage and subsequently died one week later. Dr. Miulli told the patient that the hemorrhage developed but wrongly told her it occurred away from the biopsy site and perhaps viral encephalitis caused the bleeding. After suit was filed, Dr. Miulli conceded he had performed the biopsy in the wrong location and that it caused the patient's death.

During the spring of 1999, the Mayo Clinic examined the decedent's brain. The pathology report contained no mention of viral encephalitis but this did not raise any question in plaintiff's mind, despite Dr. Miulli's discussion of the possibility of viral encephalitis previously.

In August 1999, an investigator with the Iowa Board of Medical Examiners contacted plaintiff regarding Dr. Miulli's care and treatment. When plaintiff told Dr. Miulli, he responded that the investigation was prompted by a competing neurosurgeon. During the same conversation, he again mentioned the connection between a possible viral condition and brain tumors.

In July 2001, a friend of plaintiff told her an anesthesiologist involved in the biopsy procedure stated that the hemorrhage was related to the biopsy. Plaintiff filed suit on August 1, 2001, against the hospital and Dr. Miulli.

In response to defendant's motion for summary judgment on statute of limitations grounds, plaintiff argued that fraudulent

concealment tolled the statute of limitations. Defendants argued under *Schlote*, that plaintiff has to prove an affirmative action to conceal the injury, not the cause of action. Because plaintiff clearly knew of her husband's death, the fraudulent concealment doctrine did not apply.

The court held that fraudulent concealment did not toll the statute of limitations but is a form of equitable estoppel, precluding a defendant from asserting a statute of limitations defense when it is inequitable to do so. It also abandoned the dicta in *Schlote* requiring concealment of an injury rather than a cause of action.

The court dismissed plaintiff's claims against the hospital because there was no claim of fraudulent concealment as to the hospital. As to the claim against Dr. Miulli, the court held that there was a genuine issue of material fact as to "whether plaintiff had knowledge of facts and circumstances more than two years prior to filing suit that put her on notice of Dr. Miulli's alleged fraud or that made her continued reliance on Dr. Miulli's representations unreasonable."

II. *Schlote v. Dawson*, 676 N.W. 2d 187 (Iowa 2004)

On May 2, 1996, Dr. Dawson told plaintiff that he had cancer of the throat and that his voice box had to be removed. Dr. Dawson did not tell the plaintiff that radiation therapy, rather than surgery, might be an option, nor did he tell plaintiff about a more conservative surgical option. The plaintiff underwent surgery to remove his voice box on May 21, 1996.

In August 1998, plaintiff's daughter prompted plaintiff to begin investigating the propriety of the surgery. On February 27, 2000, following the Iowa Board of Medical Examiners' decision to suspend Dr. Dawson's license for, among other things, excessive surgery, plaintiffs filed suit.

Dr. Dawson moved for summary judgment, arguing the injury was the loss of plaintiff's voice, which he was aware of more than two years before he filed suit. Plaintiffs argued the injury was excessive surgery. Alternatively, plaintiffs argued fraudulent concealment tolled the statute of limitations period.

After lengthy analysis, the court held that the injury for purposes of the statute of limitations was the removal of plaintiff's voice box. The court stated that its holding essentially eliminated the discovery rule for medical malpractice claims as it was previously known, but said this was an issue for the legislature not the courts.

The court further held that the plaintiff must show the defendant physician did some affirmative act to conceal the injury rather than the cause of action. Additionally, plaintiff has to show an independent act of concealment, not just a failure to perform. The court held that the "[f]ailure to make those disclosures as a ground of liability cannot be the basis for fraudulent concealment" or there would be no statute of limitations for a claim of negligent failure to inform a patient.

Justices Cady and Streit dissented with regard to the majority's interpretation of the discovery rule.

STATUTE OF LIMITATIONS FOR PARENTAL CONSORTIUM CLAIMS

Christy v. Miulli, 629 N.W.2d 694 (Iowa 2005)

Plaintiff's children were under the age of 8 when their father died. The court held that Iowa Code section 614.1(9)(b) applies to a minor child's parental consortium claim.

The defendants argued that section 614.1(9)(b) applies only to the minor child's personal injuries, not a consortium claim brought by the executor of an estate based on the rule that requires consortium claims to be brought with the primary injury or death claim unless it is not feasible to join the claims.

The court rejected the defendants' argument to hold that consortium claims are governed by section 614.1(9)(b). It also rejected plaintiff's argument to apply section 614.1(8)(2), which provides that minors will have one year from attainment of majority to commence an action. Sections 614.1(8)(2) and 614.1(9)(b) were enacted at the same time, causing the court to conclude that the legislature intended medical malpractice actions would be governed by section 614.1(9), not section 614.1(8).

LOCALITY RULE

Estate of Hagedorn, 690 N.W.2d 84 (Iowa 2004)

A woman 33 weeks pregnant presented to a local, rural hospital with significant bleeding. A family practice physician suspected a placental abruption that can deprive the fetus of oxygen. The family practice physician notified a surgical team that an emergency c-section may be have to be performed. However, the fetus' condition stabilized and the physician did not actually mobilize the surgical team. Later, the fetus' heart rate dropped precipitously. The surgical team was assembled and the baby was delivered within 30 minutes but died after he was transported to a neonatal unit.

Experts for both plaintiffs and defendants were in disagreement whether a family practice physician in a small rural hospital with limited resources should have assembled the surgical team earlier in order to deliver the baby sooner.

The district court gave the following jury instruction that included the "locality rule":

> A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances. The locality of practice in question is one circumstance to take into consideration but it is not an absolute limit upon the skill required.

The Supreme Court affirmed the use of the instruction, finding that the locality rule was still the law in Iowa and that its use in the instruction was appropriate.

A special concurrence by Justices Wiggins, Lavorato and Streit noted that the uniform jury instruction already included the locality rule by referring to the "degree of skill, care and learning ordinarily possessed and exercised by other physicians *in similar circumstances*."

DESIGNATION OF TREATING PHYSICIAN AS EXPERT WITNESS PURSUANT TO IOWA CODE §668.11

Hansen v. Central Iowa Hospital Corp, 686 N.W. 2d 476 (Iowa 2004).

Plaintiff filed a medical malpractice case against the hospital alleging she fell due to negligent care from the hospital personnel and sustained damages. In the expert designation pursuant to Iowa Code section 668.11, plaintiffs did not designate the plaintiff's treating physician, Dr. Pollack, as an expert. At trial, plaintiffs attempted to use Dr. Pollack as an expert with respect to causation. The district court sustained the hospital's motion to strike Dr. Pollack's testimony. The jury found that the hospital was negligent but that the negligence was not a proximate cause of plaintiff's damages.

On further review, the Supreme Court held that the treating physician's opinions on causation were formed during his care and treatment. Thus, the treating physician was not required to be certified pursuant to Iowa Code §668.11.

The court also noted that the treating physician's statement that there was a "probability" of a causal relationship was sufficient to generate a jury question on causation, even though the physician did not use the phrase "to a reasonable degree of medical certainty."

VICARIOUS LIABILITY

Wolbers v. Finley Hospital, 673 N.W. 2d 728 (Iowa 2003)

The decedent underwent a carotid endarterectomy and developed respiratory difficulties after surgery. The nursing staff and the hospital's emergency room physician attempted to treat the breathing complications, but Mr. Wolbers subsequently died despite the hospital's efforts.

The court held that Mr. Wolbers' history of tobacco use prior to his surgery could not be the basis of the comparative fault claim, applying the standards from *DeMoss v. Hamilton*, 644 N.W. 2d 302, 305 (Iowa 2002).

The court also held that the hospital was vicariously liable for any negligent acts of the emergency room physician because the physician was an employee of the hospital. The hospital had argued that because it had no right to control the medical decisions of the emergency room physician, it should not be liable for any negligent acts by the physician. The court implied that it would also hold the hospital vicariously liable even if the emergency room physician was an independent contractor rather than an employee of the hospital.

LOST CHANCE FOR SURVIVAL

Mead v. Adrian, 670 N.W. 2d 174 (Iowa 2003)

In a wrongful death claim, the plaintiff may recover damages for lost chance of survival as an alternative to the traditional wrongful death recovery. As the court explained, "a decedent with a ten percent chance of survival is entitled to recover ten percent of the amount of damages that could have been awarded if the defendant's negligence had proximately caused the death."

The court held that the damages subject to the lost chance percentage include the present value of the estate that the decedent would reasonably be expected to have accumulated, the interest on funeral expenses and the value of services and support recoverable by a beneficiary under Iowa Code section 613.15. The court specifically excluded damages for pre-death pain and suffering, loss of full mind and body and increased medical expenses. These damages can be recovered in full as long as the plaintiff has proven that they are proximately caused by the defendant's negligence.

Justice Cady filed a special concurrence.

The Practical Impact of the New Model Rules

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Hon. David Wiggins
Paul Weick
Charles Harrington
Iris Muchmore

The Practical Impact of the New Model Rules

Presented By

Charles Harrington

Iris Muchmore

Paul Wieck II

David Wiggins

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I. EFFECTIVE DATE OF THE CHANGES

A. Regarding the prospective and retrospective operation of the rules, Iowa Court 35.24 provides:

> These rules shall have prospective and retrospective application to all alleged violations, complaints, hearings, and dispositions thereof on which a hearing has not actually been commenced before the grievance commission prior to the effective date of these rules.

B. Regarding the processing of complaints the supreme court issued the following order on April 20, 2005:

> Effective July 1, 2005, ... All ethics complaints that were filed with, and are pending before, local bar associations or the Prosecutorial Standards and Conduct Committee of the Iowa County Attorneys Association on July 1, 2005, shall be immediately forwarded by those organizations to the Iowa Supreme Court Attorney Disciplinary Board for such action as the board directs. *See* Iowa Ct. R. 35.24 (addressing the prospective and retroactive application of the rules).

II. SCOPE

A. [19] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

B. [20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are

not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

C. [21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

III. ADVISORY OPINIONS

On April 21, 2005 the supreme court issued the following resolution

> The court, meeting en banc in administrative session at Des Moines, Iowa, on Thursday, April 21, 2005, upon a motion made and seconded, unanimously adopts the following resolution:
>
> For many years, lawyers and the public have benefited from the efforts of the Iowa Supreme Court Board of Professional Ethics and Conduct in issuing formal advisory opinions as to the propriety under the Iowa Code of Professional Responsibility for Lawyers of proposed actions by lawyers licensed in Iowa. Effective July 1, 2005, this court has adopted the Iowa Rules of Professional Conduct. Simultaneously, the court has amended chapter 34 of the Iowa Court Rules to eliminate the Board's responsibility to issue formal advisory opinions.
>
> The Iowa State Bar Association has offered to undertake the issuance of advisory opinions and practice guidelines under the Iowa Rules of Professional Conduct in a manner similar to its activities regarding the uniform jury instructions. The Iowa Supreme Court welcomes the assistance of the Bar Association to aid Iowa lawyers in their efforts to practice law in accordance with our new rules of professional conduct.

Advisory opinions and practice guidelines issued by the Iowa State Bar Association do not have the force of law and are not binding on the court, as Iowa law places sole responsibility for the regulation of the practice of law in the supreme court. Nonetheless, the court deeply appreciates this newest contribution of the Iowa State Bar Association. Iowa lawyers and the public will benefit from the Bar Association's work in issuing advisory opinions and practice guidelines, and the court commends the Iowa State Bar Association for its initiative and leadership in undertaking this important task.

IV. LOCAL BARS

Rule 34.8 Board actions upon receipt of response.

34.8(1) Upon receipt of a response, the board shall do one of the following:

. . .

c. Arrange for investigation of the complaint either by the board's counsel or a local bar association as the chair, or the chair's designee, deems appropriate.

V. IMPAIRED ATTORNEYS

Rule 34.12 Order for mental or physical examination or treatment

34.12(1) *Order requiring examination or treatment.* An attorney who is licensed to practice law in the state of Iowa is, as a condition of licensure, under a duty to submit to a mental or physical examination or subsequent treatment as ordered by the Iowa Supreme Court Attorney Disciplinary Board. The board may order the examination or treatment based upon a showing of probable cause to believe the attorney is suffering from a condition that currently impairs the attorney's ability to discharge professional duties. The board may order that the examination or treatment be at the attorney's expense.

34.12(2) *Show cause hearing.* Before the board may order an attorney to submit to examination or treatment, it shall schedule a hearing to permit the attorney to show cause why the order should not be entered. At least three members of the board shall participate in the hearing. At the hearing, the board's staff counsel shall first present evidence of probable cause supporting the need for evaluation or treatment. The attorney may then respond to the board's showing and rebut the board's claim that the evaluation or

treatment is necessary. The hearing shall be informal and rules of evidence shall not be strictly applied. Following the hearing, the board, by majority vote, shall either dismiss the matter or enter an order requiring the examination or treatment.

34.12(3) *Content of order.* The board's order for mental or physical examination or treatment shall include all of the following terms:

a. A description of the type of examination or treatment to which the attorney must submit.

b. The name and address of the examiner or treatment facility that the board has identified to perform the examination or provide the treatment.

c. The time period in which the attorney must schedule the examination or enter treatment.

d. The amount of time in which the attorney is required to complete the examination or treatment.

e. A requirement that the attorney cause a report or reports of the examination or treatment results to be provided to the board within a specified period of time.

f. A requirement that the attorney communicate with the board regarding the status of the examination or treatment.

g. A provision allowing the attorney to request additional time to schedule or complete the examination or to request that the board approve an alternative examiner or treatment facility. The board shall, in its sole discretion, determine whether to grant such a request.

34.12(4) *Review.* An attorney who disagrees with the board's order may seek review from the supreme court. The attorney may do so by filing nine copies of a petition for review with the clerk of the supreme court and serving one copy of the petition on the board within seven days after receipt of the board's order. The board may file nine copies and serve one copy of a response to the petition within seven days after service of the petition. The matter shall be promptly set for hearing before one or more justices of the supreme court. The board's order is stayed upon the filing of the petition for review.

34.12(5) *Hearing.* At the hearing on the petition, the board shall present evidence of probable cause supporting its order and the necessity for the evaluation or treatment. The attorney may then respond to the board's showing and rebut the board's claim that

the evaluation or treatment is necessary. The hearing shall be informal and rules of evidence shall not be strictly applied. Following the hearing, the court may affirm, vacate, or modify the board's order or may enter such order as the circumstances warrant.

34.12(6) *Failure to submit.* The failure of an attorney to submit to the evaluation or treatment ordered by the board under this rule may be grounds for discipline through the normal disciplinary process.

34.12(7) *"Condition."* For purposes of this rule, "condition" means any physiological, mental or psychological condition, impairment or disorder, including drug or alcohol addiction or abuse.

34.12(8) *Confidentiality.* All records, papers, proceedings, meetings, and hearings filed or conducted under this rule shall be confidential, unless otherwise ordered by the supreme court

VI. PROCEDURES ON DEFAULT

Rule 34.7 Failure to respond—notice—effect

34.7(1) *Failure to respond—separate ethical violation.* If after 20 days no response has been received, the respondent shall be notified by restricted certified mail that unless a response is made within 10 days from receipt of notice, the board may file a complaint with the Grievance Commission of the Supreme Court of Iowa for failure to respond, and concerning all or any portion of the matter about which the original complaint was made.

34.7(2) *Enlargement of time to respond.* The board may grant an enlargement of time to respond under rule 34.6 or 34.7(1) for good cause shown.

34.7(3) *Failure to respond—temporary suspension.* If a response is not provided within 10 days of receipt of the notice issued pursuant to rule 34.7(1) or within the time allowed under rule 34.7(2), the board shall certify the respondent's failure to respond to the clerk of the supreme court.

a. Upon receipt of the board's certificate, the clerk shall issue a notice to the attorney that the attorney's license to practice law will be temporarily suspended unless the attorney causes the board to file a withdrawal of the certificate within 20 days of the date of issuance of the clerk's notice.

b. If the attorney responds to the complaint within the 20-day period, the board shall immediately withdraw the certificate and no suspension shall occur.

c. If the board has not withdrawn the certificate and the 20-day period expires, the court shall enter an order temporarily suspending the attorney's license to practice law in the state of Iowa.

d. If the attorney responds to the complaint after a temporary suspension order is entered, the board shall, within 5 days of receiving the response, either withdraw the certificate or file with the supreme court a report indicating that the attorney has responded, but stating cause why the attorney's license should not be reinstated and the suspension should be continued under the provisions of Iowa Ct. R. 35.4, 35.14, or 35.16.

e. If the board seeks to continue the suspension under the provisions of Iowa Ct. R. 35.4, 35.14, or 35.16, the supreme court shall either reinstate the attorney or enter an appropriate order under the applicable rule.

f. If the board files a withdrawal of the certificate after temporary suspension of the attorney's license, the supreme court shall immediately reinstate the attorney's license to practice law if the attorney is otherwise eligible under the rules of the court.

g. During the initial 30 days of a temporary suspension under this rule, the attorney shall give the notice required by Iowa Ct. R. 35.21 to those clients whose interests may be adversely affected by the attorney's suspension.

h. When the suspension period under this rule exceeds 30 days, the attorney shall comply with the requirements of Iowa Ct. R. 35.21 as to all clients.

VII. DEFERRAL OF DISCIPLINE

Rule 34.13 Deferral of further proceedings

34.13(1) *Deferral.* With the agreement of the board's administrator and the attorney, the board may determine to defer further proceedings pending the attorney's compliance with conditions imposed by the board for supervision of the attorney for a specified period of time not to exceed one year unless extended by the board prior to the conclusion of the specified period.

Proceedings may not be deferred under any of the following circumstances:

a. The conduct under investigation involves misappropriation of funds or property of a client or a third party.

b. The conduct under investigation involves a criminal act that reflects adversely on the attorney's honesty, trustworthiness, or fitness as a lawyer in other respects.

c. The conduct under investigation resulted in or is likely to result in actual prejudice (loss of money, legal rights or valuable property rights) to a client or other person, unless restitution is made a condition of deferral.

d. The attorney has previously been disciplined or has been placed under supervision as provided in this rule.

e. The attorney has failed to respond to the board's notices of complaint concerning the conduct under investigation.

34.13(2) *Conditions.* In imposing such conditions, the board shall take into consideration the nature and circumstances of the conduct under investigation by the board and the history, character and condition of the attorney. The conditions may include, but are not limited to, the following:

a. Periodic reports to the diversion coordinator and the board's administrator.

b. Supervision of the attorney's practice or accounting procedures.

c. Satisfactory completion of a course of study.

d. Successful completion of the Multistate Professional Responsibility Examination.

e. Compliance with the provisions of the Iowa Rules of Professional Conduct.

f. Restitution.

g. Psychological counseling or treatment.

h. Substance abuse or addiction counseling or treatment.

i. Abstinence from alcohol or drugs.

j. Cooperation with the Iowa Lawyers Assistance Program.

k. Fee arbitration.

34.13(3) *Affidavit.* Prior to the board's deferral of further proceedings, the attorney shall execute an affidavit setting forth all of the following:

a. An admission by the attorney of the conduct under investigation by the board.

b. The conditions to be imposed by the board for supervision of the attorney, including the period of supervision.

c. The attorney's agreement to the conditions to be imposed.

d. An acknowledgement that the attorney understands that, should the attorney fail to comply with the conditions imposed by the board, a formal complaint may be filed with the grievance commission, both for the matters raised in the original complaint to the board and for the attorney's failure to cooperate with the conditions of supervision.

e. A statement that, if the attorney fails to cooperate with the conditions of supervision, the admissions by the attorney with respect to the attorney's conduct may be introduced as evidence in any subsequent proceedings before the grievance commission.

f. An acknowledgement that the attorney joins in the board's deferral determination freely and voluntarily and understands the nature and consequences of the board's action.

34.13(4) *Supervision.* The diversion coordinator shall be responsible for supervising the attorney's compliance with the conditions imposed by the board. Where appropriate, the diversion coordinator may recommend to the board modifications of the conditions and shall report to the board the attorney's failure to comply with the conditions or to cooperate with the diversion coordinator.

34.13(5) *Compliance.* Upon the attorney's successful compliance with the conditions imposed by the board, the board shall dismiss or close the investigations pending before it at the time it determined to defer further proceedings. The attorney will not be considered to have been disciplined, but the attorney's admission of misconduct may be considered in imposing sanctions in a

subsequent disciplinary matter not arising out of the same conduct.

VIII. SUPREME COURT JURISDICTION OVER REPRIMANDS

Rule 35.3 Reprimand. In the event an attorney is reprimanded by the board, a copy of the reprimand shall be filed with the clerk of the grievance commission who shall cause a copy of the reprimand to be served on the attorney by personal service in the manner of an original notice in civil suits or by restricted certified mail, with a notice attached stating that the attorney has 30 days from the date of completed service to file exceptions to the reprimand with the clerk of the grievance commission. Service shall be deemed complete on the date of personal service or the date shown by the postal receipt of delivery of the notice to the attorney. If the attorney fails to file an exception, such failure shall constitute a waiver of any further proceedings and a consent that the reprimand be final and public. In that event, the clerk of the grievance commission shall cause a copy of the reprimand to be forwarded to the clerk of the supreme court, together with proof of service of the reprimand upon the attorney and a statement that no exceptions were filed within the time prescribed. The supreme court shall then include the reprimand in the records of the court as a public document unless the court remands the matter to the board for consideration of another disposition. In the event, however, the attorney concerned files a timely exception to the reprimand, no report of the reprimand shall be made to the clerk of the supreme court and the reprimand shall be stricken from the records. The board may proceed further by filing a complaint against such attorney before the grievance commission. When an exception to a reprimand has been filed, such reprimand shall not be admissible in evidence in any hearing before the grievance commission.

IX. CONFLICTS

Rule 32:1.7: Conflict of interest: current clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) In no event shall a lawyer represent both parties in dissolution of marriage proceedings.

Rule 32:1.8: Conflict of interest: current clients: specific rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related

persons include a spouse, child, sibling, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(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 32:1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the client-lawyer relationship. Even in these provisionally exempt relationships, the lawyer should strictly scrutinize the lawyer's behavior for any conflicts of interest to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(l) A lawyer related to another lawyer shall not represent a client whose interests are directly adverse to a person whom the lawyer knows is represented by the related lawyer except upon the client's informed consent, confirmed in a writing signed by the client. Even if the client's interests do not appear to be directly adverse, the lawyer should not undertake the representation of a client if there is a significant risk that the related lawyer's involvement will interfere with the lawyer's loyalty and exercise of independent judgment, or will create a significant risk that client confidences will be revealed. For purposes of this paragraph, "related lawyer" includes a parent, child, sibling, spouse, cohabiting partner, or lawyer related in any other familial or romantic capacity.

Rule 32:1.9: Duties to former clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person, and

(2) about whom the lawyer had acquired information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Rule 32:1.10: Imputation of conflicts of interest: general rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 32:1.7 or 32:1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 32:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 32:1.11.

Rule 32:1.11: Special conflicts of interest for former and current government officers and employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

> (1) is subject to rule 32:1.9(c); and
>
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to rules 32:1.7 and 32:1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by rule 32:1.12(b) and subject to the conditions stated in rule 32:1.12(b).

(e) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(f) Prosecutors for the state or county shall not engage in the defense of an accused in any criminal matter during the time they are engaged in such public responsibilities. However, this paragraph does not apply to a lawyer not regularly employed as a prosecutor for the state or county who serves as a special prosecutor for a specific criminal case, provided that the employment does not create a conflict of interest or the lawyer complies with the requirements of rule 32:1.7(b).

Rule 32:1.12: Former judge, arbitrator, mediator, or other third-party neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an

arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the law clerk is participating personally and substantially, but only after the law clerk has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

X. WRITTEN FEE AGREEMENTS

Rule 32:1.5: Fees

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

XI. CONTINGENT FEES

Rule 32:1.5: Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state

the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 32:1.8: Conflict of interest: current clients: specific rules

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

XII. TRUST ACCOUNTS

A. Model Code Provisions

Rule 32:1.15: Safekeeping property

(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. Funds shall be kept in a separate account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) 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.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All client trust accounts shall be governed by chapter 45 of the Iowa Court Rules.

B. Rule 45 Provisions

Rule 45.1 Requirement for client trust account

Funds a lawyer receives from clients or third persons for matters arising out of the practice of law in Iowa shall be deposited in one or more identifiable interest-bearing trust accounts located in Iowa. The trust account shall be clearly designated as "Trust Account." No funds belonging to the lawyer or law firm may be deposited in this account except: 1. Funds reasonably sufficient to pay or avoid imposition of fees and charges that are a lawyer's or law firm's responsibility, including fees and charges that are not "allowable monthly service charges" under the definition in rule 45.5, may be deposited in this account; or 2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited in this account, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. Other property of clients or third persons shall be identified as such and appropriately safeguarded.

Rule 45.2 Action required upon receiving funds

45.2(1) *Authority to endorse or sign client's name.* Upon receipt of funds or other property in which a client or third person has an interest, a lawyer shall not endorse or sign the client's name on any check, draft, security, or evidence of encumbrance or transfer of ownership of realty or personalty, or any other

document without the client's prior express authority. A lawyer signing an instrument in a representative capacity shall so indicate by initials or signature.

45.2(2) *Maintaining records, providing accounting, and returning funds or property.* A lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the lawyer's possession and regularly account to the client for them. Except as stated in this chapter or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and shall promptly render a full accounting regarding such property. Books and records relating to funds or property of clients shall be preserved for at least six years after completion of the employment to which they relate.

Rule 45.3 Type of accounts and institutions where trust accounts must be established

Each trust account referred to in rule 45.1 shall be an interest-bearing account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company selected by the law firm or lawyer in the exercise of ordinary prudence. The financial institution must be authorized by federal or state law to do business in Iowa and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or the Federal Savings and Loan Insurance Corporation. Interest-bearing trust funds shall be placed in accounts from which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to observe by law or regulation.

Rule 45.4 Pooled interest-bearing trust account

45.4(1) *Deposits of nominal or short-term funds.* A lawyer who receives a client's or third person's funds shall maintain a pooled interest-bearing trust account for deposits of funds that are nominal in amount or reasonably expected to be held for a short period of time. A lawyer shall inform the client or third person that the interest accruing on this account, net of any allowable monthly service charges, will be paid to the Lawyer Trust Account Commission established by the supreme court.

45.4(2) *Exceptions to using pooled interest-bearing trust accounts.* All client or third person funds shall be deposited in an account specified in rule 45.4(1) unless they are deposited in:

a. A separate interest-bearing trust account for the particular third person, client, or client's matter on which the interest, net of any transaction costs, will be paid to the client or third person; or

b. A pooled interest-bearing trust account with subaccountings that will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client or third person.

45.4(3) *Accounts generating positive net earnings.* If the client's or the third person's funds could generate positive net earnings for the client or third person, the lawyer shall deposit the funds in an account described in rule 45.4(2). In determining whether the funds would generate positive net earnings, the lawyer shall consider the following factors:

a. The amount of the funds to be deposited;

b. The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c. The rates of interest or yield at the financial institution in which the funds are to be deposited;

d. The cost of establishing and administering the account, including service charges, the cost of the lawyer's services, and the cost of preparing any tax reports required for interest accruing to a client's benefit;

e. The capability of financial institutions described in rule 45.3 to calculate and pay interest to individual clients; and

f. Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

45.4(4) *Directions to depository institutions.* As to accounts created under rule 45.4(1), a lawyer or law firm shall direct the depository institution:

a. To remit interest or dividends, net of any allowable monthly service charges, as computed in accordance with the depository institution's standard accounting practice, at least quarterly, to the Lawyer Trust Account Commission;

b. To transmit with each remittance to the Lawyer Trust Account Commission a copy of the depositor's statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the amount of allowable monthly service charges deducted, if any, and the account balance(s) for the period covered by the report; and

c. To report to the Client Security Commission in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds.

In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors. In the case of instruments that are honored when presented against insufficient funds, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, and the amount of overdraft. If an instrument presented against insufficient funds is not honored, the report shall be made simultaneously with, and within the time provided by law for, any notice of dishonor. If the instrument is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds

Rule 45.5 Definition of "allowable monthly service charges"

For purposes of this chapter, "allowable monthly service charges" means the monthly fee customarily assessed by the institution against a depositor solely for the privilege of maintaining the type of account involved. Fees or charges assessed for transactions involving the account, such as fees for wire transfers, stop payment orders, or check printing, are a lawyer's or law firm's responsibility and may not be paid or deducted from interest or dividends otherwise payable to the Lawyer Trust Account Commission.

Rule 45.6 Lawyer certification

Every lawyer required to have a client trust account shall certify annually, in such form as the supreme court may prescribe, that the lawyer or the law firm maintains, on a current basis, records required by Iowa R. of Prof'l Conduct 32:1.15(a).

Rule 45.7 Advance fee and expense payments

45.7(1) *Definition of advance fee payments.* Advance fee payments are payments for contemplated services that are made to the lawyer prior to the lawyer's having earned the fee.

45.7(2) *Definition of advance expense payments.* Advance expense payments are payments for contemplated expenses in connection with the lawyer's services that are made to the lawyer prior to the incurrence of the expense.

45.7(3) *Deposit and withdrawal.* A lawyer must deposit advance fee and expense payments from a client into the trust account and may withdraw such payments only as the fee is earned or the expense is incurred.

45.7(4) *Notification upon withdrawal of fee or expense.* A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The attorney must transmit such notice no later than the date of the withdrawal.

45.7(5) *When refundable.* Notwithstanding any contrary agreement between the lawyer and client, advance fee and expense payments are refundable to the client if the fee is not earned or the expense is not incurred.

Rule 45.8 General retainer

45.8(1) *Definition.* A general retainer is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not a payment for the performance of services and is earned by the lawyer when paid.

45.8(2) *Deposit.* Because a general retainer is earned by the lawyer when paid, the retainer should not be deposited in the trust account.

Rule 45.9 Special retainer

45.9(1) *Definition.* A special retainer is a fee that is charged for the performance of contemplated services rather than for the lawyer's availability. Such a fee is paid in advance of performance of those services.

45.9(2) *Prohibition.* A lawyer may not charge a nonrefundable special retainer or withdraw unearned fees.

Rule 45.10 Flat fee

45.10(1) *Definition.* A flat fee is one that embraces all services that a lawyer is to perform, whether the work be relatively simple or complex.

45.10(2) *When deposit required.* If the client makes an advance payment of a flat fee prior to performance of the services, the lawyer must deposit the fee into the trust account.

45.10(3) *Withdrawal of flat fee.* A lawyer and client may agree as to when, how, and in what proportion the lawyer may withdraw funds from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees.

XIII. CONFIDENTIALITY

Rule 32:1.6: Confidentiality of information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

Rule 32:1.13: Organization as client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not rule 32:1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that the lawyer has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 32:1.7. If the organization's consent to the dual representation is required by rule 32:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

XIV. COMMUNICATION WITH CLIENTS

Rule 32:1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 32:1.0(e), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Iowa Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

XV. MULTI-JURISDICTIONAL PRACTICE

Rule 32:5.5: Unauthorized practice of law; multijurisdictional practice of law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

XVI. HOUSE COUNSEL

Rule 31.16 Registration of house counsel

31.16(1) *Who must register.* Any person who is not admitted to practice law in the state of Iowa, but who is admitted to practice law in any other United States jurisdiction, and who maintains an office or a systematic and continuous presence in this state for the practice of law as house counsel for a corporation, association, or other business, educational, or governmental entity engaged in business in Iowa must register and will then be allowed to practice law in this state without examination or admission to the Iowa bar. For purposes of this rule, "United States jurisdiction" includes the District of Columbia and any state, territory, or commonwealth of the United States.

31.16(2) *Procedure for registering.* A lawyer applying for registration under this rule shall submit an affidavit to the clerk of the supreme court certifying that:

a. The applicant has been lawfully admitted to practice and is a lawyer in good standing in another United States jurisdiction;

b. The applicant has not been disbarred or suspended from practice in any jurisdiction and has never been convicted of a felony;

c. While serving as counsel, the applicant will perform legal services solely for a corporation, association, or other business, educational, or governmental entity, including its subsidiaries and affiliates;

d. While serving as counsel, the applicant will not provide personal legal services to the employer's officers or employees; and

e. Said corporation, association, or other business, educational, or governmental entity is not engaged in the practice of law or provision of legal services.

31.16(3) *Requirements for registration.* Prior to being registered to practice in Iowa, the applicant must:

a. Pay a $200 registration fee to the Client Security Commission; and

b. Submit the following documents to the clerk of the supreme court:

(1) Proof of admission in jurisdictions of licensure;

(2) A certificate of good standing from the highest court of each jurisdiction of admission;

(3) A certificate from the disciplinary authority of each jurisdiction of admission stating that the applicant has not been suspended, disbarred, or disciplined and that no charges of professional misconduct are pending; or that identifies any suspensions, disbarments, or other disciplinary sanctions that have been imposed upon the applicant, and any pending charges, complaints, or grievances;

(4) An affidavit by the corporation, association, or other business, educational, or governmental entity for which the applicant intends to provide services, certifying that the applicant will be employed by the entity, the applicant is eligible for practice under this rule, and the entity will promptly notify the Client Security Commission of the termination of the applicant's employment; and

(5) Any other document required to be submitted by the supreme court.

31.16(4) *Court's discretion to approve registration.* The supreme court shall have the discretion to grant or deny an application or to revoke a registration. The court may procure the character investigation services of the National Conference of Bar Examiners, at the applicant's expense, in any matter in which substantial questions regarding the applicant's character or fitness to practice

law are implicated. The clerk of the supreme court shall issue a certificate of registration upon the supreme court's approval of the application.

31.16(5) *Discipline in other jurisdictions— notification.* A lawyer who is practicing law in Iowa under this registration provision must immediately inform the Iowa Supreme Court Attorney Disciplinary Board in writing of any disciplinary action commenced or any discipline or sanction imposed against the lawyer in any other jurisdiction.

31.16(6) *Limitation of activities.* Registration under this rule does not authorize a lawyer to provide services to the lawyer's employer for which pro hac vice admission is required. A lawyer registered under this rule must therefore comply with the requirements for pro hac vice admission under rule 31.14 for any appearances before a court or an administrative agency.

31.16(7) *Amnesty period.* Any lawyer not licensed in this state who is employed as house counsel in Iowa on the effective date of this rule, July 1, 2005, shall not be deemed to have been engaged in the unauthorized practice of law in Iowa prior to registration under this rule if application for registration is made within 12 months of that date.

31.16(8) *Practice pending registration.* Any lawyer who becomes employed as house counsel in Iowa after the effective date of this rule, July 1, 2005, shall not be deemed to have engaged in the unauthorized practice of law in Iowa prior to registration under this rule if application for registration is made within 90 days of the commencement of such employment.

31.16(9) *Annual statement and fee.* Any lawyer registered under this rule shall file an annual statement and pay the annual disciplinary fee as required by Iowa Ct. Rs. 39.5 and 39.8.

31.16(10) *Duration of registration—credit toward admission on motion.* A lawyer may practice law in Iowa under this registration provision for a period of up to five years. If the lawyer intends to continue practicing law in Iowa, the lawyer must, prior to the expiration of the fiveyear period, apply for admission on motion. *See* Iowa Ct. R. 31.12. The period of time the lawyer practices law in Iowa under the registration provisions of this rule may be used to satisfy the duration-of-practice requirement under rule 31.12(2)(*b*).

31.16(11) *Termination of employment.* When a lawyer ceases to be employed as house counsel with the corporation, association, or other business, educational, or governmental entity submitting the

affidavit under rule 31.16(3)(*b*)(4), the lawyer's authorization to perform legal services under this rule terminates unless the lawyer complies with the requirements of rule 31.16(12). When the registered employment ceases, the employer and the lawyer shall immediately notify the Client Security Commission in writing that the lawyer's employment has ended.

31.16(12) *Change of employers.* If, within 90 days of ceasing to be employed by the employer submitting the affidavit under rule 31.16(3)(*b*)(4), a lawyer becomes employed by another employer and such employment meets all requirements of this rule, the lawyer's registration shall remain in effect, if within said 90-day period there is filed with the Client Security Commission:

a. Written notification by the lawyer indicating the date on which the prior employment terminated, the date on which the new employment commenced, and the name of the new employer;

b. Certification by the former employer that the termination of the employment was not based upon the lawyer's character or fitness or the lawyer's failure to comply with this rule; and

c. The affidavit specified in rule 31.16(3)(*b*)(4) duly executed by the new employer.

31.16(13) *Discipline.* A lawyer registered under this rule shall be subject to the disciplinary authority of this jurisdiction to the same extent as lawyers licensed to practice law in this state.

XVII. BIBLIOGRAPHY

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B. Available at http://www.aspenpublishers.com from Aspen Publishers.

Gillers, Stephen and Simon, Roy D. Jr., *Regulation of Lawyers: Statutes and Standards*, Aspen Publishers 2005.

C. Available at http://www.judicial.state.ia.us/regs/csc.asp from the Client Security Commission.

Wieck II, Paul H., Lawyer Trust Accounts in Iowa, August 2005. (copy attached)

Lawyer Trust Accounts in Iowa
As Revised August, 2005

Paul H. Wieck II
Client Security Commission

Establishing an Account

Need for a Trust Account:

Not every lawyer needs a trust account. The key issue is whether you accept funds of the kind that must be placed in a trust account. (See the discussion regarding required trust account deposits under "Operating the Account," below.) Government attorneys or corporate counsel generally will not need to maintain a trust account. Most private practitioners will need to maintain a trust account. Rules 32:1.15 and 45.1.

What Kind of Trust Account is Required:

For most client funds, the appropriate account is the pooled, or IOLTA account, in which funds belonging to multiple clients or third parties are pooled in a single account. Interest earned on a pooled trust account (net of customary service charges for that type of account) is paid by the depository institution to the Lawyer Trust Account Commission (LTAC). LTAC distributes grants annually as approved by the Iowa Supreme Court for legal services for low-income persons and law-related education. Rule 45.4(1).

Court rules also authorize establishment of a separate interest-bearing account for an individual client or third party. When a separate interest-bearing account is established for an individual client or third party, the interest earned on the account (net of account costs) is payable to the client or third party for whom the account was established. Rule 45.4(2)(a).

Court rules also authorize establishing a pooled trust account with subaccounting, wherein the interest owed to each individual client is computed and paid, net of pro rata account costs, to the individual client. These accounts seldom are used due to the administrative overhead associated with interest computation and the generally insignificant amount of interest actually payable to any particular client after deduction of costs. Rule 45.4(2)(b).

In determining whether to deposit client or third-party funds into an IOLTA account or a separate account for the individual client, the lawyer must assess whether the funds to be invested could produce a positive net return for the client. Note that the key phrase "significant net return" no longer appears in the rule. The lawyer should consider the following factors:

> The amount of the funds to be deposited
>
> The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
>
> The rates of interest or yield at the financial institution in which the funds are to be deposited;
>
> The cost of establishing and administering the account, including service charges, and the cost or preparing any tax reports required for interest accruing to a client's benefit;
>
> The depository institution's ability to calculate and pay interest to individual clients;
>
> Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

Rule 45.4(3).

Tip: This is not a one-time analysis. Every client balance in a pooled trust account should be considered in light of these factors on a recurring basis. An excellent time to consider this issue is incident to the monthly reconciliation of client balances with the trust account checkbook and bank statement.

What Institutions May Serve as Trust Account Depositories:

A bank, savings bank, trust company, savings and loan association, credit union, or federally regulated investment company may serve as a depository institution, provided the institution is authorized to do business in Iowa, and is FDIC/NCUSIF/FSLIC insured.
Rule 45.3.

The trust account must be located in Iowa. Rule 45.1.

Other factors the attorney should consider when selecting a depository institution:

Institutional stability
Convenience
Bank interest rate and fees
Return of cancelled checks or facsimiles thereof

Nature of the Account to be Established:

The account agreement must allow withdrawals and transfers without delay whenever the deposited funds are required, subject only to any notice period the institution is required to impose by law or regulation. In practice, this means a checking account or the functional equivalent thereof. Rule 45.3.

The trust accounts of the lawyer must include in the title of the account the word "Trust Account." Rule 45.1.

Special Lawyer Duty With Respect to Establishing an IOLTA Account:

The lawyer is responsible for directing the institution to perform the interest payment and reporting tasks required of IOLTA depositories on no less often than a quarterly basis. These tasks include remitting interest or dividends earned on the account, net of normal and customary service charges, to the Lawyer Trust Account Commission, along with a copy of the account statement. Rule 45.4(4). Service charges for purposes of this netting process only include the normal monthly service charge customarily assessed by the institution for the type of account involved. If the institution's monthly service charge exceeds the IOLTA interest payable and the institution does not waive the excess, the law firm is responsible for paying the excess service charge. Charges associated with law firm activities with the account such as wire transfer fees or check printing charges may not be netted against IOLTA interest, and are a law firm responsibility also. Rule 45.5. The Commission asks that depository institutions also prepare and send a summary report form with the statement. Copies of the report form and an instruction document for new IOLTA depository institutions are included in the forms portion of this outline.

The federal tax identification number for the Lawyer Trust Account Commission is 42-1245104. This number must be used in connection with any IOLTA trust account established pursuant to rule 45.4(1).

Overdraft Notification Program

With respect to any account established under rule 45.4(1), the lawyer is required to direct the depository institution to report to the Client Security Commission any time an overdraft condition exists with respect to a lawyer trust account. This rule is modeled after a similar provision adopted in Minnesota in 1990. At least thirty states have adopted a similar provision requiring that banks immediately notify the lawyer and the state disciplinary office whenever an overdraft occurs in a lawyer trust account. The experience in those states that have adopted such a rule is that early intervention following reporting of an overdraft helps prevent additional losses to clients that would occur absent a timely inquiry by the disciplinary authority. Rule 45.4(c).

More than One Trust Account:

A lawyer or law firm may maintain more than one trust account. However, because a single IOLTA trust account can hold funds for multiple clients, most lawyers only need to maintain one IOLTA trust account. Multiple accounts create additional record-keeping overhead and increase the chance that mistakes will be made depositing and disbursing funds. Multiple trust accounts most often are used where circumstances dictate opening a trust account for an individual client under the provisions of rule 45.4(2)(a) in addition to the IOLTA trust account normally maintained by the lawyer or firm.

Signature Authority on Trust Accounts:

Nothing in rule 32:1.15 or chapter 45 dictates that only attorneys may have signature authority on a trust account. However, it is recommended that staff not have signature authority. The personal responsibility and accountability for client funds is non-delegable, and the attorney will be personally responsible for any staff defalcation.

Operating an Account

Principles of Trust Account Operations:

> Do not Commingle Your Own Funds in the Trust Account, except for the limited exception provided by rules 32:1.15(b) and 45.1(1).
>
> Each Client's Funds in a Pool Account Must Be Treated as a Separate Sub Account

A Client Can Only Spend His or Her Sub Account Monies

A Client Sub Account Never Should Show a Negative Balance

Only Make Disbursements from Known Good Funds

You Must Account to the Penny at All Times

The End Result for Any Client Sub Account Must be Zero

An Audit Trail is Essential

What Funds Must Be Deposited in the Trust Account:

All funds of clients, regardless of size, paid to a lawyer or law firm, including advances for costs and expenses and excluding only retainer fees paid on a regular and continuing basis, must be deposited in an interest-bearing trust account located in Iowa. Rules 32:1.15(a), 45.7(3), 45.9(1) and 45.10(2). The decision on where to place funds is based on ownership at the time the funds are received—not how quickly ownership will change from client to the lawyer. Common examples:

> Any advance fee or retainer except a "general retainer." Rules 45.7(7)(3)(advance fees and expenses), 45.9(1)(special retainers) and 45.10(2)(flat fees); *Board of Professional Ethics and Conduct v. Apland*, 577 N.W.2d 50 (Iowa 1998)
> Advances from the client for costs and expenses
> Settlement proceeds that include a portion that is the attorney's fee
> Real estate loan proceeds prior to closing and disbursement
> Funds from the sale of property belonging to the client

What Funds May NOT Be Deposited in the Trust Account

No funds belonging to the lawyer or the law firm may be deposited in the trust account. Common examples of funds that should not be placed in the trust account include:

> Fees already billed for and earned
> Funds an attorney holds that are not related to the practice of law (e.g., the monies belonging to the county bar association for which the attorney is treasurer).

Exception: Funds reasonably sufficient to avoid or pay service charges may be deposited in the trust account. Rule 45.1(1). Where a

minimum balance requirement exists for the account, it is permissible to deposit funds sufficient to maintain the minimum balance. A separate sub account ledger should be maintained for such deposits.

Exception: Funds belonging in part to a client and in part to the lawyer or law firm (presently or potentially) must be deposited in the trust account. This rule applies even if the funds will be disbursed to the parties entitled thereto on the same day they are received. However, the lawyer or law firm's portion must be withdrawn promptly when due, unless entitlement to that portion is disputed by the client. Disputed portions must remain in trust until the dispute is resolved. Rule 45.1(2).

What Payments or Disbursements May be Made from the Trust Account:

> No payments for personal or office expenses of the lawyer should be made from a trust account. If some portion of the money in a trust account belongs to the lawyer because it is his or her earned fee, the lawyer should write a check on the trust account payable to the lawyer, deposit it in the lawyer's regular business account and pay his or her expenses from the regular account.

Fees may and should be withdrawn as soon as they are earned and undisputed. An accounting to the client for the fees deemed earned should be provided the client no later than contemporaneously with the withdrawal for such fees or expenses. Rule 45.7(4).

Costs or expenses incident to services performed may be paid based on agreement with the client. An accounting to the client for costs and expenses paid from the client's sub account should be provided the client no later than contemporaneously with the withdrawal for such expenses. Rule 45.7(4).

Disbursements requisite to closing of a real estate transaction or settlement of an injury claim may be made from the client sub account. An accounting to the client for all the disbursements should be provided to and approved by the client incident to the disbursements.

If two or more parties dispute entitlement to funds held by a lawyer in trust, the lawyer should retain those funds in trust until such time as the dispute is resolved. Rule 32:1.15(e). The disputed funds should be placed in an account that will bear interest for the benefit of the parties if the considerations of rule 45.4(3) indicate the funds could generate positive net earnings for the parties ultimately found entitled to the funds.

When Disbursements May be Made Based on a Deposit

Every deposit to a lawyer trust account must be allowed to clear through the banking process before disbursement is made based on that deposit. If this procedure is not observed, the likely eventual result will be wrongful disbursement of other clients' funds when a check or draft deposited to the trust account is dishonored.

Cash deposits, verified electronic transfers and bank certified checks are reliable enough to support same day disbursement. Cashier's checks, personalized checks and drafts should be allowed to clear completely through the issuing institution. Your own banking institution can provide guidance regarding normal clearance times and can verify clearance of individual instruments at the issuing bank.

If a same-day closing or settlement is desired, the best solution generally will be to require that the deposit to your trust account be made by wire transfer or bank certified check.

What Books and Records Must be Maintained

Every lawyer engaged in private practice of law must maintain books and records sufficient to demonstrate compliance with rule 32:1.15(a). Books and records relating to funds or property of clients are to be maintained for at least <u>six</u> years after completion of the employment to which they relate. Rule 45.2(2). A certification regarding this responsibility is included in the annual reporting form filed with the Client Security Commission each year. Rule 45.6.

A lawyer must 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. Rule 45.2(2).

Recommended Implementation of the Record-Keeping Duty:

The following books and records should be maintained for funds and property received and disbursed in a fiduciary capacity, whether for clients or for others:

> An identification of all trust accounts maintained, including the name of the depository, account number, account name, date account opened, and its interest bearing nature. A record should also be maintained showing clearly the type of each such account, whether pooled with net interest paid to the Lawyers Trust Account

Commission (IOLTA account), pooled with allocation of interest, or individual, including the client name.

A check register for each trust account that chronologically shows all deposits and withdrawals.

a. Each deposit entry should include the date of the deposit, the amount, the identity of the client(s) for whom the funds were deposited, and the purpose of the deposit.

b. Each withdrawal entry should include the date the check was issued, the payee, the amount, the identity of the client for whom the check was issued (if not the payee), and the purpose of the check.

Subsidiary ledgers for each client matter ("client ledgers") for whom the attorney receives trust funds.

a. For every trust account transaction, attorneys should record on the appropriate client ledger the date of receipt or disbursement, the amount, the payee and check number (for disbursements), the purpose of the transaction, and the balance of funds remaining in the account on behalf of that client matter. An attorney shall not disburse funds from the trust account that would create a negative balance on behalf of an individual client matter.

b. A separate subsidiary ledger for nominal funds of the attorney held in the trust account pursuant to rule 45.1(1), to accommodate reasonably expected bank fees and charges. This ledger should record any monthly service charges not offset or waived by the bank in the same month.

c. An attorney maintaining a non-IOLTA pooled account pursuant to rule 45.4(2) should record on each client ledger the monthly accrual of interest, and the date and amount of each interest disbursement, including disbursements from accrued interest for costs of establishing and administering the account.

A monthly trial balance of all subsidiary ledgers identifying each client matter, the balance of funds held on behalf of the client matter at the end of each month, and the total of all the client balances. No balance for a client matter may be negative at any time.

A monthly reconciliation of the checkbook balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance. The adjusted bank statement balance is determined from the month-end bank statement balance by adding outstanding deposits and subtracting outstanding checks. See the form at the end of the outline as an example of the structure of a monthly three-way reconciliation of the checkbook, subsidiary ledgers and the adjusted bank statement.

Bank statements, canceled checks, voided checks and duplicate deposit slips. Cash fee payments should be documented by copies of receipts, preferably countersigned by the payor. All disbursements should be made by check, except when payment by check would be economically imprudent or when circumstances require a transaction by wire transfer. For withdrawal by wire transfer, an attorney or law firm should create a written memorandum describing the transaction, signed by the attorney responsible for the transaction. The wire transfer must be entered in the check register.

A record showing all property, specifically identified, other than cash, held in trust from time to time for clients or others. Routine files, documents and items such as real estate abstracts which are not expected to be held indefinitely need not be so recorded but should be documented in the files of the lawyer as to receipt and delivery. A suggested form for recording property held in trust is included in the forms portion of this outline.

Use of Computer Accounting Systems

Lawyers or law firms may use computer systems to maintain trust account records. A number of functional software programs are available for this purpose. For an example of guidelines for use of a general accounting software program, and information regarding just a few of the many trust-account specific software modules available, see the following web pages:

http://www2.mnbar.org/qbguide/qbguide1.htm

http://www.pclaw.com/products/jr5/b_trustbank_15.htm

http://www.easysoft-usa.com/Program_Pages/TrustReports.html

http://www.abacuslaw.com/products/trust-accounting.html

An attorney who maintains trust account records by computer should print and retain, on a monthly basis, the checkbook register, the balances of the sub account ledgers, and the reconciliation report. Electronic records should be regularly backed up by an appropriate storage device. The frequency of the back up procedure should be directly related to the volume of activity in the trust account.

Accounting to the Client

The lawyer must render appropriate accounts to the client regarding all funds, securities and other properties of a client coming into the possession of the lawyer. Rule 45.2(2). Prompt payment or delivery must be made to the client of all such items the client is entitled to when the client so requests. Rule 45.2(2).

Simply stated: when clients ask you how much money you're holding for them or what you've done with the money while you've had it, you must tell them. You must advise the client every time something is added to the client's sub account, and every time something is taken from the client sub account.

Client Retainers Using Credit Cards

Credit card charges entail a fee payable to the institution processing the credit card charges. These fees are the lawyer's responsibility, and the client should receive full credit for the face amount of the deposit to the trust account. The authority provided by rule 45.1(1) may be used to establish a law firm sub account with a small, periodically refreshed balance to pay the service charges associated with credit card retainers. An alternative, if the institution is willing, is to charge the service charges against the law firm's general business account.

Interest must be paid to the IOLTA program on the full face value of any retainer placed in a pooled IOLTA account based on a credit card charge.

Normally, there is a delay until the bank actually credits a credit card payment to the trust account, and there is a further period during which the client may reverse the charge on the card. The attorney must ascertain when the credit card-based retainer actually is credited to the account by the bank and when it becomes ineligible for charge-back by the institution, and not write any checks against the retainer until those contingencies have passed.

What Should be Done with Funds Owed a Client Who No Longer Can be Located?
("Stale Funds Procedure")

A lawyer or law firm must exercise due diligence to locate and communicate with the client or clients to whom stale or excess funds might rightfully belong. What constitutes reasonable due diligence will vary depending on the amount of the funds involved. Reasonable efforts might include, for example, corresponding with possible owners by mail, searching for possible owner addresses through the Social Security Administration if you have a Social Security Number for them, or employing one of the firms that conducts searches for heirs.

If it is impossible to make proper disposition of the monies to the client using the steps outlined above, then the monies should be considered potentially subject to the provisions of Iowa Code section 556.7. If the time period specified in section 556.7 has not passed, the monies may be deposited in a in a separate, interest-bearing account under the provisions of rule 45.4(2)(a). If the time period specified in section 556.7 has passed, or when the time period specified in section 556.7 does pass, the lawyer or firm then may follow the procedures specified in Iowa Code section 556.11 and 556.13, regarding notice and tender of the monies to the Treasurer of the State of Iowa.

Closing an Account

Moving Your Trust Account to a New Depository Institution

A lawyer is not required to notify anyone before transferring a trust account to a new depository institution. However, care should be taken to ensure that all outstanding checks on the existing trust account are accounted for, and that interest owed the Lawyer Trust Account Commission will be properly disbursed by the institution. Moving a trust account likely will result in a change in information previously reported to the Client Security Commission, and will warrant an interim report to the commission within thirty days after the change.

Closing the Trust Account

Once again, a lawyer is not required to notify anyone before closing a trust and leaving practice. However, here also care should be taken to ensure that all outstanding checks on the trust account are accounted for, and that interest owed the Lawyer Trust Account Commission will be properly disbursed by the institution. All monies owed clients must be

returned to the clients entitled thereto so that no remaining client monies exist in the trust account. If a particular client cannot be found, it may be necessary to complete the "stale funds" procedure before closing the account. Closing a trust account likely will result in a change in information previously reported to the Client Security Commission, and will warrant an interim report to the commission within thirty days after the change.

Audit Program, Client Security Commission

The Assistant Court Administrator for the Client Security Commission is responsible for conducting audits and investigations of attorneys' accounts and office procedures to determine compliance with rules 32:1.15 and chapter 45. Rule 39.2(3)(c). Attorneys are required to cooperate fully with these audits and investigations as a continuing condition of their license to practice. Rules 39.10 and 39.12.

The Assistant Court Administrator is assisted in the performance of audits and investigations by part-time trust account auditors. The general goal of the Commission is to conduct an unannounced periodic audit of each lawyer trust account in Iowa no less than every three to four years. Special audits or investigations are conducted on an as-needed basis. Possible causes for special audits include claims against the Client Security Trust Fund, unexplained overdrafts of trust accounts, and some types of ethics complaints.

Common Issues

The Court has clearly specified how retainers of various kinds must be handled in Iowa. Virtually all the commonly used variants of the retainer initially must be placed in the trust account.

Failure to Take Fees when Warranted: Lawyers are responsible for removing fees from retainers placed in the trust account on a timely basis when they are earned. An accounting should be provided the client no later than the time when the earned fee is withdrawn from the retainer. Failure to remove earned fees on a timely basis constitutes commingling, and over time can be the cause of unexplained excess funds in a trust account.

Outstanding Checks: Frequently clients or other payees will fail to promptly negotiate checks drawn on the trust account. The lawyer or law firm should have an established procedure for periodically following up on these outstanding checks, to clear them from the end of month

reconciliations and aid in placing client sub accounts in zero status when warranted.

"Unintentional" Overdrafts: Overdrafts carry considerable risk of inadvertently using funds in one client's sub account to subsidize operations with respect to another client's sub account. Common causes of overdraft situations include failure to make trust account deposits in a timely manner; failure to ensure that a deposited check clears the bank upon which it is drawn before issuing trust account checks based on it; asking clients to "wait until tomorrow" to cash a settlement check.

Contact Information:

Mail: Iowa Supreme Court Commissions, Iowa Judicial Branch Building, Des Moines, Iowa 50319
Office Location: 1111 E. Court Avenue, Des Moines, Iowa
Telephone: (515) 725-8029 Voice, (515) 725-8032 Facsimile
E-Mail: Paul.WieckII@jb.state.ia.us Web Site: http://www.judicial.state.ia.us/regs/csc.asp

References

Grateful acknowledgement is made of the following resources, from which principles, concepts, tips and narrative have been readily adapted in the foregoing outline. Particular credit is noted for Opinion Number 9 of the Minnesota Lawyers Professional Responsibility Board, which substantially provides the analysis regarding record keeping duties.

Rule 32:1.15, Iowa Rules of Professional Responsibility.

Chapter 45, Iowa Court Rules.

Board of Professional Ethics & Conduct v. Apland, 577 N.W.2d 50 (Iowa 1998)

Opinion No. 9, Maintenance of Books and Records, Minnesota Lawyers Professional Responsibility Board (August 1, 1999), http://www.courts.state.mn.us/lprb/opinions.html#09

The ABA Guide to Lawyer Trust Accounts, Jay G. Foonberg (ABA Section of Law Practice Management, 1996)

Trust Accounts – Everything You Ever Wanted to Know but Were Afraid To
Ask (Minnesota State Bar Association Continuing Legal Education, April 2002)

Ethics and Lawyer Trust Accounts (District of Columbia Bar Association, November 20, 2002)

How to Set Up Your Law Firm Trust Account (The Missouri Bar, November, 2001)

Managing Your Trust Account: Musts, Can'ts and Practice Guidance (State Bar of Arizona Continuing Legal Education, January 17, 2003)

Client Trust Accounting for Delaware Attorneys (Lawyers' Fund for Client Protection of the State Bar of Delaware, November 23, 1998), http://courts.state.de.us/lfcp/pubs/cta.htm

Illinois Client Trust Account Handbook (Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, December 2001), http://www.iardc.org/clienttrusthandbook_toc.html

Forms

NOTICE TO FINANCIAL INSTITUTION
TO ESTABLISH NEW INTEREST-BEARING ACCOUNT

My law firm, as required by Iowa Supreme Court Order, is participating in the Interest on Lawyer Trust Accounts program established by the Iowa Supreme Court. Under this program, please open an account subject to negotiable orders of withdrawals paying the highest rate of interest available for which the account qualifies.

Interest on this account should be remitted to the Lawyer Trust Account Commission, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319. The tax identification number for the Commission is 42-1245104 and must be used in connection with this account.

Interest on the account, computed in accordance with your standard accounting practice (net of any service charge or fee you charge for the bare privilege of maintaining this kind of account) must be remitted by check mailed to the Commission preferably monthly but not less than quarterly. You are not permitted to deduct from interest any charges for transactions involving this account such as stop payment fees, wire transfer fees or check printing fees. These fees are the responsibility of the law firm to pay. With each remittance to the Commission, please transmit a completed remittance report along with a copy of the trust account statement for the reporting period. Remittance report forms are available from the Commission.

Should an overdraft condition ever exist with respect to this account, you are required to provide the Client Security and Attorney Disciplinary Commission a copy of any notice issued the law firm regarding the overdraft condition. The mailing address of this commission is Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319.

_____
PRESENT ACCOUNT NAME

_____
PRESENT ACCOUNT NO.

_____
ALL ACCOUNT SIGNATORIES

_____
DATE

LAWYERS TRUST ACCOUNT COMMISSION
INTEREST REMITTANCE REPORT FOR
POOLED INTEREST-BEARING TRUST ACCOUNTS

TO BE COMPLETED BY FINANCIAL INSTITUTION AND SUBMITTED WITH EACH REMITTANCE

FINANCIAL INSTITUTION:
Name: _____
Office or Branch:
_____
Address:_____
Telephone:_____
Contact
Person:_____
(Name and Title)
Alternate Contact
Person:_____
(Name and Title)
Report Period: _____ through
_____
(MM/DD/YY) (MM/DD/YY)

ATTORNEY/LAW FIRM POOLED INTEREST-BEARING TRUST ACCOUNT:

Name:_____
Address:_____
Account
Number:_____
Rate of Interest Applied: _____%
Interest Earned for Period $
_____
Less: Service Charges and Fees (if any) ___(
)__
Net Amount Remitted $
_____
_____
NOTES:
Attach this report to a copy of the depositor statement.
If remitting a lump sum payment for multiple attorneys/firms, please submit a separate Interest Remittance Report for each pooled interest-bearing trust account.
Even if no interest was earned in a quarter, this report is to be submitted for such account.

Interest should be remitted by check payable to the Lawyer Trust Account Commission, and mailed to:

LAWYER TRUST ACCOUNT COMMISSION
Iowa Judicial Branch Building
1111 E. Court Avenue
DES MOINES, IOWA 50319

Voice (515) 725-8029
Fax (515) 725-8032

TRUST ACCOUNT RECONCILIATION

_____, 20___

BEGINNING BALANCE	$_____
TOTAL RECEIPTS THIS MONTH	
$_____	
SUBTOTAL	$_____
LESS CHECKS WRITTEN THIS MONTH	
$_____	
BALANCE	$_____

ITEMIZATION OF SUBACCOUNT BALANCES

_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
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_____	$_____
_____	$_____
TOTAL	$_____

BANK STATEMENT CONFIRMATION

BANK BALANCE PER STATEMENT	$_____
PLUS OUTSTANDING DEPOSITS	
$_____	
LESS OUTSTANDING CHECKS	$_____
BALANCE	$_____
LESS INTEREST	$_____
RECONCILED BALANCE	$_____

Trust Safe Deposit Receipt

Received this _____day of _____, 20__, by _____.

_____

_____

_____

(Description of item(s) being placed into safe deposit box -- if items are numbered such as stocks or bonds, specify numbers.)

Item(s) being held in trust for: _____

Firm Name: _____

Client Name:_____

Item(s) being placed into safe deposit box by:_____

Any questions regarding contents should be addressed to:

_____

Name and Address of Bank Where Safe Deposit Located

_____

Safe Deposit Box ID Number: _____

Anticipated period item(s) will be held:_____

Excerpt from Iowa Rules of Professional Conduct and Other Applicable Iowa Court Rules, As Amended July 1, 2005

RULE 32:1.15: SAFEKEEPING PROPERTY

(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. Funds shall be kept in a separate account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) 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.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All client trust accounts shall be governed by chapter 45 of the Iowa Court Rules.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. *See*, Iowa Ct. R. ch 45.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party; but when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Such a fund has been established in Iowa, and lawyer participation is mandatory to the extent required by chapter 39 of the Iowa Court Rules.

CHAPTER 45

CLIENT TRUST ACCOUNT RULES

Rule 45.1 Requirement for client trust account. Funds a lawyer receives from clients or third persons for matters arising out of the practice of law in Iowa shall be deposited in one or more identifiable interest-bearing trust accounts located in Iowa. The trust account shall be clearly designated as "Trust Account." No funds belonging to the lawyer or law firm may be deposited in this account except:

1. Funds reasonably sufficient to pay or avoid imposition of fees and charges that are a lawyer's or law firm's responsibility, including fees and charges that are not "allowable monthly service charges" under the definition in rule 45.5, may be deposited in this account; or

2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited in this account, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Other property of clients or third persons shall be identified as such and appropriately safeguarded.

Rule 45.2 Action required upon receiving funds.

45.2(1) *Authority to endorse or sign client's name.* Upon receipt of funds or other property in which a client or third person has an interest, a lawyer shall not endorse or sign the client's name on any check, draft, security, or evidence of encumbrance or transfer of ownership of realty or personalty, or any other document without the client's prior express authority. A lawyer signing an instrument in a representative capacity shall so indicate by initials or signature.

45.2(2) *Maintaining records, providing accounting, and returning funds or property.* A lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the lawyer's possession and regularly

account to the client for them. Except as stated in this chapter or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and shall promptly render a full accounting regarding such property. Books and records relating to funds or property of clients shall be preserved for at least six years after completion of the employment to which they relate.

Rule 45.3 Type of accounts and institutions where trust accounts must be established. Each trust account referred to in rule 45.1 shall be an interest-bearing account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company selected by the law firm or lawyer in the exercise of ordinary prudence. The financial institution must be authorized by federal or state law to do business in Iowa and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or the Federal Savings and Loan Insurance Corporation. Interest-bearing trust funds shall be placed in accounts from which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to observe by law or regulation.

Rule 45.4 Pooled interest-bearing trust account.

45.4(1) *Deposits of nominal or short-term funds.* A lawyer who receives a client's or third person's funds shall maintain a pooled interest-bearing trust account for deposits of funds that are nominal in amount or reasonably expected to be held for a short period of time. A lawyer shall inform the client or third person that the interest accruing on this account, net of any allowable monthly service charges, will be paid to the Lawyer Trust Account Commission established by the supreme court.

45.4(2) *Exceptions to using pooled interest-bearing trust accounts.* All client or third person funds shall be deposited in an account specified in rule 45.4(1) unless they are deposited in:

a. A separate interest-bearing trust account for the particular third person, client, or client's matter on which

the interest, net of any transaction costs, will be paid to the client or third person; or

b. A pooled interest-bearing trust account with subaccountings that will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client or third person.

45.4(3) *Accounts generating positive net earnings.* If the client's or the third person's funds could generate positive net earnings for the client or third person, the lawyer shall deposit the funds in an account described in rule 45.4(2). In determining whether the funds would generate positive net earnings, the lawyer shall consider the following factors:

a. The amount of the funds to be deposited;

b. The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c. The rates of interest or yield at the financial institution in which the funds are to be deposited;

d. The cost of establishing and administering the account, including service charges, the cost of the lawyer's services, and the cost of preparing any tax reports required for interest accruing to a client's benefit;

e. The capability of financial institutions described in rule 45.3 to calculate and pay interest to individual clients; and

f. Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

45.4(4) *Directions to depository institutions.* As to accounts created under rule 45.4(1), a lawyer or law firm shall direct the depository institution:

a. To remit interest or dividends, net of any allowable monthly service charges, as computed in accordance with the depository institution's standard accounting practice, at least quarterly, to the Lawyer Trust Account Commission;

b. To transmit with each remittance to the Lawyer Trust Account Commission a copy of the depositor's statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the amount of allowable monthly service charges deducted, if any, and the account balance(s) for the period covered by the report; and

c. To report to the Client Security and Attorney Disciplinary Commission in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds. In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors. In the case of instruments that are honored when presented against insufficient funds, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, and the amount of overdraft. If an instrument presented against insufficient funds is not honored, the report shall be made simultaneously with, and within the time provided by law for, any notice of dishonor. If the instrument is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

Rule 45.5 Definition of "allowable monthly service charges." For purposes of this chapter, "allowable monthly service charges" means the monthly fee customarily assessed by the institution against a depositor solely for the privilege of maintaining the type of account involved. Fees or charges assessed for transactions involving the account, such as fees for wire transfers, stop payment orders, or check printing, are a lawyer's or law firm's responsibility and may not be paid or deducted from interest or dividends otherwise payable to the Lawyer Trust Account Commission.

Rule 45.6 Lawyer certification. Every lawyer required to have a client trust account shall certify annually, in such form as the supreme court may prescribe, that the lawyer or the law firm maintains, on a current basis, records required by Iowa R. of Prof'l Conduct 32:1.15(a).

Rule 45.7 Advance fee and expense payments.

45.7(1) *Definition of advance fee payments.* Advance fee payments are payments for contemplated services that are made to the lawyer prior to the lawyer's having earned the fee.

45.7(2) *Definition of advance expense payments.* Advance expense payments are payments for contemplated

expenses in connection with the lawyer's services that are made to the lawyer prior to the incurrence of the expense.

45.7(3) *Deposit and withdrawal.* A lawyer must deposit advance fee and expense payments from a client into the trust account and may withdraw such payments only as the fee is earned or the expense is incurred.

45.7(4) *Notification upon withdrawal of fee or expense.* A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The attorney must transmit such notice no later than the date of the withdrawal.

45.7(5) *When refundable.* Notwithstanding any contrary agreement between the lawyer and client, advance fee and expense payments are refundable to the client if the fee is not earned or the expense is not incurred.

Rule 45.8 General retainer.

45.8(1) *Definition.* A general retainer is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not a payment for the performance of services and is earned by the lawyer when paid.

45.8(2) *Deposit.* Because a general retainer is earned by the lawyer when paid, the retainer should not be deposited in the trust account.

Rule 45.9 Special retainer.

45.9(1) *Definition.* A special retainer is a fee that is charged for the performance of contemplated services rather than for the lawyer's availability. Such a fee is paid in advance of performance of those services.

45.9(2) *Prohibition.* A lawyer may not charge a non-refundable special retainer or withdraw unearned fees.

Rule 45.10 Flat fee.

45.10(1) *Definition* A flat fee is one that embraces all services that a lawyer is to perform, whether the work be relatively simple or complex.

45.10(2) *When deposit required.* If the client makes an advance payment of a flat fee prior to performance of the services, the lawyer must deposit the fee into the trust account.

45.10(3) *Withdrawal of flat fee.* A lawyer and client may agree as to when, how, and in what proportion the lawyer may withdraw funds from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees.

Lawyer Trust Accounts in Iowa

As Revised August, 2005

Paul H. Wieck II
Client Security Commission

Establishing an Account

Need for a Trust Account:

Not every lawyer needs a trust account. The key issue is whether you accept funds of the kind that must be placed in a trust account. (See the discussion regarding required trust account deposits under "Operating the Account," below.) Government attorneys or corporate counsel generally will not need to maintain a trust account. Most private practitioners will need to maintain a trust account. Rules 32:1.15 and 45.1.

What Kind of Trust Account is Required:

For most client funds, the appropriate account is the pooled, or IOLTA account, in which funds belonging to multiple clients or third parties are pooled in a single account. Interest earned on a pooled trust account (net of customary service charges for that type of account) is paid by the depository institution to the Lawyer Trust Account Commission (LTAC). LTAC distributes grants annually as approved by the Iowa Supreme Court for legal services for low-income persons and law-related education. Rule 45.4(1).

Court rules also authorize establishment of a separate interest-bearing account for an individual client or third party. When a separate interest-bearing account is established for an individual client or third party, the interest earned on the account (net of account costs) is payable to the client or third party for whom the account was established. Rule 45.4(2)(a).

Court rules also authorize establishing a pooled trust account with subaccounting, wherein the interest owed to each individual client is computed and paid, net of pro rata account costs, to the individual client. These accounts seldom are used due to the administrative overhead associated with interest computation and the generally insignificant amount of interest actually payable to any particular client after deduction of costs. Rule 45.4(2)(b).

In determining whether to deposit client or third-party funds into an IOLTA account or a separate account for the individual client, the lawyer must assess whether the funds to be invested could produce a positive net return for the client. Note that the key phrase "significant net return" no longer appears in the rule. The lawyer should consider the following factors:

The amount of the funds to be deposited
The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
The rates of interest or yield at the financial institution in which the funds are to be deposited;
The cost of establishing and administering the account, including service charges, and the cost or preparing any tax reports required for interest accruing to a client's benefit;
The depository institution's ability to calculate and pay interest to individual clients;
Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

Rule 45.4(3).

Tip: This is not a one-time analysis. Every client balance in a pooled trust account should be considered in light of these factors on a recurring basis. An excellent time to consider this issue is incident to the monthly reconciliation of client balances with the trust account checkbook and bank statement.

What Institutions May Serve as Trust Account Depositories:

A bank, savings bank, trust company, savings and loan association, credit union, or federally regulated investment company may serve as a depository institution, provided the institution is authorized to do business in Iowa, and is FDIC/NCUSIF/FSLIC insured. Rule 45.3.

The trust account must be located in Iowa. Rule 45.1.

Other factors the attorney should consider when selecting a depository institution:

Institutional stability
Convenience
Bank interest rate and fees
Return of cancelled checks or facsimiles thereof

Nature of the Account to be Established:

The account agreement must allow withdrawals and transfers without delay whenever the deposited funds are required, subject only to any notice period the institution is required to impose by law or regulation. In practice, this means a checking account or the functional equivalent thereof. Rule 45.3.

The trust accounts of the lawyer must include in the title of the account the word "Trust Account." Rule 45.1.

Special Lawyer Duty With Respect to Establishing an IOLTA Account:

The lawyer is responsible for directing the institution to perform the interest payment and reporting tasks required of IOLTA depositories on no less often than a quarterly basis. These tasks include remitting interest or dividends earned on the account, net of normal and customary service charges, to the Lawyer Trust Account Commission, along with a copy of the account statement. Rule 45.4(4). Service charges for purposes of this netting process only include the normal monthly service charge customarily assessed by the institution for the type of account involved. If the institution's monthly service charge exceeds the IOLTA interest payable and the institution does not waive the excess, the law firm is responsible for paying the excess service charge. Charges associated with law firm activities with the account such as wire transfer fees or check printing charges may not be netted against IOLTA interest, and are a law firm responsibility also. Rule 45.5. The Commission asks that depository institutions also prepare and send a summary report form with the statement. Copies of the report form and an instruction document for new IOLTA depository institutions are included in the forms portion of this outline.

The federal tax identification number for the Lawyer Trust Account Commission is 42-1245104. This number must be used in connection with any IOLTA trust account established pursuant to rule 45.4(1).

Overdraft Notification Program

With respect to any account established under rule 45.4(1), the lawyer is required to direct the depository institution to report to the Client Security Commission any time an overdraft condition exists with respect to a lawyer trust account. This rule is modeled after a similar provision adopted in Minnesota in 1990. At least thirty states have adopted a similar provision requiring that banks immediately notify the lawyer and the state disciplinary office whenever an overdraft occurs in a lawyer trust account. The experience in those states that have adopted such a rule is that early intervention following reporting of an overdraft helps prevent additional losses to clients that would occur absent a timely inquiry by the disciplinary authority. Rule 45.4(c).

More than One Trust Account:

A lawyer or law firm may maintain more than one trust account. However, because a single IOLTA trust account can hold funds for multiple clients, most lawyers only need to maintain one IOLTA trust account. Multiple accounts create additional record-keeping overhead and increase the chance that mistakes will be made depositing and disbursing funds. Multiple trust accounts most often are used where circumstances dictate opening a trust account for an individual client under the provisions of rule 45.4(2)(a) in addition to the IOLTA trust account normally maintained by the lawyer or firm.

Signature Authority on Trust Accounts:

Nothing in rule 32:1.15 or chapter 45 dictates that only attorneys may have signature authority on a trust account. However, it is recommended that staff not have signature

authority. The personal responsibility and accountability for client funds is non-delegable, and the attorney will be personally responsible for any staff defalcation.

Operating an Account

Principles of Trust Account Operations:

Do not Commingle Your Own Funds in the Trust Account, except for the limited exception provided by rules 32:1.15(b) and 45.1(1).

Each Client's Funds in a Pool Account Must Be Treated as a Separate Sub Account

A Client Can Only Spend His or Her Sub Account Monies

A Client Sub Account Never Should Show a Negative Balance

Only Make Disbursements from Known Good Funds

You Must Account to the Penny at All Times

The End Result for Any Client Sub Account Must be Zero

An Audit Trail is Essential

What Funds Must Be Deposited in the Trust Account:

All funds of clients, regardless of size, paid to a lawyer or law firm, including advances for costs and expenses and excluding only retainer fees paid on a regular and continuing basis, must be deposited in an interest-bearing trust account located in Iowa. Rules 32:1.15(a), 45.7(3), 45.9(1) and 45.10(2). The decision on where to place funds is based on ownership at the time the funds are received—not how quickly ownership will change from client to the lawyer. Common examples:

Any advance fee or retainer except a "general retainer." Rules 45.7(7)(3)(advance fees and expenses), 45.9(1)(special retainers) and 45.10(2)(flat fees); *Board of Professional Ethics and Conduct v. Apland*, 577 N.W.2d 50 (Iowa 1998)
Advances from the client for costs and expenses
Settlement proceeds that include a portion that is the attorney's fee
Real estate loan proceeds prior to closing and disbursement
Funds from the sale of property belonging to the client

What Funds May NOT Be Deposited in the Trust Account

No funds belonging to the lawyer or the law firm may be deposited in the trust account. Common examples of funds that should not be placed in the trust account include:

Fees already billed for and earned

Funds an attorney holds that are not related to the practice of law (e.g., the monies belonging to the county bar association for which the attorney is treasurer).

Exception: Funds reasonably sufficient to avoid or pay service charges may be deposited in the trust account. Rule 45.1(1). Where a minimum balance requirement exists for the account, it is permissible to deposit funds sufficient to maintain the minimum balance. A separate sub account ledger should be maintained for such deposits.

Exception: Funds belonging in part to a client and in part to the lawyer or law firm (presently or potentially) must be deposited in the trust account. This rule applies even if the funds will be disbursed to the parties entitled thereto on the same day they are received. However, the lawyer or law firm's portion must be withdrawn promptly when due, unless entitlement to that portion is disputed by the client. Disputed portions must remain in trust until the dispute is resolved. Rule 45.1(2).

What Payments or Disbursements May be Made from the Trust Account:

No payments for personal or office expenses of the lawyer should be made from a trust account. If some portion of the money in a trust account belongs to the lawyer because it is his or her earned fee, the lawyer should write a check on the trust account payable to the lawyer, deposit it in the lawyer's regular business account and pay his or her expenses from the regular account.

Fees may and should be withdrawn as soon as they are earned and undisputed. An accounting to the client for the fees deemed earned should be provided the client no later than contemporaneously with the withdrawal for such fees or expenses. Rule 45.7(4).

Costs or expenses incident to services performed may be paid based on agreement with the client. An accounting to the client for costs and expenses paid from the client's sub account should be provided the client no later than contemporaneously with the withdrawal for such expenses. Rule 45.7(4).

Disbursements requisite to closing of a real estate transaction or settlement of an injury claim may be made from the client sub account. An accounting to the client for all the disbursements should be provided to and approved by the client incident to the disbursements.

If two or more parties dispute entitlement to funds held by a lawyer in trust, the lawyer should retain those funds in trust until such time as the dispute is resolved. Rule 32:1.15(e). The disputed funds should be placed in an account that will bear interest for the benefit of the parties if the considerations of rule 45.4(3) indicate the funds could generate positive net earnings for the parties ultimately found entitled to the funds.

When Disbursements May be Made Based on a Deposit

Every deposit to a lawyer trust account must be allowed to clear through the banking process before disbursement is made based on that deposit. If this procedure is not observed, the likely eventual result will be wrongful disbursement of other clients' funds when a check or draft deposited to the trust account is dishonored.

Cash deposits, verified electronic transfers and bank certified checks are reliable enough to support same day disbursement. Cashier's checks, personalized checks and drafts should be allowed to clear completely through the issuing institution. Your own banking institution can provide guidance regarding normal clearance times and can verify clearance of individual instruments at the issuing bank.

If a same-day closing or settlement is desired, the best solution generally will be to require that the deposit to your trust account be made by wire transfer or bank certified check.

What Books and Records Must be Maintained

Every lawyer engaged in private practice of law must maintain books and records sufficient to demonstrate compliance with rule 32:1.15(a). Books and records relating to funds or property of clients are to be maintained for at least six years after completion of the employment to which they relate. Rule 45.2(2). A certification regarding this responsibility is included in the annual reporting form filed with the Client Security Commission each year. Rule 45.6.

A lawyer must 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. Rule 45.2(2).

Recommended Implementation of the Record-Keeping Duty:

The following books and records should be maintained for funds and property received and disbursed in a fiduciary capacity, whether for clients or for others:

An identification of all trust accounts maintained, including the name of the depository, account number, account name, date account opened, and its interest bearing nature. A record should also be maintained showing clearly the type of each such account, whether pooled with net interest paid to the Lawyers Trust Account Commission (IOLTA account), pooled with allocation of interest, or individual, including the client name.

A check register for each trust account that chronologically shows all deposits and withdrawals.

a. Each deposit entry should include the date of the deposit, the amount, the identity of the client(s) for whom the funds were deposited, and the purpose of the deposit.

b. Each withdrawal entry should include the date the check was issued, the payee, the amount, the identity of the client for whom the check was issued (if not the payee), and the purpose of the check.

Subsidiary ledgers for each client matter ("client ledgers") for whom the attorney receives trust funds.

a. For every trust account transaction, attorneys should record on the appropriate client ledger the date of receipt or disbursement, the amount, the payee and check number (for disbursements), the purpose of the transaction, and the balance of funds remaining in the account on behalf of that client matter. An attorney shall not disburse funds from the trust account that would create a negative balance on behalf of an individual client matter.

b. A separate subsidiary ledger for nominal funds of the attorney held in the trust account pursuant to rule 45.1(1), to accommodate reasonably expected bank fees and charges. This ledger should record any monthly service charges not offset or waived by the bank in the same month.

c. An attorney maintaining a non-IOLTA pooled account pursuant to rule 45.4(2) should record on each client ledger the monthly accrual of interest, and the date and amount of each interest disbursement, including disbursements from accrued interest for costs of establishing and administering the account.

A monthly trial balance of all subsidiary ledgers identifying each client matter, the balance of funds held on behalf of the client matter at the end of each month, and the total of all the client balances. No balance for a client matter may be negative at any time.

A monthly reconciliation of the checkbook balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance. The adjusted bank statement balance is determined from the month-end bank statement balance by adding outstanding deposits and subtracting outstanding checks. See the form at the end of the outline as an example of the structure of a monthly three-way reconciliation of the checkbook, subsidiary ledgers and the adjusted bank statement.

Bank statements, canceled checks, voided checks and duplicate deposit slips. Cash fee payments should be documented by copies of receipts, preferably countersigned by the payor. All disbursements should be made by check, except when payment by check would be economically imprudent or when circumstances require a transaction by wire transfer. For withdrawal by wire transfer, an attorney or law firm should create a written memorandum describing the transaction, signed by the attorney responsible for the transaction. The wire transfer must be entered in the check register.

A record showing all property, specifically identified, other than cash, held in trust from time to time for clients or others. Routine files, documents and items such as real estate abstracts which are not expected to be held indefinitely need not be so recorded but should be documented in the files of the lawyer as to receipt and delivery. A suggested form for recording property held in trust is included in the forms portion of this outline.

Use of Computer Accounting Systems

Lawyers or law firms may use computer systems to maintain trust account records. A number of functional software programs are available for this purpose. For an example of guidelines for use of a general accounting software program, and information regarding just a few of the many trust-account specific software modules available, see the following web pages:

http://www2.mnbar.org/qbguide/qbguide1.htm

http://www.pclaw.com/products/jr5/b_trustbank_15.htm

http://www.easysoft-usa.com/Program_Pages/TrustReports.html

http://www.abacuslaw.com/products/trust-accounting.html

An attorney who maintains trust account records by computer should print and retain, on a monthly basis, the checkbook register, the balances of the sub account ledgers, and the reconciliation report. Electronic records should be regularly backed up by an appropriate storage device. The frequency of the back up procedure should be directly related to the volume of activity in the trust account.

Accounting to the Client

The lawyer must render appropriate accounts to the client regarding all funds, securities and other properties of a client coming into the possession of the lawyer. Rule 45.2(2). Prompt payment or delivery must be made to the client of all such items the client is entitled to when the client so requests. Rule 45.2(2).

Simply stated: when clients ask you how much money you're holding for them or what you've done with the money while you've had it, you must tell them. You must advise the client every time something is added to the client's sub account, and every time something is taken from the client sub account.

Client Retainers Using Credit Cards

Credit card charges entail a fee payable to the institution processing the credit card charges. These fees are the lawyer's responsibility, and the client should receive full credit for the face amount of the deposit to the trust account. The authority provided by rule 45.1(1) may be used to establish a law firm sub account with a small, periodically refreshed balance to pay the service charges associated with credit card retainers. An alternative, if the institution is willing, is to charge the service charges against the law firm's general business account.

Interest must be paid to the IOLTA program on the full face value of any retainer placed in a pooled IOLTA account based on a credit card charge.

Normally, there is a delay until the bank actually credits a credit card payment to the trust account, and there is a further period during which the client may reverse the charge on the card. The attorney must ascertain when the credit card-based retainer actually is credited to the account by the bank and when it becomes ineligible for charge-back by the institution, and not write any checks against the retainer until those contingencies have passed.

What Should be Done with Funds Owed a Client Who No Longer Can be Located? ("Stale Funds Procedure")

A lawyer or law firm must exercise due diligence to locate and communicate with the client or clients to whom stale or excess funds might rightfully belong. What constitutes reasonable due diligence will vary depending on the amount of the funds involved. Reasonable efforts might include, for example, corresponding with possible owners by mail, searching for possible owner addresses through the Social Security Administration if you have a Social Security Number for them, or employing one of the firms that conducts searches for heirs.

If it is impossible to make proper disposition of the monies to the client using the steps outlined above, then the monies should be considered potentially subject to the provisions of Iowa Code section 556.7. If the time period specified in section 556.7 has not passed, the monies may be deposited in a in a separate, interest-bearing account under the provisions of rule 45.4(2)(a). If the time period specified in section 556.7 has passed, or when the time period specified in section 556.7 does pass, the lawyer or firm then may follow the procedures specified in Iowa Code section 556.11 and 556.13, regarding notice and tender of the monies to the Treasurer of the State of Iowa.

Closing an Account

Moving Your Trust Account to a New Depository Institution

A lawyer is not required to notify anyone before transferring a trust account to a new depository institution. However, care should be taken to ensure that all outstanding checks on the existing trust account are accounted for, and that interest owed the Lawyer Trust Account Commission will be properly disbursed by the institution. Moving a trust account likely will result in a change in information previously reported to the Client Security Commission, and will warrant an interim report to the commission within thirty days after the change.

Closing the Trust Account

Once again, a lawyer is not required to notify anyone before closing a trust and leaving practice. However, here also care should be taken to ensure that all outstanding checks on the trust account are accounted for, and that interest owed the Lawyer Trust Account Commission will be properly disbursed by the institution. All monies owed clients must be returned to the clients entitled thereto so that no remaining client monies exist in the trust account. If a particular client cannot be found, it may be necessary to complete the "stale

funds" procedure before closing the account. Closing a trust account likely will result in a change in information previously reported to the Client Security Commission, and will warrant an interim report to the commission within thirty days after the change.

Audit Program, Client Security Commission

The Assistant Court Administrator for the Client Security Commission is responsible for conducting audits and investigations of attorneys' accounts and office procedures to determine compliance with rules 32:1.15 and chapter 45. Rule 39.2(3)(c). Attorneys are required to cooperate fully with these audits and investigations as a continuing condition of their license to practice. Rules 39.10 and 39.12.

The Assistant Court Administrator is assisted in the performance of audits and investigations by part-time trust account auditors. The general goal of the Commission is to conduct an unannounced periodic audit of each lawyer trust account in Iowa no less than every three to four years. Special audits or investigations are conducted on an as-needed basis. Possible causes for special audits include claims against the Client Security Trust Fund, unexplained overdrafts of trust accounts, and some types of ethics complaints.

Common Issues

The Court has clearly specified how retainers of various kinds must be handled in Iowa. Virtually all the commonly used variants of the retainer initially must be placed in the trust account.

Failure to Take Fees when Warranted: Lawyers are responsible for removing fees from retainers placed in the trust account on a timely basis when they are earned. An accounting should be provided the client no later than the time when the earned fee is withdrawn from the retainer. Failure to remove earned fees on a timely basis constitutes commingling, and over time can be the cause of unexplained excess funds in a trust account.

Outstanding Checks: Frequently clients or other payees will fail to promptly negotiate checks drawn on the trust account. The lawyer or law firm should have an established procedure for periodically following up on these outstanding checks, to clear them from the end of month reconciliations and aid in placing client sub accounts in zero status when warranted.

"Unintentional" Overdrafts: Overdrafts carry considerable risk of inadvertently using funds in one client's sub account to subsidize operations with respect to another client's sub account. Common causes of overdraft situations include failure to make trust account deposits in a timely manner; failure to ensure that a deposited check clears the bank upon which it is drawn before issuing trust account checks based on it; asking clients to "wait until tomorrow" to cash a settlement check.

Contact Information:

Mail: Iowa Supreme Court Commissions, Iowa Judicial Branch Building, Des Moines, Iowa 50319
Office Location: 1111 E. Court Avenue, Des Moines, Iowa
Telephone: (515) 725-8029 Voice, (515) 725-8032 Facsimile
E-Mail: Paul.WieckII@jb.state.ia.us Web Site: http://www.judicial.state.ia.us/regs/csc.asp

References

Grateful acknowledgement is made of the following resources, from which principles, concepts, tips and narrative have been readily adapted in the foregoing outline. Particular credit is noted for Opinion Number 9 of the Minnesota Lawyers Professional Responsibility Board, which substantially provides the analysis regarding record keeping duties.

Rule 32:1.15, Iowa Rules of Professional Responsibility.

Chapter 45, Iowa Court Rules.

Board of Professional Ethics & Conduct v. Apland, 577 N.W.2d 50 (Iowa 1998)

Opinion No. 9, Maintenance of Books and Records, Minnesota Lawyers Professional Responsibility Board (August 1, 1999), http://www.courts.state.mn.us/lprb/opinions.html#09

The ABA Guide to Lawyer Trust Accounts, Jay G. Foonberg (ABA Section of Law Practice Management, 1996)

Trust Accounts – Everything You Ever Wanted to Know but Were Afraid To Ask (Minnesota State Bar Association Continuing Legal Education, April 2002)

Ethics and Lawyer Trust Accounts (District of Columbia Bar Association, November 20, 2002)

How to Set Up Your Law Firm Trust Account (The Missouri Bar, November, 2001)

Managing Your Trust Account: Musts, Can'ts and Practice Guidance (State Bar of Arizona Continuing Legal Education, January 17, 2003)

Client Trust Accounting for Delaware Attorneys (Lawyers' Fund for Client Protection of the State Bar of Delaware, November 23, 1998), http://courts.state.de.us/lfcp/pubs/cta.htm

Illinois Client Trust Account Handbook (Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, December 2001), http://www.iardc.org/clienttrusthandbook_toc.html

Forms

NOTICE TO FINANCIAL INSTITUTION
TO ESTABLISH NEW INTEREST-BEARING ACCOUNT

My law firm, as required by Iowa Supreme Court Order, is participating in the Interest on Lawyer Trust Accounts program established by the Iowa Supreme Court. Under this program, please open an account subject to negotiable orders of withdrawals paying the highest rate of interest available for which the account qualifies.

Interest on this account should be remitted to the Lawyer Trust Account Commission, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319. The tax identification number for the Commission is 42-1245104 and must be used in connection with this account.

Interest on the account, computed in accordance with your standard accounting practice (net of any service charge or fee you charge for the bare privilege of maintaining this kind of account) must be remitted by check mailed to the Commission preferably monthly but not less than quarterly. You are not permitted to deduct from interest any charges for transactions involving this account such as stop payment fees, wire transfer fees or check printing fees. These fees are the responsibility of the law firm to pay. With each remittance to the Commission, please transmit a completed remittance report along with a copy of the trust account statement for the reporting period. Remittance report forms are available from the Commission.

Should an overdraft condition ever exist with respect to this account, you are required to provide the Client Security and Attorney Disciplinary Commission a copy of any notice issued the law firm regarding the overdraft condition. The mailing address of this commission is Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319.

PRESENT ACCOUNT NAME

PRESENT ACCOUNT NO.

ALL ACCOUNT SIGNATORIES

_____

DATE

LAWYERS TRUST ACCOUNT COMMISSION
INTEREST REMITTANCE REPORT FOR
POOLED INTEREST-BEARING TRUST ACCOUNTS

TO BE COMPLETED BY FINANCIAL INSTITUTION AND SUBMITTED WITH EACH REMITTANCE

FINANCIAL INSTITUTION:
Name: _____
Office or Branch: _____
Address:_____
Telephone:_____
Contact Person:_____
(Name and Title)
Alternate Contact Person:_____
(Name and Title)
Report Period: _____ through _____
(MM/DD/YY) (MM/DD/YY)

ATTORNEY/LAW FIRM POOLED INTEREST-BEARING TRUST ACCOUNT:

Name:_____
Address:_____
Account Number:_____
Rate of Interest Applied: _____%
Interest Earned for Period $ _____
Less: Service Charges and Fees (if any) (_____)
Net Amount Remitted $ _____

_____
_____ NOTES:
Attach this report to a copy of the depositor statement.
If remitting a lump sum payment for multiple attorneys/firms, please submit a separate Interest Remittance Report for each pooled interest-bearing trust account.
Even if no interest was earned in a quarter, this report is to be submitted for such account.
Interest should be remitted by check payable to the Lawyer Trust Account Commission, and mailed to:

LAWYER TRUST ACCOUNT COMMISSION
Iowa Judicial Branch Building
1111 E. Court Avenue
DES MOINES, IOWA 50319

Voice (515) 725-8029
Fax (515) 725-8032

TRUST ACCOUNT RECONCILIATION

_____, 20___

BEGINNING BALANCE	$_____
TOTAL RECEIPTS THIS MONTH	$_____
SUBTOTAL	$_____
LESS CHECKS WRITTEN THIS MONTH	$_____
BALANCE	$_____

ITEMIZATION OF SUBACCOUNT BALANCES

_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
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_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
TOTAL	$_____

BANK STATEMENT CONFIRMATION

BANK BALANCE PER STATEMENT	$_____
PLUS OUTSTANDING DEPOSITS	$_____
LESS OUTSTANDING CHECKS	$_____
BALANCE	$_____
LESS INTEREST	$_____
RECONCILED BALANCE	$_____

Trust Safe Deposit Receipt

Received this _____day of _____, 20__, by _____.

_____
_____
_____
(Description of item(s) being placed into safe deposit box -- if items are numbered such as stocks or bonds, specify numbers.)

Item(s) being held in trust for: _____

Firm Name: _____

Client Name:_____

Item(s) being placed into safe deposit box by:_____

Any questions regarding contents should be addressed to: _____

Name and Address of Bank Where Safe Deposit Located _____

Safe Deposit Box ID Number: _____

Anticipated period item(s) will be held:_____

Excerpt from Iowa Rules of Professional Conduct and Other Applicable Iowa Court Rules, As Amended July 1, 2005

RULE 32:1.15: SAFEKEEPING PROPERTY

(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. Funds shall be kept in a separate account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) 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.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All client trust accounts shall be governed by chapter 45 of the Iowa Court Rules.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books

and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. *See*, Iowa Ct. R. ch 45.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party; but when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Such a fund has been established in Iowa, and lawyer participation is mandatory to the extent required by chapter 39 of the Iowa Court Rules.

CHAPTER 45
CLIENT TRUST ACCOUNT RULES

Rule 45.1 Requirement for client trust account. Funds a lawyer receives from clients or third persons for matters arising out of the practice of law in Iowa shall be deposited in one or more identifiable interest-bearing trust accounts located in Iowa. The trust account shall be clearly designated as "Trust Account." No funds belonging to the lawyer or law firm may be deposited in this account except:

1. Funds reasonably sufficient to pay or avoid imposition of fees and charges that are a lawyer's or law firm's responsibility, including fees and charges that are not "allowable monthly service charges" under the definition in rule 45.5, may be deposited in this account; or

2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited in this account, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Other property of clients or third persons shall be identified as such and appropriately safeguarded.

Rule 45.2 Action required upon receiving funds.

45.2(1) *Authority to endorse or sign client's name*. Upon receipt of funds or other property in which a client or third person has an interest, a lawyer shall not endorse or sign the client's name on any check, draft, security, or evidence of encumbrance or transfer of ownership of realty or personalty, or any other document without the client's prior express authority. A lawyer signing an instrument in a representative capacity shall so indicate by initials or signature.

45.2(2) *Maintaining records, providing accounting, and returning funds or property.* A lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the lawyer's possession and regularly account to the client for them. Except as stated in this chapter or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and shall promptly render a full accounting regarding such property. Books and records relating to funds or property of clients shall be preserved for at least six years after completion of the employment to which they relate.

Rule 45.3 Type of accounts and institutions where trust accounts must be established. Each trust account referred to in rule 45.1 shall be an interest-bearing account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company selected by the law firm or lawyer in the exercise of ordinary prudence. The financial institution must be authorized by federal or state law to do business in Iowa and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or the Federal Savings and Loan Insurance Corporation. Interest-bearing trust funds shall be placed in accounts from which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to observe by law or regulation.

Rule 45.4 Pooled interest-bearing trust account.

45.4(1) *Deposits of nominal or short-term funds.* A lawyer who receives a client's or third person's funds shall maintain a pooled interest-bearing trust account for deposits of funds that are nominal in amount or reasonably expected to be held for a short period of time. A lawyer shall inform the client or third person that the interest accruing on this account, net of any allowable monthly service charges, will be paid to the Lawyer Trust Account Commission established by the supreme court.

45.4(2) *Exceptions to using pooled interest-bearing trust accounts.* All client or third person funds shall be deposited in an account specified in rule 45.4(1) unless they are deposited in:

a. A separate interest-bearing trust account for the particular third person, client, or client's matter on which the interest, net of any transaction costs, will be paid to the client or third person; or

b. A pooled interest-bearing trust account with subaccountings that will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client or third person.

45.4(3) *Accounts generating positive net earnings.* If the client's or the third person's funds could generate positive net earnings for the client or third person, the lawyer shall deposit the funds in an account described in rule 45.4(2). In determining whether the funds would generate positive net earnings, the lawyer shall consider the following factors:

a. The amount of the funds to be deposited;

b. The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c. The rates of interest or yield at the financial institution in which the funds are to be deposited;

d. The cost of establishing and administering the account, including service charges, the cost of the lawyer's services, and the cost of preparing any tax reports required for interest accruing to a client's benefit;

e. The capability of financial institutions described in rule 45.3 to calculate and pay interest to individual clients; and

f. Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

45.4(4) *Directions to depository institutions*. As to accounts created under rule 45.4(1), a lawyer or law firm shall direct the depository institution:

a. To remit interest or dividends, net of any allowable monthly service charges, as computed in accordance with the depository institution's standard accounting practice, at least quarterly, to the Lawyer Trust Account Commission;

b. To transmit with each remittance to the Lawyer Trust Account Commission a copy of the depositor's statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the amount of allowable monthly service charges deducted, if any, and the account balance(s) for the period covered by the report; and

c. To report to the Client Security and Attorney Disciplinary Commission in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds. In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors. In the case of instruments that are honored when presented against insufficient funds, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, and the amount of overdraft. If an instrument presented against insufficient funds is not honored, the report shall be made simultaneously with, and within the time provided by law for, any notice of dishonor. If the instrument is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

Rule 45.5 Definition of "allowable monthly service charges." For purposes of this chapter, "allowable monthly service charges" means the monthly fee customarily assessed by the institution against a depositor solely for the privilege of maintaining the type of account involved. Fees or charges assessed for transactions involving the account, such as fees for wire transfers, stop payment orders, or check printing, are a lawyer's or law firm's responsibility and may not be paid or deducted from interest or dividends otherwise payable to the Lawyer Trust Account Commission.

Rule 45.6 Lawyer certification. Every lawyer required to have a client trust account shall certify annually, in such form as the supreme court may

prescribe, that the lawyer or the law firm maintains, on a current basis, records required by Iowa R. of Prof'l Conduct 32:1.15(a).

Rule 45.7 Advance fee and expense payments.

45.7(1) *Definition of advance fee payments.* Advance fee payments are payments for contemplated services that are made to the lawyer prior to the lawyer's having earned the fee.

45.7(2) *Definition of advance expense payments.* Advance expense payments are payments for contemplated expenses in connection with the lawyer's services that are made to the lawyer prior to the incurrence of the expense.

45.7(3) *Deposit and withdrawal.* A lawyer must deposit advance fee and expense payments from a client into the trust account and may withdraw such payments only as the fee is earned or the expense is incurred.

45.7(4) *Notification upon withdrawal of fee or expense.* A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The attorney must transmit such notice no later than the date of the withdrawal.

45.7(5) *When refundable.* Notwithstanding any contrary agreement between the lawyer and client, advance fee and expense payments are refundable to the client if the fee is not earned or the expense is not incurred.

Rule 45.8 General retainer.

45.8(1) *Definition.* A general retainer is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not a payment for the performance of services and is earned by the lawyer when paid.

45.8(2) *Deposit.* Because a general retainer is earned by the lawyer when paid, the retainer should not be deposited in the trust account.

Rule 45.9 Special retainer.

45.9(1) *Definition.* A special retainer is a fee that is charged for the performance of contemplated services rather than for the lawyer's availability. Such a fee is paid in advance of performance of those services.

45.9(2) *Prohibition.* A lawyer may not charge a non-refundable special retainer or withdraw unearned fees.

Rule 45.10 Flat fee.

45.10(1) *Definition* A flat fee is one that embraces all services that a lawyer is to perform, whether the work be relatively simple or complex.

45.10(2) *When deposit required.* If the client makes an advance payment of a flat fee prior to performance of the services, the lawyer must deposit the fee into the trust account.

45.10(3) *Withdrawal of flat fee.* A lawyer and client may agree as to when, how, and in what proportion the lawyer may withdraw funds from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees.

Report of the United States District Court

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Hon. Mark Bennett
United States District Court
Northern District of Iowa
320 6th Street
313 Federal Building
Sioux City, IA 51101
(712) 233-3909

The Vanishing Civil Jury Trial[1]

> "The jury system is the handmaid of freedom. It catches and takes on the spirit of liberty, and grows and expands with the progress of constitutional government. Rome, Sparta and Carthage fell because they did not know it, let not England and America fall because they threw it away." Charles S. May (1875)[2]

The recent dramatic decline in civil jury trials in federal court certainly would have been of concern to Charles May and ought to be a matter of grave and urgent concern for lawyers, litigants, federal judges and citizens. "In federal court, case dispositions increased from about 50,000 in 1962 to more than 250,000 in 2002; yet after peaking at over 12,000 trials in 1985, the number of trials declined to about 4,500 in 2002, which is less than the 5,800 civil cases that were tried in 1962. Thus, the proportion of federal cases resolved by trial declined from 11.5 percent in 1962 to 1.8 percent in 2002." [3] This precipitous and shocking drop in civil jury trials is even more startling because the number of authorized Article III judges in the district courts has more than doubled during the same period, from 307 in 1962 to 665 in 2002.[4] As my colleague, Judge William G. Young, has eloquently written, "The American jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic."[5] More than 200 years ago James Madison observed, "Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[6] If Madison is correct, given the First Congress's passage of the Seventh Amendment in 1789, how did we get into this precarious predicament in just a few short years? More importantly, what needs to be done to breathe new life into trial by jury?

The list of culprits in the legal literature allegedly responsible for the vanishing civil jury trial is surprisingly long, but includes "the usual suspects." For example, a poll of the leadership of the American College of Trial Lawyers produced the following representative list, in the order most frequently mentioned: Increased use of ADR, rising litigation costs, rising stakes/amounts at issue, increasing use of summary judgment, uncertainty of outcome, judges' views of their role as case managers, mandatory sentencing guidelines, stricter requirements for expert evidence post-*Daubert*, lack of trial experience among judges, tort reform, lack of judicial resources, and external market constraints.[7] Space limitations permit comment on only a few of these "suspects."

First, I have never been a huge proponent of ADR—especially court-mandated ADR—and I believe it has become the civil jury trial's number one enemy. While ADR has many splendid qualities, it is, in my view, the single greatest cause of the addition of trial lawyers to the endangered species list. Trial strategy and refinement of jury trial skills are quickly becoming relics of a bygone era. The atrophy of trial advocacy skills among experienced trial lawyers and the inability of inexperienced lawyers to gain invaluable trial experience virtually ensures that there will be no next generation of trial lawyers as we know them. Indeed, lawyers now

describe themselves as "litigators" rather than "trial lawyers,"[8] and an ABA study recently noted "that a growing number of lawyers who describe themselves as litigators have scant, if any, actual trial experience."[9] This change in nomenclature reflects a paradigm shift away from trial by jury towards expensive "litigating," often with the aim of ultimately resolving the dispute through ADR rather than by jury trial. While it is true that trial by jury has never been the primary method for resolving civil litigation, ADR has hastened its demise.

Second, massive pre-trial discovery has become the financial lifeblood of "litigators." I wonder if the enormous cost of this pre-trial discovery actually scares off litigants from going to trial? Are the litigants then pressured into ADR by their "litigators," who are often scared to go to trial, having spent so much of their clients' money, but possessing so little current trial experience? Might this explain the phenomenon, which I am sure all experienced trial court judges observe: tough-talking, take-no-prisoners "litigators" who suddenly cave in and settle as the trial date approaches? What does it say about trial practice that many partners in litigation practices of small, mid-sized, and large law firms haven't actually tried a jury trial in years?

Third, I think that the trend away from jury trials toward a new focus on expensive discovery and summary judgment has been fueled by the complicity of federal trial and appellate judges. The rise of summary judgment as a means of trial avoidance has been made easier by the U.S. Supreme Court's trilogy of decisions in 1986, so that summary judgment is now the Holy Grail of "litigators." In my view, trial and appellate judges engage in the daily ritual of docket control by uttering too frequently the incantation, "We find no material question of fact."[10] Indeed, while we all hear so much about the so-called "litigation explosion," it is interesting to note that from 1962 to 2002, civil trials in federal courts per million persons in the United States fell by 49%.[11] What does it say about judges' attitudes toward trials that the average federal district court judge last year had only 19 trials (and that includes criminal cases—another phony whipping boy for the decline in civil trials)?

At the risk of being blunt and overly simplistic, here is the nub of the problem: Litigation has become far too expensive, and, as a result, lawyers try far fewer cases. With a dramatically diminishing civil jury trial bar, the determination of the value of cases is often left to ADR "neutrals," some of whom are non-lawyers and many of whom have never tried a case. We now find ourselves in an ever faster downward spiral, in which inexperienced "trial" lawyers settle cases in ADR with no real experience from which to gauge the value that a jury would place on their case. Inexperience breeds fear and, thus, the fear of going to trial puts added pressure on the downward spiral of fewer trials. Add to this mix the fact that federal trial court judges place far too much pressure far too often on litigants and lawyers to settle their cases, and the result is this extraordinary crisis: the vanishing civil jury trial.

As a collective legal community, we need to find thoughtful ways to dramatically reduce the cost of discovery and summary judgment. We also need to streamline the process for getting civil cases to trial. While I am not suggesting eliminating all discovery, raising the bar to

obtain summary judgment and returning to "trial by ambush," such a scheme might have some appeal over our present system. As federal trial court judges, we need to cease pressuring litigants and lawyers to settle. No litigants should ever feel that their trial judge was not willing and eager to try their case. I am confident that if federal trial court judges put as much energy into creative thinking about speedier, less expensive civil jury trials, in a more "user friendly" trial environment, as they have into pressuring litigants to settle, we could restore the right to trial by jury to its historic place in the Bill of Rights. Failure to do so will spawn drastic consequences, including the withering away of the trial bar as we know it and the loss of opportunities for hundreds of thousands of potential civil trial jurors to serve their nation.

The decline of civil trial by jury in federal court is tragic and the loss of this "stunning experiment in direct popular rule"[12] would be catastrophic for the nation. As Justice George Sutherland observed, "[T]he saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."[13] I believe that there is still time; the question is, will we stretch forth a saving hand?

1. Chief Judge Bennett's contributions to the following article are recreated here with permission from the American Judicature Society: Judges' Views on Vanishing Civil Trials, 88 *Judicature* 306 (2005).

2. Charles S. May, Commencement Address to the University of Michigan Law School (Mar. 1875), in J.W. DONOVAN, MODERN JURY TRIALS AND ADVOCATES, 165-90 (2d rev. ed., New York, Banks & Brothers 1882).

3. Judges' Views on Vanishing Civil Trials, 88 *Judicature* 306, 306 (2005) (Introductory remarks provided by *Judicature*).

4. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* JOURNAL OF EMPIRICAL LEGAL STUDIES , Volume 1, Issue 3, 500, November 2004.

5. Hon. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW., 30, 31 (July 2003).

6. 1 ANNALS OF CONG. 454 (Joseph Gales ed. 1789).

7. AMERICAN COLLEGE OF TRIAL LAWYERS, THE "VANISHING TRIAL": THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM (October 2004).

8. John H. Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 LITIG. 5, 6 (1978).

9. Stephanie Francis Ward, *No Place Like Court, Shrinking Trial Dockets Reduce Learning Opportunities for Young Litigators*, 89-SEP A.B.A. J. 62 (2003).

10. *Kampouris v. The Saint Louis Symphony Society*, 210 F.3d 845, 850 (8th Cir. 2000) (Bennett, Chief Judge, sitting by designation, dissenting) (lamenting the overuse of summary judgment and the erosion of the right to trial by jury).

11. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT Table C-4 (1962-2002).

12. William G. Young, *America's Civil Juries . . . going, going, Gone?* 4 LEGAL NETWORK NEWS NO.2, 1 (1998) (summarizing De Tocqueville's view of American civil juries, citing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 337-339 (Schocken 1st ed. 1961))

13. *Associated Press v. NLRB,* 301 U.S. 103, 141, 57 S. Ct. 650, 81 L .Ed. 953 (1937) (Sutherland, J., dissenting).

** Mark W. Bennett is the Chief Judge of the United States District Court for the Northern District of Iowa. The N.D. of Iowa led the nation's 94 districts in trials per judge in 2001 and 2002, and was second in the nation in 2003. In all three years, the N.D. of Iowa had more than twice the national average of trials per judge.

Iowa Products Liability: Some Questions Answered and Some Answers Questioned

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Kevin M. Reynolds
Whitfield & Eddy PLC
317 Sixth Avenue, Suite 1200
Des Moines, IA 50309-4195
(515) 288-6041

IOWA PRODUCT LIABILITY LAW: SOME QUESTIONS ANSWERED AND SOME ANSWERS QUESTIONED[1]

Kevin M. Reynolds
Whitfield & Eddy, PLC
Des Moines, Iowa

[1]The author borrowed this title from a well-know article by warnings consultant Alan Dorris, entitled "Product Warnings in Theory and Practice: Some Questions Answered and Some Answers Questioned," Proceedings of the Human Factors Society 35th Annual Meeting 1073, 1075 (1991). The subject paper is an adaptation to one that was printed in the Spring 2004 issue of "Defense Update," entitled " Some Suggested Changes in Iowa Law That Could Benefit Defendants in Product Liability Cases."

INTRODUCTION

Iowa product liability law in 2005 is in a state of flux. The Iowa Supreme Court in October of 2003 handed down Wright v. Brooke Group, which adopted the Restatement 3d of Torts, Product Liability, and "abandoned" (in the Court's words) 402A. Nevertheless, 402A concepts and terms continue to permeate the products landscape. 402A was initially adopted in Iowa in 1970 and has been the centerpiece of products litigation in this state for more than 30 years. .

The purpose of this article is to analyze current issues in Iowa product liability law, and to discuss strategies that might be employed by counsel to successfully defend the case at issue..

Problem No. 1: HOW DO WE HANDLE DEFENDING A MULTIPLICITY OF CLAIMS FOR BASICALLY THE SAME PRODUCT DEFECT?

The Iowa Supreme Court "abandoned" the Restatement of Torts, Second, Section 402A and the concept of "strict liability in tort" in Wright v. Brooke Group, Inc., 652 N.W.2d 159, 169 (Iowa 2002). In its place, the Court adopted Section 2 of the Restatement Third of Torts, Products Liability (1997). Id. Section 2 of the Restatement Third organizes a product liability claim around three possible allegations: manufacturing defect or flaw (Section 2(a)); design defect (Section 2(b)); and failure to warn or instruct (Section 2(c)). After Wright, the old labels of "strict liability in tort," "negligence," and "warranty" should not be used in Iowa product liability cases. The abandonment of these terms can help a products defendant. The Wright Court agreed that these terms should not longer be employed, when it stated:

> We are convinced such a distinction [between strict liability and negligence in a design defect case] is illusory, just as we found no real difference between strict liability and negligence principles in failure to warn cases. . . Because the Products Restatement is consistent with our conclusion, we think it sets forth an intellectually sound set of legal principles for product defect cases.

62 N.W.2d at 167.

Many defense lawyers ask the question: is the Restatement 3d more or less favorable to plaintiffs? I respectfully submit that this is the wrong question, but rather the issue is now: How can the Restatement 3d and its provisions be used to help products defendants? One thing is abundantly clear: the adoption of the Restatement 3d mandates that overlapping and duplicitous claims for the same product defect are to be longer permitted. Don't think that this was much a problem before? Tell that to a defense lawyer who has "won" a case on the strict liability design defect count, but "lost" it on the negligence or warranty count! The Iowa Uniform Civil Jury Instructions were revised appropriately last year in light of the Wright Court's adoption of the Restatement 3d, Section 2. See IUCJI 1000.1 (Manufacturing Defect); 1000.2 (Design Defect); 1000.3 (Inadequate Instructions or Warnings); and 1000.4 (Reasonable Alternative Design Requirement).

Practice Pointer: Strategically, if you find a court that is reticent follow this approach, even in light of Wright, it can be effective to point out the likelihood of an inconsistent jury verdict, a mistrial, and a costly retrial as a result. In the example in the preceding paragraph, many courts have held that a "no" finding on defect but a "yes" finding on negligence is inconsistent, and cannot stand. See, e.g., Tipton v. Michelin Tire Co., 101 F.3d 1145 (6th Cir. 1996)(court unable to reconcile jury finding of "yes" on negligent design but "no" on strict liability design defect). This makes sense: strict liability was invented in the first place to ameliorate the so-called harsh effects of having to prove a specific act of negligence. In addition, sophisticated plaintiff's attorneys don't want to have to retry their case, either, so many times just as soon as they are alerted to this potential problem, and know that you are sensitive to it, they will voluntarily give up the duplicitous claims.

Nevertheless, it should be recognized that a strong impediment doing away with the "strict liability, negligence, and warranty" matrix is the extent to which these terms permeate

Iowa product liability precedent and statutory enactments prior to Wright. For example, the Iowa Comparative Fault Act refers to "strict tort liability" in Section 668.1(1), which defines what constitutes "fault." Another good example is Iowa Code Section 613.18, the so-called "retailer immunity" statute. If the terms strict liability and warranty are no longer to be used in products case, what does this statute now mean? It explicitly speaks in terms of "strict liability in tort or breach of implied warranty of merchantability."

A more recent example is the Iowa statute of repose for products, Section 614.1(2A). This statute refers to "strict liability in tort," "negligence," and "breach of an implied warranty." Iowa Rule of Evidence 5.407, regarding subsequent remedial measures, carves out an exception for cases based on "strict liability in tort or breach of warranty." Technically speaking, after Wright, each of these references is outdated, is no longer useful and confuses the issues. Instead, a product case after Wright is either based on: 1) manufacturing defect; 2) design defect; or 3) failure to warn or instruct. Using these terms, that factually describe the type of claims being made, would greatly simplify Iowa product liability law. It would also make it clear that for each type of defect, a plaintiff has only one, and not multiple, claims. Iowa statutes should eventually be amended by the Legislature to substitute the new terminology adopted in Wright. In the meantime, the existing statutory language should be judicially construed as applying the same protections for defendants under the Restatement 3d terminology as was provided for strict liability claims – the clear intent of the Legislature. Finally, and as set forth in part 6 below, Iowa Rule 5.407 should be amended to conform to Federal Rule of Evidence 407 by deleting the strict liability exception for the inadmissibility of subsequent remedial measures.

Problem No. 2: HOW CAN WE PUT BLAME AND LIABILITY ON THOSE TORTFEASORS WHO ARE AT FAULT AND ACTUALLY CAUSE ACCIDENTS?

The Iowa Comparative Fault Statute, Chapter 668 of the Iowa Code, is a creature of the Iowa Legislature and dates to 1986. At least two aspects of that law should be changed, however, to bring a more common-sense approach to the liability scheme and make the statute more fair to product defendants. Unfortunately, only the Legislature can change the statute, and the likelihood of that being done is best described as "slim and none–and Slim has just left town."

A. The jury should not be told about the effect of their fault apportionment.

Under Iowa Code Section 668.3(5), in a comparative fault case tried to a jury, the court is duty-bound to instruct the jury "and permit evidence and argument" with respect to the effects of the percentages so determined. As a practical matter, this means that the lay-person jury is told that if they find plaintiff more than fifty percent at fault, that plaintiff will not recover. The problem with telling the jury this is that it tends to unfairly "skew" the jury's fault finding in favor of plaintiffs and against defendants. This greatly waters down the "more than fifty percent and you are barred" rule in Iowa. It is respectfully submitted that if the jury were not told of the effect of their fault allocation, there would be many more cases where plaintiffs were found to be more than fifty percent at fault, and this would ultimately result in a defense judgment.

This aspect of Iowa law should be changed, but since it is a part of the statute, it will have to be changed by the Legislature. Further, the plaintiff's attorney should not be allowed to argue the "effect" of their answers to the verdict interrogatories. The jury should simply be instructed, as the fact finder, to determine the percentage of fault assigned to each party. Once those answers are given, it should be up to the trial court to determine the appropriate judgment that is entered in the case, based on applicable law. If the jury determines that a plaintiff's fault is more

than fifty percent, then the judge would enter a defense judgment. For findings of 50% or less, the judge would reduce the judgment by like amount. In this manner, the jury's fault findings will not be improperly "poisoned" by the jury knowing the legal effect of their answers, and the trial court would fulfill its role by applying the law to the facts found by the jury.

Practice pointer: Since this is the current law by statute, what is defense counsel to do? One approach would be to confront it head-on with the jury. One might even start the inquiry during jury selection of prospective jury members:

> "At the end of this case you will be instructed by the Court. The instructions tell you what the law is. The law in Iowa is that if you find the Plaintiff, Mr. Jones, more than 50% at fault, then he does not recover. Would you follow that law? Would you hesitate to find Mr. Jones more than 50% at fault, if you truly believed that was the case? What if another juror said "wait a minute, I like him, I think he should recover, can't we 'fudge' the percentages to make it so he can recover? Would you agree with that approach? Would that be proper in your mind?"

B. Fault should be allocated to bankrupt parties.

In Pepper v. Star Equipment Ltd., 484 N.W.2d 156, 158 (Iowa 1992) the Iowa Supreme Court held that fault cannot be allocated to a bankrupt party. This ruling was reaffirmed in Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994), when the Court held that the Manville asbestos trust was not a "party" for purposes of fault allocation. The effect of this court-imposed rule is to take the fault of bankrupt parties and to place it squarely onto the shoulders of less-culpable (or even non-culpable) defendants. The Court's majority in Pepper euphemistically called this "fault siphoning" when viewed from the plaintiff's standpoint. Id. However, from a solvent defendant's point of view, this is patently unfair. Justice Snell's well-reasoned dissent in Pepper makes eminent sense. This court-imposed rule puts fault squarely on parties that did nothing wrong (other than to be unlucky enough to be sued in a case where one of their co-defendants was in bankruptcy). Pepper exalts the importance of the "collectibility"

of damages over the apportionment of fault. Id. at 159. This result makes no sense given the overarching premise behind a comparative fault system: that each party should bear only its own fault, and not that of any other party.

Alternatively, if a defendant is in bankruptcy, the jury should be entitled to assess fault against that party, as if they were an absent or "prior-settled TORTFEASORS." See Iowa Code Section 668.2, 668.3(1) (2003). Further this harsh rule makes no sense in light of Iowa Code Section 613.18, (2003), the "retailer immunity" statute. This statute provides that a retail seller of a product may be held strictly liable in tort for a product defect, *if the manufacturer has been declared insolvent.* Actually, if an "insolvent" manufacturer has insurance to pay plaintiff's claim, there is no reason to invoke Section 613.18, although the statute provides for no such exception. In many products cases, both the retail seller and the manufacturer are joined as defendants. (This is done many times by plaintiff's counsel to "destroy" diversity and federal court jurisdiction). As noted, in many cases even a bankrupt manufacturer has an insurance policy against which the plaintiff can proceed. Where this is the case, there is a mechanism in the bankruptcy court whereby a party can ask that the bankruptcy "stay" be lifted, and plaintiff be allowed to proceed in litigation, to this extent. Section 613.18 can be also applied notwithstanding the jury's allocation of fault as against a bankrupt manufacturer. Although the retailer would technically have a contribution "action over" and against the manufacturer, based on its vicarious liability for the loss, to the extent it pays more than its "fair share" of allocated fault, that claim may be worthless if the manufacturer is without assets. But, in most cases, a retailer will have insurance against this liability, and this will be helpful to the small-business retailer in such a situation.

Practice pointer: Pepper is the current law; but how do we deal with this situation now? Argue that bankrupt party was the sole proximate cause of the accident. Under the sole proximate cause doctrine, the entity that is the "sole proximate cause" does not have to be made a party to the case. In some situations, that entity has legal immunity from suit, yet, it is proper to argue that their actions were the sole proximate cause. See, e.g., Chumbley v. Dries & Krump Mfg. Co., 521 N.W. 2d 192 (Iowa Ct. App. 1993)(employer removed barrier guard from punch press; plaintiff could not sue employer due to work comp exclusive remedy bar; held, proper for press manufacturer to defend case, arguing that employer's actions in removing guard was the sole proximate cause of plaintiff's injury). The only thing that Pepper says is that the bankrupt party cannot be made a party *for purposes of allocation of fault*. Id.

Apart from strategy under the current rule, how do we change the Pepper rule? Make record long and hard on this issue in the trial court, preserving it as a potential appeal issue. The strident dissent in Pepper, not to mention its correct analysis, indicates the fragility of this rule. This issue can make an exceedingly big difference in the right case with the right facts. What if you are defending a "nominal" defendant in a case where the "culprit" is the bankrupt entity? Obviously, the trial judge is bound to follow Pepper, as he or she is not operating as an "independent contractor" where Iowa law is concerned. But in an appropriate case, the trial court might issue a ruling with language that might assist a later appeal.

Problem No. 3: HOW DO WE USE SECTION 668.14, THE STATUTORY ABROGATION OF THE COLLATERAL SOURCE RULE, TO OUR FULLEST ADVANTAGE?

Iowa's common-law collateral source rule was abrogated by statute, Iowa Code Section 668.14, in comparative fault cases seeking damages for personal injury. The effect of this legislative mandate, however, was greatly curtailed by judicial fiat in Schonberger v. Roberts, 456 N.W.2d 201 (Iowa 1990). In Schonberger, the Court held that this statute, despite its

language to the contrary, did not apply to worker's compensation payments. Id. at 203. Quite clearly, the Iowa Legislature had welfare benefits or programs in mind when it allowed an exception for benefits paid pursuant to "a state or federal program." Worker's compensation insurance, provided to a private employer by a private insurance company, is no more a "state or federal program" than the Iowa Comparative Fault Act with regard to a tort case for personal injury.

Logically, Schonberger, a sharply divided 6-3 decision, cannot be supported by the language of the statute. The majority was concerned with a "double reduction" for the plaintiff. Id. at 202. In reality, if work comp payments were deemed admissible, no such double deduction in fact, exists. This is because under the statute as written, the jury is also told that if there is a lien or subrogation interest for benefits paid, and if there is a recovery, that plaintiff can inform the jury that he or she has to pay that money back out of any proceeds obtained by judgment. The majority's concerns in Schonberger were false ones, and would have been answered by closer adherence to the statute. One can't help but recall the old law-school adage, that when interpreting a statute, the first rule is "read on." This point was well-made by the Chief Justice McGivern's dissent in Schonberger. Id. at 205-06. At any rate, the majority decision itself constitutes an unconstitutional violation of the separation of powers doctrine.

Practice pointer: The practical, strategic question after Schonberger is this: will product liability defendants be "better off" if the jury is told of the work comp payments, lien, and right to be paid back out of any judgment, or will they be *worse off?* In some cases, it might be to your client's advantage for the jury to know that plaintiff's medical bills have been paid for and they are not "destitute" or facing bankruptcy as a result. In this connection, if a plaintiff plays the "destitute" "card" hard enough, they may, in fact, open the door to collateral source benefits and waive the protections of the common law rule. Perhaps in other cases, a strong argument

can be made that a defendant might actually be worse off if the statute were used by defendant and collateral source benefits were admitted into evidence. It is possible that in such a case, the jury might just "increase" plaintiffs' tort recovery by the amount of the work comp benefits, knowing that these funds will not reach the plaintiff's "pockets."

Problem No. 4: HOW DO WE UTILIZE THE "STATE-OF-THE-ART' DEFENSE, SECTION 668.12 OF THE IOWA CODE, TO OUR FULLEST ADVANTAGE?

Iowa's state-of-the-art defense in a products case is governed by statute. See Iowa Code § 668.12. However, this statute was substantially (and unnecessarily, in the author's view) watered down by Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994). Olson correctly held that "failure to warn" claims were exclusively governed by a negligence standard, and from that point forward no failure to warn based on strict liability in tort would be permitted. Id. at 289. Yet, the Court erred when it unnecessarily found that "state-of-the-art" would not be a legal defense to an action based on failure to warn. Id. at 291. The Court confused the "state-of-the-art" concept with industry custom and practice, a separate issue in a products case. Other cases have cleared up the confusion on these two concepts. See, e.g., Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994)(state of the art is not the same as industry custom and practice).

The Court's holding in Olson cannot be squared with the express terms of the statute. Section 668.12 *explicitly* applies as a defense to failure to warn and/or labeling claims. The Court's reasons for carving out this exception are not persuasive. Although a plaintiff might contend that a product's warnings are "unreasonable" or negligent, the manufacturer-defendant might well choose to defend by urging that its warnings were "state-of- the-art" as of the time they were created, and cannot be the basis of liability. This is what the Legislature intended when it included the terms "warning, or labeling of a product" expressly in the statute. Once again, to the extent the Court's holding in Olson removes these words from the statute, it is

respectfully submitted that this holding is an unconstitutional violation of the separation of powers doctrine.

Practice pointer: Defense counsel should recognize that the state of the art defense in Iowa is attractive, since it is one of the sole remaining "complete" defenses to a product claim.[2] As attractive as this defense is, counsel should be mindful of the "continuing duty to warn" language that is present in the second sentence of 668.12. For example, pleading 668.12 and the "state of the art" defense as an affirmative defense in your answer, may "clue in" an otherwise unsuspecting plaintiff's counsel, and steer them toward perhaps a more problematic claim, involving the continuing duty to warn.

Second, and as it concerns so-called "post-sale" duties to warn or instruct, defense counsel should know that absent an order from an administrative agency, there is no common-law duty to recall or retrofit a product. See, e.g., Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994); Gregory v. Cincinnati Inc., 450 Mich. 1, 538 N.W.2d 325 (1995); see also Restatement 3d of Torts, Products Liability, Section 11 (1997). Also, to the extent that a plaintiff's counsel tries to argue to the court that warnings or instructions on products in the field should be retrofitted with "new and improved" on-product warnings, this, as a practical matter, constitutes a retrofit of a product, and there is no such legal duty under Iowa law.

Problem No. 5: HOW DO WE DEAL WITH THE "BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY" CLAIM IN A DESIGN DEFECT CASE?

Over thirty years ago, in Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970), the Court correctly recognized that breach of implied warranty claims were duplicative of strict liability. The Court in that case noted that unless there were undefined

[2]Another example of a so-called "complete" defense in a products case would be the Iowa statute of repose for

"unusual circumstances," both claims should not be submitted in the same case. Id. at 684-85. This is the correct view. More recently, however, the Court has actually retreated from this enlightened position, muddied the waters unnecessarily, and held that instructing on both claims in a design defect case was "not error." Mercer v. Pittway, 616 N.W.2d 602, 621 (Iowa 2000). Mercer was decided before the Court's adoption of the Restatement Third in Wright, however, and a strong argument can be made that this aspect of Mercer is no longer good law.

Practice pointer: As discussed in Problem No. 1 of this paper, the practical problem with instructing on both claims is that an inconsistent jury verdict may result, necessitating a complete retrial of the case. Some savvy trial judges have tried to avoid this problem by setting the order of the jury verdict interrogatories, so that they ask about the warranty claim first, and the defect claim second. In other cases, the implied warranty claim can be avoided altogether by applying what is, in essence, a five-year "statute of repose" set forth in the Iowa Uniform Commercial Code, Section 554.2725 (2003). That section of the Code states that the cause of action "accrues" at time of tender of delivery, i.e., sale of the product. But this may not cure the problem. It is wise defense strategy to argue the potential for an inconsistent verdict to any court leaning toward instructing on both claims. Plaintiffs will sometimes stand down when this is done, fearing an issue on appeal or reversible error. What should be done if the jury finds there is no "defect" under strict liability, but finds a "breach" of the implied warranty of merchantability? Isn't it true that strict liability was designed to ameliorate the "harsh effects" of warranty claims (e.g., privity rules)? Or to circumvent warranty disclaimers, which many courts find unconscionable and unenforceable with respect to claims for personal injury? How can there be a "breach" of warranty absent a "defect" in the product? Why is implied warranty even needed, if strict liability is submitted?

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products, Section 614.1(2A) of the Iowa Code.

The Court should clear up this area of the law, and clearly find (with respect to a garden-variety tort claim for personal injury) that with regard to a design defect claim, there is only one claim, and that breach of implied warranty of merchantability should be relegated to contract, and not tort, claims. This approach is consistent with the Court's adoption of the Restatement (Third) of Torts, Products Liability, §2(b) as discussed in Wright v. Brooke Group, 652 N.W.2d 159, 181-82 (Iowa 2002).

> Problem No. 6: HOW CAN WE GET FULL ADVANTAGE OF THE RULE AGAINST "SUBSEQUENT REMEDIAL MEASURES"?.

Iowa Rule of Evidence 5.407 (formerly Rule 407) governs the admissibility of "subsequent remedial measures." Iowa's rule, adopted in 1983, was based on the federal rule then in existence. The Iowa rule, however, contains an important "special rule" for product liability cases, as follows:

> This rule does not require the exclusion of evidence of subsequent remedial measures when offered in connection with a claim based on strict liability in tort or breach of warranty. . .

When adopted, this "products liability" exception was based on a distinct minority rule in federal circuit courts at the time, one of which was the Eighth Circuit. See, e.g., Robbins v. Farmers Union Grain Terminal Association, 522 F.2d 788 (8th Cir. 1977). This rule was based on a feeling, long-since disproven and discarded, that a manufacturer would not have a disincentive toward changing a product's design if subsequent remedial measures were allowed to be introduced into product liability suits, which were typically based on strict liability in tort.

This minority federal view was totally eviscerated in 1997 when Federal Rule of Evidence 407 was amended to read in pertinent part as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. (Emphasis added)

Iowa Rule of Evidence 5.407 should be amended to be consistent with the current federal rule and established practice. This would have the effect of applying the proscription against subsequent remedial measures to product liability cases. See, e.g., "Amended Rule 407: the Good, the Bad, and the Ugly," Kevin M. Reynolds and Lori E. Iwan, For the Defense, October 1998.

Practice pointer: If you cannot use Rule 407 to bar evidence of subsequent remedial measure, then try Rule 403. There is no good reason why a subsequent remedial measure admissible under Iowa Rule 5.407 could not be found to be inadmissible when applying Iowa Rule of Evidence 5.403. In McIntosh v. Best Western Steeplegate Inn, 546 N.W.2d 595, 597-98 (Iowa 1996), which was not a products case but rather a slip-and-fall incident, the Court held that the application of ice melt to a sidewalk would be admissible in even a negligence case, to prove a prior defective "icy" condition, notwithstanding Rule 407's proscriptions against using such evidence in negligence cases. As if that were not troubling enough, McIntosh also held that Rule 403 is not applicable at all when Rule 407 is applied. Id. at 598. This result makes no sense. First, it is respectfully submitted that the Court's McIntosh analysis under Rule 407 was incorrect. Even so, this error was magnified when the Court went on to rule that Rule 403 could not used to deny the admissibility of a remedial measure found to be admissible under Rule 407. The rules of evidence are separate and distinct; even if a remedial measure is found to be admissible under application of rule 407, there is no reason why Rule 403 could not be applied to render that same evidence inadmissible under that Rule's separate standards. This is no different

than finding that certain evidence is relevant and admissible, at the threshold, under Rules 401 and 402, yet is ultimately inadmissible under Rule 403, or under the hearsay rule.

In addition, this language no longer makes any sense when the holding of Wright is considered, which adopted Section 2(b) of the Restatement Third for design defect cases. 652 N.W.2d at 169.

Also, keep in mind that Rule 407 is designed to bar subsequent remedial measures in negligence cases. In Iowa, a failure to warn claim is a negligence claim. See Olson v. Prosoco, cited *infra*. As a result, if your client's product-related warnings and instructions were changed due to the subject incident, that evidence should be barred from the jury's consideration.

Finally, under Iowa law, the "event" in a products case which governs what is subsequent is *the accident in question*, not the date of design or manufacture of the product. Tucker v. Caterpillar Co., 564 N.W.2d 410 (Iowa 1997).

Problem No. 7: HOW DO WE HANDLE "DAUBERT" IN STATE COURT CASES WHERE THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE IS SUBJECT TO SERIOUS QUESTION?

Iowa's Daubert law is vague at best and somewhat in a state of flux. The Court's "iron grip" on the antiquated Frye rule cannot really be justified in this technological age of sophisticated products and complicated mechanism-of-injury issues which are present in most product cases. There is no good reason why it has to be that way. Daubert has been an integral part of federal jurisprudence for more than ten (10) years, as that decision came down in 1993. In Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525 (Iowa 1999), the Iowa Supreme Court held that it was not adopting Daubert, yet the Court noted that Daubert's analysis and factors might be "helpful" in a particular, "complex" case. Id. at 533. Rather than fight the majority of courts that have adopted Daubert as the law on admissibility of expert witness testimony under Rule 702, the Iowa Court should embrace and adopt it. I invite defense counsel in products

cases, which often have technical issues, to use the Daubert analytical framework persuasively as a "helpful" guide in Iowa courts.

When Leaf is closely scrutinized, the Court's reasons for refusing to adopt Daubert are wanting. The Court refuses to adopt Daubert because "we are committed to a liberal view on the admissibility of expert testimony." 590 N.W.2d at 531. But this is nothing more than a tautology. While this conclusory statement may be an accurate description of how the Iowa Court approaches expert witness admissibility issues, this vague, essentially standardless "standard" gives litigants and trial judges virtually no guidance. This iteration of the rule is troublesome, in that it sounds too much as if the Iowa Court is ready, willing and able to fully embrace "junk science" to undergird expert witness opinion. The Court seems to be saying that if an expert's opinion is "bad" enough, then the jury can simply ferret that out with the assistance of good cross-examination by counsel. But this does nothing to lower the costs of litigation, promote early resolution of cases, and increase the efficiencies of the judicial system.

The Leaf Court also held that Daubert-type standards would apply only to "scientific" opinion evidence, and not "garden variety" expert witness opinion, such as mechanical engineering testimony, for example. 590 N.W.2d at 531. That narrow reading of Rule 702 was debunked, however, a few short months later by the United States Supreme Court in Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Kumho Tire is a further indication that the Iowa Supreme Court's analysis of this issue is outside of the mainstream of established Daubert precedent.

Finally, Iowa Rule of Evidence 5.702 should be amended to conform with amended Federal Rule of Evidence 702. This amendment would strengthen the rules regarding expert opinion evidence, which can be so persuasive to a lay person jury, and serve as an additional impediment to "junk science" being put forth in Iowa courtrooms. Our state's court system, its

judges and attorneys, and its citizens, demand and (indeed) are entitled to something better than what we presently have. The Iowa rule was initially based, word-for-word, on the federal rule, and there is no justification today for a different rule in Iowa state court, as opposed to federal courts sitting in Iowa. In fact, this rather stark difference in interpretation of Rule 702 is a primary reason why many product defendants seek removal of any case to federal court, if diversity of citizenship or another basis for federal court jurisdiction exists.

Practice pointer: The 8th Circuit has some of the strongest Daubert law available. As a result, if federal court jurisdiction is available to you, strongly consider removal to federal court. If plaintiff's counsel has added a non-diverse local retailer of the product as a party to try to ruin diversity, consider using Iowa Code Section 613.18 to argue that the retailer is "fraudulently joined" and should be ignored for purposes of diversity.

When attacking expert opinion evidence in state court, consider placing your focus on Iowa Rule of Evidence 5.702, and refrain from calling it formally a "Daubert" motion. Not using the "Daubert" label might very well improve your chances of success, and eliminates any "knee jerk" reaction from the court, i.e. "Oh, Daubert, we don't follow that in Iowa." When plaintiff's counsel tries to argue that Daubert is not controlling in Iowa courts, point out that the Iowa Supreme Court in Leaf explicitly stated that the Daubert factors may be relevant and persuasive in an appropriate case.. Even though Daubert is not controlling law in Iowa state courts, its factors can be persuasive in an appropriate case. See Leaf, cited *infra*. Certainly, the effect of Iowa Rule 702 is no different than the federal rule, in that in the first instance, the court decides whether the proffered evidence is admissible. In this sense, Iowa state court judges serve as "gatekeepers" under Iowa Rule of Evidence 5.702.

In any case where plaintiff's expert is expressing opinions of weak or questionable foundation, the following inquiries (at a minimum) should be made:

1. Has your theory been tested? Can it be tested? (Note: if the theory cannot be tested, then it is not based on science, and for that reason, should be inadmissible. If it is testable, then it is based on science, but the expert should be required to test it to determine the validity of the expert's conclusions and opinions).
2. If it can be tested, and you haven't tested it, why haven't you tested it?
3. If your theory can't be tested, is it really based on good science? Is it based on science at all? If it can't be tested, isn't it like astrology? Is astrology based on good science?
4. Has you theory been subject to peer review and/or publication?
5. What is its known or potential rate of error?
6. Are there controlling standards with regard to the tests you used?
7. Has it attracted widespread acceptance in the relevant scientific community?
8. Has the technique or theory been developed solely for purposes of litigation? (Note: this was an additional, important factor added by the 9th Circuit court on remand in Daubert).

Problem No. 8: HOW DO YOU HANDLE A PLAINTIFF'S FAILURE TO WEAR A HELMET IN DEFENDING A MOTORCYCLE MANUFACTURER?

Under current Iowa law, if a motorcycle rider sustains a serious head injury in an accident, a product liability defendant may not argue that the failure to wear head protection was "negligence" chargeable to plaintiff. Meyer v. City of Des Moines, 475 N.W.2d 18, 190-91 (Iowa 1991). Any economist worth his or her "salt" would tell you that this unfortunate rule has the effect of providing a disincentive for motorcycle riders (or riders of mopeds, ATVs, bicycles, snowmobiles, roller skaters, skateboarders and the like) to wear helmets. See, e.g., "The Armchair Economist: Econmics and Everday Experience," Stephen A. Landsburg (1997). It also

shifts the consequences of a rather bad personal choice to the product defendant, who has no control over a particular plaintiff's decision to wear or not wear a helmet. In today's litigation climate, and with increasing use of helmets and acceptance thereof, this situation needs to be rectified.

Meyer was decided over 20 years ago at a time when few, if any, motorcycle riders (or in that particular case, a moped operator) wore helmets. The "custom and practice" with regard to wearing helmets has changed, and more and more people have opted to wear them. Media publications and ads typically show riders wearing helmets. Although Iowa presently has no mandatory helmet law or statute, there is no inconsistency between the lack of a helmet law and allowing a jury to find, under the facts and circumstances, that a particular plaintiff, in a particular accident resulting in a particular injury, was negligent for failing to wear a helmet. There is no statute in Iowa mandating that the failure to use a helmet is *inadmissible* in the trial of a civil case. See, e.g., Verburg v. Roadside Marine, Inc., Docket No. 464-00, Chittenden Superior Court (Vermont 2002)(defendant should not be prevented from urging that failure to wear a helmet is negligence based on Vermont's seat belt statute which disallows evidence of failure to wear a seatbelt). In many of these cases, a plaintiff's primary injury is a head injury that might have been reduced or altogether avoided by a helmet. Serious head injuries are often disabling and many times fatal. In such cases, it should be up to the jury to decide whether plaintiff could have reduced or eliminated his or her injury by wearing a helmet.

Practice pointer: Even though the use or non-use of a helmet is "inadmissible" into evidence, as a practical matter, the jury will know whether or not the plaintiff was wearing a helmet at the time of the accident. This is especially true if the plaintiff received serious head injuries in the accident. Astute plaintiff's counsel will want to ask the court for a jury instruction making it clear to the jury that they are not to consider plaintiff's failure to wear a helmet as

negligence or fault of any kind. Query whether a jury might engage, to some extent, in "nullification" in a case involving a serious head injury that could have been altogether avoided had plaintiff worn a helmet at the time of the crash.

Problem No. 9: HOW DO YOU DEFEND A CAR ACCIDENT CASE WHERE A PARENT HAS FAILED TO USE A CHILD-SAFETY SEAT, SUBJECTING THE CHILD TO AN UNREASONABLE RISK OF INJURY?

Iowa Code Section 321.446 is the child-restraint statute. Section 6 of that statute provides:

> Failure to use a child restraint system, safety belts, or safety harnesses as required by this section does not constitute negligence nor is the failure admissible as evidence in a civil action.

This law is statutory and would likely pass a constitutional attack under the deferential "rational basis" test. However, this law should be amended by the Iowa Legislature to reflect the present-day reality regarding the public's acceptance and widespread use of child safety seats. The safety of our children should be a high priority. See, e.g., Note, Liability for Nonuse of Child Restraints, 70 Iowa L. Rev. 945 (1985).

Further, in Iowa a parent can be cited for failing to properly restrain a child in a motor vehicle. This provides a clear lynchpin for arguing that in a civil case, the failure to restrain a child should constitute negligence *per se*. This statute, no doubt a testament to the successful lobbying efforts on the part of the plaintiff's personal injury bar, has the perverse effect of rewarding grossly negligent and reckless parents for not properly securing their children into car seats or seat belts in a motor vehicle. An extreme example might be a parent who allows his kids to ride in the open bed of a pick up. If there was even a minor "fender bender" type accident, the children could be ejected and severely injured. Serious and debilitating brain injuries might be ultimately determined to be the responsibility of the other driver (or the vehicle manufacturer) involved in an otherwise minor accident. Although this result is neither within the control nor

reasonably foreseeable from the standpoint of the other driver, or of the vehicle seller, it is both from the negligent parent's point of view: this would clearly be a foreseeable and readily avoidable consequence of the parent's actions. Nevertheless, in the trial of a civil claim for injuries to the children, a defendant could not argue that the parent was "negligent" for allowing the kids to ride in the back of the pickup, exposing them to this sort of obvious consequence. As a result, a fundamental unfairness would be visited upon the court and the defendant. If most Iowa citizens understood this was how our civil tort system operated, they would revolt. Chapter 668, the Iowa Comparative Fault Act, was adopted with the intent of doing away with this type of unfairness. With this statutory proscription removed, even if some small percentage of fault were placed on the parent, this would not bar their recovery unless it was more than fifty percent of the total fault assessed in the occurrence. In addition, the Court should make it clear that a parent's fault in violating the statute would not, in any event, be assessed against the innocent child victim, reducing his or her recovery.

On April 28, 2004, Governor Vilsack signed into law an amendment to the child restraint law that had been passed by the Legislature in the 2004 session. Beginning July 1, 2004, children through age 5 must be secured in a safety seat or booster seat. Those who are younger than 1 and weigh less than 20 pounds must be secured in a rear-facing seat. Under the old law, only children through age 2 were required to use safety seats. Other new rules apply to older children. Those between the ages of 6 and 10 will be required to at least wear seat belts. Under the former law, children 6 or older could ride unrestrained in the back seat. Despite these helpful changes, there was no change in the liability rules applicable to cases where children have been injured by their parents' failure to use a proper child restraint device.

Problem No. 10: HOW DO WE HANDLE THE ABROGATION OF THE SEAT BELT DEFENSE IN IOWA?

Iowa Code Section 321.445 is the Iowa seat belt statute. That law contains the following provision:

> In a cause of action arising on or after July 1, 1986, brought to recover damages arising out of the ownership or operation of a motor vehicle, the failure to wear a safety belt or safety harness in violation of this section shall not be considered evidence of comparative fault under section 668.3, subsection 1. However, except as provided in section 321. 446, subsection 6, the failure to wear a safety belt or safety harness in violation of this section may be admitted to mitigate damages, but only under the following circumstances:
>
> (1) Parties seeking to introduce evidence of the failure to wear a safety belt or safety harness in violations of this section must first introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injury or injuries claimed by the plaintiff.
>
> (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 after any reductions for comparative fault. [Emphasis added]

Limiting any reduction due to plaintiff's fault to no more than "five percent" makes this statute arbitrary and capricious, likely not sustainable in view of a serious constitutional attack. Although the constitutionality of this statute was upheld several years ago in Duntz v. Zeimet, 478 N.W.2d 635, 637 (Iowa 1991), however, that was not in the context of a crashworthiness case, or a crashworthiness case with an allegation of a defective restraint (i.e., seat belt or airbag) system. Under a rational basis test, some distinction is probably possible, as between those who use seat belts and those who do not. But there can be no serious question that mandating a maximum reduction of five percent, no matter what the facts of the case are, is arbitrary and capricious. The practical effect on a motor vehicle manufacturer is to deny them the right to prove what caused plaintiff's injuries. The five percent limit is so ridiculously low as to make it economically infeasible for a motor vehicle manufacturer to even raise or argue the lack of a seat belt in defense. This provision is counterintuitive and undermines the Iowa seat belt law, which

requires occupants to buckle up. Iowa's seat belt law is a primary statute, which means that a law enforcement officer can stop a citizen and write up a ticket based on the seat belt violation alone.

In recent years, widespread published data regarding seat belt usage in Iowa reports levels above eighty percent. There is nothing inherently wrong with allowing a jury to consider whether failure to use a seatbelt, in a particular case, constitutes negligence that is causally related to the injuries alleged. Allowing the jury to consider use or non-use of a seat belt, without any artificial limitations protecting negligent plaintiffs, is consistent with the Iowa Comparative Fault Act, where the jury apportions fault among the parties. It is also consistent with the normal rule that a tortfeasor's violation of a mandatory safety regulation constitutes negligence *per se*. As a result, the present iteration of this statute should be attacked vigorously in an appropriate case in an attempt to have it stricken down as unconstitutionally violative of due process and equal protection under both the state and federal constitutions.

Practice pointer: Iowa's seat belt statute is obviously incorrect. A simple example to the court may be used to amplify this message. One portion of the law formerly held that "use or non-use" was "inadmissible in any civil action." However, if this section were literally enforced, then no plaintiff would be able to sue an auto manufacturer for a defect in a seat belt system, in even a case where it was alleged that the seat belt was defectively manufactured or designed! This was the result in one case in Minnesota until the statute was later amended by the legislature. See Olson v. Ford Motor Co., 558 N.W.2d 491 (Minn. 1997).

Second, the Iowa Supreme Court has never examined the seat belt statute in the context of a crashworthiness claim. There is a fatal inconsistency between on the one hand, suing an automobile manufacturer for crashworthiness, but on the other hand, not letting the manufacturer defend the case by pointing to evidence of non-use of an available safety system, such as a

seatbelt. See, e.g., LaHue v. General Motors Corp., 716 F. Supp. 407, 415-16 (W. D. Mo. 1989)(noting that it is contrary to the premise of comparative fault to hold an automobile manufacturer responsible for injuries directly attributable to a plaintiff's failure to use an available seat belt). The statute might very well be held unconstitutional as applied in such a case.

Problem No. 11: HOW DO WE HANDLE "CRASHWORTHINESS" AND "ENHANCED" INJURY CLAIMS?

Iowa crashworthiness law is in a distinct minority that, strangely enough, does not permit any evidence of a tortfeasor's fault in causing the accident to be admitted during the trial of the "enhanced injury" case. This rule, established over a decade ago in the highly controversial and fragmented (four dissenters) decision in Reed v. Chrysler, 494 N.W.2d 224 (Iowa 1992), flies in the face of common sense, is contrary to the Restatement (Third) of Torts, Section 16, and is adverse to the majority rule on this issue in this country. Under Reed, a driver or plaintiff could be "high" on cocaine and cause his vehicle to leave the roadway; yet, in the trial of a "crashworthiness" or "enhanced injury" claim against the vehicle manufacturer, the driver's or plaintiff's drug usage which caused the accident in the first place would be held to be irrelevant, inadmissible, and kept from the jury! This is not an outlandish example; the actual plaintiff in Reed was intoxicated on alcohol, and the Court held that such evidence was inadmissible. Id. at 230. This "error" resulted in the reversal of a defense judgment, and a remand for a new trial. Given the Iowa Supreme Court's adoption of the Restatement (Third) of Torts, Products Liability, Sections 1 and 2, when presented with an appropriate case, the Court should also reverse the holding in the Reed case and adopt Section 16 of the Third Restatement.

A more recent example of the havoc that can be created by the present rule can be found in Weyerhauser Co. v. Thermogas Co., 620 N.W.2d 819 (Iowa 2000). There the Court, in a *en*

banc decision, held that the cause of a plant fire would not be "relevant" to a product liability claim against a supplier of propane, where it was claimed that a propane tank exploded "prematurely" in a fire. The fire in Weyerhauser was caused when an employee driving a fork lift truck left the parking brake engaged, overheating the lift and causing the fire. The owner of the plant (and the employer of the forklift's driver) sued the supplier of the propane tank which fueled the lift, among others. The plant owner alleged that its $5 million dollar property loss was caused by the "defective" tank. (Note: most tanks containing flammable fluid under pressure will explode when exposed externally to heat.) The jury at trial employed common sense and found Weyerhauser 70% at fault for the loss, and a defense judgment was entered. Unfortunately, this result was reversed on appeal and the case remanded for a new trial. Upon the retrial, the jury would be instructed that the cause of the fire would not be "relevant" to a determination of the defect claims. It is respectfully submitted that this result defies common sense. Obviously, the driver's abuse of the forklift should be considered in any effort to lay blame or responsibility for any losses occasioned as a result of the fire. Under established Iowa law regarding proximate cause, the forklift driver's fault in causing the fire at the outset is a "substantial factor" in causing the damages.

Problem No. 12: HOW DO WE DEAL WITH PUNITIVE DAMAGE CLAIMS IN PRODUCT LIABILITY CASES IN IOWA?

In Iowa, punitive damage claims are governed by exclusively by statute. See Iowa Code § 668A.1. The Iowa Legislature passed this statute in 1986. It was intended to be a part of a "tort reform" package, but this fact has been lost on many litigants and courts alike. See Commission to study liability and liability insurance concerns; 86 Acts, ch. 1211, §44. This effort was further buttressed by an amendment to the statute in 1987, which added a heightened burden of proof of "clear, convincing and satisfactory preponderance of the evidence." See 87

Acts, ch 157, §11, SF 482; Section 668A.1(a). When viewed in this context, it is clear that the Legislature intended to make punitive damages more difficult to obtain, not easier, as compared to the prior "common law" of punitive damages.

Nevertheless, the Iowa Supreme Court continues to cite, in support of punitive damage awards, common law that existed prior to Chapter 668A and indeed, in many cases, this prior common law is not congruent with the punitive damage statute. This prior common law of punitive damages has been superseded and "preempted," if you will, by Chapter 668A's standards and burden of proof. See Iowa Uniform Civil Jury Instructions Nos. 210.1, 210.2, 210.3, and 210.4. In so doing, the Court ignores the plain language of the statute, which requires proof of an intentional act before punitive damages are proper. The practical effect of this jurisprudence has been an overall "watering down" of the very high threshold that was specifically and purposefully set by the Iowa Legislature for the recovery of punitive damages.

Section 668A.1 of the Iowa Code (2003) states in pertinent part as follows:

> In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
> a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another. . .
>
> (emphasis added)

Notably, the statute requires both *willful* and *wanton* conduct. "Willful" is a synonym for "intentional." Yet, the Court has skirted this issue by citing outdated case law prior to the adoption of Chapter 668A to support an award of punitive damages. See, e.g., McClure v. Walgreen Co., 613 N.W.2d 225, 231 (Iowa 2002)(punitive damages are appropriate only when actual or legal malice is shown; "actual malice" is characterized by such factors as personal spite, hatred, or ill will, while "legal malice" is shown by wrongful conduct committed or continued

with a willful or reckless disregard for another's rights). Another way in which this high standard has been circumvented is by interpreting the term "willful" in the statute to mean only an "intent to act." Id. at 230.

Defense counsel should urge the trial court, and preserve record on appeal, that in every case involving a claim for punitive damages, that intentional conduct, as required by the statute, must be shown. "Intent" in this context must mean something other than a mere "intent to act."

At least one other aspect of punitive damages should be kept in mind in a products case. This flows from the recent United States Supreme Court decision in State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).[3] The Campbell decision supports limiting punitive damages to a "one-to-one" ratio of compensatory damages to punitive damages in most cases where substantial compensatory damages are awarded. 123 S.Ct. at 1524 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.") Many defense counsel overlook this helpful "one-to-one" ratio limitation argument, quoting instead the Campbell Court's oft-cited admonition that, "In practice, few awards exceeding a single-digit ratio [e.g. 9-1] between punitive and compensatory damages, to a significant degree, will satisfy due process." Id. The Iowa Bar Association Board of Governors at this writing has not yet approved a post-Campbell update to Iowa Uniform Civil Jury Instruction 210.1, and practitioners are forewarned that the existing version of that punitive damages instruction is unconstitutionally defective in light of Campbell.

[3] See Tom Waterman's article, "New Assistance for Defending Punitive Damage Claims in Iowa – the 'marching orders' of State Farm Mutual Automobile Insurance Company v. Campbell," September 2003 DEFENSE UPDATE.

CONCLUSION

This paper has attempted to discuss some of the "hot button" issues of Iowa product liability law. In the trial of virtually every products case, there are multiple opportunities to shape Iowa product liability law for the future. Defense counsel should keep an open mind for opportunities to improve Iowa law. This paper discusses just a few examples of issues that may be "ripe" for reconsideration (and hopefully, change) by the Iowa Supreme Court or by the Iowa Legislature. Keep in mind these issues, as well as others you may think of, to give your client the best chance of success and to restore a "common sense" view to Iowa product liability law.

Apportionment, Successive Injuries and Other Emerging Issues in Workers' Compensation

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Coreen K. Sweeney
Nyemaster, Goode, West, Hansell & O'Brien, P.C.
700 Walnut Street Suite 1600
Des Moines, IA 50309
(515) 283-3100

APPORTIONMENT, SUCCESSIVE INJURIES AND OTHER RECENT DEVELOPMENTS IN WORKERS' COMPENSATION

By Coreen K. Sweeney*
NYEMASTER, GOODE, WEST, HANSELL & O'BRIEN, P.C.
700 Walnut, Suite 1600
Des Moines, Iowa, 50309-3809
Telephone: (515) 283-8160
Fax: (515) 283-8108

SUBSTANTIVE CHANGES AND ADDITIONS TO IOWA'S WORKERS' COMPENSATION LAWS BY HOUSE FILE 2581

I. Apportionment and Full Responsibility

A. Old Law: Confusing and Inequitable

1. **The old apportionment rule:** Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 264 (Iowa 1996).

   a. A prior injury, condition or illness, unrelated to employment;
   b. Independently produces;
   c. An ascertainable portion of the employee's;
   d. Cumulative industrial disability;
   e. The employer is liable only for that portion of the industrial disability attributable to the current injury.

2. **Concomitant "full responsibility" rule:** Nelson, 544 N.W.2d at 265 (citing Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995)).

   a. When there are two successive work-related injuries**;**
   b. The employer held liable for the second injury is generally held liable for the entire disability resulting from the combination of the prior disability and the present injury.

3. **Confusing and inequitable results:**

   a. With two successive work-related injuries, regardless of who the employer was, second employer is liable for the entire disability. Senegas v. IBP, Inc., 638 N.W.2d 699 (2002).
   b. Double recovery: Example from Excel Corp. v. Smithart, 654 N.W.2d 891, 897 (Iowa 2002):

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i. Worker sustains back injury resulting in PPD of 20% and, after returning to work, sustains a second separate back injury resulting in PPD of 40%. Worker was entitled to be compensated for the 40% disability based on the second injury even though Worker had previously received compensation for the 20% disability. Although Worker had a 40% disability, Worker actually received a total disability award between the two injuries, totalling 60%.

ii. This is so, even though the second claim for injury was compensated using current wages, which would normally provide a higher wage base and result in greater compensation to the worker. Id.

c. Only when ascertainable: Employer was liable for portion of nonwork-related injury because the portion was not ascertainable; liability increased by reason of judicial economy not culpability.

d. Usually applied only to industrial disability, unless the impaired scheduled member had been at least partially restored. See Floyd v. Quaker Oats, 646 N.W.2d 105, 109-10 (Iowa 2002).

e. Statutory exception: "Apportionment of disability between two work-related injuries" only allowed when "the worker is disabled and drawing compensation at the time of the accident for which the employee claims compensation." Mycogen Seeds v. Sands, 686 N.W.2d 457,465-66 (Iowa 2004) (citing Iowa Code § 85.36(9)(c) (2003) (**§85.36(9) repealed 2004)).**

B. New Law: More Equitable

1. Effective for injuries occurring on or after September 7, 2004. HF 2581 § 18 (enacted on September 7, 2004).

2. **The new apportionment rule**: New Iowa Code § 85.34(7) on successive disabilities provides:

a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's pre-existing disability that arose out of and in the course of employment with a different employment or from causes unrelated to employment.

b. If an injured employee has a pre-existing disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the pre-existing disability was compensable under the same paragraph of Section 85.34(2), as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

If, however, an employer is liable to an employee for a combined disability that is payable under Section 85.34(2)(u), and the employee has a pre-existing disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

c. A successor employer shall be considered to be the same employer if the employee became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment.

3. What does it mean?

a. Must be the same employer to obtain credit for benefits previously paid.

b. Benefits must have been previously paid, and if not, the employer is liable for the entire disability.

c. Statute creates a "fresh start," which is a baseline representing the employee's ability to work and earn at the time of the first injury with the employer. (It does not

assume that the person was a perfect physical specimen if he or she was not already.)

d. Industrial disability baseline is the first injury with the current employer, i.e. only one "fresh start" with the same employer ("fresh start") refers to combined disability measured in relation to the employee's condition immediately prior to the first injury. The competitive labor market determines the earning capacity each time the employee is hired by new employer.

e. Disabilities retain character as industrial or scheduled.

f. Current employer has full responsibility for compensating all industrial and scheduled disability it causes.

g. Current employer has no responsibility for industrial or scheduled disability others caused and gets no credit for disability others compensated.

h. Employer receives credit for part of the combined disability it compensated; no credit for disability employer caused but didn't compensate.

i. Credit is reduced if wages and weekly rate were adversely affected.

j. Prevents double recoveries and double reductions for subsequent industrial disability injuries with the same employer.

k. Incorporates changes to a person's earning capacity, which occur over time, but increases and decreases.

l. Permanent total awards receive no credit.

4. Allows for satisfaction "to the extent of the percentage of the disability for which the employee was previously compensated by the employer," except if industrial disability and employee is earning less due to prior injury. Id.

C. EXAMPLES:

1. EXAMPLE A: Scheduled v. Scheduled Injury/Different Employer.

Employee injures his right hand while working for Employer Y, resulting in 10% functional loss of the hand. Employee loses job, but obtains work with Employer Z. Employee injures his right hand again, in a separate injury, resulting in a scheduled member disability to the hand of 18%, with doctor opining 8% is new. What does Employer Z owe under the new law?

c. Employer Z is liable for the functional impairment of the hand caused by Z, or 8%. Note that Z is responsible only for the disability it independently causes.

b. No longer matters if the scheduled member has been partially restored, <u>unless</u> scheduled member has been partially restored to the extent the actual disability at the time of the second injury was less than 10%.

2. EXAMPLE B: Scheduled v. Scheduled/Same Employer

Same facts as Example #1, but this time the second injury occurred with the same employer, Employer Y. How much does Employer Y owe?

a. Apportionment rule applies because injury was to same member and occurred with same employer.

b. Employer Y is liable for the 18% disability but receives credit for the 10% paid previously, assuming Employer Y did indeed pay employee this amount.

c. Employer Y owes employee an additional 8% to the arm.

3. EXAMPLE C: Scheduled v. Industrial Disability.

Employee sustains work-related injury to right arm resulting in payment of 10% to the right arm. Claimant has a subsequent injury to the right shoulder resulting in 15% industrial disability.

a. Employer Y receives no credit for scheduled member disability payment from first injury.

b. Employee receives full 15% industrial disability from second injury.

4. EXAMPLE D: Industrial v. Industrial/Different Employer

Employee sustains back injury while working for Employer Y resulting in a paid industrial disability of 20%. Employee sustains a second back injury with Employer Z resulting in a 30% industrial disability.

a. No credit for previous industrial disability payment made by Employer Y.

b. Employee receives a full 30% in industrial disability benefits from second injury, due to "fresh start" with change in employer.

5. EXAMPLE E: Industrial v. Industrial/Same Employer

Employee works for Employer Y for $15.00/hour as a factory worker and has a back injury resulting in 20% industrial disability, which Employer Y pays. Employer Y returns Employee to the same job level providing him regular increases in pay as if he had never been injured. Three (3) years later, Employee injures his shoulder at work while earning $18.00/hour and now has 30% industrial disability.

a. Employer Y receives full credit for previously paid industrial disability of 20% and pays the incremental difference (10%) for the second injury.

b. Payment Injury l: Work comp rate equals $335.00.

20% industrial disability equals $33,500.00.

c. Payment Injury 2: Work comp rate equals $395.00.

30% industrial disability equals $59,250.00.

d. Difference due: Ten percent (10%) at $395.00, or $19,750.00.

6. EXAMPLE F: No credit (Industrial v. Industrial)

Employee works for Employer Y for $15.00/hour as a factory worker and has a back injury resulting in 20% industrial disability

which was NOT paid. Employer Y returns Employee to an equal level job providing him regular increases in pay as if he had not been injured. Three years later, Employee hurts a shoulder at work while earning $18.00/hour and now has a 30% industrial disability.

a. Full responsibility rule applies; Employer Y receives **NO** credit for previously unpaid industrial disability.

b. Employer Y pays full 30% industrial disability for second injury.

7. EXAMPLE G: Partial credit (Industrial v. Industrial)

Employee works for Employer Y for $15.00/hour as a factory worker and has a shoulder injury resulting in a paid industrial disability of 20%. As a direct result of the work restrictions, Employee is returned to work as a clerk, earning $14.00/hour. Three (3) years later, when the factory worker would have earned $18.00/hour and Employee is earning $17.00/hour as a clerk, she has back injury resulting in 30% industrial disability.

a. Employer Y receives a partial credit.

b. Reduction in wages $17.00 (now)/$18.00 (would earn if still worked as factory worker) equals 94.4% which is a reduction of 5.6% in wages.

c. Partial credit equals 20% paid – 5.6% = 14.4%.

d. New industrial disability is 30%, less credit of 14.4% = 15.6% industrial disability for second injury.

8. EXAMPLE H: Full credit (Industrial v. Industrial)

Employee works for Employer Y for $15.00/hour as a factory worker and has a shoulder injury resulting in a paid industrial disability of 20%. Employee physically could have returned to work at the same wages, but voluntarily took a day-shift job as a clerk earning $14.00/hour. Three (3) years later, when a factory worker would have earned $18.00/hour and Employee is earning $17.00/hour as a clerk, she has a back injury resulting in 30% industrial disability.

a. Employer Y receives a full credit for previously paid industrial disability since Employee's reduction in wages

was not directly attributed to any physical restrictions resulting from the first injury.

b. Employee is paid 10% industrial disability for the second injury. (Note that injured Employee must prove that the reduction in wages is due to first injury to avoid full credit calculation for previously paid industrial disability.)

D. RECOMMENDATIONS FOR EMPLOYER:

1. As always, encourage employee's return to work as soon as medically feasible and accommodate restrictions.

2. Try to find a job within the same "work classification" without wage reduction.

3. Document all employee requests for job reassignment to lower paying jobs and reasons for transfer. (Ideally, include in settlement documents.)

4. Consider obtaining FCE in addition to treating doctor's recommendations on restrictions (provides a more quantifiable level of disability).

5. Have detailed job descriptions in place insofar as physical restrictions are concerned.

6. Document offers of employment in the same job classification and document employee acceptance/rejection of offers.

7. Have treating doctor provide opinion on employee's ability to return to work given job description and assigned restrictions.

8. In cases where the employee remains employed, consider settling cases on an agreement for settlement basis (Section 85.34) or full commutation (Section 85.45) to establish amount of PPD paid with each injury and rate of pay.

II. Other Changes by HF 2581

A. Authorized Medical Care: Under Iowa Code § 85.27(4), the employer is responsible for the cost of care it chooses:

1. Until the employer gives notice to the employee that the employer is no longer authorizing the care, and gives notice of the reason for the change in authorization.

2. The employer is not responsible for sudden emergency care it arranges, if the care is arranged for an employee's condition unrelated to the employment.

B. Vocational Rehabilitation: Increases the vocational rehabilitation supplement in Iowa Code § 85.70 from $20 to $100 per week.

C. Reports and Injuries: Iowa Code § 86.12 creates a $1,000 penalty for failure to file annual or final reports or notice of commencement of payments and increases the penalty for failure to file a First Report of Injury to $1,000.

D. Waivers for Physical Defects: Repeals Iowa Code § 85.55, which had prohibited waivers generally and allowed waivers for individuals with "physical defects." HF 2581 § 17.

III. Challenging the Constitutionality of HF 2581

A. A challenge to HF 2581 was filed in Polk County. Godfrey v. State of Iowa (Dist. Ct. Decn. 7/25/05).

B. Plaintiff alleged that HF 2581 violated the "single subject" provision of Iowa Constitution, Article 3, § 29, which states:

1. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

2. The purpose of this provision is "to apprise the legislators and the public in general of the subject-matter of the legislation." Chicago Rock Island v. Pacific Railway Co., 224 N.W. 41, 44 (Iowa 1929).

C. Plaintiff's petition was dismissed by District Court on the basis that Plaintiff lacked standing to bring her claim. Id.

SUBSTANTIVE CHANGES AND ADDITIONS TO IOWA'S WORKERS' COMPENSATION LAWS BY SF 342

IV. Workers' Compensation Settlement Procedures Revised (Iowa Code § 85.35)

A. Repeals the "bona fide" dispute requirement of compromise settlements.

1. New § 85.35(1) states: "The parties to a contested case or persons who are involved in a dispute which could culminate in a contested case may

enter into a settlement of any claim arising under 85A, 85B, or 86, providing for disposition of the claim.

2. The settlement shall be in writing *on forms prescribed by the workers' compensation commissioner* and submitted to the workers' compensation commissioner for approval."

B. New § 85.35(2) pertaining to Agreement for Settlement. Parties may enter into if:

1. Establishes employer's liability;
2. Fixes nature and extent of employee's right to accrued benefits; and
3. Establishes employee's right to statutory benefits that accrue in the future.

C. New § 85.35(3) allows for Compromise Settlement of employee's claim to benefits as a full and final disposition of claim, which replaces former Special Case Settlement.

D. New § 85.35(4) allows parties to enter into a "Combination" Settlement, combining an Agreement for Settlement with a partial compromise settlement.

E. New § 85.35(5) creates Contingent Settlements:

1. A contingent settlement may be made and approved, conditioned upon:

    a. Subsequent approval by a court
    b. Subsequent approval by a government agency (meant to allow Medicare to approve the settlement).
    c. Any other subsequent event that is expected to occur within one year from the date of the settlement.

2. If the condition subsequent does not occur, the workers' compensation commissioner may vacate the settlement and its approval if:

    a. Either party files a petition for vacation or
    b. Agreement by all parties

3. If vacated, tolls periods of limitation between settlement and time of vacation, restores claim to status prior to settlement.

4. Settlement becomes final and fully enforceable in one year from date of approval automatically, unless within the year a petition to vacate or extend the time for occurrence is filed.

F. New § 85.35(7) codifies standard for when the workers' compensation commissioner shall approve of a settlement.

1. If an employee is represented by legal counsel, it is presumed that the required showing for approval of the settlement has been made;

2. The parties must show the following three things:

    a. Substantial evidence to support settlement terms
    b. Employee is knowingly waiving rights
    c. Settlement is a reasonable and informed compromise

G. **New Settlement Forms:** Required only for settlement documents signed after July 1, 2005. See Appendix A. (See also, forms posted on workers' compensation website; http://www.iowaworkforce.org/wc/publications.htm).

1. Designed for a typical injury causing TTD of HP and PPD.

2. May alter forms as needed for other types of cases, i.e. PTD, occupational hearing loss, death.

3. Attachments may include: Social Security offset language, releases, structured payment schedules, designation of authorized providers, etc., which is no change from the prior rules.

4. Agreement for Settlement. Requirements include:

    a. Jurisdictional stipulations

    b. Foundational information for the rate of compensation

    c. Entitlement to TTD/TPD/HP be established, requiring start and end dates (but week-by-week statement not required).

    d. Substantial evidence required, to support settlement (typically a report identifying impairment, MMI, restrictions).

5. Compromise Settlement. Requirements include:

    a. Evidence of a bona fide dispute (now may include dispute of nature or degree of disability).

    b. Counsel's stipulation of facts, or medical records/reports.

        i. Stipulation of bona fide dispute pursuant to Rule 6.1(2);

        ii. Must be stipulation to "facts" (i.e., percent of disability stated as dispute, not general statement indicating "legal conclusions."

iii. E.g., Dr. Smith identified 5% impairment to arm while Dr. Jones rated the arm at 20%, representing a bona fide dispute as to the nature and extent of injury.

6. Statutory presumption of approval (§ 85.37)

   a. Both parties must have counsel and forms and documents "must be complete and consistent on their face."

   b. When employee not represented, Claimant's Statement form must be used.

      i. In Agreement for Settlement, corroborating evidence includes: statement of earnings, medical records/reports that fix HP, material to PPD.

      ii. In settling industrial disability, evidence on "all primary factors," including: return-to-work status, comparison of pre-injury to post-injury earnings, impairment rating and restrictions.

7. Claimant's Statement:

   a. Required when employee is unrepresented.

   b. Used to evaluate the reasonableness of the settlement.

   c. It should be completed by the employee in his/her own words and can be printed or handwritten by the employee.

   d. Attached pages are permitted.

   e. The claim administrator should require the employee to complete and return the statement as part of the initial settlement negotiations when an agreement is reached.

   f. The claim administrator should then provide the completed statement to the attorney who is preparing the settlement documents for the claim administrator.

   g. It is recommended that the claimant's statement should not be prepared by the attorney who prepares the settlement documents for the insurer because it could place the attorney in a conflict of interest situation by providing legal guidance to the adverse party.

V. Confidential Information: Definition and Procedures (§§ 22.7 & 86.45)

A. Adds to Iowa Code § 22.7, which prevents the disclosure of public records deemed confidential by this section, subsection 51, which states:

1. Confidential information, as defined in section 86.45(1) filed with the workers' compensation commissioner.

2. Section 22.7 allows the release of this information only when "otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information."

B. New § 86.45(1) defines "confidential information" as:

1. All information filed with the Commissioner "as a result of an employee's injury or death *that would allow the identification of the employee or the employee's dependents*."

2. Includes: FROI and subsequent reports of claim activity.

3. Does not include: pleadings, motions, decisions, opinions, or applications for settlement that are filed with the Commissioner.

C. New § 86.45(2) creates other exceptions to when confidential information may be disclosed:

1. Pursuant to terms of written waiver of confidentiality executed by employee.

2. To other governmental agency, or for research purposes, where such disclosure does not allow identification of employee or dependents. (NOTE: This would not be confidential information as defined by §86.45(1) anyway.)

3. To the employee, agent or attorney.

4. To the person who submitted the information to the agency.

5. To insurance carrier, third-party administrator of benefits, attorney, or adjuster/agent of employer involved in administering the claim.

6. To all parties to a contested case proceeding, where employee or q dependent is a party.

7. In compliance with a subpoena.

8. To governmental agency charged with enforcing liens or rights of subrogation or indemnity.

D. New § 86.45(3) specifically states that a violation of these provisions does not give rise to a cause of action against the Commissioner, the state or other agency.

VI. Various Other Changes under SF 342

A. Section 85.27, amended: Now clarifies that "day of incapacity" means "eight hours of accumulated absence of work" so that an employee is entitled to wages after 24 hours.

B. Section 85.38 (amended): Prohibits a nonoccupational plan for illness, injury or disability, from denying benefits based on the fact that employer's liability under workers' compensation laws is "unresolved."

C. Section 85.71 (out-of-state injuries) adds new subsection (5): Jurisdiction, under statute, now includes when an "employer has a place of business in Iowa and the employee is working under a contract of hire which provides that the employee's workers' compensation claims be governed by Iowa law."

D. Section 86.24 (amended) Repeals affidavit stating that transcript has been ordered in contested case proceeding.

APPENDIX A

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

_____ Claimant, vs. _____ Employer, and _____ Insurance Carrier, Defendants.	Contested Case File No._____ Compliance File No._____ Injury Date: _____ AGREEMENT FOR SETTLEMENT Iowa Code Section 85.35(2)

The undersigned parties submit this Agreement for Settlement to the Workers' Compensation Commissioner for approval. The parties agree:

1. Claimant sustained an injury arising out of and in the course of employment with Employer on _____ *(date)*.

2. Jurisdiction exists because the injury occurred in Iowa OR Iowa Code section 85.71(___) applies. *(Circle one.)*

3. Claimant is married/single *(circle one)*, entitled to ____exemption(s) and gross weekly earnings are $_____ using Iowa Code section 85.36(___). The rate of weekly compensation is $_____. (If the rate for PPD differs it is $_____ per week.)

4. The injury caused Claimant to sustain the following disability and resulting entitlement to compensation:
   a. Temporary total disability/temporary partial disability/healing period compensation for _____ weeks from _____ (date) thru _____ (date). Iowa Code sections 85.33, 85.34(1). *(A detailed description may be attached.)*
   b. Permanent partial disability for ____ % loss of _____ *(member or earning capacity)* resulting in _____ weeks of compensation under Iowa Code Section 85.34(2)(___) payable commencing _____ (date).
   c. Other compensation or benefits consisting of _____
   _____
   _____

5. Benefits that accrued and were paid are shown in the attached payment activity report (PAR), dated _____. Benefits that remain to be paid are _____

_____

6. The employer/insurance carrier shall file a final electronic Subsequent Report of Injury [SROI (FN)] and mail Claimant a PAR that contains the information in the final SROI, including the date that weekly compensation was last paid. Rules 876 IAC 2.6, 3.1(2), and 11.7.

7. This settlement waives a hearing, decision, and resulting statutory benefits. It is subject to review-reopening for three years following the last date that weekly compensation is paid. Iowa Code sections 85.26(2) and 86.14.

8. Claimant is entitled to medical care for the injury, including care in the future. Iowa Code sections 85.26(2) and 85.27. *(A detailed description may be attached.)*

9. Evidence that corroborates this settlement is attached. A Claimant's Statement is attached if claimant is not represented by an attorney.

WHEREFORE, the parties request that this Settlement be approved.

Claimant	Date	Claimant's Attorney	Date
Employer/Insurer	Date	Employer/Insurer's Attorney	Date

ORDER

I find that substantial evidence supports the terms of the foregoing settlement, the employee knowingly waives hearing, decision, and resulting statutory benefits and the settlement is a reasonable and informed compromise of the competing interests of the parties. The foregoing settlement is therefore approved this ____ day of_____, 20____.

_____
Iowa Workers' Compensation Commissioner

The information provided will be open for public inspection under Iowa Code §§ 22.11 and 86.45(1).

14-0021 (7-05)

CHECKLIST

AGREEMENT FOR SETTLEMENT

THIS FORM MUST ACCOMPANY THE SETTLEMENT PAPERS

_____ All documents must be legible.

_____ One set of papers is required for each date of injury.

_____ 8 1/2 x 11 white paper (all documents).
876 IAC 8.7

_____ Originals and copies must be clearly identified.
876 IAC 4.16

_____ Self-addressed stamped envelope (adequate size with sufficient postage).
876 IAC 4.16

_____ First Report of Injury must be filed for each date of injury.
Iowa Code section 86.11; 876 IAC 3.1(1)

_____ ***Current*** payment activity report for each date of injury must be filled out in its entirety and filed with the settlement.
876 IAC 3.1(2) and (3)

PREPARED BY:_____

DATE_____
print or type

TELEPHONE NUMBER:_____

14-0023 (7-05)

Claimant's Statement
(for Non-represented claimant only)

Read the information before you begin completing this statement.

Please be advised that the Division of Workers' Compensation cannot represent any party in a claim for benefits. The Division of Workers' Compensation cannot furnish legal counsel or represent the interest of any party in any claim. An attorney can advise you as to the complexities of settlements and rights which may be applicable. In choosing to represent yourself, you assume the sole burden of proceeding and bear any risk associated with the settlement requested.

How to Complete This Form

The Division of Workers' Compensation will use the information you give on this statement in considering your proposed settlement.

Print or type your answers.

A reference to "you," "your," or "claimant" means the person who was injured at work.

Answer all the questions in each section with your response or "none," "does not apply," or "don't know."

Check answers where a space or box is provided.

If you need more space for any of your answers, use Section 5

Section 1-Information About the Claimant

A. Name _____ _____ _____
(First) (MI) (Last)

B. Current Age _____

C. Daytime phone number (_____) _____- _____
(area code)

D. Date of Injury _____/_____/_____
Month Day Year

Section 2 – Information about The Injury

A. State the part(s) of the body injured:

_____

B. Have you received a Permanent Partial Disability rating? ___yes ____no

If yes, please give the percent of disability _____%
If more than one doctor has given a PPD rating state below:

_____ _____%
Doctor's name % of disability

C. Any work restrictions given by the doctor? _____yes _____no

If yes, please state the restrictions given and include whether they are Temporary or Permanent:

_____

_____

_____

Section 3 – Information About Your Education

A. Last year of schooling completed in grades K-12 _____

B. Did you graduate from High School? _____yes _____no
Check one: Diploma? _____ GED? ____

C. List any additional schooling, job training, degrees, certificates, or licenses you have received:

_____

_____

_____

Section 4 – Information on Work History.

Please briefly list jobs held during the past 10 years:

Are you unable to do any of these jobs? _____yes _____no
If yes, explain which jobs and why:

Are you currently working? _____yes _____no
Is this the job you held when injured? _____yes _____no
(If yes to either question, explain)

Have Your Earnings changed because of injury? _____yes _____no
If yes, explain.

Section 5-Additional Information You Want to Share:(attach up to 2 additional pages, if necessary)

Section 6 – Certification and Signature

I certify that I have answered these questions to the best of my ability and that any statements written are accurate and true to the best of my knowledge.

Signature:_____ Date: _____

(Print name here): _____

(07-05)
14-0163

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

_____ Claimant, vs. _____ Employer, and _____ Insurance Carrier, Defendants.	Contested Case File No.:_____ Compliance File No.: _____ Injury Date: _____ COMBINATION SETTLEMENT [Iowa Code Section 85.35(4)]

The undersigned parties submit this Combination Settlement to the Workers' Compensation Commissioner pursuant to Iowa Code section 85.35(4). In support of it, these parties agree:

1. The claimant sustained an injury that arose out of and in the course of the employment on _____ (date of injury).

2. The employer/insurance carrier is compensating claimant for the disability described in the accompanying Agreement for Settlement without dispute.

3. The employer/insurance carrier disputes other claims made by claimant that claimant attributes to the employer, and the parties are making a full and final disposition of all other such injuries, disabilities, or claims as set forth in the accompanying Compromise Settlement.

_____ Claimant	Date	_____ Employer/Insurance Carrier	Date
_____ Claimant's Attorney	Date	_____ Employer/Carrier's Attorney	Date

Approved as part of the accompanying settlements this _____ day of _____, 20____

_____
Iowa Workers' Compensation Commissioner

The information provided will be open for public inspection under Iowa Code §§ 22.11 and 86.45(1).
14-0159 (7/05)

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

_____ Claimant, vs. _____ Employer, and _____ Insurance Carrier, Defendants.	Contested Case File No.: _____ Compliance File No.: _____ Injury Date: _____ COMPROMISE SETTLEMENT [Iowa Code Section 85.35(3)]

The undersigned parties submit this Compromise Settlement pursuant to Iowa Code section 85.35(3).

A. A dispute exists under the Iowa Workers' Compensation Law, which the parties seek to resolve by a full and final compromise disposition of claimant's claim for benefits. The subject and nature of the dispute is _____

_____

_____

_____

B. Evidence of the dispute is in the attached documents. Rule 876 IAC 6.1. If claimant is not represented by an attorney; a *claimant's statement* is attached.

C. As a compromise of their competing interests, the parties agree to the payment and other terms of settlement contained in the attached page(s).

D. Release: In consideration of this payment, claimant releases and discharges the above employer and insurance carrier from all liability under the Iowa Workers' Compensation Law for the above compromised claim.

E. Statement of Awareness of Claimant: I have read the compromise settlement and attached page(s). I understand that the money I receive under this settlement is the total amount I will receive from my claim and that there will not be a hearing and decision on my claim. I am aware that if the Workers' Compensation Commissioner

approves this compromise settlement and the employer/insurance carrier pays me the agreed sum, then I am barred from future claims or benefits under the Iowa Workers' Compensation Law for the injury(ies) compromised. I understand I may: 1) consult with an attorney of my own choosing, or 2) call the Iowa Division of Workers' Compensation at (515) 281-5387, or both in order to receive a full explanation of the terms of this document and of my rights under the Iowa Workers' Compensation Law. I have either done so or freely waive my right to do so.

Claimant's Attorney Date Claimant Date

Subscribed and sworn to by claimant before me on this _____ day of

_____, _____.

Notary Public

E. Employer/Insurance Carrier: The employer/insurance carrier consents to the compromise settlement.

Employer/Insurance Carrier's Attorney Date

Employer/Insurance Carrier Date

ORDER

I find that substantial evidence supports the terms of the foregoing settlement, the employee knowingly waives hearing, decision, and resulting statutory benefits and the settlement is a reasonable and informed compromise of the competing interests of the parties. The foregoing settlement is therefore approved this _____ day of _____, 20_____.

Iowa Workers' Compensation Commissioner

The information provided will be open for public inspection under Iowa Code §§ 22.11 and 86.45(1).

14-0025 (7/05)

CHECKLIST

COMPROMISE SETTLEMENT (IOWA CODE SECTION 85.35)

THIS FORM MUST ACCOMPANY THE SETTLEMENT DOCUMENTS

_____ All documents must be legible.

_____ One set of papers for each date of injury.

_____ 8 1/2 x 11 white papers (all documents).
876 IAC 4.16

_____ Originals and copies clearly identified.
876 IAC 4.16

_____ Self-addressed stamped envelope (adequate size with sufficient postage).
876 IAC 4.16

_____ First report of injury must be filed for each date of injury (if appropriate).
Iowa Code section 86.11
876 IAC 3.1(6)

_____ Final, updated claim activity report must be filled out in its entirety and filed with the settlement papers.
876 IAC 3.1(2) and (3)

PREPARED BY:_____
print or type

DATE:_____

TELEPHONE NUMBER:_____

14-0027 (7-05)

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

_____ Claimant, vs. _____ Employer, and _____ Insurance Carrier, Defendants.	Contested Case File No.:_____ Compliance File No.:_____ Injury Date: _____ CONTINGENT SETTLEMENT [Iowa Code Section 85.35(5)]

The undersigned parties submit this Contingent Settlement to the Workers' Compensation Commissioner pursuant to Iowa Code section 85.35(5). These parties agree the accompanying settlement and its approval are conditioned upon the occurrence of the following event:

_____

_____.

If it appears that the contingent event will not occur within one year of the commissioner's approval of this settlement, during the course of that year, a party may apply to the commissioner to vacate the settlement or extend the time allowed for the event to occur. If no party applies within the course of that year either to vacate the settlement or to extend the time allowed for the contingent event to occur, the contingency lapses and the settlement becomes final and fully enforceable.

_____ _____

Claimant Date Employer/Insurance Carrier Date

_____ _____

Claimant's Attorney Date Employer/Carrier's Attorney Date

Approved as part of the accompanying settlement this _____ day of

_____, 20_____.

_____

Iowa Workers' Compensation Commissioner

The information provided will be open for public inspection under Iowa Code §§ 22.11 and 86.45(1).
14-0161 (7/05)

Cutting Edge Trial Presentation Technology

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Rick Kraemer
Executive Presentations
3345 Wilshire Boulevard, Suite 1234
Los Angeles, CA 90010
(213) 480-1644

Cutting Edge Presentation Technology In "The Information Age"

By Rick Kraemer / Barbara Carter
contribution: J. Patrick McNicholas, Esq.

Presenting evidence in trial, mediation, and other legal arenas has changed dramatically over just a few short years. Incorporating complex technology to convey concepts in trial has become more prevalent, and we are still learning methods to prepare and present information to achieve the greatest impact with a judge and jury.

Key to finding the best vehicles for legal exhibits is understanding how the modern juror differs from that of a previous generation. Looking at how television news is being presented today can be instructive in understanding juror comprehension.

Television news shows of the '50s and '60s generally consisted of a prime anchor – such as Walter Cronkite – who read news stories and used limited film and visual information. The vocal qualities and storytelling capabilities of these news anchors were the key to holding and attracting audiences. Their method of conveying information was largely influenced by their personal presentation of the storyline. They were effective as communicators without the use of supporting visuals, however, at the time television was new. "Seeing" news read for the first time outside of movie newsreels, rather than just "listening" via radio, had far more impact than it would today.

Walter Cronkite 1960s

During the late '60s and '70s the anchor person was placed within a "newsroom" set (rather than a plain backdrop) with an effort to make visual interest more dimensional. The camera still focused primarily on the news desk using small teams rather than just one person. The addition of film and video made it possible to incorporate "man-on-the-street" reporting, and could transport viewers to the scene of the event, increasing the emotional impact on the viewer. Perhaps one of the greatest examples would be the landing on the moon in 1969, where video was sent back to Earth in real-time. At the same time, the technology of the newsroom became visible to the audience to add interest to the broadcast. Graphics were limited as computer visuals had not yet become available; videotape and film were the primary media.

Walter Cronkite on the CBS Evening News Set New York City, 1978

Fast forward to the news programs of the '80s and early '90s and the scene has changed to multiple anchors with a full team of specialists and personalities. This further augmented the broadcasting of media, increasing viewer attention with more variety of visuals, people, and footage. Graphics began to support the anchor placed within a set. Graphic backdrops were incorporated which related to the story. Graphic symbols or photos of an event were placed in a "window" near the newsperson and were shown simultaneously on-screen with the footage. Greater inclusion of "on-the-spot" reporting increased the "urgency" of reporting, thereby increasing impact. Viewers began seeing a variety of graphics and images and became accustomed to absorbing even more information through the incorporation of multimedia at higher speeds.

Dan Rather CBS Evening News

The beginnings of multi-tasking for viewing visuals had roots with computer graphics and editing technologies available to the broadcast industry. The digital age had increased visual complexity. During the '90s, commercials and films began to use rapid editing of many visuals at high speed to convey stronger impressions and capture viewer attention. The audience of Generation X had been raised on computer games and digital graphics. The web came of age, and visual complexity began to explode. Modern attention spans shortened as the pace and volume of information increased.

CNN.com website

Since 9/11, the incorporation of streaming media with a news person, plus the addition of graphics or footage – splitting up the screen into information panels – has become a common practice. In the past, a person walked on and handed Walter Cronkite a story – "this just in" – a '60s version of streaming media. Today viewers are being given information in real-time before the anchor presents it, at a much faster rate than a decade ago. Imagine today's viewers being presented with the events of 9/11 using the style of the 1960s. It would certainly capture their attention, but the impact might not have been felt so personally or as profoundly. The audience is now fully engaged on many levels.

FOX News broadcast

What all this presents in the trial courtroom is a need for keeping the information moving to fully engage the viewer. While many attorneys are adept at great storytelling or oration, the current viewer – or juror – may not be tuned in or have an attention span that would keep him or her interested.

In addition, the complexity and type of material which is being presented in court over the life span of the trial can get boring or stale to jurors who are preconditioned to visual speed and complexity in our world of sound bites. Augmenting your case with technology is a big asset to juror retention – especially in document intensive/complex cases. We are still exploring ways of being more innovative in trial, without losing our past assets.

Layering graphics and technology can give the dimensionality that newsrooms sought to involve and engage the juror in the aspects of your case. The use of mixed media can keep and hold the attention of a juror better than presenting just the dry facts.

The basic elements of the newsroom can be used in the courtroom:

- **Oration** – the basic building block of creating a relationship with the jurors
- **Human element** – witnesses, experts, testimony
- **Physical elements** – models, demonstrative exhibits, real physical evidence
- **Images** – electronic enhancement of documents, databases of case data
- **Graphics** – storyboards, timelines, diagrams, photo enlargements
- **Video** – expert testimony and depositions, "day-in-the-life" experiences
- **Scripts** – opening and closing arguments, mediation presentations
- **Animation** – re-creations of events for emotional impact and comprehension

All of the above make it real for the viewers. Well-orchestrated uses of these elements can engage the jury, move the case more efficiently, relay higher volumes of information more effectively, and can speed the trial along without boring or burning out the "audience". You gain a flexible advantage when you find out what a particular juror may or may not understand by having a variety of information and ways of conveying it on demand. This is the cutting edge – the ability to focus the current technology and use all the means at your disposal to open the minds and hearts of the jury. The key word here is FOCUS.

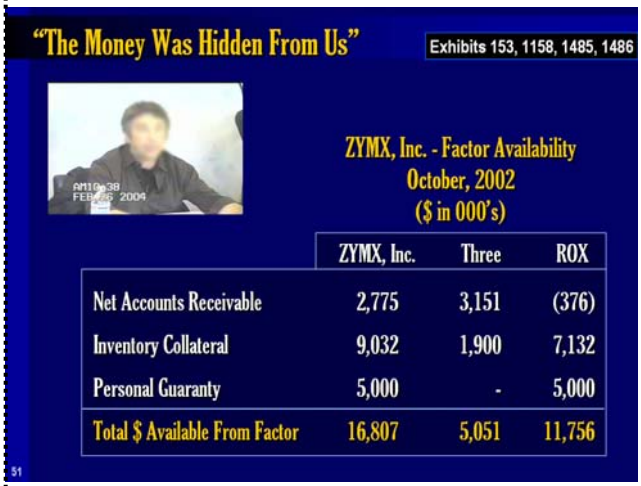
Using cutting edge technology in trial can "cut" both ways. Used properly, it enhances and streamlines your case and builds a platform of visual support, augmenting your role as an advocate for your client. Used poorly, it can supplant your role as advocate, and technology becomes "the advocate" and you become "the support". This can weaken your critical relationship with the judge and jury, and can lessen your credibility and negatively impact your client. The critical relationship bridge you build with your personality and interaction with the jurors can potentially be overwhelmed by technology, which can dominate attention, distract, or just turn the jury off.

The use of the variety of tools available today should be nearly "transparent" to the jury. Just as the overuse of visuals in the news media can create visual fatigue, boredom, and loss of interest, it can impact you adversely in the courtroom as well. An excess of graphics and visual effects flattens the relationship with the viewer and loses the emotional connection to the audience. Some of today's popular news programs again incorporate a personality; such as Larry King Live, Hannity and Colmes, or the O'Reilly Factor, re-injecting a personal dimension lacking on image and graphic heavy news programs and hearkening back to the Cronkite era. Watching these programs becomes more engaging as the visuals are more supportive as illustrations, rather than as flash. What you remember are people and the stories. They still use plenty of graphics and footage, but in a fashion which does not distract from the news personality and the story, and re-engages the viewer.

Likewise, as an advocate you do not want to allow your presentation technology to take over or dominate, causing you to lose your connection with the judge and jury. It is critical to maintain your role and identity as the spokesperson for your client. **Again, you don't want the jury to view the technology as the advocate and you as the support.**

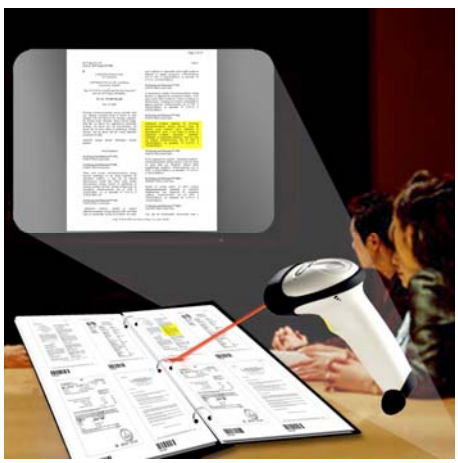
Developing a relationship with the judge and jury is based on trust. Trust is built on credibility derived from accuracy and demeanor - your knowledge of facts and the law. Technology should support that role to enhance the building of that relationship. It is also an asset in building your credibility when used well – showing accurate information to the jury in an efficient form without wasting their time. The various programs available have purpose here in allowing you to present your case in a streamlined fashion and keep it real for the jury. PowerPoint, Trial Director, Sanction, and Animation are tremendous assets when employed properly in the courtroom. Each one has its strengths and weaknesses, therefore choose the proper program based on your needs for presentation.

PowerPoint has the advantage of giving focus and credibility to opening and most especially closing arguments. The program facilitates efficient organization of case data, allowing you to gather all the trial evidence as you go along. You then synthesize the material into a succinct and orderly closing argument which highlights actual evidence admitted during trial, refocusing the jury's attention on it. Rather than asking the jury to rely on their memory or what was written in their notes, you revisit evidence presented during trial in a more powerful fashion, reviewing exact testimony or documents in a scripted and logical manner. Additionally, incorporating video "clips" of testimony to show witnesses impeaching themselves, or an animation to show how something happened, can be extremely helpful while you present your client's case. When used well, PowerPoint can build credibility and trust for you as advocate, enhancing rapport with the jury.

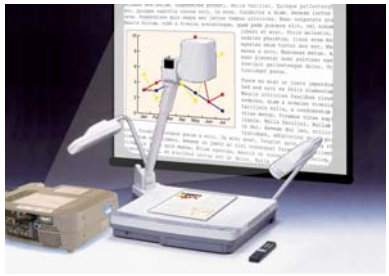


It is recommended you have a trial technician who has rehearsed with you, so that you focus on the jury, rather than on the technology. You want to make certain that their eyes are on you and you direct their attention to the visuals as you go, or the material could dominate your argument. The visuals should support, not distract from you. Likewise, keep your reading of the material on the screen to the main points so that you don't lose your jury. Remember the "newsroom" model.

One of the weaknesses of PowerPoint is that you are "locked in" to a presentation; if you require a more interactive and on-the-spot presentation of evidence, **trial software packages**, such as **Sanction** and **Trial Director**, are more appropriate to use. These tools are useful in managing large databases of evidence for rapid recall and for highlighting important aspects of case documents or testimony. They allow you to focus the jury on what matters most in a document. As you present evidence, matters come up and you have the flexibility to rapidly recall any trial document or video on-the-fly, comparing recent testimony with actual facts. They are best used in an unscripted forum, allowing you to prompt for display of specific documents. While using an **Elmo** can allow for similar on-the-fly display of documents, the placing of documents repeatedly on an overhead projector, and the eye-bounce it causes, destroys the focus of rapidly presented documents and objects.

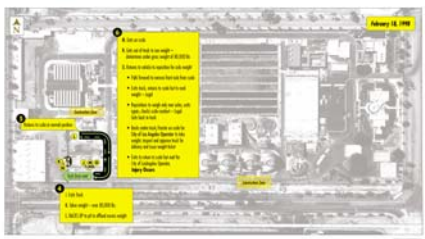


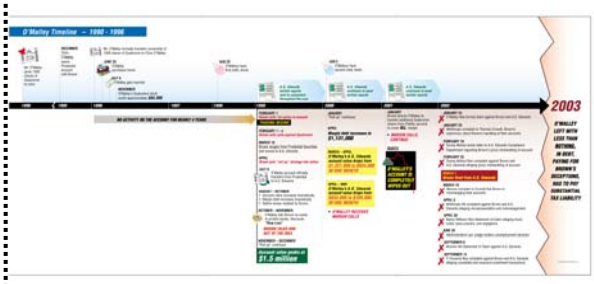
Elmos or **Doar** machines are great in small document cases, or trials with tight budgets. However, they are less precise and can waste time and make you look disorganized, lowering your credibility and losing your audience just like a poorly produced news program.



Recent developmental differences in the user interfaces of trial software programs such as Sanction and Trial Director have added enhancements which are visually more friendly and easier to watch. Currently, Trial Director incorporates improved graphics tools and transitions, allowing for even better display of video and documents. Again, having an experienced trial technician present is critical, so you focus on being an advocate, instead of dealing with software. The Achilles heel of on-the-fly presenting is not having the organization of a presentation locked in to keep things flowing smoothly. You also lose audience attention while deciding what to show and/or while you are looking for it. This technology is best used for daily trial display or unscripted rebuttal. For linear arguments with time restrictions, stick to PowerPoint.

In all circumstances, it is critical to scout ahead, determine the size and layout of the courtroom and check with the judge and see what will be allowed. You could waste time and money preparing something which will not be allowed to be shown. Be certain to include exhibit numbers on all documents and testimony in all your PowerPoint presentations, so it will be easy to switch live to the actual document and then back to the presentation if you need to on-the-fly. Again, this increases credibility and gives the jury the ability to jot down exhibit numbers for reference when deliberating.





Finally, don't throw out the baby with the bath water. Just because you employ technology to display anything you might need, dimensionality is important – **don't forget the boards and models**. The jury needs all the dimensions, plus they help tell the story better. Having a **timeline anchor board** available at all times keeps the perspective better focused while you are showing testimony or documents on screen. A **player's chart**, an **acronym board**, and other visual exhibits will round out that presentation, fully engaging the viewers.

The use of technology is expected – just as the current juror has evolved, and what was once hot new technology has become **a requirement**. If the other side is using technology and you are not, you could be giving up a huge advantage.

Hot Issues and New Developments in Employment Law

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Martha L. Shaff
Betty Neuman & McMahon LLP
600 Union Arcade Bldg
111 East Third Street
Davenport, IA 52801-1596
(563) 326-4491

EMPLOYMENT LAW UPDATE

By: Martha L. Shaff
Betty, Neuman & McMahon P.L.C.
111 E. Third Street, Suite 600
Davenport, IA 52801

This is a really broad topic which makes it really difficult to cover in 45 minutes. Therefore, I have not included some but by no means everything that is going on in employment law.

I. New statutes

A. Class Action Fairness Act of 2005 28 USCA Sec. 1453.

Takes away necessity of entire class being diverse, as long as one plaintiff and one defendant are diverse that is good enough. This statute is not limited to employment law but will be helpful to defendants in class action employment cases because you will not be able to remove the case to Federal court. The act went into effect on February 18, 2005 and only applies to cases fileD after that time. Check the act for the other requirements of in excess of $5 million as the amount in controversy. Also, there is question as to whether it will apply to all types of employment law

B. American Jobs Creation Act of 2004 26 U.S.C. Section 62(a)(19)

This law addressed the issue of taxation of attorney fees in employment cases. The act allows plaintiffs settling an employment law matter an "above the line" deduction for their income from the amount of attorney fees. The entire amount of the settlement must be reported to the IRS but plaintiff should not pay any federal income tax for the amount of their attorney fees. Remember when drafting your settlement agreements to include language excluding yourself and client from any advice or information on the tax burden.

C. Fair Labor Standards Act (FLSA)

The amendments to this act were effective in August 2004. While there were many changes some of the more critical changes come in the category of "white-collar" exemptions. There still isn't much in the way of case law interpreting the statute but in the next several months we may see more on this issues, particularly overtime pay. Note there is no longer the distinction between the short test and the long test.

C. Family Medical Leave Act. (FMLA)

Like the FLSA there has been talk about amending the FMLA, however, at this time there is no agreement as to the language that will be adopted but keep your eyes open for possible changes in the next year.

II. DISCOVERY UPDATES

What are your employers doing with email???

Zubulake v. UBS Warburg LLC (Zubulake I) 217 FRD 309 (2003) and Zubulake III, 216 FRD 280 addressed this issue. With all of the technology available to employers the first request for production of documents is probably going to ask for emails. Zubulake addresses the cost of producing those emails. Employers may react to the request stating that emails have been deleted, they are only available on back up tapes, etc. While Zubulake is a New York case the likelihood is that the federal courts will follow it to some degree.

Zubulake I recognized the various categories of ediscovery. The court broke the data down into two categories, accessible format and relatively inaccessible. 217 FRD at 318-20. Then within the categories the court broke it down again listing the information in order of most accessible to least.

a. "active, on line data," such as hard drives;
b. "near-line data" such as optical disks and
c. "offline storage/archives" Id.

Under relatively inaccessible the court outlined:

a. "backup tapes" and
b. Erased, fragmented or damaged data" Id. at 319

The court found that information that is relatively accessible must be produced at the cost to the party producing it. Id. at 324. For the relatively inaccessible category there is a cost shifting analysis following the analysis of a seven factor test. Id. Changes to the rules of federal procedure may address this relatively inaccessible category. Safe Harbor protection for producing parties is also being contemplated by the Federal Rules Committee for the producing party. Employers need to be aware of their document retention programs, they need to know how they store data and they should make sure their managers understand the many eyes who may be reading those emails at some later date.

III. GOOD NEWS FOR EMPLOYERS:

Under the ADA, the sixth circuit held in Williams v. London Utility Comm'n, 375 F.3d 424 (6th Cir. 2004) that a plaintiff who asserts he is totally disabled cannot also pursue a claim under the ADA claiming that he can perform essential job functions. Mr. Williams, applied for disability benefits the day after termination. The court held that was inconsistent with his claim on the last day of work that he could do the job so he was estopped from pursuing an action under the ADA.

The Iowa Supreme Court recently decided the case of Hlubek v. Pelecky and Wirtz, No. 24/04-0255 Westlaw 20050722/04-0255. Mr. Hlubek was a driver's ed instructor for the Mississippi Bend Area Education Association (AEA) working at the North Scott community school district. He was accused of sexual harassment by a student. North Scott investigated the complaint and determined there was no harassment. The AEA was informed of the complaint and investigation by North Scott. The AEA conducted its own investigation by Glen Pelecky, chief administrator and Thomas Wirtz, director of administrative services. Wirtz interviewed 12 students in addition

to the complainant and found that there was inappropriate conduct. Both Wirtz and Pelecky interviewed Hlubek. Pelecky started termination proceedings against Hlubek who quit before a hearing was held. Hlubek claims he did so because Pelecky threatened to seek revocation of this teaching certificate if he did not resign. Hlubek then applied for several positions. Maquoketa superintendent called Pelecky to inquire about Hlubek. Pelecky said "the AEA was "dissatisfied" with Hlubek's performance and decided not to renew his contract." Hlubek was also acquitted of criminal charges for assault related to the same girl. Hlubek did not get the job from Maquoketa after a criminal background check. He then sued for 1. intentional interference with his AEA contract; 2. interference with potential contract with Maquoketa by knowingly making false statements and 3. interference with potential business relationships. The Iowa Supreme court took the case after summary judgment was granted by the district court. The court analyzed the case under Statutory immunity sections 280.27 and 613.21 for school employees and under 91B.2 for immunity for former and current employers who give information. The court found that immunity under the school statutes was proper. The court had not interpreted 91B.2 previously. The court found that the statute's purpose and proper application are clear. It provides *immunity to employers who act in a reasonable manner when providing work information about a former or current employee*. Hlubek argued that the only reason why he did not get the Maquoketa job was because Pelecky must have told them about the criminal charges filed by Nicole. The court found no evidence to support Hlubek's contention and affirmed the summary judgment decision.

IV. AGE DISCIMINATION IN EMPLOYMENT ACT (ADEA)

Smith v. City of Jackson, 125 U.S. 1536 (2005). Police and public safety officers brought suit against the city under the ADEA alleging that salary increases they received were less generous than increases received by younger officers. The Supreme Court held (5-3) that the ADEA authorizes recovery in disparate-impact cases. The court has allowed disparate impact cases under Title VII since 1971 in Griggs v. Duke Power Co. 401 U.S. 424 (1971). The ADEA is parallels Title VII with the substitution of age for "race, color, religion, sex or national origin." The major difference between the two statues is the narrowing language in the ADEA by permitting any "otherwise prohibited" action "where the differentiation is based upon reasonable factors other than age." Disparate-impact cases are those where the involved employment practices are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another. The employee must identify a specific employment practice that is allegedly responsible for any observed statistical disparities. The practice need not pass the business necessity test, rather just a reasonableness standard.

Grutz v. U.S. Bank National Association, 695 N.W.2d 505 (Iowa Ct. App. 2005). Grutz sued US. Bank for age discrimination when she was terminated after 12 years at the age of 45. The stated reason for termination was lack of "dedication/commitment and team spirit." Summary judgment was granted and affirmed by the court of appeals. Of interest is the analysis and discussion about Desert Palace v. Costa, 539 U.S.90 (2003). Some believe that the framework as described by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) was changed by Desert Palace, but it appears the impact was minimal. The Iowa court followed McDonnell because both of the parties followed the framework. Furthermore, no one disputed that Grutz presented a

prima facie case of age discrimination. The ruling was affirmed because the bank gave a legitimate reason for the employment decision and the plaintiff could not prove pretext.

V. FAMILY MEDICAL LEAVE ACT (FMLA)

Halverson-Collins v. Community & Family Resources, 2005 WL 827127 (N.D. Iowa 2005). Halverson-Collins was an employee of Community & Family Resources (CFR) from 1984-1987 then returned from 1990 forward. In September 2002 plaintiff requested time off for 11/25-27/02. The leave was granted. The reason for the leave was medical but that was not disclosed to CFR. Plaintiff claims that supervisory functions were taken away from her during that time due to her health. CFR denied that they had any knowledge of the health problem until October 2003 when a subsequent request was made. Due to a merger the plaintiff's job duties were changed in 2003, changing her from salaried to hourly and no supervisory role. In October 2003 plaintiff started missing days from work because of heart problems. Iowa Heart faxed CFR a work excuse in October 2003 and plaintiff's supervisor approached her about FMLA leave. The communication between plaintiff and her supervisor was very poor. She was off partially on FMLA and partially under holiday and bereavement pay. When plaintiff returned to work she was informed that her position had been eliminated but she could apply for another position, she did not. Three other people were let go on the same day. Plaintiff filed a complaint alleging violation of the FMLA grounded in retaliation. The first analysis by the court was the appropriate analysis. The Court emphasized that McDonnell-Douglas burden shifting analysis is the appropriate application to Title VII claims and is appropriate for analysis of FMLA claims. CFR admitted for purposes of the motion that plaintiff had a prima facie case of retaliation. The court found that CFR also proffered legitimate reasons for the termination unrelated to the FMLA leave. Plaintiff claimed pretext based upon the temporal proximity of the FMLA leave the and adverse employment action. The court held that timing alone could not sustain her burden. Circumstantial evidence in support of the inference of pretext must be shown by the plaintiff. The court denied the summary judgment motion finding that a job announcement in the local newspaper 16 days after termination when CFR claimed that the termination was due to restructuring lacked credibility. Furthermore, plaintiff allegedly had the qualifications necessary to do the job. Summary judgment denied.

VI. AMERICANS WITH DISABILITY ACT (ADA), Title VII, ADEA

Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040 (8th Cir. 2005) Kratzer suffered a work place injury in 1994 limiting her ability to use a foot pedal or sit for more than 1 hour. Rockwell accommodated her. Plaintiff tested for a new classification. She passed the written test, the mechanical test required accommodations. Rockwell and plaintiff agreed that she would obtain updated restrictions evaluation before testing. Rockwell told her she had two options test for the new classification with the accommodations documented in her file or get an updated evaluation. Plaintiff did not provide the updated evaluation until over 2 years later. Plaintiff's ADA claim is challenged because she did not meet the requirements of the job, being trained and passing the test. Plaintiff claimed that was Rockwell's fault for not accommodating her. The court found that her request was not sufficient. The employee must inform the employer of the accommodation needed not just of the need for accommodation. Plaintiff claimed that Rockwell failed to test her because of her sex. For the same reasons that the ADA claim failed the sex

discrimination claim failed. The hostile work environment claim failed because she did not feel that the alleged statement were harassment. Plaintiff's claim for retaliation also failed for lack of evidence. IRCA claims were dismissed for the same reasons.

VII. DRUG TESTING

Tow v. Truck Country of Iowa, Inc. 695 N.W2d 36 (Iowa 2005) Prospective employee sued employer alleging that denying him employment based upon his refusal to be retested at his own expense violated statute governing private employers. The supreme court held that the employer was responsible for the cost of retesting – his employment was subject to successfully passing the drug test - first test was inconclusive so Tow was told he could take a second test and he would be hired if it was negative. Tow would pay the cost of the second test but if it was negative then TCI would reimburse him. Tow declined to front cost, the court held that he had no duty to advance the cost of the second test; employee proved wage loss claim – two years less amount earned at other employment; attorney fees were appropriate, plaintiff attempted to mitigate his damages.

VIII. WORKERS' COMP SETTLEMENT

Obrecht v. Electrolux Home Products, Inc., 2005 WL 578477 (N.D. Iowa 2005). Obrecht was an employee of Electrolux. She suffered a work related injury and settled the case pursuant to a Compromise Special Case Settlement pursuant to 85.35. On the same day Electrolux terminated plaintiff saying that is was a term of her settlement agreement reached in the workers' compensation case. Plaintiff disagreed that this was a term of the settlement even though the documents stated "It is further understood and agreed that claimant and defendant-employer are mutually released and discharged form any further obligations of continued employment." Plaintiff was represented by counsel. Plaintiff filed a claim for wrongful termination in violation of public policy – for filing a workers' compensation claim. Electrolux filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The court denied the motion to dismiss stating that while parties are free to contract when the contract is in violation of public policy the freedom to contract is outweighed.

IX. TORIOUS INTERFERENCE

Catipovic v. Peoples Community Health Clinic, Inc., 401 F.3d 952 (8th Cir. 2005). Dr. Catipovic was terminated by Peoples from a contract. Plaintiff alleged that IBP, one the Clinic's largest customers used coercive influence on the Clinic's management to have him fired because he was writing too many work releases to IBP employees. Some of the work releases stated specific work restrictions, others said "can't work". IBP brought the number of releases to the attention of the clinic and a meeting was held which the doctor attended. IBP requested that the releases be more specific so that they could determine if they were job related. The Clinic claimed it terminated the doctor because of his problems with treatment of TB patients, patient complaints about his rudeness, demeanor and foul language. IBP moved for summary judgment which was denied but their motion for directed verdict was granted. On appeal the court affirmed stating the question was two fold: Was IBP's conduct a substantial factor in causing the termination and could the plaintiff have been terminated without IBP's actions. The court found that a jury could

conclude that IBP's actions were a substantial factor but it would be unreasonable for a jury to conclude that the Clinic would have retained the doctor but for the actions of IBP.

X. PREGNANCY DISCRIMINATION/WRONGFUL DISCHARGE/ FLSA

Smidt v. Porter, 695 N.W.2d 9 (Iowa 2005). Smith brought claims of pregnancy discrimination, breach of written and oral contact, fraud and overtime violations of the FLSA against former employer. Using the McDonnell burden shifting framework the court held that summary judgment was not appropriate on the pregnancy claim; the IRCA preempts a claim for wrongful discharge; plaintiff was an exempt employee so did not qualify for OT; summary judgment on the oral and written contract were in error.

XI. FLSA – overtime

Kennedy v. Commonwealth Edison Co., 410 F.3d 365 (7th Cir. 2005). 55 employees from the Nuclear Power plant holding jobs of work planner, lead planner, first line supervisor, supply analyst and staff specialist filed action for overtime play under the FLSA. The court found that the employees were paid on "salary basis" with in the meaning of the regulations; the primary duties of the employees was office or nonmanual work and the jobs included work requiring the exercise of discretion and independent judgment. (based upon old regs as the new regs issued in April 2004 are not retroactive)

XII. RIGHTS OF RESERVISTS AND NATIONAL GUARD

National Guard and reservists who return to civilian occupations after serving in support of post 9/11 declaration should have their active duty time counted toward their eligibility for time off work under the FMLA. Uniformed Services Employment and Reemployment Act (USERRA) entitles service members to all the benefits of employment that they would have obtained if they had been continuously employed.

Spoliation – What Every Defense Lawyer Needs to Know

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Paul Burns
Bradley & Riley, P.C.
2007 First Avenue SE
PO Box 2804
Cedar Rapids, IA 52406
(319) 363-0101

Spoliation of Evidence

Paul D. Burns
Bradley & Riley PC

Issues of "spoliation of evidence" arise in many factual contexts. Recent cases in the Eighth Circuit and Iowa have examined spoliation claims and discussed the elements necessary to establish spoliation and the appropriate sanction to be imposed if it is established.

Eighth Circuit - Stevenson v. Union Pacific Railroad Co.

The most significant recent case concerning spoliation of evidence is *Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739 (8th Cir. 2004). *Stevenson* involved a car-train collision which killed one car passenger and severely injured another. The surviving passenger had no memory of the accident. Union Pacific routinely taped conversations between the train crew and a dispatcher and had made such an audio recording the night of the accident. Stevenson sued and requested that the audio recording be produced. The recording was not available, however, because Union Pacific had destroyed it pursuant to a routine procedure of keeping the audiotapes for 90 days before reusing and overwriting the tapes. Union Pacific also destroyed retain copies of track maintenance records from before the accident.

The district court (E.D. Ark.) sanctioned Union Pacific for this conduct by giving the jury an adverse inference instruction and awarded plaintiff $164,410.25 in costs and attorney's fees incurred as a result of the spoliation. The district court found no fault with the tape-retention policy in the abstract but found "it was unreasonable and amounted to bad faith conduct for Union Pacific to adhere to the principle in the

circumstances of this case" because Union Pacific knew from experience that the taped conversations would be relevant in any potential litigation. There was evidence that a claims representative for Union Pacific received notice of the accident shortly after it occurred.

The district court instructed the jury at the outset of the trial that the voice tape and track inspection records "were destroyed by the railroad and . . . should have been preserved," and that the jurors "may, but are not required to, assume that the contents of the voice tapes and track inspection records would have been adverse, or detrimental, to the defendant." The court prevented Union Pacific from calling witnesses seeking to explain that it destroyed the tape and track inspection records pursuant to its routine document retention policies. The jury returned a verdict in plaintiff's favor for $2.0 million and Union Pacific appealed.

On appeal, the Eighth Circuit clarified the legal standard for supporting an imposition of sanctions for spoliation of evidence in the context of a document retention policy. In the 1988 case of *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988), the Eighth Circuit stated that if a corporation "*knew or should have known* that the documents would become material at some point in the future then such documents should have been preserved." *Id.* at 1112 (emphasis added). The *Stevenson* court stated that the "knew or should have known" language in *Lewy* was dicta and was inconsistent with previous pronouncements that an element of bad faith was required. *Stevenson*, 354 F.3d at 746-747. The court clarified: "We have never approved of giving an adverse inference instruction on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some

indication of an intent to destroy the evidence for the purpose of obstructing the truth in order to impose the sanction of an adverse inference instruction." *Id.* at 747.

After reviewing the record the Eighth Circuit examined three categories of evidence that had been destroyed. The contrasting results are illustrative of how the court will examine spoliation claims.

Voice Tapes

The Eighth Circuit concluded that the district court did not abuse its discretion by sanctioning Union Pacific for destruction of the voice recording, though noting this case "tests the limits of what we are to uphold as a bad faith determination." *Id.* at 747-48.

> The district court's bad faith determination is supported by Union Pacific's act of destroying the voice tape pursuant to its routine policy in circumstances where Union Pacific had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and its knowledge that litigation is frequent when there has been an accident involving death or serious injury. While these are quite general considerations, an important factor here is that a voice tape that is the only contemporaneous recording of conversations at the time of the accident will always be highly relevant to potential litigation over the accident. We conclude that this weighs heavier in this case than the lack of actual knowledge that litigation was imminent at the time of the destruction. Additionally, the record indicates that Union Pacific made an immediate effort to preserve other types of evidence but not the voice tape, and the district court noted that Union Pacific was careful to preserve a voice tape in other cases where the tape proved to be beneficial to Union Pacific. The prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence of the facts surrounding the operation of the train at the time of the accident.

Id. at 748.

Pre-Litigation Destruction of Track Maintenance Records

After affirming the district's court imposition of sanction for destruction of the voice tapes, the Eighth Circuit held that the district court abused its discretion in

imposing the adverse inference jury instruction with respect to the prelitigation destruction of track maintenance records because the destruction was pursuant to a routine document destruction policy, there was no showing that the railroad knew that litigation was imminent when the records were destroyed, and the records were not as obviously relevant as the audio tapes because they would not have shown the exact condition of the track at the time of the collision. *Id*. at 748-749. The court concluded the facts did not support the necessary finding of bad faith.

Post-Litigation Destruction of Track Maintenance Records

Finally, the court addressed Union Pacific's destruction of track maintenance records after litigation had commenced – and after a document request seeking the records had been served on Union Pacific's counsel. Here, the Eighth Circuit upheld the district court's imposition of sanctions. Once again, the documents had been destroyed pursuant to a routine document retention policy. The court rejected the railroad's defense that the records were destroyed innocently because the proper employees did not realize the records were relevant and did not locate the records until it was too late to prevent the destruction of the records under the routine policy. "After the specific request for track maintenance records, Union Pacific cannot rely on its routine document retention policy as a shield." *Id.* at 750. The court further held that destruction of requested records during litigation was sanctionable, including an adverse inference instruction, even absent an explicit finding of bad faith.

Refusal to Allow Rebuttal

The Eighth Circuit next addressed the district court's failure to allow the railroad to offer reasonable rebuttal to the adverse inference instruction and concluded the district

court abused its discretion in refusing this evidence. The adverse inference instruction allowed, but did not require, the jury to draw an adverse inference from the destruction of evidence. A permissive inference is subject to reasonable rebuttal and Union Pacific should have been allowed to offer some evidence of its document retention policy and how it affected the destruction of the requested records as an innocent explanation for its conduct. *Id.* at 750. The court reversed and remanded the case for retrial.

Eighth Circuit - Morris v. Union Pacific Railroad Co.

The Eight Circuit revisited the spoliation doctrine later in 2004 in another case involving the Union Pacific Railroad. *Morris v. Union Pac. R.R.*, 373 F.3d 896 (8th Cir. 2004), arose in the Western District of Arkansas. A tow truck operator sued the railroad claiming negligence and punitive damages related to injuries sustained when the operator was struck by a train while working at the site of a prior collision at the crossing. *Id.* Prior to litigation commencing, the railroad destroyed an audiotape of communications between the train crew and the dispatcher on the date of the accident, in compliance with its 90-day retention policy. *Id.* at 899. The district court, somewhat confusingly, determined that the destruction of the audiotape was not "intentional" but it was done in "bad faith," citing the "knew or should have known" standard of *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988) (the district court's ruling was issued prior to *Stevenson*).

The district court gave an adverse inference instruction to the jury. During closing, counsel for plaintiff argued extensively that the jury should infer that the destroyed tape contained specific admissions by the railroad, inferences that were not supported by evidence in the record, and emphasized that the railroad had been

"destroying evidence" which it "was not supposed to do." The jury returned a verdict in favor of plaintiff for $8.0 million.

The Eighth Circuit reversed on the grounds that the adverse inference instruction should not have been given. The court first noted:

> An adverse inference instruction is a powerful tool in a jury trial. When giving such an instruction, a federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury. It necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape. As the district court in this case put it colloquially, "it's like cow crap; the more you step in it, the more it stinks."
>
> *Morris*, 373 F.3d at 900-01.

The Eighth Circuit cited to the district court's finding that the destruction was not "intentional" to show that the necessary finding of bad faith was missing. As to the district court's finding that the destruction was in bad faith the court noted that the district court did not have the benefit of the *Stevenson* decision and therefore the district court must have been relying on *Lewy*'s "should have known" standard which had since been rejected. The Eight Circuit also distinguished the facts of *Morris* from *Stevenson* in that in *Stevenson* there was evidence that the railroad claims representative went about selectively preserving evidence while allowing the audio tape to be destroyed. In *Morris*, no such "selective" preservation of evidence occurred and there was a lack of particularized information that railroad personnel consciously permitted the destruction of a relevant audiotape. *Id.* at 902. The court noted that the distinction between the two cases "may be modest" but the *Stevenson* case "tested the limits" of what constitutes bad faith.

The Eighth Circuit Employment Discrimination Cases

Between *Stevenson* and *Morris*, the court reviewed a decision from the Southern District of Iowa in *Groves v. Cost Planning and Mgmt. Int'l, Inc.*, 372 F.3d 1008 (8th Cir. 2004). Groves sued her former employer, alleging that she was laid off because of her gender and her pregnancy. *Id.* The lower court granted the employer summary judgment, concluding that the employer articulated legitimate, nondiscriminatory reasons for its actions and that Groves did not have sufficient evidence to show that the articulated reasons were pretextual. *Id.* at 1009. On appeal, Groves argued, among other things, that the district court failed to recognize that her employer destroyed documents and failed to recognize that those documents would have helped her prove her case. *Id.* at 1010. The court ruled that the district court did not commit error because the destroyed records (correspondence with potential insurance providers) were not relevant personnel records, Groves did not show that the correspondence would have helped her case, and Groves did not show that the employer destroyed the documents to suppress the truth. *Id.* at 1010.

In August of 2004, the Eighth Circuit decided *Jones v. Boeing Co.*, 109 Fed.Appx. 821 (8th Cir. 2004) (not selected for publication in the Federal Reporter). Jones sued Boeing, her former employer, for sex discrimination in violation of Title VII and the Missouri Human Rights Act and for alleged violations of the Equal Pay Act. *Id.* The district court dismissed the claim under the Equal Pay Act and granted summary judgment for Boeing on the discrimination claims. *Id.* at 822. Jones appealed, arguing, among other things, that an adverse inference instruction should have been given because Boeing destroyed "asking sheets" that she contends would have demonstrated that Boeing

offered overtime work to male employees before offering such work to female employees. *Id*. at 823.

The court stated that an "adverse inference instruction is warranted only when there is 'a finding of intentional destruction indicating a desire to suppress the truth' and prejudice to the plaintiff." *Id.* at 823 (quoting *Stevenson* at 746-748). There was no evidence of intent to destroy and, based upon the asking sheets submitted by Jones herself, the sheets did not demonstrate that Boeing offered overtime to men before offering it to women, so Jones was not prejudiced by the destruction of the asking sheets. *Id.* at 823.

Counsel's Obligation to Monitor a Client's Preservation of Evidence

While not a case from the Eighth Circuit, the recent case of *Zubulake v. UBS Warburg*, 2004 WL 1620866, No. 02 Civ. 1243 (S.D. N.Y., July 20, 2004) is often cited for its extensive discussion of a litigant's preservation obligations, and an *attorney's* obligation to monitor the client's compliance. The context of the dispute concerned data backup tapes. Concerning a litigant's obligations the court summarized them as follows:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention / destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval) then such tapes would likely be subject to the litigation hold.

Id. at *7 (citing *Zubulake IV*, 220 F.R.D. 212, 218 (S.D. N.Y. 2003).

The *Zubulake* court next discussed a lawyer's duties once a litigation hold is in place.

1. Counsel's Duty to Locate Relevant Information. Counsel must become "fully familiar with her client's document retention policies" as well as the client's "data retention architecture." According to the court, this will invariably require speaking with information personnel who can explain system-wide backup procedures and the actual implementation of the firm's recycling policy. *Id.* at *7-8. "In short it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance . . .." *Id.* at *8.

2. Counsel's Continuing Duty to Ensure Preservation. Inherent in Rule 26's continuing duty to supplement discovery responses is a duty to make sure that discoverable information is not lost. *Id.* at *9. While a lawyer "cannot be obliged to monitor her client like a parent watching a child" the lawyer must take reasonable steps to ensure continued preservation. *Id*. The court outlined precautions as guidelines that counsel should take to ensure compliance with the preservation obligation. First counsel must issue a "litigation hold" at the outset of the case "or whenever litigation is reasonably anticipated." *Id*. Second, counsel should communicate directly with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. "Key players" are those likely to have relevant information and it is particularly important to communicate clearly with them. The key players should be "periodically reminded" that that litigation hold is still in place. Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also ensure that all backup media which the party is required to maintain is kept in a safe place. In some cases this means counsel should

physically take possession of the backup tapes to ensure they are not inadvertently destroyed. *Id*. at *10.

Recent Iowa Cases

In *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004) the Iowa Supreme Court outlined the requirements for a spoliation inference: (1) the evidence was "in existence"; (2) the evidence was "in the possession of or under control of the party" charged with its destruction; (3) the evidence "would have been admissible at trial"; and (4) "the party responsible for its destruction did so intentionally." *See also* Iowa Civil Jury Instruction 100.22. Prior to *Hartsfield* the Court reviewed a trial court's refusal to give a spoliation instruction for abuse of discretion but in *Hartsfield* the Court determined that the proper standard was for correction of errors of law. *Id.* at 631. The spoliation instruction must be given if substantial evidence has been introduced on each element. *Id.* ("[T]he trial court does not have discretion to refuse a spoliation instruction when the defendant has generated a jury question on the spoliation inference.").

In the case of *Hendricks v. Great Plains Supply Co.*, 690 N.W.2d 486 (Iowa 2000), the court declined to allow a spoliation inference where the remnants of a home were demolished seven weeks after it was destroyed by fire. Claims adjusters had already been to the scene and investigators for the homeowners' insurer had photographed the fire scene and taken portions of flu pipe, wire, and insulation from the fire's origin. *Id.* The evidence did not support a finding of intentional destruction of evidence.

In *Phillips v. Covenant Clinic*, 625 N.W.2d 714 (Iowa 2001), the court ruled that a medical clinic's failure to produce a patient's medical records for a medical malpractice

case did not warrant a spoliation inference because there was no evidence to contradict the evidence presented by the clinic that they delivered the records to the hospital and the records were never returned. In *Phillips*, the executor of the patient's estate was unable to establish proximate cause for purposes of the medical malpractice claim without the spoliation inference.

In *Lynch v. Saddler*, 656 N.W.2d 104 (Iowa 2003), a spoliation inference was again not warranted because the facts did not support intentional destruction or alteration of evidence, and in any case the issue was not preserved for appellate review.

Merely negligent destruction or destruction as a result of a routine procedure is not sufficient to satisfy the intentional destruction prong of the test. *Lynch* at 111 (citing *Phillips* at 719). The control prong of the test is only satisfied when missing evidence is within the control of the party whose interests would naturally call for its production. *Phillips* at 719 (citing *Quint-Cities Petroleum Co. v. Maas*, 143 N.W.2d 345, 348 (1966)).

The party seeking the spoliation inference has the burden of generating a genuine factual issue as to whether the party accused of spoliation possessed or controlled the records at any relevant time to support the inference and whether the accused party intentionally altered or destroyed the evidence. *Phillips* at 719-720.

The court in *Phillips* acknowledged the frustration of litigants "when documents and other evidence needed to help prove their claim disappear." *Id.* at 720. The court explained that the inference is not to be grounded on the need or the blamelessness of the party seeking the inference or on the mere fact that evidence has disappeared. *Id.* at 720.

The inference must be based on the nature of the conduct of the party that destroyed the evidence and the need to punish such conduct. *Id.* at 720.

Ethics in the Courtroom

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Skip Ames
Hand Arendall, L.L.C.
PO Box 123
Mobile, AL 36601
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ETHICS IN THE COURTROOM

Orrin K. Ames III
Hand Arendall, L.L.C.
Mobile, Alabama
Tel: (251) 694-6204
Fax: (251) 694-6375
E-mail: sames@handarendall.com

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ETHICS IN THE COURTROOM

> As scrutiny turns from accountants to lawyers in the scandal, the legal profession should be looking for ways to assure Americans that when fraudulent activities are under way that threaten their livelihoods, their investments and their pensions, lawyers will be on their side, not on the side of the criminals.[1]

I. Introduction

The above observation arises out of post-Enron concerns about the legal profession. However, the concerns expressed are of universal relevance, whether inside or outside of the courtroom, whenever lawyers represent organizations rather than individuals.[2] The concerns are not confined to the recent high profile corporate corruption and financial manipulation scenarios.[3] They are applicable to any situation where organization-wide wrongdoing is a concern.[4]

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[1] George W. Overton, *Ethics After Enron*, 16 CBA RECORD 45 (2002). *See also* Sarah Helene Sharp, *On Being a Blab or a Babbler: The Ethics and Propriety of Divulging Client Confidences*, 11 GEO. J. LEGAL ETHICS 79 (1997) (hereafter "Sharp") ("The profession would be well served by a rule that requires attorneys to balance their clients' rights and interests with the obligations that attorneys have to their own moral consciences and to the courts, their community, and the Constitution."); Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563, 565 (1996) ("Our advocacy can be hired. Not our conscience.").

[2] *See* Brian Moline, *Ethical Traps for the Organization Lawyer: Interplay Between KRPC 1.6, 1.13 and 1.11*, 72 J. KAN. B. A. 20 (April, 2003) (informative article highlighting some unique issues with respect to in-house counsel.).

[3] For interesting articles relating to some reasons for the corporate corruption situations and suggestions for the proper functioning of boards and corporate risk management, *see* Mark Siwik, *Emerging Corporate Governance Standards for Risk Management and the Lawyer's Role*, 14 COVERAGE 1 (Nov.-Dec. 2004); William W. George and Gardiner Morse, *Imbalance of Power*, 2002 HARV. BUS. REV. 22 (July); Roderick

In this context, one of the most rapidly developing areas of the law, and one that will be intensely scrutinized, tested and re-tested is the area of confidentiality.[5] The central core, therefore, around which an exploration of ethical concerns in the courtroom is built for this material and the accompanying presentation, is confidentiality and its two primary dimensions: the attorney-client privilege and the work product doctrine. Both pretrial and trial dimensions of these areas will be addressed because of the inextricable relationship between what occurs inside and outside of the courtroom.

An equal concern of this material is the reality that, as the criminal investigations arising out of the recent corporate corruption incidents move forward, and as the civil suits are filed,[6] a central inquiry will ask where the lawyers were during the corrupt

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M. Kramer, *When Paranoia Makes Sense*, 2002 HARV. BUS. REV. 62 (July); Rakesh Khurana, *The Curse of the Superstar CEO*, 2002 HARV. BUS. REV. 60 (September); Roderick M. Lencioni, *Make Your Values Mean Something*, 2002 HARV. BUS. REV. 113 (July); Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, 2002 HARV. BUS. REV. 106 (September).

[4] *See* Associated Press, *Former CEO enters fraud guilty plea*, MOBILE REGISTER, June 27, 2005 at 5B ("The former head of a textile company who overstated assets by $35 million has agreed to plead guilty in a fraud case that bankrupted the manufacturer and cost 300 people their jobs.); *Workers: Implant maker hid defects*, MOBILE REGISTER, May 23, 2005 at 5A (story of employee allegations that Mentor Corporation hid defects in breast implants and "instructed [the manager of product evaluation] to destroy reports detailing high rupture rates and poor quality of some types of implants . . . .").

[5] *See* Orrin K. Ames III, *Trumping the Attorney-Client Privilege and Confidentiality*, THE ATTORNEY-CLIENT PRIVILEGE 1 (DRI Monograph 2002) (hereafter Ames-Trumping). *See also* American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 307 (2003) (report) ("In seeking a waiver of the attorney-client or work product privilege, the government's demands change the very nature of the criminal justice system as well as the adversary process.").

[6] For discussions regarding staying civil proceedings when there are parallel criminal proceedings or the risk of criminal prosecution, *see Ex parte* Antonucci, 2005 WL 1492057 (Ala. June 24, 2005); *Ex parte* Ebbers, 871 So. 2d 776 (Ala. 2003).

conduct of their clients. For that reason, the activities of the lawyers and the law firms involved will come under intense scrutiny[7] and their relationships to corporate corruption issues will be examined, studied, and tested by courts, prosecutorial authorities, lawyers, lay persons, and academia.[8] Arising out of this scrutiny will be an overall examination of lawyers' ethical and moral conduct both inside and outside of the courtroom.

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[7] *See In re* Enron Securities, Derivative & Erisa Litigation, 235 F. Supp. 2d 549 (S.D. Tex. 2002) (addressing the claims against the lawyers, accountants, etc.). *See also Report of Investigation By the Special Investigative Committee of the Board of Directors of Enron Corp.*, February 1, 2002 (hereafter *Powers Report*) (criticizing the Vinson & Elkins law firm) available at http://news.findlaw.com/hdocs/docs/enron/sicreport; *Vinson & Elkins Must Defend Against Shareholder Charges Over Enron Collapse*, 19 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 4 (January 1, 2003) (addresses the allegations against Vinson & Elkins, Enron's outside counsel); *Final Report in Enron Bankruptcy Case Criticizes In-House Lawyers, Outside Counsel*, 19 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 668 (December 3, 2003); Comment, *Lawyer Conduct and Corporate Misconduct*, 117 HARV. L. REV. 2227 (2004); Jenny B. Davis, *The ENRON FACTOR: Experts Say The Energy Giant's Collapse Could Trigger Changes in the Law That Make it Easier to Snare Professionals*, 88 A.B.A.J. 40 (April 2002); Laurie P. Cohen and Mark Maremont, *E-mails Show Tyco's Lawyers Had Concerns*, THE WALL STREET JOURNAL, December 27, 2002 at C1. This is an excellent article that also addresses the duties of lawyers when they believe that their clients are committing fraud or possibly other illegal conduct. *See also* Paul Beckett and Laurie P. Cohen, *J.P. Morgan Is Still Shadowed by Enron Link*, THE WALL STREET JOURNAL January 16, 2000 at C1 ["The grand jury's investigation is part of a long-running probe by Manhattan District Attorney Robert Morganthaw into J. P. Morgan and Enron, in particular the bank's role in allegedly helping Enron hide debt through a series of natural gas trades with an offshore company called Mahonia Ltd.); Jenny B. Davis, *Law Firms Added to Enron Shareholder Suit*, 1 ABAJ. ERPT. 14 (April 12, 2002) (deals with the University of California, the lead plaintiff in the shareholder suit against Enron, adding Vinson & Elkins and Kirkland & Ellis as defendants); Julie Hilden, *The brink of legality: Why Enron's lawyers walked while their accountants fried*, MSNBC, http://stacks.msnbc.com/news/770559.asp? cp1+1 (June 21, 2002); Overton, *supra* note 1 ("The Times, with probable accuracy, predicts a pressure of unprecedented force on our profession . . . ."). The effects on trials from the corruption scandals could also be profound. *See* John Gilbert, *Fear and Loathing in Corporate America*, 89 A.B.A.J. 50, 52, 53 (January 2000) ("A first-of-its-kind survey for the Minority Corporate Counsel Association released in October shows that among potential jurors, 75 percent or more distrust corporations on a variety of counts."; . . . "Putting managers and executives on the stand also could prove risky as 71 percent of the respondents said they believe those at the top are more likely to lie than lower-level employees or expert witnesses."); Sylvia Hsieh, *Post-Enron Juror Attitudes Are Hardening Against Corporate Defendants*, LWUSA, September 2, 2002 at 14 ("[T]here's evidence that juror attitudes are hardening against corporate defendants."). *See also* Corey D. Babbington, *Preserving the Attorney-Client Relationship After United States v. Anderson*, 49 KAN. L. REV. 221, 243 (2000) ("Anderson marked the first time lawyers were criminally indicted for legal advice given to clients.").

[8] *See* Thomas G. Bost, *The Lawyer as Truth-Teller: Lessons From Enron*, 32 PEPP. L. REV. 505 (2005)

Many of the developments in the attorney-client privilege will occur as a result of the passage of the Sarbanes-Oxley Act of 2004,[9] the Securities and Exchange Commission's passage of rules of practice affecting lawyers,[10] the ongoing debate regarding the concept of a noisy withdrawal,[11] and, perhaps, most important, the work of

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(hereafter Bost) (excellent article exploring the role of the Vinson & Elkins firm in the Enron story); Bernard S. Carrey, *Enron-Where Were the Lawyers?*, 27 VT. L. REV. 871 (2003); Dennis J. Block and Simon C. Roosevelt, *Responding to a Corporate Crisis*, 1249 P.L.I. CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 531 (May-July 2001) (Westlaw cite: 1249 PLI/Corp. 531) (addresses proper actions of board, counsel, etc. in corporate crises); Milton R. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197 (2000) (addresses ethical and other concerns for counsel representing corporations); Susan Pulliam and Deborah Soleman, *How Three Unlikely Sleuths Discovered Fraud at WorldCom*, THE WALL STREET JOURNAL, October 30, 2002 at 1A; *supra* note 4 and *infra* note 13 and articles cited therein; Jonathan P. Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145 (1988). For an enlightening perspective on the roles of lawyers in public interest-type environmental litigation and what the author addresses as attacks on lawyers, professors, and law school clinics in such public interest work *see* Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417 (2002); Robert R. Kuehn, *Access to Justice: The Social Responsibility of Lawyers: Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U.J.L. & POL'Y 33 (2000).

[9] 15 *U.S.C.* 7201, *et seq*. *See also* Patti Bond, *Scrushy trial tests new anti-fraud law*, MOBILE REGISTER at 9A (May 25, 2005) (which addresses the claims against Richard Scrushy in the Birmingham, Alabama Federal trial of issues arising out of the HealthSouth overstated earnings fraud and observing that they represent the first effort of the Federal government to formally charge and take to trial a Sarbanes-Oxley count and observing that Richard Scrushy is the "first chief executive to be tried under the Sarbanes-Oxley Act" and that "corporate watchdogs all over the country are waiting to see if the new law has any teeth." However, on June 28, 2005, Mr. Scrushy was acquitted of all charges. *See* Dan Morse and Chad Tarhune, *Health South: Scrushy Is Acquitted*, THE WALL STREET JOURNAL, June 29, 2005 at A1 (the jury said the evidence "clearly proved the existence of fraud," but that, as to Mr. Scrushy, "[t]here just wasn't enough evidence . . . . There was reasonable doubt."); *Acquittal Casts Cloud Over Sarbanes-Oxley Law*, THE WALL STREET JOURNAL, June 29, 2005 at A8 ("The certification provisions of Sarbanes-Oxley were intended to prevent the type of defense that Mr. Scrushy's attorneys mounted in which they said he had no knowledge of the accounting improprieties that occurred while he ran the company."). *But see* Jay Reeves, *Scrushy still faces slew of lawsuits from scandal*, MOBILE REGISTER, June 30, 2005 at 6A. ("Aside from a lawsuit filed by the Securities and Exchange Commission, the fired Health South chief executive officer and aspiring preacher is named in at least 61 other federal lawsuits filed in Birmingham over the massive fraud."). *See generally*, Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, 21 ACCA DOCKET 92 (May, 2003).

[10] *See* Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323 (2002).

[11] *See* discussion *infra*.

the American Bar Association's Commission 2000 and the Presidential Task Force on Corporate Responsibility ("Task Force") the recommendations of which culminated in very important changes in Rules 1.6 and 1.13 of the ABA's Model Rules of Professional Conduct ("Model Rules").[12] This is the new setting in which developments in the attorney-client privilege and work product areas will occur.[13]

[12] A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT (herewith MODEL RULE(s)). *See generally* Lawrence A. Hamermash, *2003 Symposium: The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35 (2003).

[13] *See* Roger C. Cramton, et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004); Developments in the Law – Corporations and Society, *Lawyer Conduct and Corporate Misconduct*, 117 HARV. L. REV. 2227, 2227 (2004) ("Lawyers' negligence almost certainly contributed to the wave of corporate scandals that shook the securities markets in 2001 and 2002."); Susan P. Koniak, *Law and Truth: Roundtable: The Lawyer's Responsibility to the Truth: Corporate Fraud*, 26 HARV. J. L. & PUB. POL'Y. 195 (2003); Larry Cata Baeker, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws*, 77 ST. JOHN'S L. REV. 919 (2002); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143 (2002); Roger C. Cramton, *Enron and the Corporate Lawyer: Professional Responsibility Issues*, Practicing Law Institute, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, *577, 1321 PLI/Corp. 575 (April 2002) (Westlaw citation); Current Development, *The Sarbanes-Oxley Act and In-House Legal Counsel, Suggestions for Viable Compliance*, 18 GEO. J. LEGAL ETHICS 1041 (2005); Current Development, *Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys?*, 18 GEO. J. LEGAL ETHICS 881 (2005) (hereafter "*Revised Model Rule"*); Current Development, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004); Developments in the Law, *Lawyer Conduct and Corporate Misconduct*, 117 HARV. L. REV. 2227 (2004); Current Development, *The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569 (2003). *See also* Geraldine Gauthier, *Dangerous Liaisons: Attorney-Client Privilege: The Crime-Fraud Exception, ABA Model Rule 1.6 and Post-September 11 Counter-Terrorist Measures*, 68 BROOK. L. REV. 351 (2002).

II. The Privilege and Confidentiality: A Framework

A. Definitional Context:

1. The Attorney-Client Privilege: An Evidentiary Concept:

Before exploring the relationship of attorney-client privilege and work product doctrine issues to ethical conduct in the courtroom, it is helpful to briefly look at the concepts of privilege and confidentiality for some definitional context. In Federal cases, perhaps, the most commonly cited definition of the attorney-client privilege is in the case of *United States v. United Shoe Machinery Corporation.*[14] There, the court said:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion on law, or (ii) legal services, or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[15]

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[14] United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-9 (D. Mass. 1950).

[15] *Id.* at 358-9.

Contained in that definition are the seminal elements of a communication, made in confidence, for the purpose of seeking legal advice.[16] As will be discussed, this is the seminal element of the attorney-client privilege that is relevant to the crime-fraud exception.

A good definition of the attorney-client privilege has also been provided by the Florida Supreme Court in *Southern Bell Telephone & Telegraph Co. v. Deason*.[17] There, the Florida Supreme Court articulated a five-part test when the issue was whether certain corporate employees' communications were protected by the attorney-client privilege. While there are unique aspects of the corporate attorney-client privilege when the issue is whose communications within a corporate structure are protected,[18] the definition

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[16] Communications from a lawyer to a client, although containing legal advice, do not automatically come under the attorney-client privilege. Such communications from the attorney to the client "are privileged only to the extent that they reveal communications made in confidence by the client to the attorney for the purpose of obtaining legal advice." eSpeed, Inc. v. The Board of Trade of the City of Chicago, Inc., 2002 WL 827099 *1 (S.D.N.Y. April 29, 2002) (not reported in F. Supp. 2d); Sedco International, S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir. 1982) ("[L]egal advice is clearly privileged to some degree . . . (privileged to extent necessary to prevent disclosure of client's confidential communication)"); Dawson v. New York Life Insurance Company, 901 F. Supp. 1362, 1366 (N.D. Ill. 1995) ("'[I]t is generally held that the privilege will protect at least those attorney to client communications which would have a tendency to reveal the confidences of the client.'"). They may, however, come within the work product doctrine. *eSpeed, Inc.*, 2002 WL 827099 at *2. *See also* Allen v. West Point-Pepperell, 848 F. Supp. 423, 427-28 (S.D.N.Y. 1994) ("[T]he privilege does not protect facts which an attorney obtains from independent sources and then conveys to his client.") and 428 n.4 ("the work-product doctrine may protect certain factual information. . . ."). *See also* E. Bailey, *Defense Ethics and Professionalism: Are All Meetings with Clients Privileged?*," 44 FOR THE DEFENSE 62 (June 2002).

[17] Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994).

[18] *See* Upjohn Co. v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). *See also* Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393 (1998) (hereafter Weiss); John E. Sexton, *A Post-Upjohn Consideration of*

provided by the Florida Supreme Court deserves to be noted here. In *Deason*, the court said the following:

> [W]e set forth the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:
>
> (1) the communication would not have been made but for the contemplation of legal services;
>
> (2) the employee making the communication did so at the direction of his or her corporate superior;
>
> (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
>
> (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
>
> (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[19]

Subparagraph (1) of the court's definition embodies the separate element of confidentiality. That element functions as a limit on the exclusionary effect of the privilege by

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Corporate Attorney-Client Privilege, 57 N.Y.U.L. REV. 443 (1982) (hereafter Sexton). *See also* Note, *ABA Task Force Misses the Mark: Attorneys Should Not be Discouraged From Serving on Their Corporate Clients' Board of Directors*, 25 DEL. J. CORP. L. 261, 266-268 (2000) (addresses the possible loss of the attorney-client privilege when attorneys serve on clients' boards).

[19] *Southern Bell Tel. & Tel.*, 632 So. 2d at 1383.

establishing that the requirement of confidentiality will not be met unless the statement would not have been made but for the existence of the privilege.[20]

2. Confidentiality: An Ethical Concept:

Beyond the attorney-client privilege, however, there is the entirely separate area of attorney-client confidentiality. It has been observed that the rule prohibiting the divulging of client confidentiality, even after attorneys have ceased to represent clients, prevents the disclosure of information that attorneys might otherwise feel morally obligated to disclose.[21]

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[20] *See* Sexton, *supra* note 18; Weiss, *supra* n. 18. *See also* Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 31 WIS. L. REV. 31 (2000) (hereafter "Leslie") critiquing Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853 (1998) (hereafter "Rice"). *See also* Gordon v. Boyles, 9 P.2d 1106, 1123 (Colo. 2000) ("the privilege applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential." . . . "'A mere showing that the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.'"); City & County of San Francisco v. Superior Court, 231 P.2d 26 (19510 ("[A]lmost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such."); Denius v. Dunlap, 209 F.3d 944 (7th Cir. 2000) (confidentiality discussed in terms of a First Amendment right). For an explanation of the solicitor-client privilege in Canadian law, *see* Ken B. Mills, *Privilege and the In-House Counsel*, 41 ALBERTA L. REV. 79 (2003). *See also* Adam M. Dodek, *Comparative Confidentiality: Lessons from Canada*, 20 J. LEGAL PROF. 51 (1995-96).

[21] Sharp, *supra* note 1 at 79:

> "[The privilege] prevents attorneys from revealing knowledge that they feel a moral obligation to divulge and that might not be protected in court. It fosters an amoral approach to representation that feeds the public's perception that attorneys are a mercenary breed. Its application sometimes has results that neither practitioners nor lay persons expect or welcome. Finally, it unreasonably impinges on the First Amendment rights of individuals who are obligated to uphold the Constitution."

Nevertheless, a concept of confidentiality does exist and it is embodied in Model Rule 1.6, as amended in 2003,[22] which provides the following:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent reasonably certain death or substantial bodily harm;
>
> (2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;

See Revised Model Rule supra note 13 in which there are discussions of surveys revealing what actually motivates attorneys to disclose privileged information. Those surveys are enlightening and reveal that disclosures seem to emanate from individual value systems and concepts about what is right or wrong rather than formal ethical rules. The survey results are found at: Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, RUTGERS L. REV. 81 (1994); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (hereafter Zacharias-Rethinking).

[22] MODEL RULE 1.6. *See* more complete discussion *infra*.

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.[23]

The client confidentiality rule goes beyond the communicative parameters of the attorney-client privilege. It applies not simply to what clients say to their attorneys, but to matters that attorneys discover during the course of representation.[24] Therefore, *Model Rule* 1.6(a) provides constraints not simply on communicative information, but on information "relating to representation."[25] The range of those potential "secrets" is considerably more encompassing.

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[23] *Id*. *See also* Fred C. Zacharias, *The Fallacy That Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar*, Symposium, PROFESSIONAL LAW. 39 (1999) (hereafter Zacharias-Fallacy) advancing the position that the attorney-client privilege is the concept addressed by the courts, but that the separate concept of confidentiality is one that is "a product of the bar. It developed as part of the bar: vision of how lawyers and clients should interact." *Id.* at 54; Dodek, *supra* note 20 addressing the Canadian approaches to these issues. *See also Marks v. Tenbrunsel*, 2005 WL 928521 (Ala., April 22, 2005) which addresses the statutory Psychotherapist-Patient Privilege found in § 34-26-2 CODE OF ALA. (1975) and Rule 503 ALA. R. EVID. and how it is repealed by implication by § 26-14-9 CODE OF ALA. (1975) which is the child abuse reporting statute. The Alabama Supreme Court's treatment of this area is instructive in light of the fact that the Psychotherapist-Patient Privilege is frequently cited by the courts as an important privilege like the attorney-client privilege. *Id.* at * 13, J. Parker dissenting.

[24] Sharp, *supra* note 1 at 80.

[25] MODEL RULE 1.6.

3. The Need to Think of The Two Concepts Separately:

When people talk about the attorney-client privilege and confidentiality rules, there is often a commingling of those concepts. It is probably better, when considering these issues, to understand that there may be a different way of looking at attorney-client privilege and confidentiality issues depending on who is doing the "looking." It has been observed that the attorney-client privilege is viewed by the courts as being a very narrow doctrine because of the effect of the privilege in keeping probative, relevant evidence out of a trial. For that reason, the courts consistently interpret the attorney-client privilege narrowly.[26]

On the other hand, it has been observed that the principle of confidentiality is really a bar-made principle that benefits lawyers. Whether the courts accept the same concepts of confidentiality that lawyers "want" and are, perhaps, embodied in the Model Rules, is a separate question and one that is being reviewed by certain academicians.[27]

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[26] *See* Zacharias-Fallacy, *supra* note 23. *See also* Diversified Ind., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1978) (privilege invoked to resist disclosing information obtained by attorneys during an investigation into, and report of, corporate wrongdoing); N.L.R.B. v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965). *Cf. In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 384 (D.D.C. 1978) ("The court, therefore, views its duty as that of achieving a balance between the need for the disclosure of all relevant information and the need to encourage free and open discussion by clients in the course of legal representation.").

[27] *See* Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 SO. TEX. L. REV. 69 (1999) (hereafter Zacharias-Harmonizing). One of the best analyses demonstrating the difference between the attorney-client privilege and the more broad concept of confidentiality is in a case where the Supreme Court of Rhode Island reviewed an ethics opinion from the Rhode Island Ethics Advisory Panel. *See In re* Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I. 1993).

B. The Counseling Role of Attorneys:

Within the concept of the attorney-client privilege there is, arguably, a preventive lawyering and counseling role value.[28] The counseling role of the attorney has been described as follows:

> People need lawyers to guide them through thickets of complex government requirements, and, to get useful advice, they have to be able to talk to their lawyers candidly without fear that what they will say to their own lawyers will be transmitted [outside] . . . .
>
> Much of what lawyers actually do for a living consists of helping their clients comply with the law . . . . "[C]orporations 'constantly go to lawyers to find out how to obey the law.'" . . . This valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into . . . information. . . .
>
> In our libertarian tradition, what is not prohibited is generally permitted, so lawyers' counseling regarding prohibitions necessarily and desirably educate clients as to their liberties:
>
> Lawyers are constantly called upon to tell people, in advance of action or developing controversy, what their duties are to other people and to the government, and what the duties of others are to them . . . .
>
> When people do not have duties, they have liberties. Counseling about the one is in some sense counseling about the other . . . .
>
> It is a truism that while the attorney-client privilege stands firm for clients' revelations of past conduct, it cannot be used to shield ongoing or intended future criminal conduct. . . . But [the privilege] is difficult to

[28] *See* Zacharias-*Rethinking*, *supra* note 21 at 359.

> apply when the lawyer's role is more in the nature of business planning or counseling or bringing the client into compliance for past wrongs, as opposed to simply defending the client against a charge relating to past wrongs. The act of bringing a client into compliance with the law ordinarily and properly engages the lawyers in an effort to assure the client is sanctioned no more harshly than the law requires.[29]

This statement describes one role of the attorney not simply from the standpoint of the litigator who gets a case after a client's history has been irrevocably cast.[30] It highlights the counseling and guidance roles of a lawyer before a matter ever matures into a lawsuit or a criminal prosecution. As such, it describes the roles of in-house and outside counsel, but it equally highlights the nature of the attorney-client privilege and confidentiality issues of which attorneys need to be aware as they are going through the early counseling process.

As the criminal and civil cases grow out of the present corporate corruption scenarios, these issues will be thrust more and more into the public arena for scrutiny. There is no question that lawyers and how lawyers work will be in that forefront of

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[29] United States of America v. Tei Fu Chan: The Sunrider Corporation, 99 F.3d 1495, 1499-1500 (9th Cir. 1966). *See* Zacharias-Rethinking, *supra* note 21 at 359. *But cf.* Stephen A. Saltzburg, *Corporate Attorney – Client Privileges in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817, 822 (1984) ("The adoption of the privilege represents an educated guess about behavior.")

[30] *Cf.* Orrin K. Ames III, *Duty to the Client: The Need for Perspective and Balance*, Winter 1999 PROFESSIONALISM PERSPECTIVES 2 (Newsletter of the D.R.I. Lawyers' Professionalism and Ethics Committee) reprinted, 26 FLA. B. NEWS 24 (Oct. 1999) (hereafter Ames-*Duty*) (discussing the pressure from some clients who want lawyers to change their histories and providing some suggestions to lawyers about how to deal with this pressure).

scrutiny. The public is wondering not only how the accountants could have known what they knew and not counseled their corporate clients, but the public is clearly thinking that the lawyers must have known and did not give proper guidance to their clients or at worst, were participants. There is no doubt that these issues will be scrutinized through shareholder class actions, shareholder derivative suits[31] and through other types of civil litigation and criminal proceedings that will force intense scrutinization of the attorney-client privilege. For instance, with corporate executives now being criminally prosecuted and coming before grand juries, as well as being called as witnesses in civil proceedings, questions will arise about whether those corporate executives can waive the attorney-client privilege for the corporate entity. Furthermore, when shareholders want information about what the lawyers knew and what they did, there will be questions about whether the attorney-client privilege can be invoked against them by boards of directors. These issues will be brought to the forefront by the high profile Enron-type scenarios which have the potential of bringing forward any number of corporate "whistleblowers" who might also include in-house counsel.

Although these issues, and variations of them, have, to some degree, always been present in any entity representation setting, they seem to be more acute today when the lawyers may very well be facing individual government scrutiny as well as scrutiny by

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[31] *See* Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 99 DICK. L. REV. 355 (1993); William M. Lafferty and W. Leighton Lord III, *Towards a Relaxed Summary Judgment Standard for the Delaware Court of Chancery: A New Weapon Against "Strike" Suits*, 15 DEL. J. CORP. L. 921 (1990), both addressing the abuse of shareholder "strike" suits.

shareholders. Furthermore, the lawyers may be more at risk than at other times because of the desires of corporate officials, who are now finding themselves facing criminal indictments, to make deals with the federal and state governments. Whether they are going to be willing, or whether they will try, to shift the blame to the lawyers or whether they will be willing to attempt to breach the attorney client privilege to their own benefits raise profound privilege issues.

With respect to these types of concerns, the remainder of this section of this material will, therefore, be devoted to following issues that have confidentiality issues at their centers will be explored:

1. Who is the client;
2. In whom does the attorney-client privilege reside;
3. Who can waive the attorney-client privilege (conscious whistleblowing/ waiver issues will be discussed separately);
4. How that waiver can take place.[32]

[32] The scope of waiver will not be specifically addressed in this material. That is an entirely separate area deserving of more extensive treatment. *See*Thomas G. Wilkinson and Marlo Pagano-Kelleher, *Inadvertent Disclosure of Privileged Documents*, THE ATTORNEY-CLIENT PRIVILEGE 57, 72-73 (D.R.I. Monograph 2002) (hereafter Wilkinson).

III. Core Confidentiality Values and Their Relationships to In-Court Concerns

A. The Corporate Attorney-Client Privilege: Determining Who Is the Client:

One of the primary issues in representing any corporate or business entity, from the standpoint of the attorney-client privilege, from the point of view of representative counsel as well as board members and management,[33] is determining and appreciating the identity of the client. This is a threshold issue because attorneys for corporate entities deal with employees, management, and individual board members on ongoing bases. Understanding who is the "client" in such situations, what communications are privileged, and who can waive the privilege, are crucial questions that counsel must resolve, especially when one or more board members might be opposed to what a board is doing and are actively pursuing a course of conduct opposed to board decisions.

Courts have struggled with this area for years and, although a general answer has been articulated, the implementation of that answer, with the various nuances, tensions, and conflicts that manifest themselves when board members are juxtaposed with a board

[33] It is submitted that one of the best "counseling" roles that counsel can perform is to orient the board and management to this role and to this issue. *See also* Joseph Pratt, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company's Confidential Information*, 20 N.W. INT'L. L. & BUS. 145 (1999) (good exploration of attorney-client privilege issues as they relate specifically to in-house counsel). For an exploration of the privilege on in-house counsel issues from a Canadian perspective, *see* Mills, *supra* note 20.

with respect to their concepts of what is best for the corporate entity, and the ever looming threat of shareholder and member litigation, is complicated. There are even serious questions about whether the attorney advising on any given issue has some expectation that the attorney-client privilege is going to be a viable operative doctrine when representing an entity.[34]

These issues can come to a head when there is a dissident member of the board who is in disagreement with certain board actions or who has left the corporation either voluntarily or involuntarily and is involved in litigation with the corporation as well as situations where there are shareholder suits and whistleblowers. They can also manifest themselves in today's post-Enron environment where board members, management, employees, etc. are called before grand juries, where they are charged or indicted, and where they want to make deals and provide information. Therefore, getting some sense of who can waive the privilege and under what circumstances is much more than an academic exercise.

[34] In the experience of this author, this issue, and the other issues covered herein, are highlighted with the representation of property owners associations (POAs) in condominiums and planned urban or planned use developments. In those environments, the attorney representing a POA deals on very personal levels with employees, management (Operations Managers) and board members. Whereas many corporations have shareholders, POAs have members. The constant contacts with so many people associated with POAs and the ongoing need to communicate with so many people raise difficult confidentiality issues for the associations' attorneys.

The general answer for a lawyer representing any, profit or nonprofit,[35] entity is found in *Model Rule* 1.3.[36] That rule provides that, when representing a corporate entity, the attorney's client is the organization and not any particular person, to include the Board, individually, or collectively, in the organization. That approach is premised on the entity theory and the concept of representing the corporation as a separate legal entity with its own identity.[37] That perspective does not sound too complicated, however, implementation of that relationship is much more difficult.[38]

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[35] Nonprofit corporations are customarily governed by separate statutory provisions. *See, e.g.,* § 10-3A-1, *et seq.* CODE OF ALA. (1975, as amended).

[36] MODEL RULE 1.3.

[37] Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 190-191 (2001). This concept is extremely important for in-house counsel. *See* Allen W. Nelson, *The Attorney-Client Privilege and Corporate Counsel*, The Attorney Client Privilege 105 (DRI Monograph 2002); Alison M. Hill, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 CASE W. RES. J. INT'L L. 145 (1995) (addresses the attorney-client privilege, in-house counsel, and the views in the United States and E. C. countries); Scott R. Flucke, *The Attorney-Client Privilege in the Corporate Setting: Counsel's Dual Role as Attorney and Executive*, 62 U.M.K.C. L. REV. 549 (1994).

[38] *Kim*, *supra* note 37 at 191:

> The entity theory of representation has its limitations. It may work well for large, public corporations where the size and complexity of the organization gives the corporation an identity that is greater than the size of its individual party. In the case of close corporations and partnerships, however, the lines between the entity and the individuals who own or control the entity become blurred. In those contexts it is much harder for the lawyer to distinguish between the goals of the entity and the goals of the entity's individual constituents.

See also Roland J. Santini, *Application of the Attorney-Client Privilege to Disputes Between Owners and Managers of Closely-Held Entities*, 31 CREIGHTON L. REV. 849 (1998) (hereafter Santini). For an example of how the lines can blur for counsel and corporate witnesses regarding who the attorney represents, *see E. F. Hutton & Company v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969). In that case the corporate counsel met with a corporate officer before an S.E.C. hearing and accompanied the officer to the hearing and later to a bankruptcy hearing. When efforts were later made to disqualify the lawyer in a matter, the counsel argued that he had been required to accompany the officer. The court, however, held that an attorney-client relationship had been established because the officer's belief that the attorney represented him was

The primary source for determining the contours of the corporate attorney-client privilege, at least in the Federal court setting, is *Upjohn Co. v. United States*.[39] *Upjohn* is the seminal case addressing the scope of the corporate attorney-client privilege and under what circumstances the privilege will attach to communications.

In *Upjohn* the United States Supreme Court had to decide if it was going to follow the control group test[40] that had been used by a number of courts and that had been adopted by the Sixth Circuit in *Upjohn*,[41] or a subject matter approach that had been used by a number of other courts.[42] In that setting, the Court recognized that, when an attorney is representing a corporate entity, he or she will be dealing with more than a select group of people who would be deemed to be within the small control group. The reality of corporate representation is that often an attorney's main sources of information are

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reasonable saying: "Brown's reasonable understanding of his relation with the attorneys is the controlling factor here." *Id.* at 389. *Cf. Zielinski v. Clorox Company*, 504 S.E.2d 683 (Ga. 1998) (held that a company employee had not made a sufficient evidentiary showing of an individual attorney-client relationship with the corporate counsel and, in doing so, relied on the tests from *United States v. International Brotherhood of Teamsters*, 119 F.3d 210 (2d Cir. 1997) and *In re Bevil, Brasler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986).

[39] 449 U.S. 383 (1991). *See also generally*, Alexander C. Black, *Determination of Attorney-Client Privilege—Modern Cases*, 26 A.L.R. 5TH 628 (2004) (hereafter "Black-Determination"); Alexander C. Black, *What Corporate Communications Are Entitled to Attorney-Client Privilege—Modern Cases*, 27 A.L.R. 5TH 76 (2004) (hereafter "Black-What Corporate").

[40] *See Philadelphia Westinghouse Electric Corp.*, 210 F. Supp. 483 (S.D. Pa. 1962).

[41] *United States v. Upjohn*, 600 F.2d 1223, 1225 (6th Cir. 1979).

[42] *See Harper & Row Publishing, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd* 400 U.S. 348 (1971).

employees at all levels and it is to them that the attorney will, and often must, go for information.

Furthermore, it is often at the lower levels of employment that liability-producing activities can, and do, take place making those employees indispensable sources of information.

The Court, while rejecting the control group test, but not wholly adopting the subject matter test, set out factors, some of which resembled the subject matter test,[43] to use to determine, within a corporate setting, when the corporate attorney-client privilege attaches:

1. A person communicating with corporate counsel should have been directed to communicate with that corporate counsel by that person's superiors for the purposes of obtaining legal advice;

2. The information being discussed is needed, but might not be available from higher ranking officials;

3. The subject of the communication is within the employee's job duties;

4. The employee is told that the questions that are being asked of him by counsel are for the purpose of obtaining legal advice;

[43] *See generally* Bufkin Alyse King, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 631 (2002).

5. The communications were confidential when made and protected as confidential information after they were made.

Obviously, these criteria for determining when the privilege attaches go far beyond communications with a control group. *Upjohn*, therefore, extended the privilege, as it applied to internal corporate communications, to others beyond a control group. In so holding, however, *Upjohn* did not lay down any hard and fast test. Rather, it allows for a case-by-case approach in determining which communications by, and with, lower level employees will be covered by the privilege.[44]

It must be kept in mind, however, that the *Upjohn* approach is a Federal rule. It has not been universally accepted in all state jurisdictions.[45] My State of Alabama is an example of a state that has adopted it through its rules of evidence:

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[44] *See* Paul J. Sigwarth, *It's My Privilege and I'll Assert It If I Want To: The Attorney-Client Privilege in Closely-Held Corporations*, 23 IOWA J. CORP. L. 345, 350 (1988). *See*, Salsburg, *supra* note 29 at 828 for an analysis of which corporate conversations should be protected by the privilege. Professor Salzburg offers what he acknowledges is an interpretation of *Upjohn* that is "narrower than many advocates of the corporate privilege would prefer" but also offers that the work product doctrine would protect other information that the privilege, as he applies it, would not protect. His perspectives are worth studying. There are, however, circumstances where corporate employees might be able to prove that they also have a personal attorney-client privilege arising out of conversations with the corporation's counsel. *See United States v. International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, et al.*, 119 F.3d 210 (2d Cir. 1997). *See also Federal Trade Commission v. Glaxosmithkline*, 294 F.3d 141, 147 (D.C. Cir. 2002) (excellent case demonstrating what must go into a privilege log and addressing that a realistic burden on a corporation is "to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein.").

[45] *See* Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate-Attorney Client Privilege*, 1997 ANN. SURV. AM. L. 629 (excellent and informative compilation of the various states' views).

> "Representive of the client" is: (i) a person having authority to obtain professional legal service or to act on legal advice rendered on behalf of the client or (ii) any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.[46]

When determining under what circumstances the privilege will attach, and identifying within the corporate structure those with whom communications might be protected,[47] the primary issue for an attorney dealing with management and a board and with potential recalcitrant board members is determining how those communications with that board are going to be protected. That issue can manifest itself when there is an individual on the board who has an entirely different concept of what is best for the corporation or his or her own personal interests that conflict with board positions. In the context of board discussions, when there is a recalcitrant member present, there will be matters that are discussed among board members with the attorney and advice that the attorney must give to the board in its entirety because each board member is operating under a fiduciary duty.[48]

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[46] ALA. R. EVID. 502(a)(2). *See also Advisory Committee's Notes,* ALA. R. EVID. 502(a)(2) (Regarding *Upjohn*, "Rule 502 follows this decision in expanding the scope of the corporate attorney-client privilege beyond those employees within the control group, to include anyone who 'for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.'").

[47] *See* Hamilton, *supra* note 45 at 646. A full exploration of those issues are beyond the scope of the material, however, the Hamilton article does contain an excellent analysis of the conflicting approaches to the scope of the corporate attorney-client privilege.

[48] *See e.g.*, *General Standards for Directors*, § 10-2B-8.30, CODE OF ALA. (1975).

As a result of this potential, a corporation and counsel must develop some strategies designed to effectuate and protect the corporation's privilege as much as possible. Certainly clearly marking and designating all matters, e-mails, and other forms of written communications with privilege designations is a threshold step in the right direction. There are, however, other steps that can be followed to protect the privilege. Designating files for privileged matters and sealing the file cabinets where privileged matters are kept are but two methods that can be used.[49]

B. Who Has the Power to Waive the Corporate Attorney-Client Privilege?

1. General Comments.

Assuming that efforts have been undertaken to preserve the corporate client's privilege, the question then becomes: Who has the power to waive the corporation's privilege, i.e., can a board member or management level employee to whom matters have been communicated waive the privilege when he or she has a different concept of what is

[49] *See* Flucke, *supra* note 37 at 576-79; King, *supra* note 43 at 635-38; James T. Haight, *Keeping the Privilege Inside the Corporation*, 18 BUS. LAW. 551, 555-61 (1963). *But cf. Bell Microproducts, Inc. v. Relational Funding Corporation*, 2002 WL 31133195 *1 (N.D. Ill., September 25, 2002) (not reported in F. Supp. 2d) ("[T]he mere presence of a lawyer's name at the top or bottom of a document is not the bell that causes the dog named Privilege to salivate."); *In re Grand Jury Subpoena*, 559 F.2d 504, 511 (2d Cir. 1979) (as to internal corporate investigations, participation by the company's general counsel "does not automatically clothe the investigation with legal garb."). *See also* Richard H. Porter, *Voluntary Disclosures to Federal Agencies – Their Impact on the Ability of Corporations to Protect From Discovery Materials Developed During the Course of Internal Investigations*, 39 CATH. U. L. REV. 1007 (1990) (hereafter Porter).

best for the corporation, is called before a grand jury, or is locked in litigation with the corporation?

This is not just an academic issue. Even though an attorney feels that he or she has the loyalty of a board and management, recent events coming out of the corporate corruption debacle demonstrate how fleeting *perceived* loyalty may be. Board members, management, and others in corporations are now facing criminal investigations,[50] indictments,[51] shareholder suits,[52] etc. Self-preservation and the motivation to cooperate,

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[50] *See* (in chronological order), Greg Farrell, Edward Iwota, Thor Valdmaris, *Prosecutors Are Far From Finished*, U.S.A. TODAY, October 3, 2002 at 1B; Adam Shell, *Broker Pleads Guilty in Im Clone Case: Deal Leads Prosecutors Closer to Martha Stewart*, U.S.A. TODAY, October 3, 2002 at 3B; *Executives Plead* Guilty, MOBILE REGISTER, October 11, 2002 at 8B (former director of management reporting and director of legal entity accounting at WorldCom "pleaded guilty Thursday to charges stemming from a federal probe of the company's multibillion dollar accounting scandal."); Devlin Barrett, *Waksel Pleads Guilty to Six Charges*, http:/story.news.yahoo.com/ news? tmpl'story+u'lap/20021015/op_on_bi_gc/ imclone_w… (October 15, 2002) ('"ImClone Systems founder Sam Waksel pleaded guilty Tuesday to bank fraud and conspiracy in an insider trading scandal that threatens Martha Stewart and her home decorating empire . . . . Waksel's admission is the second guilty plea in the investigation."); Bruce Nichols, *Federal Judge Throws Book at Anderson*, MOBILE REGISTER, October 17, 2002 at 8B ("A federal judge in Houston on Wednesday gave defunct Arthur Anderson LLP the maximum sentence for its part in the collapse of Enron Corp., calling it a warning to the auditing profession." Anderson was sentenced to "five years' probation and a $500,000 fine."); Tom Fowler, *The Pride and the Fall*, HOUSTON CHRONICLE, October 20, 2002 at 1A (first article of a four part series on Enron); Devlin Barrett, *SEC Threatens To Take Civil Action*, Mobile Register, October 23, 2002 at 8B ("Securities and Exchange Commission lawyers have told Martha Stewart that they are ready to file civil securities fraud charges against the home décor entrepreneur for her alleged role in an insider trading scandal . . . .); Kristen Hayes, *Grand Jury Indicts Ex-Executive Fastow, Alleging He Masterminded Enron Schemes*, MOBILE REGISTER, November 1, 2002 at 8B ("The indictment is notable for the sheer number of charges. . . ."); Marcy Gordon, *SEC Expands WorldCom Fraud Charges*, MOBILE REGISTER, November 6, 2002 at 8B ("The government on Thursday expanded its civil fraud charges against WorldCom and the company raises its estimate on inflated earnings to more than $9 billion in one of the most stunning accounting scandals of the past year."); Samuel Maull, *Former Tyco director pleads guilty*, MOBILE REGISTER, December 15, 2002 at 8B ("Frank E. Walsh agrees to pay $20 million to company, $2.5 million fine."); Adam Geller, "Brokerages to pay $1.44 billion," MOBILE REGISTER, December 21, 2002 at 7B (". . . brokerage firms will pay $1.44 billion to resolve charges they gave biased stock ratings and pledged Friday to restructure the way they do business.").

[51] *See* Greg Farrell, *Former Enron CEO Charged*, U.S.A. Today, October 3, 2002 at 1B; David

as demonstrated by the Enron Board's decision to waive that attorney-client privilege on work product protection, to strike deals, to provide information on other potential defendants in a criminal investigation is *very* strong.[53] Likewise, if a former board member is in litigation with the corporation, the feeling of entitlement to access to attorney-client privileged matters while the litigant was a board member would naturally be very strong. All of these scenarios can of course also result in an organization's attorneys, both outside and in-house counsel, being called to testify at grand juries and trials. Therefore, examining how courts have struggled to develop a fair and balanced jurisprudence in this area will be the next subject of this material.

Lieberman, *Rigas Pleads Not Guilty: Adelphia Founder, 4 Others Deny Charges*, U.S.A. TODAY, October 3, 2002 at 3B.

[52] *See* Hilden, *supra* note 7.

[53] *See* David Hechler, *Scandals Help Erode Privilege: Investigators are Seeking Attorney-Client Communications*, NAT'L L. J., December 23, 2002 A22, A31 (during DoJ and SEC investigations, Enron's Board passed a resolution agreeing "to produce documents requested by any governmental agency or entity involved in any inquiry or investigation of the Company . . . regardless of whether such documents may be subject to the attorney-client privilege on the work product doctrine."); Ellen S. Podgor, *Symposium: Perspectives on the Role of Cooperators and Informants: White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 795, 796 (2002) ("There can be unique ramifications where cooperation occurs in a white-collar setting. This is particularly true when the cooperator is an individual in a corporation or organization who is providing information that will implicate the organization where he or she is employed.").

2. The Weintraub Ruling and Its Divergent Progeny

This area was addressed by the United States Supreme Court in *Commodity Futures Trading Commission v. Weintraub*.[54] In that decision the Court addressed issues about the power of the board, individual board members, and their relationship to the corporation's attorney-client privilege. In addition to the relationship of present board members to the privilege and waiver, the issue is also postured by former board members and former employees.

Although the *Weintraub* holding represents one approach to this area of law, it must be understood that the acceptance of the *Weintraub* result is not unanimous. The views among the courts vary.

Before examining *Weintraub*, it must be understood that the affairs of a corporation are run by its board of directors. In most jurisdictions, when there is a dispute among or between directors, the majority decision of the directors governs what the corporation will or will not, do. In that context, the *Weintraub* decision held that,

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[54] *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985). *See also generally*, Alexander C. Black, *What Persons or Entities May Assert or Waive Corporation's Attorney-Client Privilege—Modern Cases*, 28 A.L.R. 5TH (2003) (hereafter "Black-What Persons").

> for solvent corporations, the power to waive the corporate Attorney-Client Privilege rests with the corporation's management and is normally exercised by its officers and directors.[55]

That statement is a recognition that the officers and directors of the corporation run it and have to make decisions regarding it. Accordingly,

> an individual director is bound by the majority decision and cannot unilaterally waive or otherwise frustrate the corporation's Attorney-Client Privilege if such an action conflicts with the majority decision of the board of directors.[56]

The *Weintraub* case involved a Commodity Futures Trading Commission's investigation of a corporation. One of the directors entered into a consent decree which provided for a receiver and for the receiver to file a Chapter 7 liquidation petition. The receiver was then appointed trustee.

As part of its investigation, the Commission tried to depose Gary Weintraub, *the company's attorney*. Weintraub refused to answer 23 questions involving the corporation's attorney-client privilege. The Commission moved to compel but also asked the Trustee to waive the attorney-client privilege which he did. Weintraub was ordered

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[55] *Weintraub*, 471 U.S. at 348.

[56] *Milroy v. Hanson*, 875 F. Supp. 646, 648 (D. Neb. 1995).

to testify by the District Court, but that decision was reversed by the Seventh Circuit.[57] The United States Supreme Court took the case to resolve the conflict among various circuits on the issue.

The question for the Court was: "Which corporate actors are empowered to waive the privilege"?[58] The Court held that the Trustee could waive it saying:

> [F]or solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the basic interests of the corporation and not of themselves as individuals.[59]

Weintraub, therefore, stands for the proposition that a corporation asserts the privilege through its officers and its board of directors, i.e., its management and that, when a majority of the board of directors decides not to waive the corporation's attorney-client privilege, a recalcitrant board member does not unilaterally have the right or power to do so. This concept that the right to assert or waive the privilege is possessed by the

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[57] *Commodity Futures Trading Commission v. Weintraub*, 722 F.2d 338 (7th Cir. 1984).

[58] *Weintraub*, 471 U.S. at 348.

[59] *Id.* at 348-49 (citations omitted).

corporate client acting through its board of directors is the position followed by most courts.[60]

As addressed above, under *Upjohn*, communications with corporate personnel outside of the control group (managers, other employees, etc.) can be protected by the attorney-client privilege. Therefore, the logical question is whether personnel beyond the control group can waive this privilege.

The consensus on that issue seems to be that *Weintraub's* restrictive ruling is equally applicable to corporate employees with whom, under *Upjohn*, the privilege attaches, but who are not in a traditional control group. In *United States of America v. Tei Fu Chan: The Sunrider Corporation*,[61] the issue was whether a former corporation's comptroller could waive the privilege. The Ninth Circuit held that she could not:

> The attorney-client privilege applies to communications between corporate employees and counsel, made at the direction of corporate supervisors in order to secure legal advice . . . This "same rationale applies to the ex-employee." . . . The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and director." . . . [S]ince a corporate

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[60] *See* Sigwarth *supra* note 44 at 351-52 citing *Weintraub*, 471 U.S. at 352-58; *In re Grand Jury Proceedings*, 570 F.2d 562 (6th Cir. 1981); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 n.5; *Ross v. Popper*, 9 B.R. 485, 487-88 (BANKR. S.D.N.Y. 1980); *United States v. Delillo*, 448 F. Supp. 840, 842-43 (E.D.N.Y. 1978).

[61] 99 F.3d 1495 (9th Cir. 1996).

> employee cannot waive the corporation's privilege, the same individual as an ex-employee cannot do so. . . .[62]

However, in *Jonathan Corp. v. Prime Computer, Inc.*,[63] the court held that, in spite of *Weintraub*, which the District Court read narrowly, a marketing director could waive the privilege by disclosing a document. In addressing the corporation's position, the court said:

> Prime seeks protection through the attorney-client privilege on a legal communication made to individuals outside of Prime's "control group." Then, Prime claims that while it is entitled to the benefits of the privilege on the communication, it is not responsible for any waiver of the privilege on the communication by one of these individuals outside of the "control group." In other words, the privilege can be created for the benefit of legal communications with employees at all levels but cannot be waived or destroyed by these employees. This position is inconsistent with the joint reading and the holdings of *Weintraub* and *Upjohn*.

The implementation of the *Weintraub* rule, therefore, is not as simple as it may seem. There are different fact scenarios that create the need to look at the *Weintraub* rule from different paradigms. For instance, should the board be able to invoke the attorney-client privilege against a former board member who was at the corporation and on the board at the time that the privileged documents were generated? Should the rule be any different if the director was not at the company at the time that the documents were

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[62] *Id* at 1502.

[63] *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 683 (S.D. Va. 1987).

generated? Should the rule be different if the director is appearing in front of a grand jury and is attempting to protect himself in some way from criminal indictment? Should the situation be different if the director feels that it would be in the best interest of the company to disclose documents, but the board disagrees? Should the rule be any different for a pure whistleblower who decides, contrary to the full wishes of the board, that documents should be disclosed? All of these scenarios may very well raise different and competing interests when it comes to determining whether the privilege is going to be sustained and who is going to be permitted to invoke it. The following are examples of where these dynamics clash and how courts have resolved some of these issues.

In *Lane v. Sharp Packaging Systems, Inc.*,[64] the court was faced with the issue of whether a director who had been terminated by the company should get access to attorney-client privileged documents. The issue, as framed by the court, was: "Whether a corporation can invoke the lawyer-client privilege against a former member of the corporation's board of directors . . . ."[65]

The problem, as described by the court, was,

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[64] *Lane v. Sharp Packaging Systems, Inc.*, 640 N.W.2d 788 (Wisc. 2002).

[65] *Id.* at 792.

> [w]hether Lane, as a former officer and director of Sharp, is entitled to documents from Sharp either because he can waive the lawyer-client privilege, or because as a corporate representative, he was entitled to the privileged communications at the time they were made, and the privilege survives his termination of employment . . . .[66]

The documents that the plaintiffs were seeking were in the custody of the corporation's counsel. Therefore, the court began its analysis by questioning whether the documents were, from the outset, privileged documents. The court addressed this issue in the context of the plaintiff's argument that, as a former director he could waive the privilege and, therefore, even though they might have been initially privileged documents, they were no longer privileged because of his ability to waive the privilege.

The court, referencing the position of the company said the following:

> [A]ppellants rely on *Commodity Futures Trading Commission v. Weintraub* . . . for their position that even as a former director of Sharp, Lane may not waive the lawyer-client privilege and the present directors of Sharp may effectively assert the privilege against him.[67]

The *Lane* case is a good case study because, in resolving this issue, the Wisconsin court drew on a number of divergent views and issues represented primarily by the

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[66] *Id.* at 798.

[67] *Lane*, 640 N.W.2d at 799.

following decisions: *Milroy v. Hanson*,[68] which represents the more absolute position of not allowing access, *Kirby v. Kirby*,[69] which represents a position of allowing access, and *Garner v. Wolfinberger*,[70] which represents a view premised on fiduciary duty.

In *Milroy* a United States District Court in Nebraska examined whether a director who was also a minority shareholder of a closely held corporation had the right to documents that were otherwise protected by the attorney-client privilege. In that case, Milroy, who was a practicing attorney in Arizona and a member of the board of Sixth Street, a closely held corporation, brought suit against the corporation and other stockholders, some of who were also members of the board, seeking damages and liquidation of the company. The documents that the plaintiff sought were those held by the corporation's accountants and lawyers.

Drawing primarily on the entity theory, the *Milroy* court described the plaintiff as a dissident director as follows: "A dissident director is by definition not 'management."[71] With the litigants in that posture, the court in *Milroy* did not allow the dissident director who, because of his dissident status, did not represent the will of the corporation, to

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[68] *Milroy v. Hanson*, 875 F. Supp. 646 (D. Neb. 1995).

[69] *Kirby v. Kirby*, 1987 WL 14862 (Del. Ch. July 29, 1987) (not reported in A.2d, but this case is continually cited in this area of the law).

[70] *Garner v. Wolfinberger*, 430 F.2d 1093 (5th Cir. 1970).

[71] *Milroy*, 875 F. Supp. 650.

waive the attorney-client privilege and have access to the documents. In so doing, the *Milroy* court held that, under Nebraska law, the dissident director

> [h]as no right to waive or otherwise pierce [the corporation's] attorney-client privilege because he is not the 'management' of the corporation and 'management' of the corporation, as it has a right to do, asserts the privilege against him.[72]

The *Milroy* court focused on the control of the corporation and said that "it is 'control' of the corporation which counts."[73] The *Milroy* court said that an individual director could, therefore, not "unilaterally frustrate the corporation's attorney-client privilege if such action conflicts with the majority decision of the board of directors.[74]

The *Milroy* approach represents the use of an absolute rule premised on control. It is, apparently, not dependent on the timing of a director's tenure on a board or whether he or she had access to the privileged documents at an earlier time. It is premised solely on present control

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[72] *Id.* at 651.

[73] *Milroy*, 875 F. Supp. at 648.

[74] *Id.* The director also made an alternative argument that, since he was a shareholder, he should be entitled to see the material under the doctrine of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). The court rejected that argument. *Garner* is addressed *infra*.

Similarly in *Tail of the Pup, Inc. v. Webb,*[75] the Florida court refused to let a former director have access to privileged material. That decision was also premised on power or the lack of it on the part of that former director. In *Tail of the Pup,* he was no longer in power and, therefore, could not thwart the will of those in power.

The *Lane* court also reviewed the decision in *Kirby v. Kirby*[76] which had been addressed and criticized by the *Milroy* court. *Kirby* involved a dispute over the control of a charitable corporation. Three siblings claiming to be current directors sued a fourth sibling current director and the foundation. The defendant director was charged with breach of fiduciary duty. The defendant foundation asserted the attorney-client privilege.

There were two relevant time periods in *Kirby*. One was where the plaintiffs were directors, the second was where they had been removed as directors. In the context of those time periods, the Delaware Chancery Court in *Kirby* reasoned that all directors are responsible for the proper management of the corporation and then, contrary to the court in *Milroy*, used an analysis premised on the joint client concept. The *Kirby* court felt that, with respect to the first time period, at the time of their service, the issue was whether the directors of a corporation are "collectively . . . the client at the time the legal

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[75] *Tail of the Pup v. Webb*, 528 So. 2d 506 (Fla. App. 2 Dist. 1988).

[76] *Kirby v. Kirby*, 1987 WL 14862 (Del. Ch. July 29, 1987) (This opinion has not yet been released for publication, but it is continually cited in this area of the law.).

advice is given."[77] The *Kirby* court held the directors were "all responsible for proper management of the corporation"[78] and were "'joint client[s]'"[79] when legal advice was given. Therefore, the court held that the attorney-client privilege could not be invoked against any of them and that the privilege could not be asserted against a former director.[80]

As to the second time frame, which was after they had been removed as directors, the issue was whether the directors could have access to documents prepared after their tenure with the company. As to the documents prepared after their tenure, the court analyzed that issue by drawing an analogy to shareholder suits as addressed in the case of *Garner v. Wolfinbarger* [81] from the Fifth Circuit. That case is addressed *infra* as a separate analytical area. Suffice it to say, at this point that the court accepted the analogy to a shareholder suit and allowed the directors to try to penetrate the attorney-client privilege by showing good cause under *Garner*. One reason the court did so, however, was because it felt that the type of action that the directors were bringing under Delaware

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[77] *Id.* at *7.

[78] *Id.*

[79] *Id. See also Strougo v. Bea Associates*, 199 F.R.D. 515, 521 (S.D.N.Y. 2001) (discussed as the "'common interest' doctrine."

[80] *Id.*

[81] *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

law was one that would benefit the corporation as a whole.[82] As we will see, this element of motive of a plaintiff plays a pivotal role for some courts.

Ultimately, after examining *Weintraub*, *Kirby*, *Milroy* and other cases, the court in *Lane* rejected the *Kirby* analysis that there exists a '"collective corporate 'client'"' which may take a position adverse to management for purposes of the attorney-client privilege."[83] Holding that there is but one client and that it is the corporation and that the board does not make up a collection of clients, the *Lane* court followed the *Milroy* line of reasoning. That reasoning represented the conclusion that a dissident director is no longer part of what the board represents, is no longer a part of the management of the organization and, therefore, cannot pierce the corporate attorney-client privilege when it is invoked by the board which does represent the corporate will.[84] The court, therefore, said: "[W]e logically conclude that a former director cannot act on behalf of the client corporation and waive the lawyer client privilege."[85]

The *Milroy* court had said that cases like *Kirby* and those following it made a fundamental error by assuming that there was for a corporation some type of collective

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[82] *Kirby*, 1987 WL 14862 at *7.

[83] *Lane*, 640 N.W.2d at 800.

[84] *Id.*

[85] *Id.* at 802.

corporate client which could take a position adverse to the management, even to then-existing management, of the company. That is why the court in *Milroy* said that, even a former director who is taking a position adverse to the corporation could not have the attorney-client privilege asserted against him.

With those two positions juxtaposed, the plaintiff in the *Lane* case added an additional element and tried to argue that, in spite of the *Milroy* approach which did not allow a former director access to privileged documents, a former director should be allowed access to documents when those documents were produced while the former director was an active director. The plaintiff in the *Lane* case was an officer and director of Sharp during the time that the requested communications had been made. As a result, he argued that his access and right to the documents is based on his former status as a director and former representative of the entity at the time that the documents were being produced.

The Wisconsin court acknowledged that the issue framed that way was an issue of first impression for it. Drawing on the other cases, the court ruled against the plaintiff former director stating the following:

> Lane's status as a former director does not entitle him to access [the lawyer's] files regarding communications with with Sharp. Wisconsin law follows the entity rule and accordingly, the lawyer-client

> privilege belongs to Sharp[the lawyer's] clientand only Sharp can waive the lawyer-client privilege . . . . [W]e logically conclude that a former director cannot act on behalf of the client corporation and waive the lawyer-client privilege.
>
> We further conclude that even though the documents were created during Lane's tenure as a director, Lane is not entitled to the documents and [the lawyer's] files. As the United States Supreme Court stated in *Weintraub*, "the power to waive the corporate attorney-client privilege rests with the corporation's management as normally exercised by its officers and directors." 471 U.S. at 348. The Scarberrys currently comprise Sharp's board of directors, or management, and retain control over Sharp's lawyer-client privilege. Lane is a former director and a "dissident." We agree with the court's reasoning in *Milroy*: "A dissident director is by definition not 'management' and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of 'management.'" . . . Accordingly, we conclude that even though Lane is a former officer and director, and the documents at issue were prepared during his tenure, Sharp can effecttively assert the lawyer-client privilege against him.[86]

3. The Recalcitrant Director

Although the cases are not clear, where a recalcitrant director who, as the director in *Weintraub*, with no nefarious motivation, decides to disclose attorney-client material for whatever reason the director believes to be appropriate, there could be a cause of action for breach of fiduciary duty against such a director.[87] In fact, contrary to the

[86] *Lane*, 640 N.W.2d at 802-803.

[87] *Ampa Ltd. v. Kentfield Capital, L.L.C.*, 2000 WL 1156860 *1 (S.D.N.Y. August 16, 2000) (not reported in F. Supp. 2d) citing *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld*, 994 F. Supp 202, 212 (S.D.N.Y. 1992).

Milroy and *Lane* approaches, the court in *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld*,[88] held that a whistleblowing director *could* waive the corporation's privilege, but that he would be subject to a breach of fiduciary claim if what he did turned out not to be in the best interest of the corporation.

This is a far-reaching doctrine in today's post-Enron world where board members and management are going to be much more inclined to come forward and blow the whistle on their organizations in order to protect themselves. It must be observed, however, that this decision may not be representative of the way that the other courts following the *Weintraub*, *Kirby*, *Milroy*, and *Garner* cautionary analyses would hold. Those decisions, whichever way they go, evidence a strong concern for the privilege and a need to have even stronger arguments to balance against the privilege before allowing disclosure. The *Wechsler* court, however, clearly operated on a different paradigm, i.e., one weighted to the public's interest as opposed to secrecy imposed by the privilege. Whether other courts will follow the philosophy of *Wechsler* remains to be seen. To date, it has not been wholeheartedly followed, nor, however, has it been soundly rejected. It is submitted that the post-Enron world will put *Wechsler* to the test.

[88] *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld*, 994 F. Supp. 202 (S.D.N.Y. 1997).

4. The Garner Fiduciary Duty Exception

Before *Kirby* and *Milroy* were ever decided, the Fifth Circuit, in 1970, produced a landmark decision creating an exception to the privilege. In *Garner v. Wolfinbarger*,[89] a case from the Northern District of Alabama, shareholders brought a shareholder class action for various securities violations against the company and its management. In addition a shareholder derivative claim was brought. The shareholders wanted to recover what they had paid for shares of stock. They also claimed that the company had been harmed and, therefore, asserted a derivative action on behalf of the corporation. In this setting the court was faced with the question of whether, where the shareholders were questioning management and board decisions, the management and/or the directors could invoke the attorney-client privilege and, thereby, keep those to whom they had a fiduciary duty from learning truthful information that would be otherwise protected by the privilege.

From the point of view of Alabama practice, the history of the *Garner* case is very interesting. In 1968, United States District Judge Grooms decided that issue at the trial

[89] 430 F.2d 1093 (5th Cir. 1970).

level. In a very short opinion[90] where he noted that there was no controlling authority and that the only two cases of any import were from England, he held, without any meaningful analysis, that, in shareholder litigation of that type, the privilege was not available against plaintiff stockholders. That decision then went to the Fifth Circuit.

In that case, the individual who was formerly an attorney for the company, and who was ultimately promoted to its President, but who had resigned at the time of the action, invoked the corporate attorney-client privilege regarding advice that he had given the corporation while he was counsel. The shareholders argued that, since they were shareholders, and that, at the time advice was given, management owed them a fiduciary duty, the privilege was not able to be invoked by the corporation against them. The corporation argued that its right to assert the privilege was absolute. The American Bar Association appeared as amicus curiae and supported the corporation's view of absolute privilege.

Recognizing that there were numerous cases supporting the proposition that the corporation is the client for purposes of invoking the privilege, the Fifth Circuit said that "[t]he privilege does not arise from the position of the corporation as a party but its status

[90] *See* Saltzburg, *supra* note 29 at 828 ("The United States District Court for the Northern District of Alabama rendered the first opinion in this case which took up less than two columns of one page in the Federal Supplement. In fact the list of lawyers in the case equaled the length of the opinion. . . . It is almost axiomatic in law that when the list of counsel equals the length of the opinion . . . there will be an appeal.")

as a client."[91] The court observed that the position of the plaintiffs, however, was that the corporation should be denied the ability to invoke the privilege because of the role of the corporation as a party defending against the claims of its stockholders.[92]

In response to this position, the court said the following:

> We do not consider the privilege to be so inflexibly absolute as contemplated by the corporation, nor to be so totally unavailable against the stockholders as thought by the District Court. We conclude the correct rule is between these two extreme positions.[93]

The court recognized that there was neither any federal decisional law nor was there Alabama state law addressing the question and that the issue was one of first impression for it. In that setting the Fifth Circuit recognized that federal courts have an interest in the fact finding process and how trials are conducted in federal courts. With this responsibility in mind, the court focused on its ability to weigh and balance issues regarding the privilege. Turning then to a generalized analysis of whether a court will recognize a privilege, the court said the following:

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[91] *Garner,* 430 F.2d at 1097.

[92] *Id.*

[93] *Id.*

The privilege must be placed in perspective. The beginning point is the fundamental principle that the public has the right to know every man's evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional . . . An exception is justified if – and only if – the policy requires it to be recognized when measured against the fundamental responsibility of every person to give testimony . . . Professor Wigmore describes four conditions, the existence of all of which is prerequisite to the establishment of a privilege of any kind against the disclosure of communications:

> § 2285. General principle of privileged communications. Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view the preponderance of extrinsic policy which alone can justify the recognition of any exception . . . four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> > (1) The communication must originate in a confidence that they will not be disclosed.
> >
> > (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> >
> > (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> >
> > (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized.[94]

[94] *Id.* at 1093, 1100 citing Wigmore § 2285 at 527.

The court then said that its problem was with Wigmore's fourth condition which it described as "a balance of interest between injury resulting from disclosure and the benefit gained in the correct disposal of litigation."[95] In that context, the court then framed what it saw to be the issue when trying to determine whether a privilege was going to be recognized in this situation and compared its perspectives on the relative injuries by saying:

> We consider it in a particularized context: where the client asserting the privilege is an entity which in the performance of its functions acts wholly or partly in the interests of others, and those others or some of them, seek access to the subject matter of the communications.[96]

The court addressed the arguments advanced by both sides. Management advanced the argument that disclosure would hurt both the corporation and the attorney. The court recognized that part of management's job of managing is seeking legal counsel and, quoting management's position, said:

> [M]anagement prefers that it confer with counsel without the risk of having the communications revealed at the instance of one or more dissatisfied stockholders. The manager of preference is a rational one, because it is difficult to envision the management of any sizable corporation pleasing all of its stockholders all of the time, and

[95] *Id.* at 1101.

[96] *Id.* at 1101.

> management desires protection from those who might second-guess or even harass in matters purely of judgment.[97]

However, in addressing management's argument, the court articulated the very heart of the way that it saw the relative positions of the parties and their interests:

> But in assessing management assertions of injury to the corporation it must be borne in mind that management does not manage for itself and that the beneficiaries of its action are the stockholders. Conceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis. They serve only to obscure the fact that management has duties which run to the benefit ultimately of the stockholders. . . . There may be reasonable differences over the manner of characterizing in legal terminology the duties of management, and over the extent to which corporate management is less of a fiduciary than a common law trustee. There may be many situations in which the corporate entity or its management, or both, have interests adverse to those of some or all stockholders. But when all is said and done management is not managing for itself.
>
> The representative and the represented have a mutuality of interest and the representatives freely seeking advice when needed and putting it to use when received. That is not to say that management does not have allowable judgment in putting advice to use. But management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least, in part exercised.[98]

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[97] *Id.*

[98] *Id.*

The court observed that District Judge Grooms, in his decision, had relied on two English cases. Recognizing that those cases were not binding precedent, the court nevertheless made the following observation about their importance:

> [T]hese English cases are persuasive recognition that there are obligations, however, characterized, that run from corporation to shareholder and must be given recognition in determining the applicability of the privilege.[99]

The court then addressed the ABA's position that it had advanced in its amicus brief. It said that the ABA contended that, within Wigmore's fourth conclusion, the benefits of disclosure are outweighed by the harm done to both the client and the attorney. Addressing the perspective, the court said:

> The ABA urges that the privilege is most necessary where the corporation has sought advice about a prospective transaction, where counsel in good faith has stated his opinion that it is not lawful, but the corporation has proceeded in total or partial disregard of counsel's advice. The ABA urges that the cause of justice requires that counsel be fee to state his opinion as fully and forthrightly as possible without fear of later disclosure to persons who might attack the transaction, and that without the cloak of privilege counsel may be "required by the threat of future discovery to hedge or soften their opinions."[100]

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[99] *Id.* at 1102.

[100] *Id.*

The court, however, felt that the ABA did not always clearly distinguish between the separate interests of the corporate client and of the attorney in freedom from disclosure. Addressing what are traditional exemptions from disclosure, the court said the following:

> The privilege's exemptions from the broad duty to divulge are designed not only to protect the individual client who may assert the privilege but also to promote free and open communications between clients and attorneys in all matters. All these interests should properly be taken into account in any decision on the privilege. However, we reject the idea that the prospective decision of the client on whether to abide by advice or disregard it, or the guarantee of a veil of secrecy, either establishes or narrows the attorney's obligation in giving advice. And to grant to corporate management plenary assurance of secrecy for opinions received is to encourage it to disregard with impunity the advice sought.[101]

The court then addressed what are two traditional exceptions to the privilege: communications in contemplation of a crime or fraud, and communications to a joint attorney. The court stressed that the crime fraud exception, which will be addressed later, creates a situation where there is no privilege. Recognizing that the crime fraud exception is one that involves prospective criminal conduct, the court used language which demonstrated that, from the standpoint of shareholders, the question of whether management has used counsel's advice to commit a crime or other tortious activity is really not a basis for distinction. The court said:

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[101] *Id.*

> The differences between prospective crime and prospective action of questionable legality, or prospective fraud, are the differences of degree, not of principle.[102]

The court also recognized that the crime fraud exception is one that involves prospective conduct and that there is a much stronger policy justification for maintaining the privilege when it involves pre-advice conduct.[103] The court, however, found the second exception to the privilege singularly instructive. That exception does not protect communications, as between two parties, when an attorney is functioning in a dual capacity for those two parties.[104]

After analyzing these competing interests, but placing preeminent weight on the existence of the fiduciary duty of management to shareholders and the fact that management manages for the shareholders, the court said the following:

> In summary, we say this. The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stock-

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[102] *Id.* at 1103.

[103] *Id* at 1103 n.20.

[104] The court cited the Colorado decision of *Pattie Lea, Inc. v. District Court*, 423 P.2d 27 (1967). There the Colorado Supreme Court required a corporation to disclose communications made to its accountant in a shareholder derivative suit even though there was a statutory privilege for communications between a certified public accountant and its corporate client. The Colorado court relied heavily in its decision to force disclosure on the body of law that has developed with respect to attorneys who work for two clients being forced to disclose.

> holders on charges of acting inimically to shareholder interests, protection of those interests as well as those of the corporation and that the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.[105]

Having found that there are juxtaposed interests when shareholders are involved in litigation in derivative cases against the corporation and management, but still refusing to give them automatic access to such information, the court then turned to its concept of what the shareholders would have to demonstrate in order to pierce the corporate attorney-client privilege. Listing the indicia of what the court referred to as "good cause," it said the following:

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of share-holders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons. The court can freely use *in camera* inspection or oral examination and freely avail itself of protective orders, a familiar device to preserve confidentiality and trade

[105] *Garner*, 430 F2d at 1103.

> secret in other cases where the impact of revelation may be as great as in revealing a communication with counsel.[106]

The *Garner* case has met with mostly positive reviews. In the context of share-holder litigation against corporations, it is followed by most courts. It has, however, been criticized by academicians and courts for the extent to which some courts have applied the fiduciary exception analysis.

In advocating the limits of the *Garner* case, Professor Paul Rice has observed that the *Garner* test is a balancing test "that determines whether the shareholders' need to discover the communications outweigh the importance of protecting its confidentiality.[107] Referring to this as a "fiduciary duty exception," Professor Rice states the following:

> This "fiduciary duty exception" to the Attorney-Client Privilege has gained wide acceptance in both Federal and State courts. The exception also has been radically expanded. From shareholder derivative actions (which are brought by one or more shareholders for the benefit of the corporate entity and of all the shareholders), it has been expanded non-derivative actions in which the shareholder's action is primarily for her own individual financial benefit.[108]

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[106] *Id* at 1104.

[107] Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolf Wolfinbarger*, 55 BUS. LAW 735, n.6 (2000) (hereafter Rice-Corporate) citing Jack P. Friedman, *Is The Garner Qualification of the Corporate Attorney-Client Privilege Viable After Jaffee v. Redmon?*, 55 BUS. LAW 243 (1999) (hereafter "Friedman").

[108] Rice-Corporate *supra* n. 107 at 736. *But see Weil v. Investment/Indicators, Research and Management*, 647 F.2d 18 (9th Cir. 1981) (declined to follow *Garner* when there was not a derivative claim).

Although Professor Rice's criticism seems to be that *Garner* has been expanded beyond shareholder derivative actions, his criticism seems to be misplaced. The court was clear in stating that the presence or absence of the derivative claim was not essential to its holding.[109] Therefore, the *Garner* fiduciary exception's application to non-derivative settings should be no surprise.[110]

5. Other Fiduciary Duty Exception Scenarios.

Some other situations in which a fiduciary duty exception analysis has been used are:[111]

a. Where minority shareholders alleged a squeeze out, the Fifth Circuit extended *Garner* beyond derivative suits;[112]

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[109] *Garner*, 430 F.2d at 1097 n.11 ("[O]ur decision does not turn on whether that claim is in or out.").

[110] For a case not involving the attorney-client privilege, but demonstrating a fiduciary duty analysis that would be the type that would produce a fiduciary duty exception result, *see Arpadi v. First MSP Corporation*, 628 N.E.2d 1335 (Ohio 1994) (attorney for a general partner held to be in a fiduciary relationship with the limited partners).

[111] *See* Santini *supra* note 38 for an exploration of the fiduciary duty concept in closely held entities; Friedman, *supra* note 130 (analyzes numerous cases and their use or rejection of the *Garner* doctrine).

[112] *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1998). *See also* Keith W. Johnson, *Fausek v. White: The Sixth Circuit Garners Support for a Good Cause Exception to the Attorney-Client Privilege*, 18 DAYTON L. REV. 313 (1993). *See also* Note, *Redefining Obligations in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty in Squeeze-Outs*, 58 WASH. & LEE L. REV. 551 (2001) for a very interesting article focusing on potential liability for counsel.

b. Where former shareholders sued a majority shareholder and CEO of a company individually and not through a derivative claim;[113]

c. In an action by beneficiaries of a trust against the trustees;[114]

d. Criminal prosecution of pension fund administrators;[115]

e. Class action by employees against an employer under ERISA to obtain documents relating to communications between the company's benefits manager and its senior attorney.[116]

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[113] *Fausek v. White*, 965 F.2d 126 (6th Cir.), *cert. denied*, 61 U.S.L.W. 3435 (U.S. Dec. 14, 1992). *See also* Johnson *supra* note 126.

[114] *Riggs National Bank of Washington, D.C.*, 355 A.2d 708 (Del. Ch. 1976) (pre-*Garner*, but fiduciary exception from English law used and adopted). *See also United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999) ("The leading American case, *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976) which imported the hoary English fiduciary exception precedents to our shores, also implicitly recognizes the limits on the exception.").

[115] *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999).

[116] *In re Long Island Lighting Company Retirement Insurance Plan of Long Island Lighting Company*, 129 F.3d 268 (2d Cir. 1997) (issue of first impression was whether the employer waived the privilege as to all communications regarding an ERISA plan when the employer sought advice as a plan fiduciary and not as a plan fiduciary from the same lawyer, held: the exception did not apply because the documents dealt with non-fiduciary matters.). *See also* Timothy J. Walker, Michael S. Becon, and Sean A. Pelletier, *Life, Health, and Disability Litigation: Attorney-Client Privilege Issues*, 42 FOR THE DEFENSE 42 (April 2000) (addresses the fiduciary exception in ERISA and benefit plan litigation).

C. Other Waiver Issues:

1. At-Issue Waiver

a. Contextual Observations:

There is a developing body of law dealing with what the courts loosely, and often interchangeably, describe as "at issue" waiver, "issue injection" waiver, or "implied" waiver.[117] Unless otherwise used in a particular case, the term "at issue" waiver will be used in this material. This body of law manifests itself when opposing counsel argue that a party has done something, said something, or taken a position that he has placed otherwise protected information at issue and, thereby, made it discoverable.[118] This body

[117] There is also a separate body of law dealing with inadvertent waiver. It is customarily analyzed with criteria different from at issue and implied waiver. *See* discussion, *infra* Section III C 3. *See also*, Douglas R. Richmond, *Key Issues in the Inadvertent Release and Receipt of Confidential Information*, 72 DEF. COUNS. J. 110 (2005); Thomas G. Wilkinson *supra* note 32 at 72-73. Of course there is also waiver of attorney-client privileged matters as well as attorney work product when matters are submitted to expert witnesses. *See* Garth T. Yearick, *Lawyers Address Destruction of Testifying Experts' Draft Reports*, 20 LIT. NEWS 3 (January, 2003); *Weil v. The Long Island Savings Bank FSB*, 206 F.R.D. 38 (E.D.N.Y. October 11, 2001).

[118] *See generally*: Jay E. Grenig and Jeffrey S. Kinslan, *Waiver-Privileged Material Placed At Issue*, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE § 1.3 (2d ed.) (updated 2005 pocket part); Jerome G. Snider and Howard A. Ellins, *Waiver of the Privilege*, § 206 CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION (2004); Christopher B. Muller and Laird Kirkpatrick, *Implied Waiver by Claim Assertion*, 2 FEDERAL EVIDENCE § 203 (2d ed.) (July 2004 updated database); Jean C. Moore, *Evidence-At-Issue Waiver of Attorney Client Privilege and Public Service Co. of New Mexico v. Lyons: A Party Must Use Privileged Materials Offensively In Order to Waive the Privilege*, 31 N.M. L. REV. 623 (2001). *See also Psychotherapist-Patient Privilege-Waiver-Mental Condition At Issue*, 12 FED. LITIGATOR 285 (October 1997).

of law is gaining increasing importance as opposing counsel become more aggressive in attempting to get privileged material.

When the issue is not whether an individual has waived his or her individual protections, but whether a representative of a corporation has waived that *corporation's privilege*, very different concerns can come into play. In order to properly frame the analytical considerations, one must begin with an assumption that the agent involved, such as a member of the board, has the power to waive the privilege.[119] With that premise, the issue then becomes whether he, she, or the corporation, in any way, have put privileged communication at issue or done something the result of which will prompt a court to say that *the corporation's privilege* has been waived.

This area will become more of a focal point of inquiry post-Enron as corporate board members, management, and employees are called before Congress, before government agencies, and before grand juries to testify. In those investigatory settings, central inquiries bearing on corporate privilege waiver will be whether the witnesses are testifying to exculpate themselves or to help the corporation and whether, in so doing, they have placed the corporation's privileged communications at issue or impliedly waived the corporation's privilege.

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[119] *See generally Commodity Futures Trading v. Weintraub*, 471 U.S. 343 (1985).

Two decisions serve to highlight the issues and analyses in this area. One is the Second Circuit decision of *In re: Grand Jury Proceedings.*[120] The other is the Southern District of New York's decision in that case on remand from the Second Circuit: *In re: Grand Jury Proceedings.*[121] Before studying those decisions, however, a general explanation of the developing law in this area is both helpful and necessary.

b. General Law: The Various Approaches:

Although it is very difficult, when reading the cases, to discern real differences in the courts' analyses, there seem to be four or, possibly five, somewhat different analytical approaches used by courts to address the matter of "at issue" waiver. Unfortunately, in making their choices, the courts are not always as precise as they should be.

(1) The automatic waiver rule:

One very liberal approach is exemplified by the case of *Independent Productions Corporation v. Lowe's, Inc.*[122] There the court held that there had been an implied waiver

[120] *In re: Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 1999).

[121] *In re: Grand Jury Proceedings*, 2001 WL 1167497 (S.D.N.Y. October 3, 2001).

[122] *Independent Productions Corporation v. Lowe's*, 22 F.R.D. 266 (S.D.N.Y. 1958). *See also Frontier Refining, Inc. v. Gorman-Rupp Company, Inc.*, 136 F.3d 695, 699 (10th Cir. 1998) (referencing the approach but rejecting it); F.D.I.C., 139 F.R.D. at 170-171 (referencing the approach but rejecting it). *See also* John Palmeri and Thomas Quinn, *Implied Waiver of the Attorney-Client Privilege: Does It Work or is*

of the privilege simply by bringing an antitrust case against multiple defendants in which a conspiracy to restrain trade was alleged. That decision stands for the proposition that there can be a waiver of a privilege simply by asserting a claim, a counterclaim, or an affirmative defense to which privileged matters may be relevant. There is no balancing of any other interests – relevance seems to be the only lynchpin of that approach. This approach has been described as being "roundly criticized in the [Federal] Circuits"[123] and as being one that "does not adequately account for the importance of the attorney-client privilege to the adversary system."[124]

(2) A balancing approach, plus necessity:

In *Black Panther Party v. Smith,*[125] involving First Amendment rights and arguments that had been waived, the court used a balancing approach with an added element of necessity:

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it Guesswork?, THE ATTORNEY-CLIENT PRIVILEGE 50 (D.R.I. Monograph 2002) (referring to three approaches and observing that the automatic waiver rule "gained limited acceptance for a time in more recent cases, the circuits have roundly criticized it."). The term "liberal" is used to denote the willingness of a court to find waiver and, therefore, not a strong tendency to preserve the privilege.

[123] *Frontier Refining Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 700 (10th Cir. 1998).

[124] *Id.*

[125] *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981).

> [A] balancing inquiry should be conducted to determine whether a claim of privilege should be upheld . . . . the plaintiff's First Amendment claim should be measured against a defendant's need for the information sought. If the former out3weighs the latter, the claim of privilege should be upheld.[126]

Where, however, a need is shown, the court still imposed the requirement that it could be disclosed "only after the litigant has shown that he has exhausted every reasonable source of information."[127] Even with this added protection, this approach has been used by some courts in the attorney-client privilege area,[128] but it has not generally been used.[129]

(3) <u>The requirement of an affirmative placing of advice of counsel in issue through an affirmative plea, etc.</u>:

Some jurisdictions are much more protective of the privilege and, incorporating the concepts from the already accepted doctrine concerning waiver when advice of counsel is plead, hold that, unless a litigant formally pleads advice of counsel as an affirmative defense, or does some other similar action to *directly* place the matter at issue, they have not placed attorney-client privilege communication and work product matters

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[126] *Id.* at 1267.

[127] *Id.* at 1268.

[128] *F.D.I.C. v. Wise*, 139 F.R.D. 168, 171 (D. Colo. 1981) (cases cited therein).

[129] *Id.* (citing case rejecting this approach).

at issue so as to effectuate a waiver.[130] Under this view, privileged matters are placed at issue where "the client asserts a claim or defense, and attempts to prove that claim or defense by "disclosing or describing an attorney-client communication"[131] and then attempts to "limit its liability by describing that advice and by asserting that he relied on that advice."[132]

(4) A more pure balancing approach:

In *Greater Newburyport Clamshell Alliance v. Public Service Company of New Hampshire*,[133] the court, not favoring the added restriction of having to show that one has exhausted all other sources of information,[134] used a more pure balancing test.[135]

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[130] *See Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Company, et al.*, 32 F.3d 851 (3d Cir. 1994); *Metropolitan Life Ins. Co. v. Aetna Casualty and Surety Co.*, 730 A.2d 51 (Conn. 1999); *Palmer v. Farmers Ins. Exchange*, 261 Mont. 91, 861 P.2d 895, *reh'g denied* (1993); *Spectra-Physics v. Superior Court*, 198 Cal. App. 3d 1487, 244 Cal. Rptr. 258, 261 (1988); *Transamerica Title Ins. v. Superior Court*, 188 Cal. App. 3d 1047, 233 Cal. Rptr. 825 (1987).

[131] *Rhone-Poulenc Rorer*, 32 F.3d at 863. *See also United States Fire Insurance Co. v. Asbestospray, Inc.*, 182 F.3d 201, 212 (3d Cir. 1999).

[132] *Rhone-Poulenc Rorer*, 32 F.3d at 863.

[133] *Greater Newburyport Clamshell Alliance v. Public Service Company of New Hampshire*, 838 F.2d 13 (1st Cir. 1988).

[134] *Id.* at 14.

[135] *Id.* at 18-20.

Arguably, that court's version has a fairness element, but it does not seem to be a strong separate element of the test.[136]

(5) The Hearn approach:

Although it is hard to discern any real difference from the automatic waiver rule, what appears to be another and, perhaps, more lenient approach, has its genesis in the case of *Hearn v. Rhay* which really is the case from which the at-issue waiver doctrine traces its origins.[137] *Hearn* held that an otherwise privileged communication has been placed in issue and that waiver should be found when the following three tests are met:

1. The assertion of the privilege was the result of some affirmative act, such as filing a suit, by the asserting party;

2. Through this affirmative act, the asserting party has put the protected communication at issue by making it relevant to the case; and

3. Application of the privilege would deny the opposing party access to information vital to its case.[138]

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[136] *Id.*

[137] *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). *See also F.D.I.C.*, 139 F.R.D. at 171-72 (and cases cited therein).

[138] *Hearn*, 68 F.R.D. at 581. *See also Mountain States Telephone and Telegraph Co. v. DiFede*, 780 P.2d 533 (Colo. 1989) (injection of knowledge, lack of knowledge, reliance, etc., in a case can result in at issue waiver citing *Hearn*).

Hearn was a § 1983 case brought by an inmate in the Washington State Penitentiary. He alleged that his confinement in the mental health facility violated his due process rights and was cruel and unusual punishment. The defendants plead that they had "'acted in good faith.'"[139] In order to counter that position, the plaintiff sought discovery of legal advice that had been given to the defendants by the Attorney General of the State of Washington. Whether such discovery could be compelled was an issue of first impression for that District Court.[140]

The court, citing an earlier United States Supreme Court case dealing with the good faith defense, made the following very narrow ruling:

> Based on the holding in that case, this court is compelled to recognize a new and *narrowly limited* exception to the attorney-client privilege, which applies to civil rights suits against state officials under 42 U.S.C. § 1983 wherein the defendant asserts the affirmative defense of good faith immunity.[141]

Reviewing the habeas corpus cases in which waiver has been found when petitioners have contested the constitutionality of convictions, the court said:

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[139] *Hearn*, 68 F.R.D. at 578.

[140] *Id.* at 580.

[141] *Id.* at 580 referring to *Wood v. Strickland*, 420 U.S. 308 (1975) (emphasis supplied).

> All of these established exceptions to the rules of privilege have a common denominator. In each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party.[142]

Although the *Hearn* approach might have started out as a "limited exception"[143] in § 1983 actions, it has certainly been expanded.[144] This expansion, as well as the basic *Hearn* approach have been severely criticized by courts and academic writers.

An excellent example of the criticism of the basic *Hearn* approach is in the case of *Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Company*[145] which is usually viewed as being the example of the more constructive approach.[146] There, the issue on

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[142] *Hearn*, 68 F.R.D. at 581. *See In re Hillsborough Holdings Corporation*, 176 B.R. 223 (M.D. Fla. 1994). Although not citing *Hearn*, the court's analysis tracked *Hearn* and added some excellent language further describing the analytical elements:

> The waiver of the privilege is based upon a premise that "when a party's conduct reaches a certain point of disclosure, fairness requires that the privilege cease."

Id. at 17 B.R. 239.

[143] *Hearn*, 68 F.R.D. at 580.

[144] *See* discussions, *infra*. *See also* affirmatively citing *Hearn*: *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755 (11th Cir. 1987) (Florida law – reasonableness of attorneys' conduct during settlement negotiations).

[145] *Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994).

[146] *See* earlier discussions.

which privileged information was sought was the knowledge of insureds at the time that they took out insurance coverage.

Strongly disagreeing with the *Hearn* approach, the Third Circuit, citing specific instances where litigants had directly put advice of counsel in issue, said:

> There is authority for the proposition that a party can waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue in litigation . . . .
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> . . .
>
> In these cases the client has made the decision and taken the affirmative step . . . to place the advice of the attorney in issue. . . .The advice of counsel is placed in issue where the client asserts a claim or defense, and *attempts to prove* that claim or defense *by disclosing or describing an attorney-client communication*. . . .
>
> . . .
>
> Finding a waiver of the attorney-client privilege when the client puts the attorney's advice in issue is consistent with the essential elements of the privilege. That is, in leaving to the client that decision whether or not to waive the privilege by putting the attorney's advice in issue, we provide certainty that the client's confidential communication will not be disclosed unless the client takes an affirmative step to waive the privilege, and we provide predictability for the client concerning the circumstances by which the client will waive that privilege.[147]

[147] *Id.* at 863 (emphasis supplied).

Contrasting the above with the *Hearn* approach and directly criticizing the *Hearn* reasoning and analysis, the court said:

> Some decisions have extended the finding of a waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation. These courts have allowed the opposing party discovery of confidential attorney-client communications in order to test the client's contentions. . . . These decisions are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that removes the case even if one might conclude the facts to be disclosed are vital, highly probative, directly or even go to the heart of an issue. . . .
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> . . .
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> A party does not lose the privilege . . . when his or her state of mind is put in issue in the action. While the attorney's advice may be relevant to the matters in issue, the privilege applies as the interests it is intended to protect are still served by confidentiality.
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> . . .
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> In summary, we emphasize that our holding is not meant to preclude disclosure of the knowledge the insureds possessed at the time they obtained coverage. Facts are discoverable, the legal conclusions regarding those facts are not.[148]

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[148] *Id.* at 864-865. *See also Flint Hills Scientific, LLC v. Davidchack*, 2002 WL 975881 (D. Kansas 2002) (not printed in F. Supp. 3d) (at-issue waiver held not to apply in a motion by a party to disqualify opposing counsel because the opposing counsel had formerly represented that party; trial court's holding that the mere filing of a motion to disqualify places otherwise privileged information at issue reversed.). *But cf.* John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, 11 PROF. LAWYER 1, 7-8 (2000) for a perspective on the results of secreting such relevant, vital, and highly probative information. *See Pereira v. United Jersey Bank*, 1997 WL 773716 (S.D.N.Y. December 11, 1997) (not reported in F. Supp.) for an excellent analysis comparing the *Hearn* approach with the position of the Third Circuit in *Rhone-Poulenc*. In *Pereira*, the court adopted what it felt to be a more middle ground approach:

The criticism of the *Hearn* approach by the Third Circuit highlights the juxtaposed philosophical perspectives on relevance, fairness, and the preservation of the privilege. Adopting a more middle ground approach, but still more aligned with *Rhone-Poulenc* is the approach addressed in the next section.

(6) The requirement of a more direct placing of the *substance* of the communication in issue:

Some courts that require a more direct or overt placing of the *substance* of the privileged communication in issue seem to analyze the issue as the court did in *Mortgage Guarantee & Title Co. v. Cunha*.[149] In that case, there was an application for attorneys' fees. The issue for the Rhode Island court was whether such an application put in issue any underlying advice.

> [B]etween those extreme positions of mere assertion and overt reliance, Hearn is triggered "even if the privilege holder does not attempt to make use of the privileged information; . . . the privilege [may be waived] if [the privilege holder] makes factual assertions the truth of which can only be assessed by examination of the privileged communication."'

Id. at *12. This decision is well analyzed and should be reviewed in its entirety. *See also Lambert v.Credit Lyonnais (SUISSE), S.A.*, 210 F.R.D. 506 (S.D.N.Y. 2002).

[149] *Mortgage Guarantee & Title Co. v. Cunha*, 745 A.2d 156 (R.I. 2000).

The court rejected what it described as the "liberal Hearn test,"[150] and held that, whether privileged communications had been put in issue,

> turns on whether the actual content of the attorney-client communication has been placed in issue such that the information is actually required for the truthful resolution of the issues raised in the controversy.[151]

Cunha did not cite *Rhone-Poulenc*, but it is certainly more philosophically in line with that case. It seems, however, to require less than *Rhone-Poulenc* for waiver. *Rhone-Poulenc* required a "disclosing or describing [of] an attorney-client communication."[152] Whereas, *Cunha* allows waiver where something less "requires"[153] the production of the communication.

(7) Alabama's position:

Although the present Alabama position seems to be evolving, it now seems to be closer to the position in *Cunha* than in *Hearn*. In 1986, the Alabama Supreme Court

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[150] *Id.* at 159.

[151] *Id.* at 160. *See Metropolitan Life Ins. Co. v. Aetna Casualty and Surety Company, et al.*, 730 A.2d 51 (Conn. 1999). *Cf. Baker v. General Motors Corporation*, 209 F.3d 1051 (8th Cir. 2000) (the court articulated a test resembling the *Cunha* approach, but, in the end, applied a test more closely aligned with the test requiring a direct placing of legal advice at issue).

[152] *Rhone-Poulenc*, 32 F.3d at 863.

[153] *Cunha* 745 A.2d at 160.

addressed at issue waiver in *Ex parte Malone Freight Liner*.[154] In that case, the court held that there had been an at issue waiver of attorney-client privileged matters.

There, the Plaintiff had sued Malone to enforce a judgment previously rendered in her favor by the New York Supreme Court. Malone admitted that the New York Supreme Court had rendered a judgment and bill of costs against it, however, Malone contended, as an affirmative defense, that the judgment had been procured by fraud which prevented Malone from receiving a complete adversarial trial of the issues. In support of this position, at the trial, Malone had filed an affidavit of its New York counsel alleging that the judgment had been procured by fraud.

The Plaintiff served interrogatories and requests for production on Malone and, in its responses, Malone objected to many of the requests on the basis that they violated the attorney-client privilege. The plaintiff then filed a motion to compel.

The Trial Judge ordered Malone to produce the entire claim file of Malone's New York trial counsel regarding the vehicular accident which led to the New York judgment against Malone. In addition, the Trial Judge ordered Malone to produce all correspond-dence from Malone's New York counsel to Malone as well as all pretrial reports and trial

[154] *Ex parte Malone Freight Liner*, 492 So. 2d 1301 (Ala. 1986).

reports prepared by counsel that related to the New York action. Malone filed a petition for mandamus and the Alabama Supreme Court denied that petition.

The Alabama Supreme Court said that there were no Alabama cases on point, but that it was relying on a similar situation in the Federal decision of *Garfinkel v. Arcata National Corp.*[155] The court observed that, in *Garfinkel*, the plaintiff had contended that Arcata was required to register some 200,000 shares of stock pursuant to an agreement between Arcata and the plaintiff. Arcata had defended claiming that an opinion letter to the plaintiff by its counsel had informed the plaintiff that the stock would not be registered.

The Federal District Court held that Arcata had, thereby, placed, at issue, attorney-client privilege matters. The Federal court held that there had been a waiver and that, by its actions of its counsel sending a letter to the plaintiff, Arcata had clearly injected the opinion letter into the case as a relevant matter and that the plaintiff was entitled to probe into the circumstances surrounding the issuance of the letter.[156]

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[155] *Garfinkel v. Arcata National Corp.*, 64 F.R.D. 688 (S.D.N.Y. 1974).

[156] *Ex parte Malone*, 492 So. 2d at 1304, citing *Garfinkel* at 64 F.R.D. 689-90.

Affirmatively citing *Haymes v. Smith*,[157] the Alabama Supreme Court quoted the following language from *Haymes* which cited language from *Hearn*:

> [D]ue to the nature of this suit, which puts the legal advice defendants received directly in issue, the policy behind the privilege is outweighed by the necessity of disclosure and the privilege is inapplicable.[158]

In following the cases that followed *Hearn*, especially the *Haymes* case, the Alabama Supreme Court certainly appeared to lean toward the more liberal *Hearn* approach to disclosure. *Haymes* had found waiver where a party had asserted a reasonable belief as to a certain matter.[159]

However, in the court's subsequent decision of *Ex parte Great American Surplus Lines Insurance*,[160] it found no waiver involving an opinion letter from a lawyer representing the insurance company. There, the insureds had questioned Great American's denial of coverage and, when they did, Great American responded by notifying them that it would submit the matter to legal counsel for review. In subsequent correspondence with the insureds, Great American informed them that Great American's

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[157] *Haymes v. Smith*, 73 F.R.D. 572 (W.D.N.Y. 1976).

[158] *Malone*, 492 So. 2d at 1304 citing *Haymes*, 73 F.R.D. at 577.

[159] *Haymes*, 73 F.R.D. at 577.

[160] *Ex parte Great American Surplus Lines Insurance*, 540 So. 2d 1357 (Ala. 1989).

legal counsel had agreed with Great American's denial and that Great American was standing by its original decision of the denial of coverage.

In that case, where the insurance company affirmatively had interjected the opinion letter, but without making any reference to any substantive advice in the letter or any particular issues in the letter, the court held that there had not been a waiver of the attorney-client privilege. It did so in spite of the earlier case of *Louisville & Nashville Railroad v. Hill*,[161] in which it had held that, where there had been a partial disclosure of confidential communication, there had been a waiver. Therefore, as of the *Malone* and *Great American* cases, the Alabama Supreme Court's position was still questionable.

In 2001, the Alabama Supreme Court in the decision of *Ex parte State Farm Fire and Casualty Co.*,[162] where the question was whether the application for attorney's fees and submission of bills interjected the attorney-client privilege communication underlying those bills into evidence so that the attorney-client privilege communication was discoverable, held that it did not. The court said that the narrow question of whether an application for attorney's fees put "in issue" the attorney-client privilege communications was in fact a case of first impression for it.[163]

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[161] *Louisville & Nashville Railroad v. Hill*, 115 Ala. 334, 22 So. 63 (1987).

[162] *Ex parte State Farm Fire and Casualty Co.*, 794 So. 2d 368 (Ala. 2001).

[163] *Id.* at 372-73.

In that factual context, the court used language indicating a movement away from the *Hearn* decision and cited *Cunha* for the proposition that there will not be at issue waiver unless,

> "the actual content of the attorney-client communication has been placed in issue [in such a way] that the information is actually required for the truthful resolution of the issues raised in the controversy."[164]

There, the substantive advice that counsel had given was not at issue in a claim for attorneys' fees. Therefore, the court, distinguishing the *Ex parte Malone Freight Liner* decision, *supra*, held that a waiver had not occurred. In the normal setting, therefore, the Alabama position would seem to be more along the lines of the *Cunha* and *Rhone-Ponlenc* analyses.

Regardless of which test a court might use, the teaching from these cases in the types of corporate corruption issues that are developing is that, when state of mind is an issue in a criminal and civil context, either because it is an element of a crime or a civil claim,[165] or when it is put in issue by a defendant, there is a very high risk that a court will

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[164] *Id.* at 376, citing *Cunha* 745 A.2d at 160. *Contra*, *Pamiola v. E. J. Originals, Inc.*, 281 F.3d 726 (8th Cir. 2002).

[165] *See* Jonathan C. Poling and Kimberly Murphy White, *Corporate Criminal Liability*, 38 AM. CRIM. L. REV. 525 (2001); V. S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion? The Case of Corporate Mens Rea*, 79 B.U.L. REV. 355 (1989); Kenneth W. Simons, *Rethinking Mental States*, 72. B.U.L. REV. 463 (1992).

recognize the "at issue" waiver doctrine to breach the attorney-client privilege. However, given the above Alabama cases, the risk of such a holding here is very much reduced.

c. At Issue Waiver in the Insurance Bad Faith Area[166]

Formally adopting the *Hearn* approach in a very instructive insurance bad faith case, the Arizona Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Lee*,[167] held that State Farm had placed otherwise privileged communications at issue where State Farm not only said that it exercised "objective" good faith in construing its policy and in understanding legal principles governing its policy provisions, but that its claims representatives had also, subjectively, exercised such good faith. Although State Farm had not formally plead an affirmative defense of advice of counsel, the Arizona Supreme Court, nevertheless, made a distinction between objective and subjective good faith, and said that, if all that State Farm had done was to have defended on the basis of "objective" good faith regarding the meaning of its policy provisions, etc., one could have, objectively, judged the reasonableness of State Farm's position by examining the policy. It was crucial, however, to the Arizona Supreme Court that State Farm went beyond that and also contended that its claims representatives had, subjectively, exercised good faith

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[166] *See generally* Steven Plitt, *The Elastic Contours of Attorney-Client Privilege and Waiver in the Context of Insurance Company Bad Faith: There's a Chill in the Air*, 34 SETON HALL L. REV. 513 (2004); Donna Gooden Payne, *Insurer Bad Faith: The Need for An Exception to the Attorney-Client Privilege*, 11 REV. LITIG. 111 (Winter 1991).

[167] *State Farm Mutual Automobile Ins. Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000).

in the way that they interpreted the policy provisions and construed the law applicable to those provisions.

State Farm adamantly maintained that it had not, formally, pled advice of counsel as an affirmative defense. Finding that position unpersuasive, and focusing on subjective good faith, the Arizona Supreme Court said that, when State Farm claimed that representatives exercised subjective good faith, they were relying on all information that they had received, to include advice of counsel. Therefore, in order to test that subjective good faith, the information that they received from counsel was discoverable and, therefore, by pleading subjective good faith, State Farm had placed subjective knowledge and decisionmaking at issue resulting in the ability of opposing counsel to test everything that went into that subjective decisionmaking.

The Arizona Supreme Court stated that it was following the *Hearn* line of reasoning in arriving at its decision. It found that the *Hearn* test was met because there had been some affirmative act by State Farm, i.e., the posturing of their defense to include subjective good faith, that put the, otherwise, protected information at issue, and that to apply the privilege would deny the opposing side access to information which was vital to an assessment of the position that State Farm was taking.[168]

[168] *See also Estate of Cornwell v. American Federation of Labor*, 197 F.R.D. 3, 5-6 (D.C. 2000) (At issue waiver was found where the defendant took the position that its decisions were to be reviewed on an arbitrary and capricious standard. The court agreed and said that it would use a deferential standard of

There is an even more liberal view in the area of bad faith law that does not require the distinction between "objective" and "subjective" good faith drawn by the Arizona Supreme Court in *Lee*. This view holds that all an insured has to do is to allege bad faith and "the insured is entitled to discovery claims file materials containing attorney-client communication relative to coverage that was created prior to the denial of coverage.[169] This view is exemplified by the Ohio Supreme Court's decision in *Boone v. Vanline Insurance Company*.[170] There at-issue waiver was found where all the insurer did was to defend a bad faith case by claiming a lack of bad faith. The court seems to have held that the allegation of bad faith alone will give the plaintiff access to the entire claim file generated before the bad faith suit was filed.[171]

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reasonableness. Therefore, to test the reasonableness of the decision of the plan administrator, one "must take into account the evidence considered by the plan administrator or fiduciary" to include the evidence presented which would otherwise be protected by the attorney-client privilege in order "to determine the asserted 'reasonableness' of the" decision); *In re Rhone-Poulenc Rorer, Inc.*, 1998 WL 968489 (Fed. Cir. 1998) (unpublished) (privilege waived when understandings of the law, etc. were interjected by the defendants).

[169] *See Boone v. Vanliner Insurance Co.*, 744 N.E.2d 154 (Ohio 2001) (At issue waiver was found in a bad faith case where the insurer had not plead advice of counsel, but was simply defending on a lack of bad faith); *Bergeson v. Marsillo*, 112 F.R.D. 692, 698 (D. Mont. 1986) ("The Court finds ample authority to support a ruling that the claims files should be disclosed in a bad faith action against an insurance carrier."); *Silva v. Fire Insurance Exchange*, 112 F.R.D. 699, 700-701 (D. Mont. 1986) ("The time worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured's claim."). *See Survey of Ohio Law: Ohio Supreme Court Decisions: Insurance*, 28 OHIO N. U. L. REV. 579 (2002) (addressing the *Vanliner* case). *Contra Dixie Mill Supply Co. v. Continental Casualty Co.*, 168 F.R.D. 554 (E.D. La. 1996).

[170] 744 N.E.2d 154 (Ohio 2001).

[171] *See also Hutchinson v. Farm Family Casualty Insurance*, 867 A.2d 1, 8 (Conn. 2005) (recognized at issue waiver where an insurer invokes "a 'routine handling' defense."

d. Waiver when mens rea (state of mind) is an issue

Where at issue waiver can be the most problematic and the most dangerous is when a litigant denies the mens rea or mental state of crime or tort, pleads an affirmative defense that has an element or mental state component, or pleads an affirmative claim that places a plaintiff's state of mind at issue. Although this area has tremendous potential risk for litigants, it is submitted that courts in the area of civil torts traditionally do not analyze state of mind with any real degree of precision. Therefore, the litigant trying to get privileged material will need to be very precise in describing to a court the actual mental state at issue so that the litigant can demonstrate to a court how the mental state relates to advice from an attorney.

The best analyses of these issues, therefore, seem to occur in criminal cases because courts and counsel in criminal cases are accustomed to dealing in a more precise way with mens rea and the actual cognitive mental processes that make up specific elements of crimes and that modify other elements such as circumstance and result elements.[172] The issue, however, is by no means confined to criminal mens rea. The issue is present whenever a tort with a mental state element is involved. Examples would be wantonness, fraud, good faith, reasonable compliance with a contract, internal investigations in employment discrimination cases where defendants plead appropriate

[172] *See* MODEL PENAL CODE § 2.02. *See also* Simons, *supra* note 75; Khanna, *supra* note 75.

remedial action, and conditional privilege in defamation cases.[173] If the position that a defendant takes is that there was no wantonness,[174] then the defendant is saying that he did not have a "conscious awareness" of a risk or result. That denial of a lack of cognitive awareness can, arguably, raise the issue of advice of counsel. Similarly, with a fraud claim, the plaintiff alleging fraud is also saying that there was reasonable

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[173] *See Sedco International, S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982) (Although the court ultimately held no waiver, it said that, "by asserting fraud, Cory at most waived his right to assert the privilege to prevent disclosure of communications which might have proven he did not rely on Sedco employees' statements or that such reliance was unreasonable." The court's analysis of why the specific testimony would not bear on the reasonableness of the reliance should be read.); *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994) (communications bearing on the defendant's knowledge of the law relating to its leave of absence policy ordered disclosed); *In re VISX, Inc.*, 18 F. App. 821, (F. App. 2001) (good faith belief position waived the privilege); *American Medical Systems Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 1999 WL 1138484 *15 (E.D. La. December 10, 1999) (In an indemnification action in response to the claims and suits. . . ." held to effectuate waiver); *Hoechst Celanese Corp. v. National Union Ins. Co. of Pittsburgh, PA*, 623 A.2d 1118 (Del. Super. Ct 1992) (an insured's position in a declaratory judgment action against an insurer that it had complied with all conditions precedent in the contract held to inject attorney-client advice in issue); *Worthington v. Robert H. Endse*, 177 F.R.D. 113, 177 F.R.D. 113 (N.D.N.Y.) (where defendants affirmatively plead appropriate remedial measures the defendants "put 'at issue' the measures utilized to remedy plaintiff's allegations of a hostile work environment. As long as the defendants continue to assert the affirmative defenses that they took effective remedial action and that Endse's alleged conduct was not unwelcome, the entire report is 'at issue.'" *Dawson v. New York Life Ins. Co.*, 901 F. Supp. 1362 (N.D. Ill. 1995) (in defamation, "[t]he assertion of qualified privilege is not simply a denial of a plaintiff's claim. Qualified privilege is an affirmative defense to defamation claim."); *Connell v. Bernstein-McCauley, Inc.*, 407 F. Supp. 420 (S.D.N.Y. 1976) (waiver by asserting estoppel to a statute of limitation defense).

[174] Wantonness has a cognitive, subjective state of mind to it. *See Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators, Inc.*, 510 So. 2d 142, 145 (Ala. 1987):

> Wantonness is not merely a higher degree of culpability than negligence. Negligence and wantonness, plainly and simply are qualitatively different tort concepts of actionable culpability. Implicit in wanton, willful, or reckless misconduct is an acting, with knowledge of danger, or with consciousness, that the doing or not doing of some act will likely result in injury.

See also Young v. Serra Volkswagon, Inc., 579 So. 2d 1337, 1339 (Ala. 1991) (knowledge that a car had been wrecked.).

reliance.[175] The question in the "at issue waiver" area is whether positions like denial of wantonness or an assertion of reasonable reliance will put the privilege at issue or whether there has to be more.

e. The uniqueness of the issues in a corporate attorney-client setting:

The above analyses are easier to apply where the question of at issue waiver deals with what a party does with his own privilege. When, however, the question is what effects from a person's actions with respect to a corporation's privilege, the issues are much more complex. There appear to be no good Alabama cases analyzing these more specific issues. The following two decisions, therefore, serve to highlight those issues and the dynamics involved in them. Taken together they are highly instructive.

In *In re: Grand Jury Proceedings*,[176] the Second Circuit dealt with what the court referred to as:

> "Significant questions of first impression in this court regarding application of the attorney-client and work-product privileges in the corporate context. The questions are (1) whether a corporate officer can

[175] *Liberty National Life Ins. Co. v. Ingram*, 887 So. 2d 222 (Ala. 2004); *Foremost Ins. Co., Grand Rapids, Michigan v. Parham*, 693 So. 2d 409 (Ala. 1987).

[176] *In re Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 2000).

> impliedly waive the corporation's attorney-client and work-product privileges in his grand jury testimony, even though the corporation has explicitly refused such a waiver; and if the answer is yes, (2) what factors a district court should consider in deciding whether a waiver has occurred. We hold there can be such a waiver, and discuss below the relevant criteria in deciding the scope.[177]

The case arose out of an ongoing grand jury investigation into the alleged illegal sales of firearms and other contraband to a corporation. The district court had concluded that statements made by a corporate officer and by a corporation's in-house counsel to the grand jury waived the corporation's privileges because those witnesses had "unfairly, selectively and deliberately disclosed privileged communications for exculpatory purposes."[178]

On appeal to the Second Circuit, the defendant corporation argued that there was no waiver of either privilege as a result of the testimony, but, that, even if some of the testimony could be construed as a waiver, the District Court had erred in failing to narrow the scope of discovery to cover only the disclosed subject matter. In other words, at the Second Circuit, the defendant corporation argued no waiver, but then as a fallback position, argued the scope of waiver.

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[177] *Id.* at 179.

[178] *Id.*

The Second Circuit vacated the District Court's order and remanded the case for further proceedings. Before doing so, however, it analyzed the dynamics of the issues.

There were really two separate issues that the court addressed. The first issue arose out of the corporation's in-house counsel's testimony before the grand jury concerning his meeting with ATF officials. The witness, apparently, recounted in detail what had transpired at that meeting, but refused to turn over the notes of the meeting. The government contended that this was an improper invocation of the work-product privilege. The counsel claimed that the notes, although taken by his non-lawyer assistant, constituted his work product.

The court then focused on the testimony in front of the grand jury by the company's founder, chairman and controlling shareholder. That testimony lasted an entire day. The witness had been subpoenaed individually and not as a corporate representtative. The court confirmed that that witness knew that his corporation had asserted the attorney-client and work-product privileges and that he was not authorized to divulge the contents of any privileged communication during his testimony. In fact, the corporation had instructed him to invoke the privilege as necessary in front of the grand jury. He had also been instructed that he could leave the grand jury room and consult with his attorney during any questioning. The court observed that he exercised that option only once.

The government pointed to eight statements in that witness's testimony that it contended constituted a waiver of the privileges. The court then said, as to those statements that:

> Most of the statements can be characterized as generalized references to counsel's advice, such as "our approach was validated by counsel," "[our control of items for sale was validated] as a result of conversations with counsel," "everything I heard from counsel before the ATF meeting, everything afterwards . . . supports the fact that we are not legally responsible." A number of the statements, however, were more specific: one concerns counsel's recommendation about the use of credit cards as identification tools, another concerns counsel's advice about whether the company should monitor individual sales, and yet another refers to a report prepared by in-house counsel supporting the continuation of [the corporation's] general practices.[179]

The corporation argued that the witness had no choice but to refer to his counsel's advice in order to provide a complete answer. All parties, however, agreed that on at least several occasions, the witness did, in fact, invoke the attorney-client privilege.

The court then recounted the proceedings that had occurred at the District Court level. There, two months after the witness's grand jury testimony, the government had moved to compel production of all of the corporation's withheld documents and to bar the company from asserting the attorney-client or work-product privileges. The government argued that,

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[179] *Id.* at 180.

> Because witness repeatedly referred to advice of counsel in attempting to justify [the corporation's] actions to the grand jury, fairness demanded full disclosure of that advice. Additionally, the government submitted ex parte and affidavits setting forth the need for [the corporation's] work-product material.[180]

The court then set out what had been the corporation's arguments at the District Court level:

> First, neither witness nor counsel could waive [the corporation's] privileges without its authorization. Second, there was no implied waiver of the attorney-client privilege because the corporation did not raise an advice-of-counsel defense, nor did it take any other affirmative steps that would support a finding of waiver. Third, even if some disclosure of privileged communications took place, the district court should limit the disclosure to cover only the narrow subject matter covered in the witness's testimony. Finally, the work product privilege was not waived and the government had not shown compelling need justifying disclosure of work-product.[181]

The court observed that the District Court judge had ruled from the bench that there had been a selective disclosure of the substance of the attorney's advice by the witness in an exculpatory manner and that the witness had, therefore, waived the privilege. The District Court had found that the witness had volunteered privileged information even when the question did not call for it. Further, the district court judge

[180] *Id.* at 181.

[181] *Id.* at 181.

rejected the corporation's argument that a more formal waiver was necessary.[182] With that finding, the District Court ordered disclosure of the matters that had been withheld.

The Second Circuit further observed that, as a result of the exculpatory way in which the witness had referred to counsel's advice, the District Court had held that the privilege had been waived on fairness grounds. In the case of *In re Von Bulow*,[183] the Second Circuit explained the fairness doctrine as follows:

> [C]onsiderations—which underlie "the fairness doctrine"—aimed to prevent to a party and distortion of the judicial process that may be created by the privilege-holder's selective disclosure during litigation of otherwise privileged information. Under the doctrine the client alone controls the privilege and may or may not choose to divulge his own secrets. But it has been established law for 100 years that when the client waives the privilege by testifying about what transpired between her and her attorney, she cannot thereafter insist that the mouth of the attorney be shut. . . . From that has grown the rule that testimony as to part of a privileged communication, in fairness, requires production of the remainder.[184]

The court in *Von Bulow* further observed that the fairness doctrine protects the party, the fact finder and the judicial process "from selectively disclosed and potentially

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[182] *Id.* at 181.

[183] *In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987).

[184] *Id.* at 828 F.2d at 101-102.

misleading evidence."[185] With the fairness doctrine as a reference point, the district court in *In re Grand Jury Proceedings* felt that the witness had used the references to counsel selectively and to exculpate and, since he did that, and only disclosed part of the communications, there was a waiver as to the remainder of the communications.[186]

Turning directly to the waiver issues, the Second Circuit, reviewing the governing principles to the concept of implied waiver, said the following:

> This court has recognized that implied waiver may be found where the privilege-holder "asserts a claim that in fairness requires the examination of protected communications." . . . . We have stated . . . that fairness considerations arise when the party attempts to use the privilege both as "a shield and a sword." In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party. . . "The quintessential example is the defendant who asserts an 'advice-of-counsel defense' and is thereby deemed to have waived its privilege with respect to the advice that he received." . . . .
>
> Whether fairness requires disclosure has been decided by the courts on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted. Thus in *Bizerian*, 926 F.2d at 1292-93, we held that the defendant who intended to testify as to his "good faith" reliance on legal advice could not prevent the government from cross-examining him on advice received from counsel. Because the defendant raised the advice-of-counsel defense and sought to rely on

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[185] *Id.* at 102.

[186] The case of *In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987) is an excellent case to study with respect to the scope of waiver. The *In re Grand Jury Proceedings* case does not get into the scope issues as much as the *Von Bulow* decision does. Therefore, the *Von Bulow* decision is worth reading.

> privileged communication in a judicial setting, the court found that if defendant so testified a broad waiver would be appropriate. . . . By contrast, the D.C. Circuit declined to find a waiver when defendant testified at trial that he lacked the intent to commit the crime because, after meeting with his lawyers, he believed that his actions were lawful. . . The *White* court, citing our decision in *In re Von Bulow*, 828 F.2d at 101-02 concluded that the mere denial of mens rea through "an averment that lawyers have looked into a matter does not imply an intent to reveal the substance of the lawyers' advice. Where a defendant neither reveals substantive information, nor prejudices the government's case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the inference of waiver." . . . .[187]

Turning to an aspect of the fairness doctrine which is whether the disclosures, selective as they may be, prejudice the opposing party, the court said:

> We have also recognized that a more limited form of implied waiver may be appropriate where disclosure occurred in the context that did not greatly prejudice the other party in the litigation. . . . Further, when waiver occurs as a result of inadvertent document disclosure, courts have limited the scope of that waiver based on the circumstances involved in the overall fairness. . . .[188]

With those general considerations of waiver, the court then turned to the issue of waiver of the corporate attorney-client privilege. It made the following observations:

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[187] *In re Grand Jury Proceedings*, 219 F.3d at 182-83 citing *Hearn v. Ray*, 68 F.R.D. 574, 581-83 (E.D. Wash. 1975) which the Second Circuit had cited with approval in its decision of *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991).

[188] *In re Grand Jury Proceedings*, 219 F.3d at 183.

> The general rules governing waiver are more complicated when the issue arises in the context of corporate entities. The Supreme Court notes in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 85 L.Ed.2d 372, 105 S.Ct. 1986 (1985) that the attorney-client privilege presents "special problems" in the corporate context. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interests. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation.[189]

Addressing the body of law coming out of the *Weintraub* case that employees or officers of the corporation cannot prevent a corporation from waiving its privilege as to communications with those employees and officers if the corporation decide to do so. Employees and officers have no ability to prevent the corporation from waiving the privilege and, thereby, disclosing what officers and employees though were privileged communications.[190]

The court then observed that the *Weintrab* and *Teamsters* cases, were ones involving explicit waivers by the corporation.[191] Distinguishing those cases, the court said that neither of them,

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[189] *Id.*

[190] *Id.* at 183-184.

[191] *Id.* at 184 referring to *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210 (2d Cir. 1997).

> addressed the situation in this case, where the corporation has asserted its privilege in its communication to the government and the court and yet one of its officers arguably waived that privilege before a grand jury.[192]

The court framed the analytical dilemma for it in this particular fact pattern as follows:

> In this case, application of the general rules governing implied waiver of the attorney-client privilege in the corporate context is complicated by a number of factors that we discuss below. Primarily, this is because we have here a corporation that has asserted its privilege, has not deliberately disclosed (so far as the record before us indicates) any privileged material to the government or to other parties, but whose officer, in contravention of the corporation's instructions, has arguably waived that privilege in his grand jury testimony. In light of the district court's finding of blanket waiver of [the corporation's] privileges, we are concerned that court might not have fully appreciated the significance of the specific context for the waiver analysis.[193]

In that setting then, the court discussed approximately four criteria to analyze: "The corporate-agent dichotomy;[194] "the grand jury context";[195] "the nature of the

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[192] *Id.*

[193] *Id.* at 184.

[194] *Id.* at 184.

[195] *Id.* at 186.

disclosure";[196] and "prejudice to the government."[197] The court then analyzed each one of these guideposts.

With respect to the corporate-agent dichotomy, the court observed that corporations can only act through agents, but, in this case, the witness had been subpoenaed individually. He had not been subpoenaed as a corporate representative. With that observation, the court made a broad statement about its perspective on applied waiver analysis and observed that it felt that any "implied waiver analysis should be guided primarily by fairness principles."[198] Accordingly, the court was not willing to adopt any per se rule, but observed that each of these issues must be analyzed contextually.[199]

Returning to its observation that the witness had been subpoenaed individually, the court observed that the testimony had not been offered on behalf of the corporation. The government had argued that the witness's reference to advice of counsel was self-

[196] *Id.* at 187.

[197] *Id.* at 188.

[198] *Id.* at 185.

[199] *Id.* at 185.

interested and the court said that, given that, "it does not necessarily follow that, as a result, the corporation itself should be penalized."[200]

In making that observation, the court cited, in a footnote, the case of *In re Sealed Case*.[201] In that case, one of a corporation's officers had made an immunity deal with the government and turned over documents in accordance with that immunity arrangement. The court in *In re Sealed Case* held that that act of that officer did not "strip the corporation of its claim of privilege over those documents."[202] Therefore, the court recognized that there will be situations where corporate officers will be testifying primarily from a position of self-interest and not as a representative of the corporation. Nevertheless, the Second Circuit recognized that "other courts have attributed to the corporation an implied waiver of the attorney-client privilege as a result of testimony by a corporate officer."[203]

The court also cited the cases of *Velsicol Chemical Corp. v. Parsons*,[204] and *Weil v. Investment/Indicators, Research and Management Inc.*[205] It, however, distinguished *Velsicol* by observing that, as contrasted with that case, the witness in this case was not

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[200] *Id*. at 185.

[201] *In re Sealed Case*, 278 U.S. App. D.C. 188, 877 F.2d 976, 978, 982 (D.C. Cir. 1989).

[202] *Id.*

[203] *Id.* at 185.

[204] *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671, 675 (7th Cir. 1977).

[205] *Weil v. Investment/Indicators, Research and Management Inc.*, 647 F.2d 18, 23-25 (9th Cir. !981).

testifying as a corporate representative. The court further observed that the witness in this case had no legal training and was not involved in preparing the corporation's defense. In addition, the court observed that in this case the defendant corporation had notified the government of its intention to invoke the privilege. That had not been true in the *Velsicol* case.

With respect to the *Weil* case, the Second Circuit observed that it was a civil case and, therefore, neither the corporation nor its officer faced criminal penalties. In addition, during the officer's deposition testimony, where the alleged waiver had occurred, the corporation was present and did not object to the disclosure.

With those cases in the background, the court observed the following:

> While these cases may illustrate that, in some circumstances, a corporation can impliedly waive its privilege through the testimony of one of its officers, they hardly stand for the proposition that this must always be the case. Rather, as we have already noted, the district court should carefully weigh the circumstances surrounding the witness's testimony in deciding whether, in fairness, that testimony affected waiver of [the corporation''] privilege."[206]

This, along with other issues addressed below, was one of the issues that was sent back to the district court on remand.

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[206] *In re Grand Jury Proceedings*, 219 F.3d at 186.

Addressing the grand jury context, the Second Circuit said that the witness's testimony had occurred in the context of compelled testimony. Therefore, the court, addressing the government's argument that waiver is often appropriate where a witness tries to use the privileged testimony as a sword, but then turns around and hides behind the privilege as a basis for effectuating waiver, might not be appropriate. The court simply felt that the witness might not have been using the references to attorney-client privileged material affirmatively, but might simply have been responding to the environment of a grand jury.

Given the grand jury context, the court said that, in addition to the above, the corporation had not taken any efforts to inject privileged material into the case, the corporation had not disclosed any privileged material to the government in any other setting, since the witness could have invoked the privilege, there needed to be a factual inquiry into whether he had purposely chosen not to invoke the privilege, and, further emphasizing the grand jury setting, the court said that the witness did not have counsel with him during the testimony.[207]

Observing what the district court needed to explore on remand, the court said the following:

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[207] *Id. at 186.*

> The foregoing discussion suggests that the district court should at least consider further its conclusion that the answers of witness when under subpoena constituted [the corporation's] use of the attorney's advice as a sword.[208]

Addressing the argument of the government that the witness's testimony was calculated and was a deliberate attempt to exculpate the corporation, the corporation responded that the witness's disclosures were inadvertent and taken out of context. The court then observed that the record revealed that on several occastions the witness referred generally to the fact that he had consulted counsel, but observed that the district court had not examined some additional testimony that had not been unredacted. The court felt that the record was very limited on this issue and, therefore, it was reluctant to evaluate the district court's conclusion that the witness's waiver was purposeful.

The court acknowledged that waiver can take place inadvertently,[209] but further observed that that does not mean that all inadvertent disclosures mandate waiver.[210] The court then said:

> Because the waiver inquiry depends heavily on the factual context in which the privilege was allegedly waived, we leave it to the district court,

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[208] *Id.* at 187.

[209] *Id.*

[210] *Id.*

> on remand, to determine which—if any—of witness's statements amount to waiver, and its appropriate scope.[211]

The court then examined whether the government had been prejudiced by the testimony of the witness in reference to counsel. In examining that, the court said the following:

> Finally, as the animating principle behind waiver is fairness to the parties, if the court finds that the privilege was waived, then the waiver should be tailored to remedy the prejudice to the government.[212]

However, given the status of the record, the court indicated that it was not persuaded that the government had been prejudiced.

On remand, the District Court addressed the concerns of the Second Circuit in *In re Grand Jury Proceedings*.[213] With respect to the corporate-agent dichotomy, the District Court emphasized the concept of fairness and that that concept needed to be used when determining whether the corporation's privilege had been waived. The District Court analyzed the testimony and found that the witness's interests were intertwined with

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[211] *Id.*

[212] *Id.* at 188.

[213] *In re Grand Jury Proceedings*, 2001 WL 237377 (S.D.N.Y., March 9, 2001) (not reported in F. Supp. 2d).

the corporation's interests. Therefore, the District Court felt that the witness was not simply testifying on his own for his own reasons. The court emphasized the witness's position in the company and said: "I find his interests and the corporation's interests to be virtually congruent."[214] The court recognized that the witness was not the subject of the grand jury investigation and that, if he had been truly concerned about his own risks of prosecution, he could have invoked his Fifth Amendment rights of which he had been informed at the beginning of the grand jury. The court further emphasized that he was represented by competent counsel who had no doubt informed him of his rights to answer. In that setting the court said the following:

> In sum, I find that because of the near-congruity of witness's interests and the corporation's interests, witness's interests did not override his fidelity to [the corporation] and, thus, that this factor weighs in favor of a finding that witness waived [the corporation's] attorney-client privilege, although not overwhelmingly.[215]

Addressing the grand jury context issue, the District Court emphasized that the corporation, itself, did not enjoy a Fifth Amendment privilege, but that the witness knew that the corporation had asserted attorney-client and work-product privileges and that he was not authorized to divulge the contents of any privileged communication during his testimony. In fact, he had been instructed specifically not to do so. The court then

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[214] *Id.* at *15.

[215] *Id.* at *17.

reflected back on the fact that the Second Circuit had instructed it to determine whether the witness had purposely chosen to assert the privilege and that such finding would be very important on a waiver analysis.

The government argued that the witness had purposely chosen to not assert the privilege. Juxtaposed to that, however, the court addressed the corporation's arguments that the Second Circuit's findings militated against a waiver argument. The Second Circuit had found that the corporation had done everything it could on its own behalf to preserve the privilege and, since the testimony was given outside of the presence of his own counsel and the corporation's counsel that it would be unfair to determine that the corporation had waived its privilege when it had done everything it could do to preserve it.[216]

The court then said that, given the fact that this was a grand jury proceeding, the witness was compelled to give testimony and he could not have invoked the Fifth Amendment privilege on the part of the corporation, but that he could have invoked his own Fifth Amendment right. He could also have invoked the corporation's attorney-client privilege. The witness had the right to leave the grand jury room any time he chose although he only went out once. Most importantly, however, the court said that the witness, on more than one occasion, did in fact invoke the corporation's attorney-client

[216] *Id.* at *21.

privilege.[217] The court said that it therefore appeared that the witness did understand the corporation's rights and that each time he interjected the attorney-client privilege issue into his testimony it was in a nonresponsive manner. With that, the court said:

> It must be concluded the witness purposely chose not to exercise [the corporation's] privilege rights when he deemed it in the corporation's best interest not to do so. Yet, as recognized by the Court of Appeals, [the corporation] "did not itself take any affirmative steps to inject privileged materials into the litigation or to otherwise explicitly raise the advice-of-counsel defense." . . .
>
> This factor weighs slightly in favor of a finding the witness waived [the corporation's] attorney-client privilege to the grand jury testimony.[218]

Addressing the nature of the disclosure, the District Court said that there must be a determination of whether the injection of the attorney-client privilege issues was an attempt on the part of the corporation to exculpate itself or an attempt on the part of the witness to exculpate himself personally.

The court addressed the government's argument that the unredacted portions of the transcript demonstrated that none of the prosecutor's questions called for privileged information and that the witness clearly had sufficient interest to do what was necessary to exculpate the corporation and that is why he testified the way he did.

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[217] *Id.* at *23.

[218] *Id.* at *23.

The corporation argued that the witness's testimony did not amount to any type of invocation of advice-of-counsel defense. In that context, the court said that the corporation had not formally asserted advice-of-counsel but that the record revealed that the prosecutor's questions were not an effort to reach attorney-client privilege matters and that the questions put to the witness were ones to which he volunteered the information. Therefore, the court said:

> It also appears from a review of the entirety of witness's testimony that his recitation of the advice of counsel was deliberate and selective in an effort to exculpate the corporation. "This factor weighs in favor of a finding of waiver.[219]

Addressing the issue of whether the government had been prejudiced, the court found that the government had a number of options it could have exercised and it felt that the government was not prejudiced and would not be prejudiced by not being able to get additional information. The District Court then went into what it described as "balanc-ing."[220] In so doing, it said the following:

> The first three factors tend toward supporting a finding of waiver. They are, however, outweighed by the fact that any prejudice to the government can be remedied by several options which will not cause any undue burden to the government. Thus, considerations of fairness counsel that witness's

[219] *Id.* at *28.

[220] *Id.* at *33.

> testimony before the grand jury did not effect a waiver of [the corporation's] attorney-client privilege. Accordingly, the government's post-remand motion to compel the production of materials designed as attorney-client privilege is denied.[221]

These two cases taken together serve as excellent examples of the way that courts will analyze at issue waiver issues when a corporation's privilege is at risk. There is clearly a balancing process that is employed, especially when grand juries are involved and corporations invoke their privilege. The reluctance on the part of the Second Circuit and the Southern District of New York to find waiver, especially when the corporation had taken all efforts that it could have undertaken to preserve its privilege, exemplify the reluctance of courts in these settings to allow executives, board members, etc., even though they have power to waive the privilege, to actually waive the privilege for the corporation.

It must be remembered that these two cases took place in grand jury settings. In the post-Enron world, however, where corporations, executives, management, and employees, are finding themselves in front of grand juries, the way that these courts balanced the factors are very instructive as to how courts will look at the dynamics of these issues in the future.

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[221] *Id.* at *34.

2. Selective Waiver

There is an area of waiver that is important with respect to dealing with government agencies when defendant tries to cooperate with one government agency and discloses privileged material, sometimes pursuant to a confidentiality agreement, and then tries to argue that there has been "selective wavier" confined to that agency and not in other circumstances.[222] This material contains a review of some of the emerging selective waiver issues.

The recognition of selective waiver occurred in the Eighth Circuit's decision of *Diversified Industries v. Meredith*.[223] The doctrine has its basis in the policy perspective of encouraging cooperation with government agencies and law enforcement. The doctrine operates by allowing a party that cooperates with the government to disclose privileged material, most frequently pursuant to a confidentiality agreement, and not to waive the privilege as to anyone other than the government.[224]

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[222] *See In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). *See also*, Stuart M. Gerson and Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law*, 5 ALA. L. REV. 163 (1999); Nancy Horton Burke, *The Price of Cooperating With the Government: Possible Waiver of the Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33 (1997); Janet L. Hall, Note, "*Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work Product Doctrine*, 1993 U. ILL. L. REV. 981 (1993); Richard H. Porter, *Voluntary Disclosures to Federal Agencies – Their Impact on the Ability of Corporations to Protect From Discovery Materials Developed During the Course of Internal Investigations*, 39 CATH. U.L. REV. 1007 (1990).

[223] *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978).

[224] *See* Burke, *supra* note 222 at 35.

The doctrine has not been embraced by many courts.[225] In January, 2002, the Sixth Circuit in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*,[226] addressed this issue. There HCA had done internal audits of its Medicare patient records. It eventually turned them over to the Department of Justice in an attempt to cooperate with the DOJ investigation. It did so, however, pursuant to a confidentiality agreement containing "stringent confidentiality provisions."[227]

Later, however, private parties sued and asked the court to order production of the audits. In that setting, the Sixth Circuit observed:

> [s]ome courts have recognized that a client may "selectively" waive the privilege. And unfortunately, 'the case law addressing the issue of limited waiver [is] in a state of 'hopeless confusion'" . . . Indeed . . . some courts have even taken internally inconsistent opinions.[228]

The court then stated the three positions found among the jurisdictions and reviewed each. The court said the three positions were:

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[225] *See Westinghouse Elec. Corp. v. Republic of the Phillippines*, 951 F.3d 1414 (3d Cir. 1991) (rejecting); *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) (rejecting); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1986).

[226] *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 283 F.3d 289 (6th Cir. 2002).

[227] *Id.* at 292.

[228] *Id.* at 294-5 and n.5 (recognizing that some courts refer to this area of "limited waiver" but preferring to use the term "selective waiver.").

> [S]elective waiver is permissible, permissible . . . selective waiver is not permissible uner any situations . . . and selective waiver is permissible in situations where the Government agrees to a confidentiality order. . . .[229]

The Sixth Circuit's review of the three positions should be read in its entirety. It is an excellent and detailed analysis of the various ways that the courts that have addressed this area and have viewed the relative values in each position and which directions they have gone. In general, it can be said that, out of the courts that have addressed these issues, most have not recognized the ability of a company to selectively waive even with a confidentiality agreement.

The law in this area is, however, very important especially from the perspective of a corporate executive who, when faced with that possibility of internal corporate corruption or violations of the law by the company, must decide on whether to have an internal investigation. Deciding on who will conduct the investigation, how confidentiality will be maintained and what to do with the information once the investigation is completed are issues that have a direct relationship to this area of the law.[230]

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[229] *Id.* at 295 and cases cited by the court. *See also* David M. Greenwald and Matthew J. Thomas, *Selective Waiver of Privilege*, 44 FOR THE DEF. 10 (December 2002).

[230] For an excellent article on internal investigations, their dynamics, considerations of the corporate official who is considering initiating an investigation, *see* Porter, *supra* note 222. Regarding the "self-evaluative privilege," *see* Frederick N. Egler, Jr., *Can You Keep a Secret? Preserving Confidentiality in Life, Health & Disability Insurance Litigation*, 29 THE BRIEF 8 (2002); Gary J. Cohen, *A Guide Through the Morass of the Self-Critical Analysis Privilege*, 35 AZ. ATTORNEY 34 (July, 1999); Arlene R. Lindsay

3. Improper Handling of Privileged Material: The Receipt of Inadvertently Disclosed Privileged Material

The attorney-client privilege has many dimensions. One is the issue of waiver. Waiver issues can manifest themselves in many situations, one being where there is inadvertent disclosure of privileged material.[231]

When there is such an inadvertent waiver, how it is handled depends on a state's rules. Three general approaches have, however, emerged: absolute waiver; no waiver; a balancing approach.

a. Absolute Waiver:

Some jurisdictions hold that there is absolute waiver in spite of due care having been taken by the client and the lawyer.[232] In those jurisdictions, there is no duty to return the material and the receiving counsel is allowed to use it to his client's advantage.[233]

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and Lisa C. Solbakken, *Dispelling Suspicions as to the Existence of the Self-Evaluative Privilege*, 65 BROOKLYN L. REV. 459 (1998); James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551 (1983).

[231] Most disclosures occur through lawyers or present corporate employees. In *Apex Mun. Fund v. N-Group Securities*, 841 F. Supp. 1423, 1432 (S.D. Tex. 1933) a former employee's disclosures were held to be inadvertent.

[232] *Mergentime Corp. v. Washington Metro Area Transp. Auth.*, 761 F. Supp. 1 (D. C. Cir. 1991); *Carter v. Gibbs*, 909 F.2d 1450 (Fed. Cir. 1990); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984); *Fan Credit Bank of St. Paul v. Huether*, 454 N.W.2d 710 (N.D. 1990).

b. Balancing

In some jurisdictions, a balancing test is used.[234] This approach places paramount weight on the state of mind of the disclosing policy. The case of *Lois Sportswear, U.S.A., Inc. v. Levi Strauss and Co.* [235] is a good example of the use of this balancing approach. There the court used the following factors to determine if waiver should be deemed to have occurred:

1. An assessment of the reasonableness of the precautions taken to prevent disclosure,[236]
2. the time lapse between the disclosure, knowledge of it, and efforts taken to correct the situation,
3. the scope of discovery,
4. how extensive was the disclosure.
5. general assessment of fairness in the context of protecting the privilege.

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[233] *See also* Jennifer A. Hargrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U. ILL. L. REV. 643 (1998) (regarding scope of waiver).

[234] *See generally United States v. Billmeyer*, 57 F.3d 31 (1st Cir. 1995); *Alldred v. City of Grenade*, 988 F.2d 1425 (5th Cir. 1993); Thomas G. Wilkerson and Marlo Pageno-Kelleher, *supra* note 32.

[235] 104 F.R.D. 103 (S.D.N.Y. 1985).

[236] *See also* Heidi L. McNeil and David S. Reid, *The Protection of Privileged and Confidential Documents Within a Corporate Setting*, 31 ARIZ. ATTY. 14 (Jan., 1995).

This test "retains a high level of respect for both the attorney-client privilege and the lawyer's duty to zealously represent the client."[237]

c. No Waiver

In jurisdictions, like Alabama, paramount importance is placed on the client's state of mind and, since the client did not desire to waive the privilege, there is no waiver.[238] With this view, there are, therefore, ethical constraints on what a receiving counsel can do with the inadvertently disclosed material. The Alabama State Bar has issued an opinion that, where there is inadvertently disclosed privileged material, such as a document being inadvertently left in a series of documents produced in accordance with discovery requests, the appropriate handling of that inadvertently disclosed material by the receiving counsel is to preserve the integrity of the material, not use it, and to return it. One can either call the opposing counsel and advise him or her that the receiving counsel has the material or simply send it back in a letter. The bottom line is, in Alabama, we are not permitted to view the material any more than we had to to determine that it was privileged, or to use it.[239]

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[237] Note, *Inadvertent Disclosure, the Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 ALASKA L. REV. 466, 475 (2002).

[238] *United States v. Plache*, 913 F.2d 1375 (9th Cir. 1990); *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 676 (7th Cir. 1977); *Berg Elecs., Inc. v. Malax, Inc.*, 875 F. Supp. 261 (D. Del. 1995); *Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 836 F. Supp. 183 (S.D.N.Y. 1993).

[239] Ala. State Bar, Office of the General Counsel, *Informal Op.* (1996).

The case of *Maldonado v. New Jersey*[240] is an excellent example of the results of improper actions by the receiving attorney. There, an individual by the name of Maldonado filed a civil complaint against his employer, which was the State of New Jersey Administrative Office of the Courts, Probation Division and against individuals named Mason and Costello alleging employment discrimination. A letter, however, was written by Mason and Costello to their former attorney, Deputy Attorney General Karen Griffin, in which they asked Griffin to take further legal action on their behalf because the New Jersey Division on Civil Rights had made a finding of probable cause against them. The letter also provided Deputy Attorney General Griffin with information regarding the credibility of witnesses who were interviewed in response to the proceeding brought against them.

Somehow, that letter ended up in Maldonado's mailbox and Maldonado turned it over to his lawyer. In a discussion between the Assistant Deputy Attorney General Gonzalez, who was handling Maldonado's case, and Maldonado's attorney, Deputy Attorney General Gonzalez first became aware of the letter. As a result, she sent the attorney a letter informing him that the letter was protected by the attorney-client privilege and demanded the letter's return. The attorney stated that he would not return the original copy and demanded an in camera review by the court.

[240] 225 F.R.D. 120 (D.N.J. 2004).

The Deputy Attorney General on behalf of the defendants in Maldonado's case filed a motion for a protective order. A hearing was held on that motion and it was determined that the letter was protected by the attorney-client privilege. However, the court then ordered the parties to submit briefs on the question of whether the defendants had waived any attorney-client privilege or work product protection due to the fact that the letter inexplicably ended up in Maldonado's work place mail box. In addition to submitting their briefs on this issue, the defendants filed a motion to dismiss the plaintiff's complaint with prejudice, or in the alternative, to disqualify the plaintiff's counsel as a result of the conduct of Maldonado and the counsel concerning the procurement and retention of the letter.

The District Court addressed the concept of waiver and reviewed the case of *Ciba-Geigy Corp. v. Sandos Ltd.*[241] in which that court reviewed the various views on inadvertent waiver. The court in *Maldonado*, drawing on that decision, said the following:

> On one end of the spectrum, the cases rest all responsibility on the attorney, holding that the inadvertent disclosure of a privileged document vitiates the privilege and constitutes waiver . . . On the other end, the cases recognize the general precept that the client and not the attorney holds the privilege, and thus adopt a "no waiver" rule. . . The third school

[241] 916 F. Supp. 404 (D.N.J. 1995).

> seeks a middle ground that focuses on the reasonableness of the steps taken to preserve the confidentiality of privileged documents. . . .[242]

In reviewing and adopting the balancing approach, which the *Maldonado* court described as a middle ground, the court observed that, although waiver does normally require a knowing and intentional act, there can be inadvertent waiver with inadvertent disclosure "if such a disclosure results from gross negligence."[243] Therefore, with the balancing approach, "the party resisting a waiver argument must demonstrate that it undertook *reasonable precautions* to avoid inadvertent disclosure of privileged documents."[244] The court also analyzed the other criteria. This case, therefore, serves as a good case to review when the balancing approach is being used by a jurisdiction.

Observing that there is a difference with respect to waiver analysis in the work product context, the court said that with a work product waiver issue the question is whether the material was disclosed to an adversary. The court said that the central question in the work product area is whether the material has been kept away from adversaries, therefore, there will be no waiver when information has been disclosed to parties with a common interest, to persons in the course of a business relationship, to the

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[242] *Maldonado*, 225 F.R.D. at 128 (citations omitted).

[243] *Id.* The court said that, in situations where there is gross negligence in allowing the inadvertent disclosure of the document, the court will deem that disclosure to be equivalent to an intentional disclosure thus constituting a waiver of the privilege.

[244] *Id.*

government, etc.[245] The court said that "[i]n all cases, the focus of the inquiry is on the extent to which the relationship is an adversarial one and the efforts made to keep adversaries from obtaining material."[246] The court also observed that, in contrast with the attorney-client privilege, where the party trying to retain the privilege has the burden to show non-waiver, in a work product context, the party advocating waiver has the burden.[247]

The court ultimately held that there had been no waiver of the attorney-client privilege or work product protections. Having made that ruling, the court then addressed whether the complaint should be dismissed with prejudice. Realizing that that was a severe sanction, the court analyzed the following criteria:

1. Existence of certain extraordinary circumstances . . . .
2. The presence of willfulness . . . .
3. Consideration of lesser sanctions to rectify the wrong and to deter similar conduct in the future . . . .
4. The relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case . . . .
5. Prejudice in public interest . . . .

[245] *Id.* at 131-32.

[246] *Id.* at 132.

[247] *Id.*

6. Degree of wrongdoer's culpability . . . .[248]

After going through the balancing approach, the court held that it would not dismiss the complaint, but then turned to the issue of disqualification of counsel. The court drew on the case of *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) which involved an attorney who inadvertently received privileged information from opposing counsel. In that case, the court held that an attorney, as in Alabama, who inadvertently receives privileged information has an ethical duty to cease review of the documents, notify the privilege holder, and return the documents. In citing that case's holding, the court also cited an ABA Formal Opinion holding the same way.[249] The court described this as the "'cease, notify, and return' protocol."[250] The court then cited various jurisdictions that have held there to be disqualification when an attorney violates this rule. Following in their path, the court analyzed the following criteria:

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[248] *Id.* at 133-136.

[249] ABA Comm. on Ethics and Professional Responsibility, *Formal Op.* 94-382 (1994). *See also* The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, *N.Y.C. Eth. Op.* 2003-04, 2004 WL 837937 (April 9, 2004); New York County Lawyers' Association Committee on Professional Ethics, *NYCLA Eth. Op.* 730, 2002 WL 31962702 (July 19, 2002) (excellent recap of varying views); Utah State Bar Ethics Advisory Opinion Committee, *UT Eth. Op.* 99-01, 1999 WL 4874 (January 29, 1999); Oregon State Bar Assn. Board of Governors, *OR Eth. Op.* 1998-150 (April 1, 1998). *Cf.* Florida State Bar Assn. on Professional Ethics, *Fl. Eth. Op.* 93-3 (February 1, 1994) (once receiving lawyer notifies the disclosing lawyer, "[i]t is then up to the sender to take any further action.").

[250] *Maldonado*, 225 F.R.D. at 138.

> (i) Whether the attorney knew or should have known that the material was privileged . . . .
>
> (ii) The promptness with which the attorney notifies the opposing side . . . .
>
> (iii) The extent to which the attorney reviews and digests the information . . . .
>
> (iv) The significance of the privileged information . . . .
>
> (v) The extent to which defendants are at fault for the disclosure. . . .
>
> (vi) The extent to which the nonmovant will suffer prejudice as a result of the disqualification.[251]

Having analyzed these criteria, the court held that disqualification of the plaintiff's counsel was the appropriate remedy finding that they had not adhered to the cease, notify, and return rule. The court admitted that the sanction was drastic, but said:

> In disqualification situations any doubt is to be resolved in favor of disqualification. Therefore the court finds that the appropriate remedy to mitigate the prejudicial effects of counsel's possession, review and use of the letter was the disqualification. . . .[252]

This enforcement of the attorney-client privilege serves to highlight the value of this privilege.

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[251] *Id.* at 139-141.

[252] *Id.* at 141-42.

D. The Withdrawal of Confidentiality Protections

1. The Crime-Fraud Exception[253]

a. The Relevance Post-Enron:

Given the allegations and charges in the corporate corruption cases, and in any cases where there has been lawyer involvement in advising an organization during the times that culpable conduct is alleged to have occurred, an area with an extremely high potential for disclosure of communications that were otherwise thought to have been confidential by counsel[254] is the area of the crime-fraud exception. With the criminal indictments of corporate executives and the proliferation of grand jury investigations[255] of corporations and their management, there will be efforts to demonstrate that the lawyers involved with the management and organizations gave advice which was used to commit

[253] *See also* Brian A. Foster, Terri P. Durham, and William S. Boggs, *The Crime-Fraud Exception to the Attorney-Client Privilege*, 38 FOR THE DEFENSE 27 (September 1996); Comment, *The Public Safety Exception to Solicitor – Client Privilege: Smith v. Jones*, 34 U.B.C. L. REV. 293, 302 (2000) (recognizing that in Canada there is a similar exception "when communications are criminal in themselves or are intended to obtain legal advice to facilitate criminal activities.").

[254] Because of the developments in this area and in the area of bad faith insurance and the possibility of an insurer defending on advice of counsel, it is submitted that counsel can no longer rely on communications previously believed to be privileged remaining privileged. *See* Orrin K. Ames III, *Coverage Opinions and Privileged Communications*, 47 FOR THE DEFENSE 70 (July, 2005).

[255] *See In re:* Grand Jury Proceeding #5, 401 F.3d 247, 250 (4th Cir. 2005) (citation omitted):

> Absent a compelling reason, a court may not interfere with the grand jury process . . . . A court will intervene, however, when a recognized privilege provides a legitimate ground for refusing to comply with a grand jury subpoena.

crimes or fraud. There will certainly be allegations of knowing involvement by attorneys,[256] but as will be demonstrated, even unknowing involvement by attorneys, when their advice is used to further or commit a crime or fraud, may trigger the crime-fraud exception.[257]

As will be demonstrated, creative plaintiffs' counsel are advancing the use of the doctrine in non-fraud areas such as insurance bad faith and spoliation. Furthermore, "recently federal prosecutions have taken advantage of the increased criminalization of white collar crime and regulatory offenses to invade the attorney-client privilege by asserting the crime-fraud exception."[258] Therefore, there is direct relevance of this topic to cases beyond corporate corruption scenarios.

b. The Purpose of the Crime-Fraud Exception:

The crime-fraud exception exists to "assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting

[256] *See* Bost, *supra* note 8; Julie Hilden, *supra* note 7.

[257] *See generally* Charles Allen Wright and Kenneth W. Graham, 24 FED. PRAC. & PROC. EVID. § 5501 (2005 pocket part); Christopher B. Mueller and Laird C. Kilpatrick, 2 FED. EVID. § 195 (2d ed. 2004).

[258] American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 341 (2003).

advice for the commission of a crime or fraud."[259] "The rationale for the exception is that, pursuing a crime or fraud, the client does not seek advice from an attorney in his professional capacity to facilitate the crime or fraud."[260] Therefore, it "removes the privilege from those attorney-client communications that are 'related to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.'"[261] As one court explained: "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."[262] The exception applies equally to work product protection.[263]

In the 1941 decision of *Sawyer v. Stanley*,[264] the Alabama Supreme Court provided a good description of the exception:

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[259] United States v. Zolin, 491 U.S. 554, 563 (1989).

[260] *In re* Marriage of Decker, 606 N.E.2d 1094, 1101 (Ill. 1992).

[261] United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997).

[262] Coleman v. American Broadcasting Companies, Inc., 106 F.R.D. 201, 206 (D.C. 1985).

[263] *In re* Grand Jury Proceeding #5, 401 F.3d at 250:

> [The exception] encompasses both "fact" work product and "opinion" work product. Fact work product, which consist of documents prepared by an attorney [or at the direction of an attorney] that do not contain the attorney's mental impressions, "can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship" . . . . Opinion work product, which does contain the fruit of an attorney's mental processes, is "more scrupulously protected as it represents the actual thoughts and impressions of the attorney."

But see id. at 251-253 where the court distinguished the operation of the exception as between fact and opinion work product. *See also* notes 83-85, *infra*, and accompanying text where the differences in the way the exception operates as between the attorney-client privilege and the work product doctrine are addressed.

[264] Sawyer v. Stanley, 1 So. 2d 21 (Ala. 1941).

> [s]tate and federal authorities, as well as those from England, Ireland and Canada are . . . to the effect that the great majority of the cases hold that the *privilege* "*protecting communications between attorney and client is lost if the relation is abused, as where the client seeks advice that will serve him in the commission of a fraud*."
>
> . . .
>
> [T]here is *no professional employment, properly speaking, in such cases*
>
> . . .
>
> "In order that the rule may apply, there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his advisor professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts which is the foundation of the supposed confidence does not exist. The solicitor's advice is obtained by fraud."[265]

[265] *Id.* at 26-27. *See also* ALA. R. EVID. *Rule* 502(d) (no privilege "[i]f the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit which the client knew or should have known to be a crime or fraud.")

c. The Exception in Operation:

(1) In the Federal Courts:

(a) The Eleventh Circuit's Position:

The Eleventh Circuit's decision in *In re Grand Jury Investigation, Appeal of Glen J. Schroeder, Jr.*,[266] is a seminal case regarding the crime-fraud exception. It contains the two-prong test which is used by many jurisdictions to determine if the exception will apply.

In *Schroeder*, Glen Schroeder was the target of a grand jury investigation into charges of tax evasion. Todd Kliston, an accountant and attorney who had prepared Schroeder's income tax returns for several years, was also under investigation. The grand jury subpoenaed Kliston to testify and to produce documents relating to the preparation of Schroeder's income tax returns for certain years. Schroeder intervened and moved for a protective order on the grounds that attorney-client privilege and work-product doctrine protected the information. Kliston moved for a protective order on the same grounds. After hearing arguments, the District Court ordered Kliston to answer questions regarding the preparation of the tax returns, to respond to any questions

[266] *In re* Grand Jury Investigation, Appeal of Glen J. Schroeder, Jr., 842 F.2d 1223 (11th Cir. 1987).

regarding disclosure of the sources of income told to him by Schroeder and to submit to the court for *in camera* review any documents which Kliston was uncertain about being disclosed. Schroeder appealed that order.

In addressing whether Kliston had to disclose information on which tax returns were prepared, the court addressed issues of whether underlying data and information used in the preparation of tax returns was protected by the attorney-client privilege and whether a lawyer who was preparing tax returns is treated as capable of invoking the privilege for the work done on the tax returns. Having addressed those issues, the court turned to the crime-fraud exception to the attorney-client privilege and articulated a two-part test:

> Nevertheless, any such disclosures may not be privileged because Schroeder possibly used Kliston's legal advice to effectuate tax evasion. The attorney-client privilege does not protect communications made in furtherance of a crime or fraud. . . . In deciding whether the crime-fraud exception applies to a communication between a lawyer and his clients, courts apply a two-part test. First there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was so closely related to it . . . .[267]

[267] *Id.* at 1225.

Addressing the evidentiary showing that needs to be made to satisfy the first prong, the Eleventh Circuit said:

> The first prong is satisfied by a showing of evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed. . . . That showing must have some foundation in fact, for mere allegations of criminality are insufficient to warrant application of the exception. . . . . That is not to say, however, that motions in opposition to grand jury subpoenas should turn into mini-trials. If courts always had to hear testimony and conflicting evidence on such matters, the rationale behind the prima facie standard—the promotion of speed and simplicity at the grand jury stage—would be lost. Thus a prima facie showing can be established by a good faith statement by the prosecutor as to what evidence is before the grand jury. . . . Furthermore, the district court's determination that the facts set forth by the government establish a prima facie showing of criminal or fraudulent conduct can be reversed only for an abuse of discretion. . . . .[268]

With respect to the necessary showing for the second prong, the Eleventh Circuit said:

> The second prong is satisfied by a showing that the communication is related to the criminal or fraudulent activity established under the first prong. Courts have enunciated slightly different formulations for the degree of relatedness necessary to meet the standard. . . . Nonetheless, the different formulations share a common purpose—identifying communications that should not be privileged because they were used to further a crime or a fraud. Furthermore, the determination of whether the

[268] *Id.* at 1226-27. *See also In re Grand Jury Proceedings #5*, 401 F.3d at 251 ("Prong one of this test is satisfied by a prima facie showing of evidence that, if believed by the trier of fact, would establish the elements of some violation that was ongoing or about to be committed."); Haines v. Liggett Group, Inc., 975 F.2d 81, 95-96 (3d Cir. 1992); *In re* Sealed Case II, 754 F.2d 395, 399-403 (D.C. Cir. 1985).

> requested material is sufficiently related to the investigation must take into account that the government does not know precisely what the material will reveal or how useful it will be. . . .[269]

In *Schroeder*, the court said that the first prong of the test was satisfied through the government's submission of a summary of the evidence[270] and the submission of an IRS Special Agent's summary of the testimony that Schroeder provided in an interrogation by that agent.

The court felt that those submissions[271] were enough to make a prima facie showing of tax fraud. Addressing the second prong of the analysis, the court, however, acknowledged that whether Kliston's advice was related to Schroeder's failure to report income was less certain. The court indicated that the record did not contain the matters on which Kliston had provided Schroeder legal advice. In describing the legal advice element, the court said:

> [T]he requirement that legal advice must be related to the client's criminal or fraudulent conduct should not be interpreted restrictively. Thus any

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[269] In re Grand Jury Investigation, Appeal of Glen J. Schroeder, Inc., 842 F.2d at 1227. *See also In re: Grand Jury Proceedings #5*, 401 F.3d at 251 ("Prong two may be satisfied with a showing of a close relationship between the attorney-client communication and the possible or fraudulent activity.").

[270] However, "the necessary secrecy of the grand jury process prevents the party asserting the privilege from viewing the government's *in camera* evidence . . . ." *In re: Grand Jury Proceedings #5*, 401 F.3d at 251, n.2.

[271] *Schroeder*, therefore, involved a non-document proffer.

> legal assistance Schroeder received in generating income he did not intend to report must be treated as related to his tax evasion. Likewise, any assistance Schroeder received in disposing of income he did not report is related to his tax evasion. There is no suggestion that Kliston provided any legal assistance outside of those categories. We observe further that Kliston need not have been aware that he was assisting Schroeder in evading taxes in order for the crime-fraud exception to apply. . . . Therefore, we hold that any legal assistance Kliston may have provided Schroeder in generating income or in disposing of income was related to Schroeder's failure to report income.[272]

From the standpoint of the practicing bar, this broad sweep of the exception into areas where the lawyer's advice was used by the client to commit or further a crime or a fraud and the lawyer was not aware how the advice was being used poses great concern for the lawyer advising in good faith. However, from a practical point of view, it is difficult to conceive of many situations where lawyers would not have some suspicion of what was actually happening.

(2) <u>The Unsettled Views on the Evidentiary Requirements For a Prima Facie Case</u>.

Even today, courts are not in agreement as to what is necessary to make out a prima facie case.[273] The following are examples of how some counts have treated this issue.

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[272] *Id.* at 1227.

[273] *See* Jefferson M. Gray, *Practice Tips a Defense Lawyer's Nightmare: Litigating the Crime-Fraud*

(a) Federal Examples:[274]

(i) The D. C. Circuit's Position:

With respect to the quantum of evidence that must be shown to satisfy the first prong of the analysis and to make out a prima facie case, in contrast to the Eleventh Circuit's position that all that was required was a showing that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or was about to be committed, the D.C. Circuit in *In re Sealed Case*[275] held that the prima facie case is shown if a party "offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud."[276] However, in 1985, in *In re Sealed Case*,[277] the D. C. Circuit held that, with respect to the first step in the two-step process, a party has to make out a prima facie showing by showing a "violation *sufficiently serious* to defeat the privilege. . . ."[278] Whether that court's placing of some quantum value on the nature of the alleged crime or fraud before there will be a situation

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Exception, 8 BUS. CRIMES L. REPORT 1 (2002).

[274] *See generally In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (sets out various standards used by various federal courts).

[275] 107 F.3d 46 (D.C. Cir. 1997).

[276] *Id.* at 50.

[277] *In re* Sealed Case, 754 F.2d 395 (D.C. Cir. 1985).

[278] *In re* Sealed Case, 754 F.2d at 399 (emphasis added). *See also In re* Grand Jury Proceedings, Appeal of the Corporation, 87 F.3d 377, 380 (9th Cir. 1996).

serious enough to warrant disclosure, is still the position of the D. C. Circuit is debatable in light of the more recent decision not containing such language.

(ii) The Ninth Circuit's Position:

In *In re Grand Jury Proceedings, Appeal of the Corporation*,[279] the Ninth Circuit set out its requirement to demonstrate the exception:

> To trigger the crime-fraud exception, the government must establish that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme. . . The government is not obligated to come forward with proof sufficient to establish the essential elements of a crime or fraud beyond a reasonable doubt. . . Since the crime-fraud exception does not require a *completed* crime or fraud but only that the client have consulted an attorney in an *effort* to complete one. . . . On the other hand, it isn't enough for the government really to allege that it has a sneaking suspicion the client was engaged or intending to engage in a crime or fraud when it consulted the attorney. A threshold that low could discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas. Rather, the district court must find "reasonable cause to believe" that the attorney's services were utilized in furtherance of the ongoing unlawful scheme. . . .
>
> As we have previously said, for the crime-fraud exception to apply, "the attorney need not himself be aware of the illegality involved; it is enough that the communication furthered, or was intended by the client to further, that illegality." . . . Inasmuch as today's attorney-client privilege exists for the benefit of the client, not the attorney, it is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need know nothing about the client's ongoing or planned illicit activity for the exception to apply. It is

[279] 87 F.3d 377 (9th Cir. 1996).

> therefore irrelevant, for purposes of determining whether the communications here were made "in furtherance of" corporation's criminal activity that [the attorneys] may have been in the dark about the details of that activity."[280]

In spite of this, the Ninth Circuit has coupled its reasonable cause requirement with a rather lenient caveat. In *In re Grand Jury Subpoena 92-1 (SJ)*,[281] the Ninth Circuit described the burden as "relatively minimal."[282] This internal tension makes it very difficult for litigators to determine what they need to present, to predict the court's ultimate position, and to intelligently advise their clients.

(iii) The Second Circuit's Position:

The Second Circuit recognizes the viability of a two-pronged approach, but it has a more restrictive approach to what it takes to satisfy the second prong of its test. Both prongs are established by first demonstrating a factual basis for "probable cause to believe that a fraud or crime has been committed"[283] and second "that the communica-

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[280] *Id.* at 381-382.

[281] 52 31 F.3d 860 (9th Cir. 1994).

[282] *Id.* at 870.

[283] United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997).

tions in question were in furtherance of contemplated criminal or fraudulent conduct."[284] In the Second Circuit, probable cause in this context means "a factual basis that will strike a prudent person as constituting a factual basis to suspect the perpetration or attempted perpetration of a crime or a fraud, and that the communications were in furtherance thereof."[285]

With respect to documents that are the subject of inquiry, however, the Second Circuit imposes a rather strict test. The Second Circuit will not allow a document that is simply relevant, i.e., one that "might provide evidence of a crime or fraud,"[286] to satisfy the second prong and demonstrate that the communications were in furtherance of the crime or fraud. Instead, the Second Circuit's more stringent requirement is that "there be (i) a determination that the client communication was *itself* in furtherance of the crime or fraud and (ii) probable cause to believe that the particular communication with counsel on attorney work product was *intended* in some way to facilitate or conceal the criminal activity."[287]

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[284] *Id.*

[285] *Id. See also* Renner v. Chase Manhattan Bank, 2001 WL 1356192 (S.D.N.Y. November 1, 2001) (not reported in F. Supp. 2d). *See also In re* Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1986); *In re* Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995).

[286] *Id.*

[287] *Id.*

(b) Some State Examples:

(i) Wisconsin's Lenient Position:

In *Lane v. Sharp Packaging Systems, Inc.*,[288] the Wisconsin Supreme Court, echoing the Ninth Circuit's "reasonable cause"[289] approach, also backed off, but, rather than increase the burden by focusing on the nature of the crime or fraud, it adopted a more lenient approach by its description of the ultimate burden. There the court, while recognizing that a mere allegation of fraud was insufficient, held that "the burden [was nevertheless] low in that '[t]o drive the privilege away, there must be' something to give color to the charge."[290]

[288] 640 N.W.2d 788 (Wisc. 2002). This decision is also a very important decision addressing who, in an organizational setting, has the power to waive an organization's privilege. *See also* Commodity Futures Trading Commission v. Weintraub, 476 U.S. 343 (1985); United States of America v. Tei Fu Chan: The Sunrider Corporation, 99 F.3d 1495 (9th Cir. 1996) (former comptroller could not waive the privilege); Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 683 (S.D. Va. 1987) (marketing director could waive); Milroy v. Hanson, 875 F. Supp. 646 (D. Neb. 1995) (dissident director not allowed to waive); Kirby v. Kirby, 1987 WL 14862 (Del. Ch. July 29, 1987) (joint client theory used); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) (fiduciary exception).

[289] *Id.* at 807.

[290] *Id.* In articulating such a low burden, however, the court's language was ambiguous as to whether the lower standard applied to whether the court had to conduct an *in camera* review or whether that was the burden for a prima facie case. *See id.* at 807-08.

(ii) The Exception as Addressed in the Exxon[291] Decision in Alabama:

On December 20, 2002, the Alabama Supreme Court decided the case of *Exxon Corporation v. Department of Conservation and Natural Resources*.[292] It is an instructive case not just for Alabama lawyers, but as to the crime-fraud exception in general. The case involved the reversal of a multibillion dollar judgment given to the State of Alabama against Exxon.[293]

The case was reversed because of the inappropriate admission of a letter written by Charles Broome, an in-house counsel for Exxon.[294] The letter was a legal opinion by Broome, prepared at the request of Exxon's accounting manager to ensure that royalties

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[291] Exxon Corporation v. Department of Conservation and Natural Resources, 859 So. 2d 1096 (Ala. 2002). The trial court's verdict was reversed and remanded. After remand, the case was retried resulting in another multi-billion dollar ($3.5) verdict. For a comment on the *Exxon* case and varying assessments of its significance, *see* David S. Casey, *Unjustifiable business*, MOBILE REGISTER, April 25, 2004 at 1D. Mr. Casey, who is the president of A.T.L.A., criticizes the reactions of the U. S. Chamber of Commerce and other critics of the decision who found fault with Alabama jurors and the state's legal system and not the corporate conduct that produced a huge punitive damages verdict. *See also* John K. Villa, *Corporate Attorney-Client Privilege: Alive and Well in Alabama*, 21 ACCA DOCKET 94 (March 2003) (comments on the *Exxon* litigation from a lawyer who wrote an amicus brief for the American Corporate Counsel Association). For a treatment of the case from a Canadian perspective, *see* Ken B. Mills, *Privilege and the In-House Counsel*, 41 ALBERTA L. REV. 79, 96 (2003).

[292] 859 So. 2d 1096 (Ala. 2002).

[293] The second verdict is now on appeal to the Alabama Supreme Court. Regarding that second verdict, *see* Phillip Rawls, *State asks court to uphold record ExxonMobil judgment*, MOBILE REGISTER, July 2, 2005 at 2B ("The state government asked the Alabama Supreme Court to uphold a record $3.5 billion judgment against ExxonMobil, contending that the oil company had a 'secret scheme to cheat the state out of its bargained-for royalties.'").

[294] The case was retried without the letter.

being paid to the State by Exxon for drilling being done at Exxon's Mobile Bay project were correct. Broome was asked to review the lease and the royalty provisions. Broome did so and "offered three different interpretations of the lease language concerning the payment of royalties, along with the likelihood of success of each interpretation in litigation."[295] Broome's analysis was then used by Exxon which "adopted an interpretation of the lease and began paying . . . royalties based upon that interpretation . . ."[296]

The State then audited the payments and demanded royalties that it deemed were due. Exxon refused to pay and brought a declaratory judgment action "to determine the rights of the parties under the lease agreement."[297] Eventually the State counterclaimed for breach of contract and fraud. Exxon maintained that there was simply a disagreement over contract interpretation, but the State advocated a sinister picture of fraud in Exxon's choice of lease constructions and the way that they dealt with the State.

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[295] *Exxon*, 859 So. 2d at 1100.

[296] *Id.* One of the issues in the case was whether the letter having been routed to a number of people lost its privileged status. The court held that it did not. *See also* Strougo v. Bea Associates, 199 F.R.D. 515, 520 (S.D.N.Y. 2001) ("[T]he distribution within a corporation of legal advice received from its counsel does not, by itself, vitiate the privilege."); Bart Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995) ("Since the decision-making power of the corporate client may be diffused among several employees, the determination of confidential communications to such persons does not defeat the privilege.").

[297] *Id.*

Broome's letter was admitted into evidence and that admission resulted in the Alabama Supreme Court's consideration of a number of attorney-client privilege issues. One issue was the State's argument that the letter was admissible because of the crime-fraud exception based on the State's position that that letter "'was instrumental in informing, guiding, and thereby furthering Exxon's fraud.'"[298]

Addressing that position, the Alabama Supreme Court cited both the Eleventh and Ninth Circuits in imposing what the court felt was a more stringent test for the application of the exception than was being advocated by the State. The State simply advocated that the crime fraud exception should apply when the attorney-client privilege communication was "'instrumental in informing, guiding, and thereby furthering'" a fraud.[299]

Rejecting that approach, the Alabama Supreme Court cited the Eleventh and Ninth Circuits, but seemed to favor language in the Ninth Circuit stating that the Ninth Circuit had emphasized that it was not enough for a party merely to allege,

> 'that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney. A threshold that low could discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas. Rather, [a] district court

[298] *Id.* at 1107.

[299] *Id.*

> must find 'reasonable cause to believe' that the attorney's services were 'utilized . . . in furtherance of the ongoing unlawful scheme.'[300]

Therefore, before the crime fraud exception will apply in Alabama, the Alabama Supreme Court appears to require the same type of "reasonable cause" threshold showing as required in the Ninth Circuit that the party was engaged in a fraud or that the attorney's advice was sought to further a scheme or fraud. This reasonable cause burden would appear to require a more persuasive quantum of evidence as the linkage of the attorney's advice to an ongoing or contemplated fraudulent scheme. However, as will be discussed, although descriptive language of an evidentiary burden might be used by the courts, it is difficult to really know, from a trial perspective, what that burden is.[301]

Justice Johnstone's dissent is worth reading because he rendered a scathing opinion concerning Exxon's in-house counsel. For all intents and purposes, Justice Johnstone accused Broome of being part of the scheme. He said that, included in the

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[300] *Id.* at 1107 citing *In re* Grand Jury Proceedings, 87 F.3d at 381 quoting *In re* Grand Jury Proceedings, 867 F.2d at 541 (9th Cir. 1989). *See also In re* Bank America Corp. Securities Lit. (MDL No. 1264) 270 F.3d 639, 644 (8th Cir. 2001) (citations omitted):

> "The attorney-client privilege is strongest where a client seeks counsel's advice to determine the legality of conduct before taking action." . . . . Therefore, the crime-fraud exception does not apply when a publicly held company seeks legal advice concerning its disclosure obligations and then commits an *unintentional* disclosure violation. To be sure, a client may seek legal advice in furtherance of intentional securities law fraud, and the crime-fraud exception will then apply. But it is not enough to show that an attorney's advice was sought before a decision was made not to disclose information that is alleged, as a matter of hindsight, to have been material.

[301] *See* discussion, *infra*.

crime-fraud exception, is an attorney's communication "which is itself a part of a plan to commit a fraud."[302] With that premise, Justice Johnstone addressed what he described as the more extreme construction addressed in Broome's letter and the construction placed upon the lease in question by Broome which Justice Johnstone said,

> flouts the express provision of the lease, flouts the limits and caveats of the three prior legal-analysis letters, and even flouts the caveat in Broome's very own letter, in the paragraph headed "The Shell Approach," stating, "I am not able to find much support for extending [a particular deduction provision in the lease] to treating operations."[303]

Justice Johnstone then reviewed the documents and expressed this conclusion that Exxon was "ready and willing to take advantage of the inexperienced staff at the Department of Conservation and Natural Resources"[304] and observed that, with respect to Broome's letter and the paragraph in question:

> This paragraph and the "more extreme construction" paragraph, in the context of the text of the lease, the prior legal-analysis letters, and the corporate mindset of Exxon, constitute an invitation for Exxon to take deductions that cannot possibly be legitimately reconciled with the

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[302] *Exxon*, 859 So. 2d at 1111. *See also* United States v. Zolin, 491 U.S. 554 (1989) (Court allowed the proof of the crime or fraud to be met by the documents themselves that were alleged to be part of the fraud); *In re* Grand Jury Proceedings, Thursday Special Grand Jury September Term, 1991, 33 F.3d 342, 350 (1994)).

[303] *Exxon*, 859 So. 2d at 1112.

[304] *Id.*

> provision of the lease; Exxon did, in fact, take millions of dollars in such deductions.[305]

Focusing directly on Broome's letter and contrasting it with legitimate attorney advice, Justice Johnstone said:

> In the case now before us, however, Broome's advice to Exxon is not "part of the professional business of an attorney." . . . Therefore, it is not within the ambit of the privilege.
>
> [T]he Broome letter also supports the equal and not inconsistent inference that Broome was an enthusiastic team player tempting a team that would appreciate the temptation to break the rules to gain some yardage. This latter inference justifies the decisions by the trial court first to permit discovery of the Broome letter and second to admit it into evidence.[306]

Justice Johnstone's views of, and comments about, the letter, the mind set of Exxon, the "team player" nature of the letter and the advice, are scathingly critical of the involvement of counsel. He, apparently, saw the dynamics of the relationship much differently from the rest of the court and he drew what he candidly admitted were inferences. Nevertheless, the world as he saw it was rather sinister and supported the State's theme of fraud. His perception was that Exxon's in-house counsel had insinuated himself into the fraud by giving the advice that he gave.

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[305] *Id.*

[306] *Id.* at 1113.

(3) The Common Element of Timing:

An essential for the crime-fraud exception to apply is the timing of the advice sought by the client. The crime-fraud exception will not apply if the advice being sought relates to past activity. That is typical advice. That is true even if there have been past crimes. The distinction, however, lies in the fact that, as contrasted with advice on past activity, the crime-fraud exception will apply if advice is being sought for future or ongoing crimes and frauds. Therefore, with respect to the crime-fraud exception, the timing of the communication is a central issue.[307]

d. The Application of the Exception to the Work Product Doctrine:

Courts may differentiate how they handle the exception depending on whether the attorney-client privilege or work product are involved. Even then, there may be a differentiation between opinion and fact work product.

[307] Along these lines, it is worth noting that there is a developing body of law holding lawyers liable on an aiding and abetting concept for the breach of a fiduciary duty by a client. The courts distinguish this from malpractice claims and recognize it as a separate basis of liability even though the lawyer owed no independent duty to the third party to whom his client owed the fiduciary duty. *See* Anstine v. Alexander, 2005 WL 963503 (Colo. App. April 21, 2005; GCM, Inc. v. Kentucky Central Life Ins. Co., 947 P.2d 143 (N.M. 1997); Future Group, II v. Nationsbank, 478 S.E.2d 45 (S.C. 1996); Bryan C. Barksdale, *Redefining Obligations in Close Corporation Fiduciary Representation: Attorney Liability For Aiding and Abetting the Breach of Fiduciary Duty in Squeeze-Outs*, 58 WASH. & LEE L. REV. 551 (2001).

However the courts handle it, it is clear that the crime-fraud exception also applies to the work product doctrine.[308] In *In re: Grand Jury Proceedings #5*,[309] the Fourth Circuit, which follows the Eleventh Circuit's approach with the attorney-client privilege, addressed a crucial distinction between the operation of the exception with the attorney-client privilege and with attorney opinion work product:

> [B]ecause the attorney, as well as the client, has the right to assert the opinion work product privilege, a prima facie case of crime or fraud must also be made out against the attorney for the exception to apply . . . Thus while the attorney-client privilege may be vitiated without showing that the attorney knew of the fraud or crime, those seeking to overcome the opinion work product privilege must make a prima facie showing that the "attorney in question was aware of or a knowing participant in the criminal conduct . . . If the attorney was not aware of the criminal conduct, a court must redact any portions of subpoenaed materials containing opinion work product . . . ."[310]

With respect to fact, not attorney, work product, however, there is a difference. In contrast to attorney work product, there can be disclosure of fact work product when the attorney is not aware of the crime or fraud.[311]

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[308] *In re* Grand Jury Proceeding (FMC Corp.), 604 F.2d 798 (3d Cir. 1979). *See also* Deborah F. Buckman, *Crime-Fraud Exception to Work Product Privilege in Federal Courts*, 178 A.L.R. FED. 87 (2005).

[309] 401 F.3d 247 (4th Cir. 2005).

[310] *Id.* 251-252 (citations omitted).

[311] *Id.* at 252 ("We thus use similar standards when applying the crime-fraud exception to attorney-client and fact work product privileges.: *Id.* at 252-53).

e. The Developing Law Regarding *In Camera* Hearings:

(1) The Zolin Case:

The United States Supreme Court's decision in *United States v. Zolin*,[312] deserves to be given special attention. It was one of the latest opportunities that the Court took to address the crime-fraud exception. In so doing, it held that it was not going to address the "quantum of proof necessary . . . to establish the applicability of the crime-fraud exception."[313] The Court did, however, take the opportunity to address other aspects of the evidentiary issues with respect to the crime-fraud exception, i.e., what type of evidence does one have to introduce to trigger the crime-fraud exception and the standard for an *in camera* review of documents.

This issue relating to the type of evidence was addressed because some circuits had held that documents which would have otherwise been demonstrative of the crime or fraud and the attorney's linkage with it, were not admissible and could not be used to meet the threshold burdens and that the exception had to be proven by evidence independent of the documents.[314] That view required that, whatever burden of persuasion

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[312] United States v. Zolin, 491 U.S. 554 (1989).

[313] *Id.* at 563.

[314] *Id.* at 556. *See also* Renner v. Chase Manhattan Bank, 2001 WL 1356192 at *12 (S.D.N.Y. November

was going to be used in any particular situation to invoke the crime-fraud exception, had to be demonstrated by evidence that was independent of the documents that were evidence of the crime or fraud.[315] In *Zolin*, therefore, the Court addressed whether such documents could be used to prove the predicate crime or fraud and the linkage to the attorney's advice; whether *in camera* reviews of such documents could be used to demonstrate the prima facie case for the applicability of the crime-fraud exception; and if so, what standard was to be used to determine if an *in camera* review would be granted by a district court.

Obviously, either side, or both sides of the dispute, may have some interest in an *in camera* review. The party wanting to prove the crime or fraud would have some interest in showing the court the precise documents that it contends is demonstrated by the predicate crime or fraud. On the other hand, a party wanting to demonstrate the neutrality of the documents and their lack of probative value would have an interest in the court reviewing them *before* a burdensome *in camera* review *before* ordering production is crucially important.

2, 2001) (not reported in F. Supp. 2d) ("I must consider first whether the record evidence independent of the communications asserted to be privileged furnishes probable cause." . . .); United States v. Shewfelt, 455 F.2d 836, 840 (9th Cir.), *cert. denied*, 406 U.S. 944, 32 L.Ed.2d 331, 92, S. Ct. 2042 (1972).

[315] *Zolin*, 491 U.S. at 556.

In exploring those concerns, the Court addressed and answered three primary evidentiary questions. In so doing it gave some guidance as to how, mechanically, counsel could get evidence before a court for a court to make its determination about whether a prima facie case had been shown. The Court held as follows:

> [W]e conclude that a rigid independent evidence requirement does not comport with "reason and experience," . . . and we decline to adopt it as part of the developing federal common law of evidentiary privileges. We hold that *in camera* review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. We further hold, however, that before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support *a reasonable belief that in camera review may yield evidence that establishes the exception's applicability*. Finally, we hold that the threshold showing to obtain *in camera* may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.[316]

The Supreme Court, therefore, sanctioned a District Court's ability to determine the applicability of the crime-fraud exception by a review of the documents which themselves establish the exception, or negate it. That, however, was viewed by the Court

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[316] Id. at 574-575 (emphasis added). *See also* Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1984):

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.
>
> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.

as a possible first step because it clearly recognized that there were two phases of the *in camera* process. One is convincing a trial court that the *in camera* review is necessary. The second is convincing the trial court to override the privilege. It expressed this by differentiating the two burdens. It held that "a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege."[317] That, however, is as far as the Court went. For a litigator translating that "guidance" into a realistic evaluation of the status of his or her evidence is no easy task.

While the Supreme Court addressed the question of the burden that must be met to invoke the court's *in camera* review power, it still left unresolved, how much evidence is required to demonstrate the prima facie case in order to overcome the privilege. Whether one uses the D. C. Circuit's prima facie case definition or the Second Circuit's probable cause definition, there is no consensus of opinion as to how much evidence, or what quality of evidence, is required to demonstrate the applicability of the exception.

While acknowledging the availability of *in camera* reviews, *Zolin* still evidences the Court's cautionary stance regarding their use and it does not *require* a District Court to conduct such reviews before ordering production.[318] The Supreme Court's caution in *Zolin*, however, is not accepted by all courts.

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[317] *Zolin*, 491 U.S. at 571.

[318] *See* the recognition of that in *In re* BankAmerica Corp. Securities Lit., (MDL. No. 1264) 270 F.3d 639,

The Eighth Circuit articulated that perspective in *In re BankAmerica Corp.*[319]:

> Requiring a threshold showing of facts supporting the crime-fraud exception followed by an *in camera* review of the privileged materials helps ensure that legitimate communications by corporations seeking legal advice . . . are not deterred by the risk of compelled disclosure under the crime-fraud exception. Therefore, district courts should be highly reluctant to order disclosure without conducting an *in camera* review of allegedly privileged materials.[320]

Therefore, although potentially burdensome, *In re: BankAmerica* suggests that, while not necessarily the rule, *in camera* inspections should not be the exception. In taking that position, the Eighth Circuit articulates a stance that is highly protective of the attorney-client privilege by recognizing that *in camera* inspections help prevent unwarranted disclosures that might occur without the Courts' actual scrutiny of the matters in question. In point of fact, the court in *Bank America* saw such a value in *in camera* reviews that it observed that it had "found no case in which [it] affirmed an order to produce documents under the crime-fraud exception where the district court did not first review the documents *in camera*."[321]

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644 (8th Cir. 2001).

[319] 270 F.3d 639 (8th Cir. 2001).

[320] *Id.* at 644.

[321] *Id.*

(2) Non-Document Proffers:

Recognizing that non-document proffers like the one in *Schroeder*[322] were alright, the Fourth Circuit in *In re: Grand Jury Proceedings #5*,[323] distinguished the *Zolin* case based on document and non-document proffers. It held that *Zolin* dealt with the situation where there is an *in camera* examination of the "actual documents for which privilege is claimed."[324] It said that, in such a situation, *Zolin* governs and the party arguing for the exception has to first make a "threshold showing that the documents [themselves] could potentially demonstrate the existence of the crime or fraud before an *in camera* hearing could occur."[325] The Fourth Circuit observed that once the showing was made, the District Court "can review the allegedly privileged documents *in camera* to assist the court in determining if the government has presented a prima facie case that the crime-fraud exception should apply."[326]

In contrast, the Fourth Circuit said that the *Zolin* decision did not speak to situations "in which a judge examines evidence from the opponent of the privilege,

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[322] *In re* Grand Jury Investigation, Appeal of Glen J. Schroeder, Jr., 842 F.2d 1223 (11th Cir. 1987).

[323] 401 F.3d 247 (4th Cir. 2005).

[324] *Id.* at 253 citing *Zolin*, 491 U. S. at 532.

[325] *In re Grand Jury*, 401 F.3d at 253.

[326] *Id.* at 257.

usually the government, *ex parte* and *in camera* without examining the allegedly privileged documents themselves."[327] In such a situation where there is a reliable government proffer independent of information, the court said that the government still had to make a prima facie case demonstrating that the crime-fraud exception applies, but it rejected the proposition that the government must meet some initial burden to obtain an *in camera* hearing involving that type of evidence alone.[328]

Therefore, in contrast to the Eighth Circuit's approach which is to put a paramount importance on the use of *in camera* inspections of the actual documents, the Fourth Circuit is content to allow a District Judge to order production based solely *in camera* reviews of the opposing parties' submissions, even when the privilege holder had not seen the government's submissions without ever reviewing the actual documents in question.[329] In recognizing that leeway to the District Courts, it said that it is "within [the Court's] discretion to determine whether it [is] necessary to review the actual documents."[330] In such cases, the Fourth Circuit does not hold the party seeking the information to such a high standard with non-document proffers. The court felt that, under those circumstances, the government is "not required to demonstrate an adequate

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[327] *Id.*

[328] *Id.*

[329] *Id.* at 253.

[330] *Id.*

factual basis for support of the crime fraud exception to obtain the *in camera* review as it has to do in a *Zolin*-document case.[331]

In this particular case, however, the court found that the District Court could not have been satisfied as to prong two of the government's burden because it "could not have concluded that any sort of relationship [existed] between the allegedly privileged documents and the alleged crime because it was presented with no evidence of the contents of the documents."[332] It had no summaries of the contents of the documents and, therefore, had "no basis on which to conclude [that] documents [were] connected to the crime or fraud.[333] Therefore, while the Fourth Circuit did not require an actual review of the documents, it held that a court must have some reliable indication of the contents of the documents to meet the *linkage* requirement of the second prong of a party's burden.

The importance of this decision becomes clear when a court rules that the exception applies. The Fourth Circuit's position eliminated the argument that, with non-document proffers, a District Court has to actually review documents. However, it did recognize that, in contrast to its position, at least two circuits have found that a District

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[331] *Id.*

[332] *Id.* at 255.

[333] *Id.*

Court *must* actually review the allegedly privileged documents *in camera* before determining whether the crime fraud exception applies.[334]

f. Revisiting the Unsettled Question of the Evidentiary Burden: The Unique Concept of Prima Facie Showing After Zolin:

In *Zolin*, the Supreme Court unfortunately did not address or clarify the evidentiary showing required to defeat the privilege. Specifically, the court said that it "need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception."[335] Furthermore, in articulating its prima facie showing standard, the Supreme Court utilized the prima facie concept in a unique way in the crime-fraud exception setting. In a regular evidentiary setting, the prima facie showing concept ordinarily shifts the burden to the opposing side and allows the opposing party some type of rebuttal capacity.[336]

With the crime-fraud exception, however, the prima facie standard in *Zolin* is used to vitiate the privilege without allowing the other side the opportunity to rebut.[337]

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[334] *Id.* at 253 n.5, citing *In re* Bank America, 270 F.3d at 645 and *In re* Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986).

[335] *Zolin*, 491 U. S. at 563.

[336] *See* Comment, *The Crime or Fraud Exception to the Attorney-Client Privilege: Marc Rich and the 2d Circuit*, 51 BROOK. L. REV. 913, 918-19 (1985).

[337] *Zolin*, 491 U. S. at 565.

The Supreme Court in *Zolin* acknowledged this dilemma, but did not resolve the inconsistency between the normal operation of a prima facie case burden of persuasion and its operation in the context of the crime-fraud exception.[338]

The operation of the prima facie burden concept in *Zolin* becomes highly problematic when combined with the necessity to maintain grand jury secrecy. This is demonstrated by the Fourth Circuit's handling of same issues in *In re Grand Jury Proceedings Thursday Special Grand Jury September Term, 1991*.[339] In that case, the government made an *in camera ex parte* submission to the trial court of certain grand jury matters. The trial court reviewed that submission without conducting an *in camera* review of the actual documents alleged to be part of the crime. Based on that review, it held that the prima facie showing to vitiate the privilege had been met. The issue on appeal was whether the use of the *ex parte* submission could be a sufficient basis, without an *in camera* review of the documents themselves, to conclude that the exception had been shown, and whether this procedure complied with the Supreme Court's guidance

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[338] *Id.* (citations omitted):

> We note . . . that this Court's use in Clark v. United States of the phrase "prima facie case" to describe the showing needed to defeat the privilege has caused some confusion. . . . In using the phrase in Clark, the Court was aware of scholarly controversy concerning the role of the judge in the decision of such preliminary questions of fact. The quantum of proof needed to establish admissibility was then, and remains, subject to question. . . . In light of the narrow question presented here for review, this case is not the proper occasion to visit these questions.

[339] 33 F. 3d 342 (4th Cir. 1994).

that before engaging in an *in camera* review of documents that are alleged to be privileged, the court should require the side seeking the documents to show "'a factual basis adequate to support a given fact belief by a reasonable person,' . . . that in camera review . . . may reveal evidence to establish the claim that the crime-fraud exception applies."[340]

The Fourth Circuit differentiated the required showing before the actual documents are reviewed in camera from an *in camera ex parte* submission not asking for a review of the documents, but proffering other bases for the vitiation of the privilege, such as in that case, where the government simply proffered, in camera, a "submission consisting of testimony presented to the grand jury."[341] The objecting party submitted in opposition, summaries of the requested documents.[342]

The Fourth Circuit said that the Supreme Court's articulation of the above standard for *in camera* reviews of documents did not apply when the documents were not actually reviewed.[343] It, therefore, held that the question was whether the use of such an

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[340] *Zolin*, 491 U.S. at 572.

[341] *In re Grand Jury Proceedings*, 33 F.3d at 350.

[342] *Id.*

[343] *In re Grand Jury Proceedings*, 33 F.3d at 350:

> *Zolin* established the threshold showing required prior to a court's *in camera* review of allegedly privileged documents. *Zolin* did not provide a general rule applicable to all

ex parte procedure was permitted. The court held that it was, even when, because of the need to maintain grand jury secrecy, the party asserting the privilege does not have access to the government's submission and, therefore, cannot advance an informed rebuttal.[344]

The Federal courts were, therefore, left to develop their own standards for a sufficient showing to trigger the crime-fraud exception. The approaches of some of the courts in response to this situation, have been discussed earlier in this article.

g. Expansion of the Exception to Torts Beyond Fraud, to Include Insurance Bad Faith and Spoliation:

(1) The recognition of a broad civil tort applicability:

Some courts have expanded the exception to a broad area of other civil torts. In *Coleman v. American Broadcasting Companies, Inc.*,[345] the court, although not expanding the exception in that case for other reasons, set out various cases and rationale where the

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in camera reviews of any materials submitted by the parties.

[344] *Id.* at 351-354.

[345] Coleman v. American Broadcasting Companies, Inc., 106 F.R.D. 201 (D.C. 1985).

exception has been extended to business torts,[346] non-business torts,[347] and to other conduct beyond crimes and fraud.[348]

In *Central Construction Company v. The Home Indemnity Company*,[349] which had a bad faith claim in it, the Supreme Court of Alaska gave the exception a very expensive sphere of operation. There the court said:

> [W]e decline to accept Home's argument that "crime or fraud" should be narrowly defined, and hold that services sought by a client from an attorney in aid of any crime or a *bad faith breach of a duty* are not protected by the attorney-client privilege. . . . "'Acts constituting fraud are as broad and as varied as the human mind can invent. Deception and deceit in any form universally connote fraud. Public policy demands that the "fraud" exception to the attorney-client privilege . . . be given the broadest interpretation.'"[350]

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[346] *Id.* at 208, n. 12.

[347] *Id.* at 208, n. 12 citing Diamond v. Stratton, 95 F.R.D. 203 (S.D.N.Y. 1982) (intentional infliction of emotional distress.).

[348] *Coleman*, 106 F.R.D. at 208 citing *In re* Sealed Cases, 636 F.2d 793, 812 ("other types of misconduct fundamentally inconsistent with the basic premises of the adversary system.").

[349] Central Construction Co. v. The Home Indemnity Co., 794 P.2d 595 (Alaska 199).

[350] *Id.* at 598. *See also In re* Sealed Case, 754 F.2d 395, 399 (D.C.C. 1985) ("crime, fraud, or other misconduct."); Laybold-Heraeus Technologies, Inc. v. Midwest Instrument Co., 118 F.R.D. 609, 615 (E.D. Wisc. 1987) (applies to business torts such as antitrust violations); Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982) (intentional and reckless inflection of mental anguish). *But cf.* Motley v. Marathon Oil Co., 71 F.3d 1547, 1552 (10th Cir. 1995) (does not extend to general tortious conduct).

(2) Insurance Bad Faith and the Crime-Fraud Exception:

In bad faith cases, insureds have sometimes succeeded in arguing that bad faith amounts to fraud and have obtained attorneys' files under the crime-fraud exception.[351] In the case of *Escalante v. Sentry Insurance*,[352] the Washington Court of Appeals recognized that the exception had been utilized in several insurance bad faith decisions outside of that state "based on the recognition that attorney-client communications should not be protected when they pertain to ongoing or future fraudulent conduct by the insurer. *See e.g. United Services Auto Ass'n v. Worley*, 526 P.2d 28 (Alaska 1974); *In re Bergeson*, 112 F.R.D. 692 D. Mont. 1986); *Silva v. Fire Ins. Exchange*, 112 F.R.D. 699 (D. Mont. 1986)."[353]

The *Escalante* court also addressed the threshold showing required for a court's examination of the sought after privileged material. The court said that an *in camera* inspection was a matter of court discretion "requiring a factual showing 'adequate to

[351] *See* United Services Automobile Ass'n v. Werley, 526 P.2d 28 (Alaska 1974). *See also* Central Const. Co. v. Home Indemnity, 794 P.2d 595 (Alaska 1990); Escalante v. Sentry Ins., 743 P.2d 832, at 842-43 (Wash. App. 1987). *See also* Steven Plitt, *supra* note 166; Donna Gooden Payne, *supra* note 166.

[352] 743 P.2d 832 (Wash. App. 1987).

[353] *Id.* at 842.

support a good faith belief by a reasonable person that wrongful conduct sufficient to involve the . . . fraud exception . . . has occurred.'"[354]

The court further addressed its description of the burden of persuasion to penetrate the privilege once the *in camera* hearing was held. The court said that there had to be a "foundation in fact for the charge of civil fraud."[355]

In a very well analyzed decision, the Connecticut Supreme Court demonstrated an analysis that moved through the contentions of a bad faith plaintiff that at-issue waiver applied through an analysis of the crime-fraud exception. In *Hutchinson v. Farm Family Casualty Insurance Company*,[356] the insureds' daughter was killed in a traffic accident. Farm Family failed to pay uninsured motorist benefits and the insureds filed suit for breach of contract, bad faith, state unfair trade practice, reckless and willful misconduct, and fraud. The insureds sought the claim file and Farm Family objected to the production of certain documents based on attorney-client privilege.

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[354] *Id.* at 842-843 quoting from Caldwell v. District in and for City and Cty of Denver, 644. P.2d 26 at 33 (Colo. 1982).

[355] *Id.* at 842 quoting *Caldwell*, 644 P.2d at 33.

[356] 867 A.2d 1 (Conn. 2005).

At the trial level, the plaintiffs argued that privileged materials that are relevant are discoverable in a bad faith action.[357] Farm Family argued that the central issue was whether there had been a fraudulent representation by the claims agent and, therefore, the matters in the file were not relevant, because they dealt with communications between Farm Family and its counsel, not the alleged fraud and that the privileged material was not subject to any privilege exception.[358]

The trial court conducted an *in camera* review of the material, concluded that it was *relevant* and ordered it produced.[359] Therefore, the only standard warranting production used by the trial court was relevance. On appeal, Farm Family argued that *relevance* was not the correct standard for ordering the production of privileged material.[360]

The Connecticut Supreme Court reviewed the trial court's ruling as a plenary matter because the trial court's ruling that privileged matters were discloseable in a bad faith case when they were relevant was a question of law. In doing so, it addressed the

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[357] *Id.* at 4.

[358] *Id.*

[359] *Id.*

[360] *Id.*

argument of at issue waiver and held that it would apply in situations where the "'routine handling' defense was raised."[361]

The court then turned to the crime fraud exception which it held applied to civil fraud in Connecticut.[362] In stating a test similar to the Eleventh Circuit's test,[363] it rejected the concept that relevance and need will be the determining criteria.[364] However, it recognized that "[a] number of courts have concluded . . . that the civil fraud exception should be extended to claims of bad faith against insurers."[365] The rationale for doing so is the court's view that such conduct is an avoidance or an evading of a legal or contractual obligation without justification.[366] The court, therefore, applied the same burden of persuasion for an *in camera* review in bad faith cases as it uses in fraud cases.[367]

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[361] *Id.* 8-9 citing Tackett v. State Farm Fire & Casualty Ins. Co., 653 A.2d 254, 259-26 (Del. 1995).

[362] *Id.*

[363] *Id.*

[364] *Id.* at 5-6.

[365] *Id.* at 6 citing jurisdictions which have adopted that position.

[366] *Id.* at 6-7:

> We conclude that, just as there is no justification for the attorney-client privilege where a communication was made for the purpose of committing fraud, there is no justification for the privilege when a communication was made for the purpose of evading a legal or contractual obligation to an insured without reasonable justification.

[367] Id. at 7 citing *Zolin*:

Having concluded that the trial court had used the improper standard of need and relevance, the Connecticut Supreme Court then went on to analyze whether the plaintiffs had established, on the basis of "nonprivileged materials,"[368] that its test to establish the crime fraud exception had been met.[369] The court found that the plaintiff had not met any threshold showing and that all the plaintiff, arguably, showed was that the insurer "sought the good faith legal advice of its attorneys and then failed to follow it."[370] The court held that this was insufficient to invoke the exception.[371]

In contrast, the dissent saw such a situation as one where there was need, relevance and a quasi-fiduciary relationship. Accordingly it saw the need for disclosure in order to meet the insured's burden.[372]

> Accordingly, we conclude that an insured who makes an allegation of bad faith against his insurer is entitled to an *in camera* review of privileged materials when the insured has established, on the basis of nonprivileged materials, probable cause to believe that (1) the insurer action in bad faith and (2) the insurer sought the advice of its attorneys in order to conceal or facilitate its bad faith.

[368] *Id.* at 11.

[369] *See* discussion, *supra*.

[370] *Id.* at 11.

[371] *Id.*

[372] *Id.* at 13.

> [T]his combination of need and relevance in the context of the special quasi-fiduciary nature of the first party insurance relationship between the plaintiffs and the defendant provides a particularly compelling basis for disclosure. . . .

Focusing on what the dissent found to be the unique relationship between an insured and an insurer[373] as being quasi-fiduciary,[374] along with the insurance industry's advertising assuring customers that they are "'in good hands or dealing with a good neighbor,'"[375] the dissent felt that there was support for "the adoption of a limited new exception to the attorney-client privilege in the context of allegations of bad faith against first party insurers."[376]

This decision is, therefore, important because of the range and quality of the debate within the case as to the competing views on this issue. It is, therefore, quite instructive.

(3) Spoliation and the Crime-Fraud Exception:

An additional link between spoliation and the crime-fraud exception already now exists. In *Rambus, Inc. v. Infineon Technologies AG*,[377] the District Court in the Eastern District of Virginia took the spoliation doctrine one step farther. That court held that the

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[373] *Id.* at 13.

[374] *Id.* at 13-14.

[375] *Id.* at 14 (citation omitted).

[376] *Id.*

[377] 22 F.R.D. 280 (E.D. Va. 2004).

crime-fraud exception[378] applies to attorney work product and attorney-client communications that further spoliation of evidence. As reviewed above, the crime-fraud exception precludes protection for attorney-client communications or attorney work product when the attorney's advice is used in furtherance of the commission of a crime or fraud.

In *Rambus*, the court said that the crime-fraud exception was not solely limited to circumstances constituting a crime or a fraud. In fact the court said "[t]he term 'crime/ fraud exception,' . . . is 'a bit of a misnomer,' as many courts have applied the exception to situations falling well outside of the definitions of crime or fraud."[379] With that premise, the court said:

> Although the United States Court of Appeals for the Fourth Circuit has not set forth a precise test for application of the crime/fraud exception in cases of spoliation, it is inconceivable that our Court of Appeals would find that a client's interest in confidential communications and work product respecting destruction of documents in anticipation of litigation

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[378] *See* Charles Allen Wright and Kenneth W. Graham, *Exceptions – Crime or Fraud*, 24 FED. PRACT. & PROC. EVID. § 5501 (updated 2004).

[379] *Rambus*, 22 F.R.D. at 288. *See also* Blanchard v. EdgeMart Financial Corporation, 192 F.R.D. 233, 241 (N.D. Ill. 2000) ("Some courts have applied the exception to a lawyer's unprofessional behavior . . . or unethical behavior . . . to an intentional tort . . . and even to sanctionable conduct, including under Rule 11 . . . ."); Gutter v. E. I. DuPont de Nemours, 124 F. Supp. 2d 1291, 1298 (S.D. Fla. 2000) (crime-fraud exception applies where duties were performed "in furtherance of a crime, fraud, or *other misconduct fundamentally inconsistent with the basic premise of the adversary system*.") (emphasis added); *In re* Sealed Case, 754 F.2d 395, 399 (D.C. App. 1985) ("Communications otherwise protected by the attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, *or other misconduct*.") (emphasis added).

> would outweigh the societal need to ensure the integrity of the process by which litigation is conducted which, of course, is the purpose of prohibiting spoliation of evidence. . . . Indeed, the "[d]estruction of evidence undermines two important goals of the judicial system – truth and fairness." . . . .[380]

Going further, the court said that,

> construing the crime/fraud exception to encompass spoliation is fully consonant with the Fourth Circuit's instructions on how to apply the underlying privileges. In the Fourth Circuit, the attorney-client and work product privileges are to be "strictly confined within the narrowest possible limits consistent with the logic of [their] principle[s]," . . . . The work product doctrine recognizes that lawyers, as officers of the court found both to work for the advancement of justice" and the "rightful interests" of their clients, must be able to produce material without fearing its wide dissemination. . . . To provide zealous representation of clients in our adversarial system of justice, lawyers must be free to assemble information, sift the relevant from the irrelevant facts, prepare legal theories, and plan litigation strategy without the undue interference of having their thoughts and opinions broadcast widely. . . . The work product doctrine, therefore, recognizes that the widespread distribution of attorneys' work product would have a "demoralizing" affect on the profession that would not benefit individual clients or the system as a whole. . . .[381]

Making a distinction, however, the court then said:

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[380] *Rambus*, 22 F.R.D. at 288.

[381] *Id.* at 289.

> Communications between lawyer and client respecting spoliation of evidence, however, is fundamentally inconsistent with the asserted principles behind the recognition of the attorney-client privilege, namely, "observance of law" and the "administration of justice." . . . . Indeed, by intentionally removing relevant evidence from litigation, spoliation directly undermines the administration of justice. . . . . Moreover, an attorney who counsels a client about the spoliation of evidence is not advancing the observance of law, but rather counseling misconduct. Thus, there is no logical reason to extend the protection of the attorney-client privilege to communications undertaken in order to further spoilation. . . . .
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> Similarly, attorney work product materials that relate to the spoliation of evidence neither "work for the advancement of justice" nor further the "*rightful* interests" of an attorney's client. . . . . Declining to afford such materials protection would not have a "demoralizing" effect on the profession nor would it fail to accord attorneys, as officers of the courts, their rightful sphere of protection. . . . To the contrary, by removing the ability of lawyers and clients to hide such materials behind the work product privilege, the courts will assure that the work of lawyers is confined to the rightful interests of clients, rather than interests – such as the destruction of evidence – that frustrate the administration of justice and cast the legal system (as well as the legal profession) in an unsavory light.[382]

The court then held the crime-fraud exception applicable to spoliation situations:

> For the foregoing reasons, the crime/fraud exception extends to materials or communications created in planning, or in furtherance of, spoliation of evidence. That conclusion, however, does not resolve the issue whether the crime/fraud exception applies to the documents that are the object of Infineon's motion. In order to pierce Rambus's claims of privilege in this case, Infineon must make a prima facie showing [end of Side A]) that Rambus was spoliating, or was planning to spoliate, evidence and sought or used the advice of counsel or the input of work product to further the

[382] *Id.* at 289-90.

> endeavor; and (2) that the documents contained in the communications or work product bear a close relationship to Rambus' scheme to engage in the spoliation.[383]

Also relevant to this line of analysis is *Model Rule* 3.4[384] which provides that an attorney may not "obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document" or "assist another person to do any such act."[385] Furthermore, it mandates that an attorney must make a "reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[386]

h. Concluding Observations:

The important thing about this area, and what counsel in the post-Enron environment need to keep in mind, is that this exception to the attorney-client privilege and the work product doctrine will certainly see more litigation and refinement, especially in those jurisdictions which do not require the goal of the party seeking legal advice to be a crime or a criminal-type fraud, but allow the exception to apply to a broader range of torts.

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[383] *Id.* at 290.

[384] Rule 3.4 A.B.A. Model Rules of Professional Responsibility (hereafter Model Rules).

[385] *Id.*

[386] *Id.*

E. Lawyers' Emerging Disclosure Duties

1. Sarbanes-Oxley:

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002.[387] It is often referred to by the media as the Corporate Responsibility Act.[388] The Act called for the SEC, within 180 days, to have issued rules regarding lawyer reporting. Among other things,[389] the Act provided that the rules should structure a system where lawyers are to report violations of securities laws and breaches of fiduciary duty.

On November 6, 2002 the S.E.C. agreed to propose rules that "would require corporate lawyers to report evidence of their clients' material securities law violations or fiduciary breaches."[390] The proposed rules were to have a 30-day comment period with final rules due to be enacted by January 26, 2003.[391]

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[387] 15 *U.S.C.* 7201, et seq.

[388] *See* Guy Harrison, *My Opinion: Protecting Our Profession*, 65 TEX. B.J. 678 (September, 2002) (Mr. Harrison is the President of the Texas State Bar); Cynthia Reed Eddy, *Changes to Corporate Integrity Legislation Follow Recent Scandals*, 4 LAWYERS J. 7 (September 2002) (Allegheny County Bar Association publication); David Kaplan, *Landmark Act Imposes Controversial Measures on Accounting Industry*, 4 LAWYERS J. 7 (September 2002) (publication of the Allegheny Bar Association). *See also* Faith Stebelman Kahn, *What Are the Ways of Achieving Corporate Social Responsibility?: Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, September 11, 2001*, 76 TUL. L. REV. 1579 (2002).

[389] *See* Rhon Jones, *The Coming of Age of Business Litigation*, 7 The ADDENDUM 3 (December 2002) (setting out the key provisions of the Act and referring to the Act as "'the most sweeping change since the Depression.'").

[390] 18 LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 696 (November 20, 2002).

The rules as initially proposed by the SEC would have provided for reporting violations to the Chief Legal Officer (CLO) and if necessary to the Chief Executive Officer (CEO) or both; for resulting duties on them to then investigate and report back to the reporting lawyer; for record keeping; for reporting further to the audit committee or the board if the first reporting would be futile or an appropriate response is not received; and for a "noisy withdrawal" and disaffirmance of the "tainted" S.E.C. submission. In addition, the proposed rules suggested setting up a committee to which reporting lawyers could report and provided that the noisy withdrawal would not be a violation of the attorney client privilege. That proposed provisions, however, did not resolve the issue of how state bars would view such noisy withdrawals. The S.E.C.'s new proposed rules were to be a new Part 205 to 17 C.F.R., Standards of Professional Conduct, which applies to attorneys who appear and practice before the S.E.C.[392]

The SEC, however, eventually, did not go so far as to enact a noisy withdrawal rule. It did enact reporting up rules using an objective triggering standard.[393] Although this provision has received a great amount of press, some of which has evidenced consternation by lawyers, it really provides nothing more than what is already

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[391] *Id.*

[392] 18 LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 696 (November 20, 2002).

[393] *See generally, SEC Delays Action on 'Noisy Withdrawal' In Passing Narrowed Lawyer-Conduct Rules*, 19 ABN/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 72 (January 29, 2003).

conceptually required by lawyers who represent corporations. Requiring attorneys to report SEC violations as well as fiduciary duty breaches up the corporate structure is what the attorney should be doing anyway. The Act does not yet require the attorney to go "public" with the information; it simply requires the attorney to bring to the attention of the appropriate corporate official, matters that are going drastically wrong within the institution so that corrective action can be taken.

2. Amended A.B.A. Model Rule 1.6:

The spirit of the Sarbanes-Oxley Act is now embodied in some ways in *Model Rules* 1.6 and 1.13 as amended by the A.B.A. Before the 2003 amendments, under *Model Rule* 1.6 an exception to the attorney-client privilege and client confidentiality only allowed attorneys to breach those confidences if it appeared that the client was going to commit a crime that was likely to result in imminent death or serious bodily harm. This is still the Alabama rule.[394]

However, in 2003, the A.B.A. amended *Rule* 1.6 so that it now "permits, but does not require"[395] a disclosure, "to prevent the client from committing a crime or fraud that is

[394] *See Rule* 1.6(b)(1), ALA. R. PROF. CONDUCT.

[395] *ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosures*, 19 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 467 (August 13, 2003).

reasonably certain to result in substantial injury to the financial interests or property of another and in *furtherance of which the client has used or is using the lawyer's services*" and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud *in furtherance of which the client has used the lawyer's services*."[396] This latter provision is new and has been a somewhat controversial amendment. Arguably, however, the controversy should not be as intense as it has been because the more broad approach to an exception to confidentiality had already been, in one variation or another, adopted by many of the states.[397]

Section 66 of the RESTATEMENT[398] also advances the proposition that a lawyer may disclose confidential client information when the lawyer reasonably believes that it

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[396] MODEL RULE 1.6, as amended at the 2003 Annual Meeting of the A.B.A. (emphasis added). *See also* The Association of the Bar of the City of New York, Formal Op. 2002-01: *Client Confidentiality and the Intention to Commit a Crime*, 57 THE RECORD 351 (2002) ("Question: When may a lawyer who believes his client may have an intention to commit a crime disclose client confidences and secrets in order to prevent the crime?"); Roger C. Crampton, *The Duty of* Confidentiality, 87 A.B.A.J. 60 (2001); Timothy J. Miller, Note, *The Attorney: Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582 (1984). *Cf.* Committee on Professional Responsibility, Association of the Bar of the City of New York, *Report on the Debate Over Whether There Should Be An Exception to Confidentiality For Rectifying a Crime on Fraud*, 2 FORDHAM URB. L.J. 857 (1993).

[397] *See* Thomas D. Morgan, *2003 Symposium Article: Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1, 6 (2003) ("Now, after reconsideration of Rule 1.6(b) in August 2003, the ABA has caught up with the states it ordinarily tries to lead and has said much the same thing."). *See also* James Podgers, *The Non-Revolution: Proponents of a New ABA Ethics Rule on Confidentiality Downplay its Impact*, 89 A.B.A.J. 80, 80 (2003) ("Most states already follow some variation of the revised rule.").

[398] RESTATEMENT OF THE LAW GOVERNING LAWYERS.

is necessary to prevent reasonably certain death or serious bodily harm to a person. As contrasted with the *Model Rules* approach, the imminency element is not present in the RESTATEMENT. Furthermore, "[u]nder the Restatement, the threat in question need not be the product of a client's act and the act need not be unlawful."[399] Under such circumstances, the lawyer must first try to dissuade the client and warn the client of the lawyer's ability to disclose such information.

Section 67 of the RESTATEMENT, like *Model Rule* 1.6 advances a proposition that allows disclosure of a client's confidential information in order to prevent, rectify, or mitigate substantial financial loss from the client's intended, continuing, or completed criminal or fraudulent conduct.[400] This broad interpretation of the ability to disclose, however, does not have the ABA's requirement of the lawyer's services having been used and it has not yet been widely accepted.

Although there are exceptions and variations, as stated before, many states already have, in one form or another, the new *Model Rules* approach which contains the

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[399] *Analysis and Perspective: Restatement of the Law Governing Lawyers, A User's Guide* - Part 3, 16 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 584, 585 (October 25, 2000) (hereafter *Analysis*).

[400] *Id.* at 585-586.

amendment regarding financial and property injury.[401] The RESTATEMENT and *Model Rules* positions certainly are more in keeping with those who advocate some exercise of individual moral responsibility by lawyers.

The appropriate circumstances under which a lawyer should be free to divulge client "confidences" is, therefore, subject to strong, conscientious academic, and professional debate. The tensions that exist between the functions of a lawyer and the full and complete preservation of the attorney-client privilege and confidentiality rules juxtaposed with the position that there should be an individual exercise of moral judgment and responsibility by a lawyer are clearly being debated in the profession and in the academic world,[402] and, it is submitted, will be even more intensely debated as we move farther into a post-Enron environment.

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[401] *See* Thomas G. Wilkinson and James B. Dolan, *Counseling Clients to Destroy* Documents, 16 CORP. COUNSELLOR 1 (March 2002); *Analysis and Perspective supra* note 295 at 585 ("Comment B to Section 67 indicates that more than 40 jurisdictions permit lawyers to disclose client confidences in order to prevent substantial financial injury. Seventeen states also permit disclosures to rectify past and completed client fraud, the comment says."). *See also* Jenny B. Davis, *The ENRON FACTOR: Experts Say the Energy Giant's Collapse Could Trigger Changes in the Law That Make It Easier to Snare Professionals*, 88 A.B.A.J. 40 (2002) (addressed the ABA Ethics 2000 Commission's debate on the Rule and suggestions that Rule 1.13 be modified to allow disclosures outside of the organization).

[402] *See* Patrick T. Casey and Richard S. Dennison, *The Revision to A.B.A. Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569, 573-577 (2003) in which the authors address the tensions related to client trust and the danger of the advocate's role being changed to that of a whistleblower. *See also* Stephen L. Pepper, *The Lawyer's Amoral Role: A Defense, a Problem, and Some Possibilities*, 1986 A.B.F. RES. J. 613; Andrew A. Kaufman, *A Commentary on Pepper's The Lawyer's Amoral Ethical Role*, 1986 A.B.F. RES. J. 651; Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975 (1990); Robert P. Lowery, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990); Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975); John J. Flynn, *Professional Ethics and the Lawyers's Duty to Self*, 1976 WASH. U. L. Q. 429 (hereafter Flynn); W. Bradley Wendel, *Public Values and Professional*

3. Amended Rule 1.13:

As a result of recommendations of the ABA's Task Force on Corporate Responsibility, not only has *Rule* 1.6 been amended but *Rule* 1.13 has also been amended to incorporate a reporting up concept as well as a provision for authorized disclosure. If the lawyer knows that the actions of personnel in an organization are likely to result in substantial injury to an organization, the lawyer is to report up. If the authorized reporting up does not work, the lawyer, only to the extent reasonably believed necessary to prevent substantial injury to the organization,

> may reveal information relating to the representation whether or not *Rule* 1.6 permits such disclosure. . . .[403]

Responsibility, 75 NOTRE DAME L. REV. 1 (1999). These articles, among other things, address the tension between duties as lawyers and advocates and one's personal ethics and values system. *Cf.* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1304 (1995) (hereafter Zacharias-Reconciling) in which Professor Zacharias makes the following disturbing assertion:

> [T]he assumption that serving client interests extracts a significant psychological toll on lawyers is misplaced. In practice many lawyers happily surrender their personal ethics.

It is submitted and hoped that, as is evidenced by the writings that are now coming out on the topics of professionalism and reconciling the roles of lawyers with their personal value systems, Professor Zacharias's statement is not reflective of the level of concern being given this tension.

[403] *Model Rule* 1.13, as amended (2003).

This concept is remarkably similar to the S.E.C.'s proposed "noisy withdrawal." It is clearly premised, however, on the organization's best interests and the interests of the public which are also the focus of the S.E.C.'s considered noisy withdrawal.[404]

The reality is that the board is the organization within an institution to which one will look and the reporting requirements of the SEC rules emanating from the Sarbanes-Oxley Act are simply be representative of what should already be a part of the lawyer's role to assist the board in making sure that problems are caught and rectified. The Sarbanes-Oxley Act either directly, or in spirit, however, does not address what the lawyer is to do if the board turns a deaf ear. At that point, *Model Rules* 1.6 and 1.13 will come into play.

Under that situation, the attorney will have to draw on his or her own conscience and determine what he or she will do. If the choice is to become a "whistleblower," the law has, in the past, offered very little protection. The present case law evidences a strong tendency on the part of the courts to enforce the attorney-client privilege even if the attorney wants to come forward with information. Attorneys have attempted to sue for wrongful discharge, but their attempts have not met with any degree of success. Therein lies the ultimate issue for counsel if counsel sees that, under the reporting

[404] In contrast, Alabama has not adopted the disclosure language. Instead, only withdrawal is allowed. *Cf. Rule* 1.13, ALA. R. PROF. CONDUCT.

requirements, the board is either corrupt or is not fulfilling its responsibilities.[405] It remains to be seen how the permissive disclosure amendment of *Model Rule* 1.13 will impact on this area.

4. Amended Rule 4.1:

In 2002, the A.B.A. amended *Model Rule* 4.1 which prohibits knowing "[failure] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[406] This *Rule*, therefore, compliments the amended note to *Rule* 1.6, but seems to create a more mandatory requirement than does *Rule* 1.6. Alabama's rule is the same.[407]

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[405] *See Crews v. Buckman Laboratories International Inc.*, 2002 Tenn. LEXIS 252 (Tenn. May 24, 2002). *See also* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFFALO L. REV. 777 (1996); Milton C. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197 (2000); Sally R. Weaver, *The Role of the General Counsel: Perspective: Ethical Dilemmas of Corporate Counsel: A Structure and Contextual Analysis*, 46 EMORY L.J. 1023 (1997); Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing – or Something?*, 30 U.C. DAVIS L. REV. 483 (1997); John Jacob Kobus, Jr., *Establishing Corporate Counsel's Right to Sue for Retaliatory Discharge*, 29 VAL. U.L. REV. 1343 (1995); Chandra R. Coblentz, *The Impact of General Dynamics Corp. v. Superior Court on the Evolving Tort of Retaliatory Discharge for In-House Attorneys*, 52 WASH. & LEE L. REV. 991 (1995); Christopher L. Cain, Commentary, *What Constitutes Wrongful Discharge of In-House Attorneys?*, 22 J. LEGAL PROF. 223 (1997/1998); Rodd B. Lape, Comment, *General Dynamics Corp. v. Superior Court: Striking a Blow for Corporate Counsel*, 56 OHIO ST. L.J. 1303 (1995); Steven S. Gensler, Note, *Wrongful Discharge for In-House Attorneys? Holding the Line Against Lawyers' Self-Interest*, 1992 U. ILL. L. REV. 515 (1992); Philadelphia Bar Assn Op. 99-6, *Use of Confidential Information by Former In-House Counsel Against Former Employer in Employment Litigation*, NATIONAL RPTR. ON LEGAL ETHICS AND PROF. RESPONSIBILITY, http://www.lexis.com/research/retrieve? _m=f870cb 7298 f457 add 565 dd 460 ec 30250 docum (February 7, 2002).

[406] *Model Rule* 4.1(b).

[407] *See Rule* 4.1, ALA. R. PROF. CONDUCT.

5. "Miranda" Anyone?

As a result of these new concepts of authorized disclosure, as well as the "voluntary" waivers of privileges by entities that come under Justice Department scrutiny, there is a genuine issue of whether lawyers must inform their clients of the possibility that the lawyer may disclose, or be required to disclose, the client's information to third parties.[408] Professor Fred Zacharius, reporting the results of a survey that he conducted observed:

> Perhaps, the most striking revelation of the . . . survey is that lawyers overwhelmingly do not tell clients of confidentiality rules.
>
> Of the lawyer pool, 22.1% confessed that they "almost never" inform clients of attorney-client confidentiality; 59.7% stated that they inform their clients in less than 50% of their cases.[409]

With the A.B.A.'s amendments and the work of the S.E.C., it is suggested this issue will be given more consideration in the future.

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[408] *See* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U.L. REV. 441, 489-90 (1990) ("[A]n attorney practices deception upon a trusting client when she misstates or refuses to disclose those circumstances that constitute exceptions to the attorney-client privilege . . . . Thus an attorney is morally required, and should be legally required, to be forthright with a client and allow the client to choose whether the rights of disclosure outweigh its benefits.").

[409] Fred C. Zacharias-*Rethinking supra* note 21 at 382-83. *See also* Claude D. Cunningham, *How to Explain Confidentiality*, 9 CLINICAL L. REV. 579 (2003).

6. The Enron Litigation

No discussion of this topic could proceed without addressing the shareholder litigation in the Southern District of Texas. In *In re Enron Corporation Securities, Derivative & Erisa Litigation*,[410] District Judge Melinda Harmon refused to dismiss the following described claims against the lawyers and others:

> In the instance action, Lead Plaintiff alleges that Enron's lawyers, accountants, and underwriters participated together with Enron in a Ponzi scheme to enrich themselves, which, in a significant and essential part of the plan, defrauded third-party investors in Enron securities to keep funds flowing with the corporation.[411]

There will be no attempt in this material to review Judge Harmon's analysis. Her opinion, however, should be studied as being illustrative of the above duties and responsibilities of lawyers.

[410] 235 F. Supp. 2d 549 (S.D. Tex. 2002).

[411] *Id.* at 604.

F. Tensions Created by Concepts of Advocacy

1. Cross-Examination of the Truthful Witness:

Assume that, in the course of investigating a case,[412] a lawyer learns that a witness, who he has been able, independently, to establish is telling the truth,[413] has a conviction for larceny that occurred within the past nine years. The witness is going to testify in a case involving the breach of fiduciary duty by her corporate supervisor who is the CEO of a corporation. What approach will the lawyer take to her cross-examination? Will he exploit her conviction, because it involves moral turpitude, in order to destroy her credibility or will he not attack her credibility because he knows that she is telling the truth? How does he balance his loyalties? He is an officer of the court to insure that truth is not only sought but produced. Does he then exploit the weakness of the witness and possibly distort the realities?[414]

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[412] The law in Oregon on how lawyers may investigate their cases with respect to whether they can supervise undercover investigations is very interesting. *See In re Gatti*, 8 P.3d 966 (2000); OREGON D.R. 1-102, as amended January 18, 2002; STATESMANJOURNAL.COM (Jan. 31, 2002) ("The Oregon Supreme Court voted Tuesday to accept a rule that it revised Nov. 28 and that the bar's house of delegates approved Jan. 18. The change carves out an exception for lawyers who supervise or advise others engaged in lawful covert activity.").

[413] One of the justifications for cross-examination of the truthful witness and cross-examination in general is that lawyers are, theoretically, not in a position to judge whether a witness is telling the truth and that that role belongs to someone else. I submit that that is simply rationalization. We all know having investigated cases over the course of our professional careers that there are simply some witnesses who are telling the truth and others who are not.

[414] *See* Lawry-Central, *supra* note 402 at 317 ("[W]hat is assumed but [what is] rarely said: The lawyer's obligation to the client is subordinate to the lawyer's primary obligation to the law."). *See also Nix v.*

If a trial is to be a search for the truth, is there something about the adversary system, or are there interests that sufficiently counterbalance that search, to justify impeaching the witness who one knows is telling the truth? The following justifications have been provided for impeaching a truthful witness:

1. Lawyers cannot and do not know whether any particular witness is telling the truth. Merely interviewing a witness and talking to him or her will not allow the lawyer to make that type of judgment. The truth may not be what the lawyer knows or thinks it is.

2. If clients know or feel that their lawyer is not going to impeach the truthful witness, they will trust that lawyer less and be less forthcoming in what they tell her.

3. There is something about the adversary system that requires lawyers to take advantage of every possibility on behalf of a client except those things that are actually illegal.

4. Depending on who has the burdens of production and persuasion, the lawyer is simply putting to the test the quality of the oppositions evidence. This is, perhaps, a stronger justification in the criminal system where the prosecution has the burden of persuasion of proof beyond a reasonable doubt. By cross-examining the truthful witness, the lawyer is simply putting to the test the quality of the prosecutions evidence. Whether that justification is as strong in the civil system is questionable.[415]

5. It is better, as a general rule, for lawyers to challenge witnesses and not to avoid doing so because of the lawyer's personal belief or knowledge of a witnesses' accuracy. This avoids the risk that

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Whiteside, 475 U.S. 157, 166 (1986) (The United States Supreme Court described "the very nature of a trial is a search for truth. . . .").

[415] *See* Murray L. Schwartz, *On Making the True Look False and The False Look True*, 41 S.W. L.J. 1135, 1140-1141 (1988) (hereafter Schwartz-Truth).

> lawyers will too easily or too erroneously conclude that they are telling the truth and not expose any errors in the witnesses' testimony.[416]

When deciding how one should resolve that issue, consider the following perspective:

> The purpose of cross-examination should be to catch truth, ever an elusive fugitive. If the testimony of a witness is wholly false, cross-examination is the first step in an effort to destroy that which is false. One should willingly accept that which he believes to be true whether or not it damages his case. . . If the cross-examiner believes the story told to be true and not exaggerated, and if the story changes counsel's appraisal of the clients' case, then what is indicated is not a 'vigorous' cross-examination but a negotiation for adjustment during the luncheon hour. If this fails, counsel should accept the story and get his settlement by the judgment of the court or verdict of the jury. No client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth.[417]

A similar understanding of the moral posture of lawyers within the system is represented by a study done in 1958 by the American Bar Association and the Association of American Law Schools. That study made the following observation that should be considered by all lawyers when they are in the process of defining their own

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[416] *See* Schwartz-Zeal, *supra* note 415 at 552.

[417] Frances L. Wellman, THE ART OF CROSS-EXAMINATION, 204-05 (4th ed. 1936) cited in Lawry-Cross *supra* note 26 at 565-66. *See also* R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L.J. 801 (1995).

concept of professionalism: A lawyer "trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature."[418]

2. Creation of Alternative Scenarios: Are There Any Restraints On Imagination?:

Lawyers are accustomed to drawing inferences and asking judges and juries to do the same from known evidence.[419] Would it be proper, however, for a lawyer to ask a jury to draw an inference in a case when the lawyer knows that the inference does not comport with the reality of that case? The issues that are present in that question would also be present in a situation where a lawyer has access to information from the client,

[418] Lon L. Fuller and John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958) cited in Lawry-Cross, *supra* note 22 at 566-67. *See also* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001) (excellent exploration of a prosecutor's duties, how prosecution can impede the search for truth and how they can foster it.).

[419] Regarding the inferential process, legal analysis and judicial reasoning, *see Eastman Kodak Co. v. Image Technical Services*, 584 U.S. 451 (1992); *Celotex v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Matsushita Electrical Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 242 (1986); *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105 (2d Cir. 1997); *United States v. Shonubi*, 895 F. Supp. 460 (E.D.N.Y. 1995), *rev'd on other grounds*, 103 F.3d 1085 (2d Cir. 1997); Orrin K. Ames III, *Summary Judgments in Alabama: The Role of Inferences in Meeting a Party's Burdens*, 27 AM. J. TRIAL ADVOC. 329 (2003); Charles Nesson, *The Evidence or the Event ? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (hereafter Nesson).

but has other evidence which the lawyer knew was not accurate and which the lawyer decided to use knowing that a false, alternative scenario would be the result.[420]

Assume that a lawyer is handling a criminal case and her client tells her that he committed the crime around 2:00 in the afternoon. The prosecuting witness, however, has testified in preliminary hearings that the crime occurred around 11:00 a.m. She was not sure and she relied on some erroneous information and police reports and, thereafter, incorporated that information into her memory and testimony.

Her client then tells her that he can present two alibi witnesses who will testify, truthfully, that he was with them at 11:00 a.m. Should she call those witnesses to the stand to proffer the thesis to the jury that her client was with someone else at the time that the time was committed?[421] Would you present the evidence, let the jury hear the assertions by the alibi witnesses that the accused was with them at 11:00 so that the jury could, thereby, conclude that, if he was with them, he could not have committed the crime at 11:00 which was the time to which the prosecuting witness testified? Can she argue in her closing argument that the accused had not committed the crime at 11:00

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[420] *See* John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, 11 PROF. LAW. 1 (2000) (excellent article addressing, among other issues, the advancing of scenarios different from realities that a lawyer learns in confidence from a client and that are protected by the attorney-client privilege).

[421] Michigan State Bar Committee on Professional and Judicial Ethics, Op. CI-1164 (January 23, 1987).

a.m.?[422] Are there acceptable justifications that can be posited for allowing such conduct to take place?

Some of these questions can, *perhaps*, be answered with a little more ease when they arise in the context of a criminal trial. It *might* be easier to argue the case for the general testing of witnesses and the allowing of jurors to draw inferences from available evidence, even though those inferences might be wrong, when the burden of persuasion on the government is beyond a reasonable doubt. The argument in support of doing it, in that circumstance, is that the defense lawyer is putting all of the prosecution's evidence to the test, in a constitutional sense, so that the requirement of proof beyond a reasonable doubt before there is a criminal conviction will be met and satisfied. This balance between the need of society to convict and the fear of the conviction of innocent people has already been made by the system and the only question is whether the defense lawyer can appropriately implement that balance even though the consequences made be a distortion of the truth.[423]

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[422] *See* MODEL RULE 4.1 dealing with lawyers making untrue statements. Would not such a statement by a lawyer be an untruth known to the lawyer to be untrue based on what his client told him? *See* Schwartz-Truth *supra* note 59 at 1145-1147.

[423] *See* Ellen Yankiver Suni, *Symposium: Who Stole the Cookies from the Cookie Jar?: The Law and Ethic of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643 (2000); Harry I. Subin, *The Criminal Lawyer's "Different Mission,": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987). *See also* Nesson, *supra* note 419 at 1376-77 commenting on the role of the attorney-client privilege:

In the civil arena, even though some might argue that there are justifications, they do not seem to be as acceptable. The burdens of persuasion will vary from jurisdiction to jurisdiction and, therefore, they are not infused with the policy implications that proof beyond a reasonable doubt is in the criminal system. Nevertheless, one has to question whether there are ever strong enough justifications to allow this type of conduct in either system.[424]

It is submitted that too close a linkage with the client can create an environment where there is an increased tendency to create such alternative scenarios for jurors which are not based in the realities of the case. This can be done through the formal structuring of the case, through direct examination of witnesses, and through cross-examination of witnesses.[425]

> In fact, the attorney-client privilege more often impedes than advances the search for the truth by giving defense attorneys information and leeway to present plausible defenses regardless of whether they are true.
>
> > [T]he attorney-client privilege serves the defense attorney's testing function by enabling lawyers to design and present the most plausible defenses, even though they may be false. If plausible defenses are not raised at trial because the defense lawyer knows that they are untrue, the testing function is undercut. The logic of the defense attorney's testing function, then, leads to a conclusion that it is in the system's interest that a defense attorney should not be completely constrained by knowledge of the falsity of his client's defense.

[424] *See* Schwartz-Truth *supra* note 415 at 1146. *See also* Brian Slipakoff and Roshini Thayaparan, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935 (2002).

[425] *See* Richard R. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113 (1997) [hereinafter "Underwood"]; Janene Kerper, *Killing Him Softly with His Words: The Act and Ethics of Impeachment with Prior Statements*, 21 AM. J. TRIAL ADVOC. 81 (1997) [hereinafter "Kerper"].

Professor Amitai Etzioni, who teaches Public Policy Research at George Washington University, has raised some disturbing issues regarding such alternative scenarios. In framing the dilemma, he wrote the following:

> I once posed a hypothetical case (based on an actual one) to several legal authorities: Eight women charge that a physician sexually molested them while he had them connected to a wire that he claimed would endanger their lives if they moved. The defense argues that the women fabricated the whole thing, conspiring to extort money from the physician. No evidence is presented to support this claim. Assume, I suggested, that the lawyer made up the whole defense; should this be allowed?
>
> All those approached responded that lawyers' only obligations are to their clients. George E. Bushnell, Jr., former President of the American Bar Association, put it starkly: "While your report of the sexual molestation defense on its face is irresponsible, I cannot agree that the rights of the defendant should in any way be changed or modified. Rather it is my judgmentCand convictionCthat *only* through full protection of defendants' rights is the total community best served. For it is only by emphasizing the rights of the least of us that the rights of all of us the rights of the total community are preserved."
>
> This attitude is reflected in the legal community at large. For example, Floyd Abrams, an eminent New York lawyer wrote in the *New York Times Magazine* that in our current climate we should not be surprised when lawyers state things that "have nothing to do with truth" because we should know that they will say anything that might help their client. It's like sitting down to play poker; one should expect the other side to bluff. But as lay people like me see it, the courts are not a game. . . . Can't we find ways to maintain our adversarial system but also expect lawyers to act more responsibly, as officers of the court who are beholden to the community as well as their clients?"[426]

[426] Amitai Etzioni, *A Greater Good*, CAL. LAWYER 96 (May 1997). *See also* Amitai Etzioni, *On Making Lawyers a Bit More Socially Responsible*, 5 THE RESPONSIVE COMMUNITY 4 (1995).

Professor Etzioni's hypothetical and the responses that he got highlight the willingness of some lawyers to create and structure scenarios that are simply not based in reality in order to *zealously* represent their clients so that the clients will win and, thereby, self-maximize the lawyers' rewards, both intrinsic and financial. Professor Etzioni lamented on this myopic view of duty by saying the following: "I am astonished that lawyers object when asked to consider any obligations other than to their client."[427] Not only should Professor Etzioni be astonished, but so should lawyers. Many, however, are not. It is this myopic vision of duty to the client, to the exclusion of other communities around lawyers, that is the direct result of the ways lawyers incorporate the concept of utilitarian individualism into their lives and practice.

Another good example of the advancing of unsupported scenarios was related in an article by David K. Martin in the *Mobile Register* on December 14, 1997. There, Mr. Martin quoted comments by a Federal judge in a products liability case as follows:

> The theme of this case from the very inception has been that all the manufacturers together are busily bribing or influencing the rheumatology community, the major medical centers of the United States and major medical journals throughout the United States.
>
> You don't have the right to just ask insinuating questions unless you are able to show that there is something behind it. . . . Insinuating that

[427] *See* Etzioni, *A Greater Good*, *supra*, note 426.

> someone is not telling the truth is not the same as producing evidence of it. . . . It is just a way of throwing stuff out and seeing if something sticks.[428]

Another way that lawyers "create" alternative scenarios is directly related to how one initially interviews clients and witnesses and prepares them for depositions and trial. The lawyer who is motivated by utilitarian individualism, *i.e.*, the lawyer who wants to win at all costs, might approach his interviews differently.

Some criminal lawyers will begin their interviews with their clients by saying a variation of the following: "Tell me your side of the story."[429] By beginning the interview that way, the criminal lawyer sends the message to the client that he or she is not really seeking the truth, but only the client's "story." In essence, therefore, the criminal lawyer has told the client: "I don't want to know the true facts; I just want to know your story. Give it to me so that I can build your defense."

That position is extremely risky and, it is submitted, improper. Lawyers have to accept and understand that they rarely ever know the realities of their clients' cases. To allow the criminal defendant to simply give his or her "story" to the lawyer and for the

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[428] David K. Martin, *With Apologies to Shakespeare, Sue Lawyers, Don't Kill Them*, MOBILE REGISTER, Dec. 14, 1997, at 4-D. *See also* Underwood, *supra* note 425, at 123-129; Kerper, *supra* note 425, at 106-108.

[429] This observation is based on a seminar at which I instructed in Memphis, Tennessee. A number of criminal lawyers attended that seminar. Many of the criminal lawyers there said that they begin their interviews by that, or similar, language. It is submitted that such an approach is more common than not.

lawyer to take that version and build a defense around it runs the risk that that lawyer is inextricably linking himself or herself with a perjured version of the events. It is also corroboration of the lawyer's willingness to disengage from the truth and to truly be a "hired gun" to uncritically put whatever story the client wants in front of the jury and the court.

Civil lawyers often do the same thing, but in a slightly different way. They will begin their interviews by first advising the clients or witnesses of the claims in the lawsuits (there is nothing wrong with that), but then they go further and describe the legal principles and rules and then emphasize the defenses to such claims. This type of "orientation" is often given by a civil litigation lawyer to a client before that lawyer has ever received one bit of information from the client about the case. In so doing, the civil lawyer sends the same signal to the client that the criminal lawyer does. The civil lawyer is telling the client to tell him or her a version that fits within the legal framework he or she has given to the client, especially the legal framework of the defenses.

This "orientation" has a dangerous tendency to send a message to the client that the client should tell the lawyer what he thinks the lawyer wants to hear so that the lawyer can win the case. It does not send the message to the client that the lawyer is seeking the truth.

Often, lawyers will combine these types of "orientations" with the mantra that they want the clients to tell them the truth. It is submitted that that mantra falls on deaf ears once a lawyer has given the orientation to the client about what the client needs to say for the case to be won. That linkage of the lawyer to the end result for the client, while totally disregarding the integrity of the process which the lawyer has sworn to uphold, is one of the risks emanating from the desire of the lawyer to win.[430]

The "creation" of alternative scenarios in order to simply juxtapose them with the positions advanced by one's adversary is a distortion of the process and a compromise of one's obligation to the communities around him or her. This view of one's duties is inconsistent with the position of lawyers as officers of the court.[431] Lawyers accepted the role of being officers of the court before they had clients and, therefore, that responsibility must be placed in balance with the duty to the client.[432]

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[430] *See generally* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995); *Special Report: Ethics of Witness Preparation*, 14 A.B.A., B.N.A., LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 48 (1998); Janeen Kerper, *Preparing a Witness for Deposition*, 24 LIT. 11 (1998).

[431] *See* Stephen G. Safranek, *The Legal Obligation of Clients, Lawyers, and Judges to Tell the Truth*, 34 IDAHO L. REV. 345 (1998); Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 24 SUFFOLK U.L. REV. 59 (1997). *Cf.* Richard Zitrin, *Truth, Justice and the Criminal Defense Lawyer*, 9 THE PROF. LAWYER 10 (1998). Mr. Zitrin makes a forceful case, based on the concept of burden of persuasion beyond a reasonable doubt that criminal trials are different and that it is, in fact, the duty of a criminal defense counsel to do just thatCto create alternative scenarios, even though they are not based on fact, and to proffer them to the jury to test the merits of the government's case.

[432] *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989). *See also In re: Integration of Neb. State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937):

> [A]n attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his

client's interest may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.

Recent Developments in Attorney Client Privilege and Attorney Work Product

Iowa Defense Counsel Association
Annual Meeting
September, 2005

Thomas J. Shields
United States Magistrate Judge
United States District Court Southern District of Iowa
211 19th Street
PO Box 4955
Rock Island, IL 61204-4955
(309) 786-7986

A DISCUSSION OF ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT IN THE FEDERAL COURT SETTING

Thomas J. Shields
United States Magistrate Judge
United States District Court
Southern District of Iowa

THE RULES

Fed. R. Evid. 501 provides

> **Rule 501. General Rule**
>
> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Civ. P. 26(b)(1) provides in pertinent part as follows:

> **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action....

Fed. R. Civ. P. 26(b)(5) provides in pertinent part as follows:

> **(5) Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

ATTORNEY-CLIENT PRIVILEGE

The Supreme Court's ruling in Upjohn Co. v. U.S., 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981), is instructive:

> ... The attorney-client privilege is the oldest of privileges for confidential communications known to the common law. 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interest in the observance of the law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

The following observations by the Eighth Circuit in In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 at 918 are important

> "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." United States v. Brown, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950) (quoting 8 J. Wigmore, *Evidence* § 2192 (3d ed. 1940)). Privileges, as exceptions to the general rule, "are not lightly created nor expansively construed, for they are in derogation of the search for truth." Nixon, 418 U.S. at 710, 94 S.Ct. at 3108. It is appropriate to recognize that privilege "'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of

> utilizing all rational means for ascertaining truth.'" Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960); Frankfurter, J., dissenting)).
>
> Federal common law recognizes a privilege only in rare situations. See, e.g., Jaffee v. Redmond, 518 U.S. 1, - - - - 116 S.Ct. 1923, 1931, 135 L.Ed.2d 337 (1996) (adopting psychotherapist-patient privilege); University of Pa. v. EEOC, 493 U.S. 182, 189, 110 S.Ct. 577, 582, 107 L.Ed.2d 571 (1990) (rejecting academic peer review privilege); United States v. Arthur Young & Co., 465 U.S. 805, 817, 104 S.Ct. 1495, 1502-03, 79 L.Ed.2d 826 (1984) (rejecting work product immunity for accountants); Upjohn, 449 U.S. 390, 397, 101 S.Ct. at 683, 686 (assuming, and effectively deciding, that corporations may assert attorney-client privilege); United States v. Gillock, 445 U.S. 360, 373, 100 S.Ct. 1185, 1193-94, 63 L.Ed.2d 454 (1980) (rejecting speech-or-debate privilege for state legislators); Trammel, 445 U.S. at 51-53, 100 S.Ct. at 912-14 (rejecting privilege against adverse spousal testimony, but continuing to recognize privilege for confidential marital communications); Nixon, 418 U.S. at 705-13, 94 S.Ct. at 3106-10 (recognizing qualified executive privilege); Couch v. United States, 409 U.S. at 322, 335, 93 S.Ct. 611, 619, 34 L.Ed.2d 548 (1973) (rejecting accountant-client privilege); Branzberg v. Hayes, 408 U.S. 665, 690-91, 92 S.Ct. 2646, 2661, 33 L.Ed.2d 626 (1972) (rejecting news reporter's privilege); [F.N. 8] In re Grand Jury (Virgin Islands), 103 F.3d 1140, 1146-47 (3d Cir. 1997) (rejecting eight other circuits' parent-child privilege); Petersen v. Douglas County Bank & Trust Co., 967 F.2d 1186, 1188 (8th Cir. 1992) (rejecting insurer-insured confidentiality privilege); United States v. Holmes, 594 F.2d 1167, 1171 (8th Cir.) (rejecting probation officer-parolee privilege), cert. denied, 444 U.S. 873¶, 100 S.Ct. 154, 62 L.Ed.2d 100 (1979).

While reference needs to be made to underlying state law in cases involving diversity jurisdiction, as noted above, where the case turns entirely on federal jurisdiction, i.e., federal question/federal statute, the federal common law of attorney-client privilege must be consulted.

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir. 1997). See also, Fed. R. Evid. 501.

There are, of course, certain exceptions to the privileges under discussion. One is the common-interest doctrine. Another is the crime fraud exception.

The common-interest doctrine expands the coverage of the attorney-client privilege in certain situations, as explained by the Eighth Circuit in In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 922

> If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged ... that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication. (citations omitted) This doctrine softens the ordinary requirement that lawyer-client communications must be made in confidence in order to be protected by the privilege. (citations omitted) John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers, 913 F.2d 544, 555-56 (8th Cir. 1990); (applying the doctrine), cert. denied, 500 U.S. 905, 111 S.Ct. 1683, 114 L.Ed.2d 78 (1991).

Two caveats should be noted about the attorney-client privilege. First, communications generally between attorney and client must be made in confidence in order to be protected by the privilege. (But note that this ordinary requirement is somewhat softened by the common interest doctrine). Second, a reasonable-mistake-of-law rule does not apply in the realm of privileges. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 at 922, 924. However, notwithstanding

the Eighth Circuit's pronouncement regarding its rejection of a reasonable-mistake-of-law rule applying to attorney-client privilege, the same court, id. at 923, stated

> In some aspects of the law of attorney-client privilege, the client's reasonable beliefs may be relevant. For example, courts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer, reasonably believed that a lawyer represented the client rather than another party, or reasonably believed that a conversation with a lawyer was confidential, in the sense that its substance would not be overheard by or reported to anyone else. All these situations involve, in essential, reasonable mistakes of fact ...

Proposed Fed. R. Evid. 503 defines federal common law attorney-client privilege. In re Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994) (quoting 2 Jack B. Weinstein, et al., Weinstein's *Evidence* ¶ 503 [02] at 503-17 (1975)) (applying rule and finding the privilege applied to partnership and preventative disclosure of communication between a consultant of partnership and attorney). See also, United States v. Spector, 793 F.2d 932, 938 (8th Cir. 1986), cert. denied, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987) ("courts have relied upon [Rule 503] as an accurate definition of the federal common law of attorney-client privilege" and affirming order quashing subpoena for taped statements made by client at direction of a lawyer); Citibank N.A. v. Andros, 666 F.2d 1192, 1195, n. 6 (8th Cir. 1981); Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 340 (9th Cir. 1996); United States v. Moschony, 927 F.2d 742, 751 (3d Cir. 1990), cert. denied, 501 U.S. 1211, 111 S.Ct. 2812, 115 L.Ed.2d 984 (1991).

The privilege protecting attorney-client communications does not outweigh society's

interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing. Thus, it is well establish that the attorney-client privilege "does not extend the communications made for the purpose of getting advice for the commission of a fraud or crime." In re Bank America Corp. Securities Litigation, 270 F.3d 639, 641 (8th Cir. 2001), citing United States v. Zolin, 491 U.S. 554, 563, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). The Supreme Court in Zolin, Id., 491 U.S. at 572 clarified the procedure that district courts should adopt the deciding motions to compel production of allegedly privileged documents under the crime-fraud exception by resolving a conflict among circuits. It held that a district court has discretion to conduct an *in camera* review of the allegedly privileged documents and, in an effort to discourage opponents of the privilege to engage in groundless fishing expeditions, the discretion to review *in camera* may not be exercised unless the party urging disclosure has made a threshold showing "of a factual basis adequate to support a good faith belief by a reasonable person" that the crime-fraud exception applies. If that threshold showing has been made, the discretionary decision whether to conduct *in camera* review should be made "in light of the facts and circumstances of the particular case," including the volume of materials in question, their relative importance to the case, and the likelihood that the crime-fraud exception will be found to apply.

Thus, as noted in In re BankAmerica Corp. Securities Litigation, 270 F.3d at 642

> ... A moving party does not satisfy this threshold burden merely by alleging that a fraud occurred and asserting that disclosure of any privileged communications may help prove the fraud. There must be a specific showing that a particular document or communication was made in furtherance of the client's crime or fraud. See, Rabushka ex rel. United States v. Crane Co., 122 F.3d 559, 566 (8th Cir. 1997); United States v. Jacobs, 117 F.3d 82, 88 2d Cir. 1997). Because the attorney-client privilege benefits the client, it is the client's intent to further a crime or fraud that must be shown. See, e.g., In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995).

> Both the attorney's intent, and the attorney's knowledge or ignorance of the client's intent, are irrelevant. (citations omitted)

However, the attorney's intent may become relevant in cases where a party invokes the crime-fraud exception to discover documents protected by the attorney work product rule. In re BankAmerica Corp. Securities Litigation, 270 F.3d 642, FN 1; In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204, 207 (8th Cir. 1985). There the Court of Appeals, after noting the underlying premise for the attorney-client privilege (encouraging clients to make a full disclosure of all facts to counsel) added

> However, the purpose of the attorney-client privilege is not furthered "when the lawyer is consulted not with respect to past wrongdoings, but rather to further a continuing or contemplated criminal or fraudulent scheme," In re Berkley & Co., Inc., 629 F.2d 548, 553 (8th Cir. 1980), and therefore the cloak of the attorney-client privilege is removed upon "a prima facie showing that the legal advice was obtained in furtherance of illegal or fraudulent activity...." Id. This exception to the attorney-client privilege is commonly referred to as the crime or fraud exception.

> Although the work-product privilege "is distinct from and broader than the attorney-client privilege," United States v. Knobles, 422 U.S. 225, 238, N. 11, 95 S.Ct. 2160, 2170, n.11, 45 L.Ed.2d 141 (1975), the court below applied the crime of fraud exception to that privilege as well as the attorney-client privilege.

WORK PRODUCT DOCTRINE

Federal law governs the work-product doctrine. Fed. R. Civ. P. 26(b)(3); Pepsico, Inc. v. Baird, Kurtz & Dobson, L.L.P., 206 F.R.D. 646, 652-53 (E.D. Mo. 2002); Baker v. General Motors Corp., 209 F.3d 1051, 1053 (8th Cir. 2000); Petersen v. Douglas County Bank & Trust Co., 987, F.2d 1186, 1189 (8th Cir. 1992); Falkner v. General Motors Corp., 200 F.R.D. 620, 622 (S.D. Iowa 2001); St. Paul Reinsurance Co. v. Commercial Financial Corp., 197

F.R.D. 620, 628 (N.D. Iowa 2000); Estate of Philip P. Chopper v. R. J. Reynolds Tobacco Co., 195 F.R.D. 648, 650 (N.D. Iowa 2000).

As such, the work-product doctrine effectively restricts discovery of documents prepared in anticipation of litigation by or for another party, or by or for that party's attorney or agent. What constitutes documents prepared in anticipation of litigation depends upon the circumstances. Those documents could include business records that were specifically selected and compiled by

a party or its agent in preparation of litigation, and the mere acknowledgment of their selection would reveal mental impressions concerning the potential litigation.

On the other hand, documents are not protected simply because a party transferred the documents to an attorney, law firm or corporate litigation department; documents assembled in the ordinary course of business or for non-litigation purposes are not protected under the work-product doctrine. See, generally, Rule 26(b)(3), Petersen v. Douglas County Bank & Trust Co., 967 F.2d at 1189; Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987).

The Eighth Circuit in Simon, id., defines a court's duty in deciding whether a party has anticipated litigation as follows:

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

Work product is found in two categories: (1) ordinary work product and (2) opinion work product. Baker v. General Motors Corp., 203 F.3d at 1054. The district court in Pepsico, Inc. v. Baird, 206 F.R.D. at 653 notes, citing Baker, id., Gundacker v. Unisys Corp., 151 F.3d

842, 848, n. 4 (8th Cir. 1998); St. Paul Reinsurance, 197 F.R.D. at 628 and Estate of Chopper, 195 F.R.D. at 650, that

> ... Ordinary work product includes raw factual material and/or information, even photographs. (citations omitted) Ordinary work product is not discoverable unless the party seeking it can show a substantial need for the materials and cannot obtain the substantial equivalent of the materials through other means. Rule 26(b)(3). (citations omitted) Although ordinary work product is often that of an attorney, "the concept of work product is not confined to information or materials gathered or assembled by a lawyer." Falkner v. General Motors Corp., 200 F.R.D. at 623, quoting Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1997).
>
> Opinion work product includes an attorney's mental impressions, conclusions, opinions or legal theories concerning the litigation. (citations omitted) Examples of opinion work product include notes and memoranda of a party's attorney regarding witness interviews, and the selection and compilation of documents in preparation for trial. (citations omitted) Opinion work product "enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud." (citations omitted)

The Upjohn court, however, not only discussed attorney-client privilege, but also delved into the origins of the work-product doctrine, stating id., 449 U.S. at 397-98, 101 S.Ct. 686-87:

> ... This doctrine was announced by the Court over 30 years ago in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).... The Court noted that "it is essential that a lawyer work with a certain degree of privacy" and reasoned that if discovery of the material sought were permitted "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices will inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Id. at 511, 67 S.Ct. 393-394.

In diversity cases, federal courts must look to state law, not federal law, in determining

the existence and scope of an asserted privilege. Fed. R. E. 501; Pepsico, Inc. v. Baird, Kurtz & Dobson, L.L.P., 206 F.R.D. at 650; Pamida, Inc. v. E.S. Originals, 281 F.3d 726 (8th Cir. 2002); Baker v. General Motors Corp., 209 F.3d at 1053; Pritchard-Keang Nam Corp. v. Jaworski, et al., 751 F.2d 277, 281, n. 4 (8th Cir. 1984); Cervantes v. Time, Inc., 464 F.2d 986, 990, n. 5 (8th Cir. 1972).

Since Rule 501 fails to specify which state law controls, a federal district court must then rely upon the doctrine announced in Erie Railroad Co. v. Thompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (a federal court sitting in diversity must then apply the forum state's choice-of-law rules). Pritchard-Keang Nam Corp. v. Jaworski, et al., 751 F.2d at 281, n. 4; Cervantes v. Time, Inc., 464 F.2d at 990, n. 5.

It should be remembered that although the attorney-client privilege and the work-product doctrine spring from the same common law origin, In re Murphy, 560 F.2d 326, 337 (8th Cir. 1977); In re Grand Jury Proceedings, 473 F.2d 840, 844 (8th Cir. 1973), the work-product doctrine under the contemporary law "is distinct from and broader than the attorney-client privilege." United States v. Knobles, 422 U.S. at 238, n. 11, 95 S.Ct. at 2170. The circuit court added, in In re Murphy, 560 F.2d at 337

> ... The items protected by the work-product doctrine are not confined to attorney-client confidential communications. Rule 26(b)(3) extends protection to all "documents and tangible things" that are prepared in anticipation of litigation or for trial. Included in this amorphous category are trial preparation documents that contain the fruits of the attorney's investigative endeavors and any compendium of relevant evidence prepared by the attorney. Also protected by Rule 26(b)(3) are the attorney's mental impressions, opinions and legal theories.

While at the time that the Eighth Circuit Court of Appeals decided In re Murphy and In

re Grand Jury Supoenas Duces Tecum, the issue was unresolved as to whether the crime fraud exception applied to attorney opinion work-product privilege, that has now been resolved in the affirmative in this circuit. Baker v. General Motors Corp., 203 F.3d at 1054.

ISSUES FOR CONSIDERATION

1. The privilege log.

2. Asserting objections based upon attorney-client privilege and/or attorney work product.

3. Crafting the motion to compel in opposition to asserted claims of attorney-client privilege and/or attorney work product.

4. Defending against a motion to compel seeking production of materials subject to claimed attorney-client privilege and/or attorney work product.

Bringing Persuasion & Understanding to the Damages Case

Iowa Defense Counsel Association
Annual Meeting
September, 2005

J. Ric Gass
Gass, Weber, Mullins, LLC
309 North Water Street
Milwaukee, WI 53202
(414) 224-7697

Bringing Understanding to the Defense Damages Case - Combining Tactics and Techniques With Overall Strategy.

Thoughts about Attacking Damages

A Potpourri

Iowa Defense Counsel Association
2005 Annual Seminar

September 23, 2005

J. Ric Gass

Gass Weber Mullins L.L.C.

309 North Water Street
Milwaukee, Wisconsin 53202
(414) 223-3300
gass@gasswebermullins.com

Return to course materials table of contents

J. RIC GASS is the senior shareholder in the Milwaukee law firm of Gass Weber Mullins LLC. He is a Fellow in the American College of Trial Lawyers, a Diplomate in the American Board of Trial Advocates and a Fellow in the International Society of Barristers. He formerly served on DRI's Board of Directors and is a past president of both the FDCC and Lawyers for Civil Justice. Mr. Gass' practice is national in scope, and he has taken more than 250 trials to verdict. His areas of specialty are catastrophic injury, bad faith, products liability and punitive damages cases.

Thoughts about Attacking Damages

A Potpourri

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Thoughts about Attacking Damages

A Potpourri

I. Tactics and strategy

When you think about attacking damages, think about what level you will be acting on. You have to have an overall damages strategy and not just a series of tactics and techniques. Using equity rates of returns to develop a discount rate for reduction to present value is a tactic. You also have to consider how that relates to the overall strategy on attacking damages: Does it make the overall dollars suggested by the defense too low? Does it make the overall damages package from the defense seem too risky? Does it give your opponent an opening to attack all of the other parts of the defense damages package as the same kind of approach: taking risks with the plaintiff 's future care.

- Tactics
- Techniques
- Strategies
- Remember your goal is not to deny damages but rather to achieve reasonable damages—and the most important consideration is that the jury's perception is that you are helping them achieve reasonable damages as opposed to denying a legitimate award commensurate with the damages.

II. What is it about damages that makes us uncomfortable?

Finding the Right Words

A. Why don't defense lawyers want to call them damages?

B. Is it because "damages" carries with it the apparent assumption that there has been a wrongful act that caused a condition?

   - It is very similar to the dispute in the Kobe Bryant case where the defense moved to have the prosecution barred from calling the accuser a "victim" because that carries the implicit assumption that Bryant did something to her and is virtually a presumption of improper conduct on his part.

C. How else can we refer to damages? Is there another name for it? How about:

   - The results of the disease/condition?
   - Adverse effects?
   - Conditions?
   - Costs
   - Reimbursements

D. How about this?

   - "The effects and needs associated with the plaintiff 's physical condition"
   - You need to mess around with words like effects and needs using a thesaurus and other resources

III. What are the givens in terms of handling damages?

A. We must do a complete damages work up and have the experts ready to go.

B. We do not automatically put on all the damages evidence.

C. We must make a reasoned decision in each case whether to put the damages evidence in.

D. Can the decision process be reduced to a formula?

- What is the answer for very good liability cases? You can put in damages evidence and give the jury a number.
- What is the answer for very poor liability cases? You can put in damages evidence and give the jury a number.
- What about the 60–40 case? My rule of thumb: evidence but no number.

IV. Laying the groundwork for attacking damages

A. What you can do in *voir dire*

1. Is there anyone on the jury who cannot accept the following:
   a. Get their commitment to accept
   - That the defense can talk about damages without it being an admission of liability
   - That damages need to be reasonable
   - That the award of dollars must follow needs and not just be big dollars

B. The jury must feel "free" or psychologically comfortable to let the defense off on liability.

1. That it is the right thing to do
2. That doing so is easier because the plaintiff will be taken care of in other ways
3. Maybe it is that they know the plaintiff has been fending for himself and will be able to do so in the future. Maybe they know about public sources of funding.

V. With each damages topic you need to consider

A. Admissibility in general

B. Then the avenue of admissibility

- Witness or non-witness
- Briefing necessary
- Visuals necessary

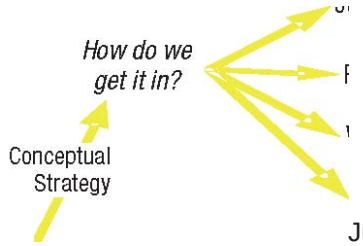
C. How we "talk" about it—theme and semantics

D. The effect it has on the trial dynamic

- How our opponent will react
- What it triggers
- "Looking down the board"

E. How the jury will react

F. "The big picture"



Judicial notice RTA

Witness Other Evidence

The New

How will plaintiff's

Damage Evidence

attorneys react?

Do we open any doors?

To make it effective what visuals do we need?

What receptivity hurdles do we face

How to enhance *with the jury?* the perception of the evidence

How Does It Get Admitted?

Defense Damages Tactic/ Technique or Evidence	What is the Goal of the Evidence?	What is the Expected Effect?	How is it Presented?	Pros	Cons
			Judicial Notice		
			RTA		
			Witness		

VI. The gift of understanding theme as a possible way of appealing to and dealing with jurors

A. If you could have anything you wanted and I had the power to give it to you, what would you ask for?

B. At first you'd think of asking for maybe money, power, looks, etc.

C. As soon as you thought about it I believe you'd ask for the one thing that would give you all that and more

- No more disputes with kids, siblings, spouse, friends, parents.
- It would give you more money than Bill Gates

D. What is this gift?

E. It is the gift of understanding—and in your role as jurors you will crave it more than anything else.

VII. Dealing with hindsight bias: a possible argument from a pharmaceutical case

A. With hindsight you live a perfect life—you'll die only of old age because you'll never have an accident or maybe not even then because you'll know what foods not to eat, drugs not to take, etc.

B. You'll never have to make any choices or decision because you'll know what to do—you'll only do what you know will work and will never do anything that won't work.

C. You'll never make a mistake in judgment or action.

D. You'll always be not just average, not just good but perfect—not even an A student but an A+ student.

E. But here's the strange thing. Let's suppose the CEO of my client had with 20/20 hindsight and for no reason took a look at the adverse event reports and saw reference to liver damage and said this needs to have a warning. Then the plaintiff 's treating doctors would have had a warning that use of the diet medication could cause liver damage. What would the plaintiff have done? Take it or not? If she had no 20/20 hindsight she'd weigh the risks and benefits and knowing the risks to be very small she'd take it. If she had 20/20 hindsight she wouldn't take it.

F. Eventually if you go through all the possibilities it might get to the point where the plaintiff wouldn't have taken the drug because of 20/20 hindsight but then she remained exposed to the risks and problems associated with being overweight: high blood pressure, diabetes, 300,000 deaths per year and then what would she do, *in hindsight*?

VIII. Punitive damages: general thoughts

A. There is a tension in the punitive damages cases when liability is largely against the defense between how much can be said relative to liability and the focus on the

confession and avoidance techniques relative to damages.

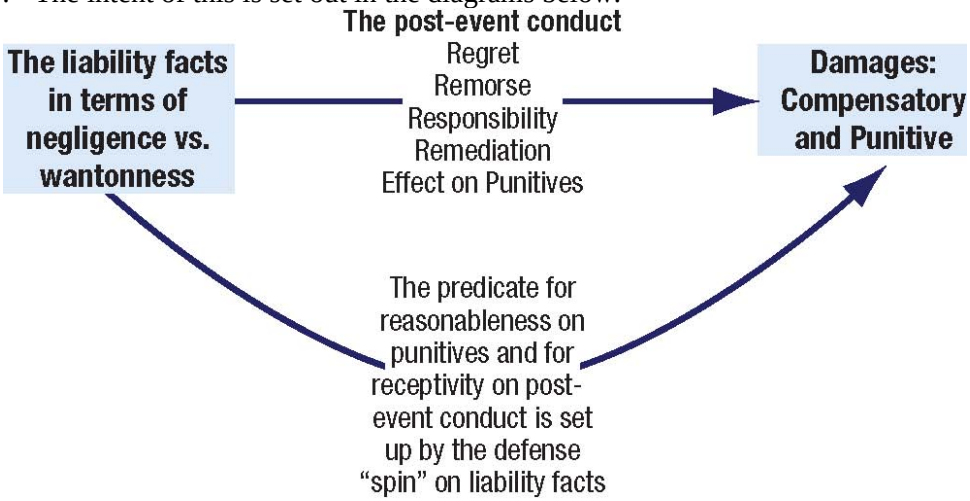
B. There is an obvious predicate for damages arguments that is laid in the liability portion of the trial no matter how thin the liability defenses are.

C. There is an obvious tension between providing a defense explanation of what was done on liability and creation of anger associated not only with admittedly bad conduct but also what might be perceived as an attempt to defend that bad conduct.

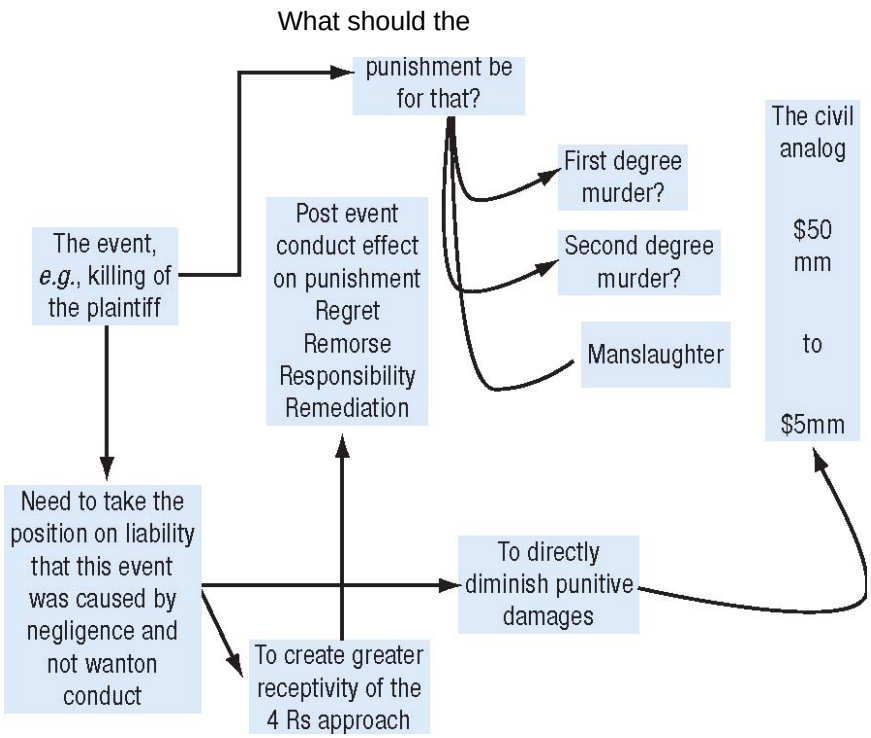
D. The counter danger is that without some "putting into context" of the bad acts that the defense jurors are left with nothing to use as bargaining chips and will feel abandoned and a breach of trust by Corporate America which they have a general good feeling towards if not an allegiance with.

E. As a result there is a need for some "contexturalizing" of the liability side of the case but not so much that it is perceived as a defense on liability so that the focus is on the post-event remedial conduct which is intended to restore a moral balance with regret, remorse, taking of responsibility and remediation is diminished by the "putting in context".

F. The intent of this is set out in the diagrams below.



G. This need for a "putting in context" through discussing the liability facts exists even in the bifurcated punitives case.



- The discussion of liability bad acts will have occurred in the liability section of the trial.
- Properly tried the discussion of those acts may not so much be a "defense" on liability but rather a discussion of the "humanity" of those acts so as to set the predicate for the damages portion of the trial.
- This is very similar to a criminal case where the defense uses the first portion of the trial to get in information that is a predicate for the mitigation in the punishment phase of the trial.

IX. An outline of portions of a defense punitive damages argument

A. Introduction

1. You all probably work for or have worked for a company/corporation
   - You've done your jobs well and honorably and without any harm intended for customers
2. If someone in the company did do something wrong to a customer
   - You and the other innocent employees shouldn't be at risk because of it
   - You and the other innocent employees shouldn't be punished for it
   - Shouldn't be like a classmate acting up and the whole class being punished
   - If the teacher can identify who did something wrong then the punishment should fall on that student and not on the whole class

B. Plaintiff asks you to be a punisher

1. If asked to do job of punisher at work, school, scout troop, church
   - First thing you'd ask: "What are the rules?"
   - No different here
   - The rules are the jury instructions

2. Some might get back in deliberations and want to decide things here on how people feel about corporations or society in general or what happened to Uncle Billy when he….
3. Or you can decide this case the right way "by the rules" as you would in real life
    - Use those instructions—they're not just the rules—they're the law

C. The "Rules": The instructions on the law

1. Let me give you the important ones
2. Before punitive damages are appropriate the conduct must be
    - Willful
    - Wanton
    - Reckless indifference
3. Was it a repeated action or an isolated incident?
4. It has to be "clear and convincing" not just a mere tipping of the scales

D. The Big Picture

1. Litigation creates a microscope
2. Need to step back and look at the context—the humanity of the situation—the real world
3. I'm going to tell you that my client made certain mistakes
    - That is all that my opponent wants to focus on
4. I want you to look at the case not with that myopia—looking only at what is under the microscope
5. I want you to look at the entire situation
6. If two of your children or two of your employees came to you asking for punish the other you'd want to know what both of them, not just one, did
    - And you'd want to know if either of them were shading the facts at all
7. You'd expect me to tell you the other side of the story
8. What I will tell you is not the other side of the story but the whole story.

E. When you have to look back and judge past actions: *reflections and ripples*

1. It is difficult to judge based on one persons characterizing/labeling of the acts of another
2. One thing that is helpful is to look at the "ripples" or the "reflections" of those acts on others around at that time
    - How did people react?
    - When a really bad act is witnessed people complain about it
    - If the act now characterized as bad wasn't reacted to as a bad act, it is an indicator that the characterization isn't correct
3. Let's look at the whole picture together

F. The frame for the whole story—What we're here to do

1. Contrary to what my opponent might think
2. We're here not to deny responsibility
3. We're here to accept responsibility
    a. We start with the problem of (this is where defense counsel shows the good goal for which the product was developed.)
4. The Watchdogs That Didn't Bark
    a. Doctors like Dr. Milburn and the FDA and the Canadian Health Protection Branch are guard dogs

b. But none of them "barked"

- None suggested a manufacturing defect
- None of them created any publicity in a world where every day there is a warning about something or a recall of something

5. No one went to *60 Minutes* or the numerous similar shows, *Frontline*, etc
6. No reports to the multitude of safety agencies in federal government or state governments

G. What did plaintiff do?

1. Within three months sues
   a. Before anything else can be done: investigation of her situation, tests, etc
   b. Nobody from plaintiff 's side "sends any message"
      - To authorities
      - To customers
      - To safety agencies
2. Instead they send a lawsuit
      - What are their priorities?
      - Safety or money?

H. What is the lawsuit for?

1. For money of course
2. But not just money to make plaintiff whole
3. But to make money on the situation
   - To get a windfall
   - To get more than made whole
   - For punitive damages

I. How then do we draw this all together

1. In hindsight
   a. My client regrets it could have done more testing
      - Could have done more investigating
      - Could have done both earlier
   b. "Mistakes" can be made when you have to act without 20/20 hindsight—with just reasonable foreseeability
   c. But no watchdogs barked
   d. Met all of the FDA standards
   e. No one ever saw a manufacturing any earlier
   f. If it was a mistake to not act sooner it was a mistake of lack of reasonable foreseeability

J. What we have is an "adverse reaction event" and concealment by three employees who exercised bad judgment, altered records and concealed their actions

1. The company has done everything the FDA has asked for, will continue to report and monitor and test and will accept responsibility for injuries
2. And will pay for those
3. Reprimands placed in all employee files [fired would be even better]
4. We regret our delay in the sending of the AERs
5. We've added the warning
6. We've appointed a committee to change the policy on the handling of AERs

K. What my opponent didn't produce is what he does not have

1. No other time in the history of the company where they ever had any similar incidents where employees made bad judgments, changed records and concealed
2. All he can spin is this situation where the company tried to help combat obesity and ended up in the old situation of "no good deed ever goes unpunished" because of the foolish acts of three employees with bad judgment
3. The senior management never heard of any other occurrence like this in the company's history

L. The same company

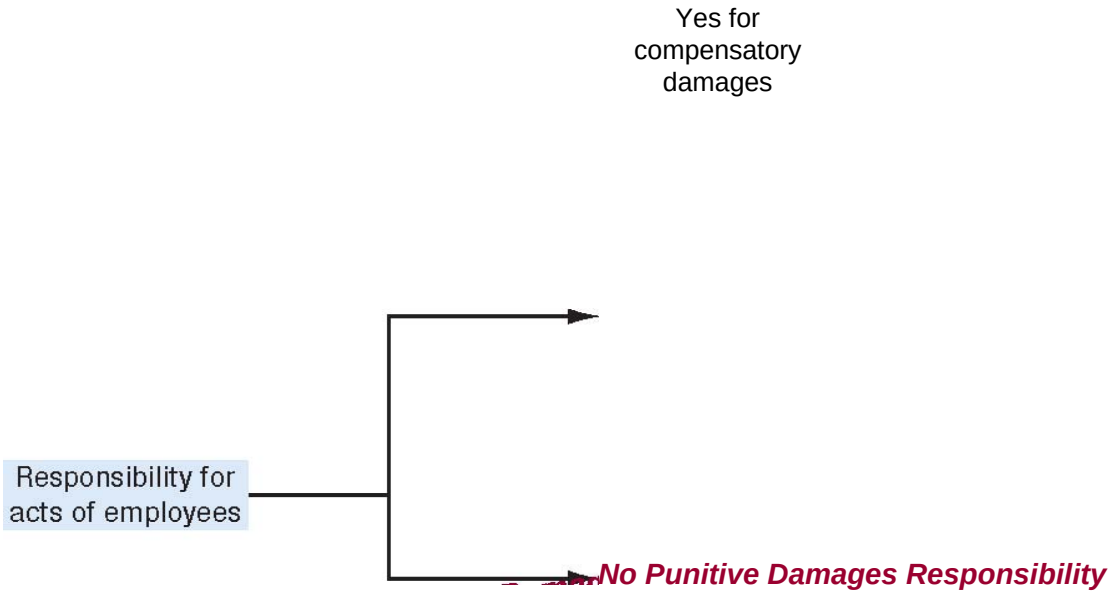
1. The same company that had people that caused the problem had people that corrected the problem
2. Within a corporate culture that my opponent so attacks and criticizes are people that do what you would want them to do: have a whistleblower protocol, people who would "blow the whistle", investigate and when defective procedures are found accept responsibility for them
3. And yet he wants to severely punish that culture

4. What kind of a message does that send to other people who do the right thing in other companies?
   - How can they make the argument and convince others not as good that they should do the right thing?
   - Those people will say see what it got the company
   - They fixed the problem and my opponent got a jury to award millions of dollars
   - Don't show any humanity, don't show any weakness, fight, stonewall etc
5. We accept that as an institution in this kind of business we have an obligation of care—it is an obligation not of perfect security—it is an obligation of reasonable care

M. The verdict

1. The correct number here is $X past meds and $Y for pain and suffering
2. The rest is pure speculation
3. The plaintiff 's suggestion of 10 percent of net worth? That's Psuedo-logic
   - The "net worth" of any company is the skills and energy of its employees not some figure from some report
   - And all those people didn't do anything wrong
   - Shareholders, suppliers, employees, rely on this company—to "punish" it punishes all of those innocent people
4. Nothing for punitive damages
5. Regulatory agencies or legislatures are more appropriate bodies for punishment
   - They can fine and penalize and order compensatory awards
   - There would be no duplication
   - They can craft remedies beyond just dollars

N. Responsibility for acts of employees



O. The reasons why you shouldn't punish

1. Punishing systems already in place in this day and age
   - U.S. attorneys, A.G.s prosecuting companies watch
2. Agencies, legislatures
   - Bad publicity—*Wall Street Journal*
   - If those watchdogs barked there was a known problem
   - If the watchdogs didn't bark then there was no known problem
3. Corrected mistake and sent in all the info and FDA decided what was necessary (their job): add a warning and the company did that
4. The mistake has been corrected

P. Punitives not appropriate here

1. This is about conduct of a few employees
2. This is a good company/good people
3. They have already got the message
   - Already have been punished—serious consequences already
4. Punishment, approvals and rules rightly come in another forum
   - Better equipped for approval and rules: public hearings
   - Better equipped for punishment because of expertise in that industry
   - Can determine quantification of punishment and craft punishments that are other than dollars and set funds for people with sensitivities *e.g.*
5. But you are better forum for compensatory damages—to make the plaintiff whole
   - Right place for specific cases
   - Not for the bigger picture
6. Punishment suppresses corporate initiative/research/development
7. Multiple numbers vs a global one time number

Q. Conclusion

1. The plaintiff claims to want punishment
2. If the plaintiff wanted punishment of the persons whose acts they say are so wrongful,

they could have sued them individually

- Why didn't they sue the employees who made the mistakes personally?
- Why didn't they seek a separate judgment against them personally?
- Why do they seek a judgment against the company and all of it's employees, including the innocent ones and their jobs?

R. Why the plaintiff didn't sue individual persons

1. It's so much harder to say to an individual we're finding against you for these huge amounts of money
2. But if those huge amounts were justified and you did award them against individuals, wouldn't it put the punishment where it would belong?
3. I submit they didn't sue personally because the goal here isn't to have you "send a message"
4. Rather, the goal of the plaintiff is to try and get you to "send them the money"—like in the movie Jerry Maguire: "Show Me The Money"
5. If they sued the alleged wrongdoers personally
   - They might never collect the kind of money they're talking about
   - But they'd sure get punishment
   - And they'd get full compensation for their "damages" because the company is asking you to award that

S. Lastly, windfalls and society

1. If you give in to plaintiff 's plea for more than being made whole who benefits?
   - Plaintiff 's attorney for sure
   - Plaintiff for sure
2. Zero benefit for society
3. In fact a negative
4. Who would ever make any kind of admission again?
5. The story of the boy who broke the window

X. The power of metaphor

> Met•a•phor—Function: *noun*. Etymology: Middle French or Latin; Middle French *metaphore*, from Latin *metaphora*, from Greek, from *metapherein* to transfer, from *meta-* + *pherein* to bear. 1: a figure of speech in which a word or phrase literally denoting one kind of object or idea is used in place of another to suggest a likeness or analogy between them (as in *drowning in money*); *broadly*: figurative language.

A. Introduction

1. Metaphor is one of the standard argument devices and among the most powerful along with analogies. It is a powerful argument form because it reaches into the jurors experiential background and has easy meaning for them. It is also powerful because metaphor evokes imagery and the language used can usually be simple and understandable.

2. As powerful as metaphors can be in legal argumentation and presentation of the case and as persuasive as a good metaphor can be, there is a danger lurking in their use. The danger is that the metaphor can be turned around on the one first introducing it. For plaintiffs counsel the use of metaphor in rebuttal is especially powerful because there is no answering argument. Metaphors introduced early in the case can have power throughout the case and can define what the case is about but early introduction allows more time for the other side to come up with the

counterspin on the metaphor. Accordingly, not only the nature of the metaphor but also the timing of its use are very important.

3. The purpose of this outline is to provide a structure for thinking about metaphors and protecting them once used.

B. The four facets of the use of metaphor

1. There are four facets or stages to go through in preparing a metaphor for use at trial: (1) the idea stage (2) the thinking it through stage (3) the milking it/developing all the nuances stage and (4) the protecting it from counterspin stage.

2. The idea stage

a. This is the "eureka" moment. It comes to you in the shower, in the car driving home or is triggered by the TV or radio that you are listening to in the background. There is no systematic way to make these moments happen. You can collect stories, remember what worked in other trials, collect articles with suggested metaphors but usually the best and the freshest come in "eureka" moments. The only real preparation is paying attention to every stimulus in your life and asking yourself "Could I use that in a trial?" Ads on tv are good sources many times of metaphors. Ad agencies spend millions of dollars on ad campaigns trying to sell products or services. Steal their creative ideas if the ad resonates with you and others. Lawyers for years used the "Where's the beef " metaphor. Many others have used Reagan's line "There you go again" and politics is a fertile ground for metaphors. Trying to re-use good lines from past trials is dangerous because resourceful opponents may find out about those from transcripts or past opponents and may know of your re-use of certain stories. Talking with other trial lawyers from other parts of the country is a good way to pick up metaphors and analogies. Their stories might come from the culture of that geographical area but can usually be recrafted to fit the culture and ethnicity of your area.

3. The thinking it through stage

a. Once you have the metaphor structure now it has to roll around in your head and you have to tell it out loud to yourself so you become familiar with it and practice and hone it. It has to be able to be told relatively quickly and it's point has to be very clear and on point with the case. As the telling of it is coming together you have to be the "Devil's Advocate" and now step outside yourself and see not just how it will play with the jury but think about how your opponent could use it themselves. Many times at this stage you realize that the metaphor is not good enough or is too dangerous no matter how much you change it. But if it seems to be holding together and making the point it's time to start thinking about the nuances stage.

4. An example to make the transition to the milking it stage

a. A metaphor I am currently working with comes from an ad that ran on TV last year

for an insurance company. It showed a group of boys playing baseball in a urban area. You see the face of a young boy who is pitching the ball, you hear the sound of a ball being hit by the bat and then as you hear the sound of the ball breaking a window you see the look of worry on the boys face. You then hear the sounds of the other boys running away while you see this one boy walking toward the house with broken window and see him ring the doorbell and getting ready to accept responsibility for the window.

b. That scene can be set up by you in any number of ways: you are the boy who took responsibility, it was your brother who you have so much respect for because he took responsibility, it was your son who did it, etc. Your point obviously is that your client has taken responsibility and no more punishment is necessary. Set it up and milk it for all it's worth. All very powerful imagery and argumentation. But, the fear is: can your opponent take the metaphor and turn it around against you in rebuttal.

5. The counterspin stage: before using the metaphor the rules are:
    a. make sure it works, *i.e.*, tell it to lay people and see if they get the point of it and accept it and do with it what you want them to do;
    b. refine it for delivery in such a way that you have minimized the chances for use by your opponent;
    c. build in a warning that your opponent will try not to respond directly to the moral of the story but try to twist it to gain a "semantic" reply or advantage rather than a substantive reply.

XI. Conclusion

A. Attacking damages requires both tactical and strategic thinking: you need to think both like the squad leader on the battlefield and the general in the war room (or secure the help of consultants to provide the strategic big picture thinking). It also requires the ability to find the right words to talk comfortably about damages. The groundwork for attacking damages is laid in

B. Every piece of defense damages evidence has to be thought through in terms of reactions and countermoves that it will evoke with both your opponent and jurors.

C. To get jurors beyond superficial reactions to sympathy, anger and hindsight bias and box car punitive damages, closing argument themes are offered in this outline. Lastly, the constraints on the use of powerful metaphors in argumentation are explored.

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Iowa Defense Counsel Association

1965 through 2004 Annual Meetings

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Des Moines, IA 50309
515/244-2847

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