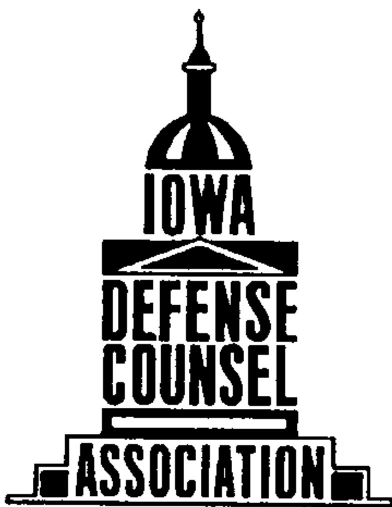
2008
Annual Meeting
& Seminar

September 18-19, 2008
West Des Moines Marriott
West Des Moines, Iowa



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Iowa Defense Counsel Association
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2008 IOWA DEFENSE COUNSEL ASSOCIATION - ANNUAL MEETING & SEMINAR SCHEDULE

Wednesday, September 17, 2008

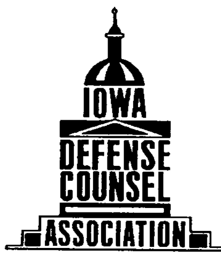
4:00 – 8:00 p.m. **IDCA Board Meeting (Boardroom B & Concord D)**
8:30 – 11:00 p.m. **IDCA Hospitality Room Open (Room 917)**

Thursday September 18, 2008

7:00 a.m. – 5:00 p.m. **Registration Open (Concord Foyer)**
7:00 – 7:45 a.m. **Exhibitor Set-up (Concord Foyer)**
7:00 a.m. – 5:00 p.m. **IDCA Internet Lounge (Grand Ballroom)**
7:00 a.m. – 5:00 p.m. **Exhibits Open (Concord Foyer)**
7:00 – 8:00 a.m. **Continental Breakfast (Concord Foyer)**
8:00 - 8:15 a.m. **Welcome and Opening Remarks (Grand Ballroom)**
Martha Shaff, IDCA President
Megan Antenucci, Program Chair
8:15 – 9:00 a.m. **Case Law Update I – Employment, Commercial, Contract, Constitutional Damages & Government (Grand Ballroom)**
Anna Mundy
Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, IA
9:00 – 9:45 a.m. **Employment Law Update (Grand Ballroom)**
Jaki Samuelson
Whitfield & Eddy, P.L.C., Des Moines, IA
9:45 - 9:55 a.m. **Legislative Update (Grand Ballroom)**
Robert M. Kreamer, Executive Director, IDCA
Kreamer Law Office, Des Moines, IA
9:55 – 10:00 a.m. **DRI Update (Grand Ballroom)**
Michael Thrall, Nyemaster, Goode, West, Hansell, & O'Brien, P.C., Des Moines, IA
J. Michael Weston, Lederer Weston Craig, P.L.C., Cedar Rapids, IA and
Harold "Pete" Peterson,
Mid-Region Representative, DRI, Utah
10:00 –10:15 p.m. **Break & Exhibits Open (Concord Foyer)**
10:15 –11:00 p.m. **Functional Capacity Evaluations & the Defense of the Claim (Grand Ballroom)**
Gina Boomershine
Accelerated Rehabilitation Center, Des Moines, IA
11:00 –11:45 p.m. **Accident Reconstruction (Grand Ballroom)**
Thomas Long
Packet Engineering, Inc., Naperville, IL
11:45 a.m. –12:15 p.m. **Update on Supreme Court (Grand Ballroom)**
The Honorable Marsha K. Ternus
Iowa Supreme Court, Des Moines, IA
12:15 –1:15 p.m. **Luncheon & Awards (CK's Steakhouse Restaurant)**
Exhibits Open (Concord Foyer)
1:15 – 2:00 p.m. **Case Law Update II – Negligence, Torts & Indemnity (Grand Ballroom)**
Amy Teas
Bradshaw, Fowler, Proctor & Fairgrave, P.C. Des Moines, IA
2:00 – 3:00 p.m. **The Art & Science of Jury Selection (Grand Ballroom)**
Len Matheo & Lisa DeCaro
Courtroom Performance, Inc., Evergreen, CO
3:00 – 3:15 p.m. **Break/Exhibits Open (Concord Foyer)**
3:15 – 5:00 p.m. **The Art & Science of Jury Selection con't (Grand Ballroom)**
Len Matheo & Lisa DeCaro
Courtroom Performance, Inc., Evergreen, CO
5:30 – 8:30 p.m. **IDCA Reception/Dinner**
Location: Des Moines Golf & Country Club
1600 Jordan Creek Pkwy., West Des Moines, IA
Action Stations & Music provided by: Freestyle
8:30 p.m. **IDCA Hospitality Room Open After the Banquet**
(Room 917 – West Des Moines Marriott)

Friday September 19, 2008

7:00 a.m. – 5:00 p.m. **Registration Open (Concord Foyer)**
7:00 a.m. – 5:00 p.m. **IDCA Internet Lounge (Grand Ballroom)**
7:00 a.m. – 3:15 p.m. **Exhibits Open (Concord Foyer)**
7:00 – 8:00 a.m. **Continental Breakfast (Concord Foyer)**
8:00 – 8:45 a.m. **Case Update III (Civil Procedure; Court Jurisdiction & Trial; Evidence; Insurance, Judgment & Limitation of Action) (Grand Ballroom)**
Kami Holmes
Swisher & Cohrt, P.L.C., Waterloo, IA
8:45 – 10:00 a.m. **The Art & Science of Witness Preparation (Grand Ballroom)**
Len Matheo & Lisa DeCaro
CourtroomPerformance, Inc., Evergreen, CO
10:00 –10:15 a.m. **Break/Exhibits Open (Concord Foyer)**
10:15 – 10:45 a.m. **The Art & Science of Witness Preparation (Grand Ballroom)**
Len Matheo & Lisa DeCaro
CourtroomPerformance, Inc., Evergreen, CO
10:45 – 11:45 a.m. **The Art & Science of Witness Preparation ETHICS (Grand Ballroom)**
Len Matheo & Lisa DeCaro
CourtroomPerformance, Inc., Evergreen, CO
Sharon Soorholtz Greer, Cartwright, Druker & Ryden, Marshalltown, IA
11:45 a.m. –12:15 a.m. **Federal District Judge Comments (Grand Ballroom)**
The Honorable Robert W. Pratt, Chief Judge
United States District Court for the Southern District of Iowa
12:15 – 1:15 p.m. **Luncheon & Annual Meeting (CK's Steakhouse Restaurant)**
Internet Lounge Open (Grand Ballroom)
Exhibits Open (Concord Foyer)
1:15 – 2:00 p.m. **Medicare & Future Medical Expenses in Personal Injury Litigation (Grand Ballroom)**
Brian C. Ivers
McDonald, Woodward & Ivers P.C., Davenport, IA
2:00 – 3:00 p.m. **Practical Tips for Using Mock Jury Trials (Grand Ballroom)**
James P. Craig, Lederer Weston Craig, P.L.C., Cedar Rapids, IA
Sean M. O'Brien, Bradshaw Fowler Proctor & Fairgrave PC,
Des Moines, IA
Alan E. Fredregill, Heidman Redmond Fredregill Patterson Plaza Dykstra & Prahl LLP,
Sioux City, IA
3:00 – 3:15 p.m. **Break/Internet Lounge Open**
Exhibits Open (Concord Foyer)
3:15 – 4:00 p.m. **Construction Defect Coverage Issues (Grand Ballroom)**
Donald G. Thompson
Bradley & Riley PC, Cedar Rapids, IA
4:00 – 5:00 p.m. **Ethics (Grand Ballroom)**
Orrin K. (Skip) Ames, III
Hand Arendall LLC, Mobile, AL
5:00 p.m. **Closing Remarks/Adjourn**



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2008

PRESIDENT	PRESIDENT-ELECT	PAST PRESIDENT
Martha L. Shaff 111 East Third Street, Suite 600 Davenport, IA 52801 Phone: (563) 326-4491 Email: mls@bettylawfirm.com	**Megan M. Antenucci** 317 Sixth Avenue, Suite 1200 Des Moines, IA 50309-4195 Phone: (515) 246-5521 Email: antenucci@whitfieldlaw.com	**Mark S. Brownlee** 805 Central Avenue, Suite 700 Fort Dodge, IA 50501-0957 Phone: (515) 576-4127 Email: brownlee@frontiernet.net

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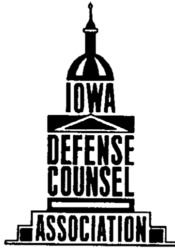

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association from September 2007 through August 2008.

Kim Bartosh, Des Moines, IA

Jace T. Bisgard, Cedar Rapids, IA

Thad J. Collins, Cedar Rapids, IA

Erika Eckley, Clive, IA

Jay D. Grimes, Urbandale, IA (Student)

Kimberly K. Hardeman, Cedar Rapids, IA

Douglas W. Krenzer, Omaha, NE

Samantha C. Norris, Cedar Rapids, IA

Nicholas SJ Olivencia, Des Moines, IA

Alison Schroder, Davenport, IA

Amanda R. Smith, Marshalltown, IA

Paul C. Thune, West Des Moines, IA

Amy L. Van Horne, Omaha, NE

IOWA DEFENSE COUNSEL ASSOCIATION
STANDING COMMITTEES 2007

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.	James A. Pugh Morain & Pugh P.L.C. 5400 University Avenue West Des Moines, IA 50266 Phone: (515) 225-5654 Fax: (515) 225-4686 Email: jpugh@fbfs.com
BOARD OF EDITORS – DEFENSE UPDATE Responsible for keeping the creating a timeline for the quarterly newsletter and keeping the committee members on track.	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@rawlingsnleland.com
CLE COMMITTEE Assists president-elect in organizing annual meeting events and CLE Programs.	Megan M. Antenucci Whitfield & Eddy, PLC 317 Sixth Avenue Suite 1200 Des Moines, IA 50309-4195 Phone: (515) 246-5521 Fax: (515) 246-1474 E-mail: antenucci@whitfieldlaw.com
COMMERCIAL LITIGATION Monitor current developments in the area of commercial litigation and act as resource for the Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues.	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
E-DISCOVERY The E-Discovery committee will monitor the new rules on e-discovery, provide our members with education on the new rules including rulings on the issue and practice pointers	David Luginbill Ahlers & Cooney, P.C. 100 Court Avenue Suite 600 Des Moines, IA 50309-2231 Phone: (515) 243-7611 E-mail: dluginbill@ahlerslaw.com
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

FAIR AND IMPARTIAL COURTS This committee will work with the ISBA and the Supreme Court regarding judges who come under attach at the time of re-appointment.	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
JURY INSTRUCTIONS Monitor activities is ISBA civil jury instructions committee and changes in civil jury instructions, recommend positions of IDCA on proposed instructions and addition to IDCA recommended jury instructions.	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
LAW SCHOOL PROGRAM/TRIAL ACADEMY 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 Co-Chair 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
LEGISLATIVE Monitor legislative activities affecting judicial system; advise Board of Directors on legislative positions concerning issues affecting members and constituent client groups	Gregory A. Witke Bradshaw Fowler Proctor & Fairgrave PC 801 Grand Avenue, Suite 3700 Des Moines, IA 50309 Phone: (515) 246-5892 Fax: (515) 246-5808 E-mail: witke.greg@bradshawlaw.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.	Michael W. Thrall Nyemaster, Goode, West, Hansell & O'Brien, P.C. 700 Walnut Street, Suite 1600 Des Moines, IA 50309-3899 Phone: (515) 283-3189 Fax: (515) 283-8045 E-mail: mwt@nyemaster.com Co-Chair Heidi DeLanoit American Family Mutual Insurance Company 5500 Westown Parkway, Suite 180 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
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: bruther@mchsi.com Co-Chair Randall 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.	Brian Ivers McDonald, Woodward & Ivers, P.C. 3432 Jersey Ridge Road, PO Box 2746 Davenport, IA 52809-2746 Phone: (563) 355-6478 Fax: (563) 355-1354 E-mail: bivers@mwilawyers.com Co-Chair Stephanie Glenn Techau Nyemaster, Goode, West, Hansell & O'Brien, P.C. 700 Walnut Street, Suite 1600 Des Moines, IA 50309-3899 Phone: (515) 283-3110 Fax: (515) 283-8018 E-mail: sgtechau@nyemaster.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 program and young lawyer training programs.	Hannah M. Rogers Nyemaster, Goode, West, Hansell & O'Brien, P.C. 700 Walnut, Suite 1600 Des Moines, IA 50309 Phone: (515) 283-3123 Fax: (515) 283-8045 E-mail: hmrogers@nyemaster.com

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Employment, Commercial, Constitutional, Contracts, Damages and Government

Iowa Defense Counsel Association
Annual Meeting
September 18, 2008

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APPELLATE CASE UPDATE I

Employment, Commercial, Constitutional, Contracts, Damages and Government
2007-2008

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I EMPLOYMENT

Gilbert v. Des Moines Area Cmty. College, 495 F.3d 906 (8th Cir. Aug. 8, 2007) (Iowa).

Facts: Gilbert was the Urban Campus Provost for DMACC in 2003 who applied for the DMACC president position. DMACC received approximately 48 presidential applications. A screening committee met to narrow down the list. Gilbert was ranked 12th, and the committee chose 12 candidates to move on because Gilbert, an African-American, was in the 12th position. References were checked and the search committee again narrowed down the list to four candidates based upon scores they received during the application process. DMACC ran an affirmative action review in which the three African American candidates' scores were compared to the other finalists. This review concluded that none of the African-American candidates received a point score sufficiently close to the scores of the finalists to receive an interview. Gilbert filed a complaint with the ICRC and EEOC, alleging discrimination on the basis of age, race, color, and retaliation. DMACC began investigating the presidential search process. DMACC discovered that substantial portions of Gilbert's application were plagiarized almost word-for-word from two separate textbooks. Gilbert argued that he used a consultant to prepare the application essays, but Gilbert could not provide information regarding the identity of this consultant. Gilbert was demoted to another position after the plagiarism was discovered. Gilbert filed suit and the district court granted summary judgment for DMACC.

Holding: The court affirmed summary judgment for the defendant. The court noted that *Desert Palace* did not alter the analysis at summary judgment stage. The court also refused to consider new arguments upon appeal.

Analysis: Gilbert attacked the district court's method of analysis, arguing that *Desert Palace* modified the *McDonnell Douglas* burden shifting analysis. Gilbert argued that instead of determining whether race was *a* motivating factor, the court required that race be *the* motivating factor. The court disagreed, finding that *Desert Palace* did not modify the court's use of the *McDonnell Douglas* framework at the summary judgment level. Additionally, the court found no indication that the district court improperly hinged the determination on Gilbert's ability to show race was the sole factor in the presidential choice. DMACC conceded that Gilbert established a prima facie case of discrimination. In order to show pretext, Gilbert made several new arguments upon appeal. The court will only consider a new argument if it is purely legal and requires no additional factual development. Gilbert argued that those facts were generally before the district court. The court refused to consider the arguments and chose to limit the review to the arguments Gilbert raised before the district court as opposed to those arguments the district court *might* have deduced from the record as a whole. The court found that Gilbert could not offer sufficient evidence to rebut DMACC's legitimate, nondiscriminatory reason for not selecting Gilbert as one of the candidates. With respect to the retaliation claim, the court was not persuaded that Gilbert's evidence supported a claim for retaliation. The court noted that DMACC never wavered from its explanation for demoting Gilbert.

Shaffer v. Potter, 499 F.3d 900 (8th Cir. Aug. 22, 2007) (Iowa).

Facts: Shaffer sued Potter, Postmaster General of the United States, for gender discrimination. Shaffer was a letter carrier for the post office. She started an affair with Burnham, a fellow letter carrier, in the summer of 1999. In May 2000, Shaffer complained to the Postal Inspector, Raper,that Burnham's wife and son were in the employee parking lot, which was not permitted. Raper discovered the affair and instructed Shaffer that if she chose to have an affair, she could not let her personal life come into the workplace. Raper did not speak with Burnham. A year and a half later, Burnham called the Postal Inspection Service to report that Shaffer had threatened him. Burnham wrote and signed a statement. Raper and another inspector listened to the threatening voicemail and transcribed it. Raper tried to record the message, but it was unsuccessful. Shaffer denied the threats. Raper pursued a warrant for arrest of Shaffer. Shaffer was terminated for improper conduct. A union-backed arbitration agreed with the termination. Shaffer filed an EEOC complaint. EEOC saw no unlawful discrimination. Shaffer filed in district court where defendant was granted summary judgment.

Holding: The Eighth Circuit affirmed the district court's grant of summary judgment for the defendant. There was no direct evidence of gender discrimination and any finding of indirect evidence would require an unreasonable inference.

Analysis: Shaffer asserted that she presented evidence of direct discrimination. Even viewing the evidence in a light most favorable to Shaffer, the evidence is not sufficient to support a finding that gender discrimination was a motivating factor. Raper did not instigate the investigations. Shaffer reported the first incident and Burnham reported the second incident. Raper did not terminate Shaffer, but rather the supervisor was responsible. Direct evidence must be from the decision maker, which Raper was not. Shaffer lacked direct evidence of discrimination. As for indirect evidence, Shaffer relied upon the same evidence. The district court did not err in rejecting unreasonable inferences that would require speculation. Shaffer presented no evidence that the supervisor acted illegal. Shaffer's claim was essentially that Burnham was not punished for similar actions. His actions were not similar because Burnham did not make threatening phone calls. Accordingly, summary judgment was appropriate.

Napreljac v. John Q. Hammons Hotels, Inc., 505 F.3d 800 (8th Cir. Oct. 10, 2007) (Iowa).

Facts: Napreljac was an employee of Embassy Suites Hotel in Des Moines, Iowa. In January 2002, he received workers' compensation benefits for neck surgery. He returned to work with temporary job restrictions in March 2003. In August 2003, a supervisor criticized Napreljac's work, and three days after this incident, Napreljac complained about back problems and work overload. He again received workers compensation benefits. In September 2003, Napreljac informed a supervisor that his back was bothering him. He informed another supervisor that he fell on stairs near a loading dock—a claim which Napreljac disputes. The General Manager instructed the supervisors to document these conversations. Several human resources employees and the supervisor accompanied Napreljac to the stairs in which he allegedly fell. They filled out

an accident investigation report. The time the incident allegedly happened was noted and Napreljac's name appears to be signed; however he disputes signing the accident form. A security camera tape was reviewed of the loading dock and Napreljac was never in that area at the time the incident occurred. Additionally, he never reported this incident to the first supervisor that he spoke to that morning. Human resources followed up with Napreljac and asked for a clarification of what occurred. Napreljac was suspended without pay pending an investigation, and six days later Napreljac was terminated. Napreljac brought a claim for common law retaliatory discharge for seeking workers compensation benefits and disability discrimination under the ADA. The Southern District of Iowa granted summary judgment in favor of the hotel.

Holding: The Eighth Circuit affirmed summary judgment in favor of the employer. First, the court found that Napreljec was not terminated for engaging in "protected" activity because falsely reporting a work injury does not qualify as protected activity. Second, the court affirmed the finding the Napreljec was not disabled under the ADA.

Analysis: First the court considered the common law claim for retailiatory discharge. Iowa recognizes a cause of action for an at-will employee who is discharged contrary to public policy, which includes termination as a result of filing a workers' compensation claim. The issue was whether Napreljec engaged in protected activity when he falsely reported falling at the loading dock, which could give rise to a workers' compensation claim. The court affirmed the district court in finding that *falsely* reporting a potential workers' compensation injury is not a protected activity. The court noted that in certain circumstances the fact of the injury is undisputed, but the cause of the injury is not. Those cases are left to the workers' compensation system to sort out. Here, the employer made the unilateral decision that the claim of compensable injury was false, and that protected activity is not at issue. The court also affirmed the district court that there was insufficient evidence to create a genuine issue of fact that Napreljec was terminated *because of* reporting a claim. Second, the court addressed the disability discrimination claim and found that Napreljec was not "disabled" under the ADA. Napreljec's work restrictions were merely temporary and those restrictions did not prevent him from seeking employment in a comparable position elsewhere.

Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa Nov. 9, 2007).

Facts: Blue was a cocktail server at the casino when she felt ill while on duty. Her supervisor directed her to rest in the lounge until she felt better. After forty-five minutes, she returned to work. While walking downstairs to return to work, she was talking with coworkers when she tripped. She noted pain in her ankle, but she returned to work. Several days later, the ankle worsened. She sought workers' compensation benefits. A deputy workers' compensation commissioner determined that the ankle injury "arose out of and in the course of her employment". This decision was appealed to the Workers Compensation Commissioner, and the Commissioner affirmed and adopted the deputy's decision. Upon judicial review, the district court rejected the conclusion that the

stairs were inherently dangerous and found that the injury did not arise out of her employment.

Holding: The Iowa Supreme Court took this case to clarify the correct test to determine whether an injury arises out of employment. Iowa again rejected the positional-risk rule which provides benefits when the injury would not have occurred *but for* a condition of employment placed the claimant in the position to be injured. Rather, Iowa applies the actual-risk doctrine that provides an injury is compensable as long as the employment subjected the employee to the *actual risk* of the injury.

Analysis: In order for an injury to be compensable there must be a "connection between the injury and the work." This requires that the injury arise out of and occur in the course of the worker's employment. Here, the employer did not dispute that the injury occurred, merely whether this injury arose out of the course of her employment. The test to apply is the "arising out of" employment which requires proof that a causal connection exists between the conditions of the employment and the injury. The Iowa Supreme Court has generally abandoned the test that the employment subject the employee to a risk or hazard that is greater than that faced by the general public. The court noted that there are two positions that states have taken with respect to this framework. Iowa applies the actual-risk doctrine, which says that the injury is compensable as long as the employement subjected the claimaint to the actual risk of the injury. Other states appliy the positional-risk doctrine, which says that an injury arises out of employment if it would not have occurred *but for* the fact that the condition of employment placed the claimant in the postion to be injured. The Iowa Supreme Court rejected the positional-risk rule and to the extent the Commissioner interpreted the award of benefits under this rule—it was reversed. The court then went on to conclude that the Commissioner correctly awarded benefits under the actual-risk doctrine. In doing so, the court called into question several previous rulings. The court distinguished the present case on the fact that it was the stairs, a condition of Blue's employment, that caused the injury itself.

Brenneman v. Famous Dave's of Am., Inc., 507 F.3d 1139 (8th Cir. Nov. 16, 2007) (Iowa).

Facts: Brenneman began working for Famous Dave's restaurant in West Des Moines in January 2003. Her immediate supervisor, Ryburn, was the general manager of that store. Shortly after Brenneman started her employment Ryburn began making sexual advances toward her. He started off winking and blowing kisses at her, and moved on to slapping her buttocks and pulling on her badge attached to the front of her belt. Ryburn also made inappropriate comments. Brenneman reported Ryburn's behavior to her trainer, who was the general manager at another location. After reporting the incident, the trainer told Brenneman that Ryburn and his wife just had a baby and maybe "Ryburn needed a little attention and he was looking in the wrong place." The trainer informed Brenneman that because she was attractive, it was likely that Ryburn was attracted to her and that Ryburn was "there as a friend and not a representative of Famous Dave's." This trainer informed Brenneman that he would report this to human resources and provided Brenneman with a hotline

number to report the incident. Brenneman tried the hotline twice and then mentioned this incident to a co-manager, who directly contacted human resources. Within ten to fifteen minutes, human resources contacted Brenneman and informed her that Ryburn's actions were "blatant sexual harassment." Human resources traveled to the West Des Moines store to investigate and informed Brenneman not to report to work that day. Human resources followed up with Brenneman after this visit and offered to switch Brenneman to another store. Brenneman said that she would need to think about it and she would contact human resources the next morning. Human resources tried to contact Brenneman several times, but she did not return her calls. Later that day, Brenneman's attorney called human resources to report that Brenneman was resigning. Famous Dave's contacted Brenneman several times through written correspondence inviting her to return to work and telling her that the Ryburn situation was handled, yet Famous Dave's does not specifically disclose employee discipline. Brenneman brought claims of hostile work environment and retaliation in violation of Title VII and the Iowa Civil Rights Act. The Southern District of Iowa granted summary judgment for the employer.

Holding: The Eighth Circuit affirmed the district court's holding that Brenneman presented a prima facie case of hostile working environment. The issue was whether the employer could take advantage of the *Ellerth-Faragher* affirmative defense. The court found that Brenneman was not constructively discharged because a reasonable person would not have found the working conditions so intolerable that she was compelled to resign. The court found that the employer took reasonable steps to correct the problem and that Brenneman unreasonably failed to take advantage of corrective measures. Hence, summary judgment was proper.

Analysis: The court affirmed the district court's holding that Brenneman established a prima facie case of hostile work environment. Famous Dave's relied upon the *Ellerth-Faragher* affirmative defense . This affirmative defense is unavailable if the employee suffers a tangible employment action. Brenneman argued that she suffered a tangible employment action because she was constructively discharged from Famous Dave's. There was an issue of whether the Supreme Court has overruled the Eighth Circuit's requirement that constructive discharge requires the plaintiff to prove that the employer intended to force the employee to quit. The court expressly avoided this issue by ruling on other grounds. The court concluded that Brenneman was not constructively discharged because a reasonable person in her position would not have found the working conditions so intolerable that she was compelled to resign. The court noted that Famous Dave's was taking steps to investigate and rectify the situation. Brenneman could have taken steps short of resignation to improve her working conditions, but she failed to do so. Brenneman may not assume the worst and jump to conclusions, and the court concluded that Brenneman did just that in this case. Because Brenneman did not suffer a tangible employment action, Famous Dave's was entitled to the *Ellerth-Faragher* affirmative defense which provides that if the employer excercised reasonable care to prevent and correct the behavior and if the employee unreasonably failed to take advantage of preventive or corrective opportunities provided, then the employer is not liable. Famous Dave's asserted that it exercised reasonable care to prevent sexual

harassment. Brenneman countered that the trainer's reponse to her was "less than ideal". Neverthless, the court found that when Brenneman invoked the hotline, she received an immediate response from Famous Dave's. The court also noted that Famous Dave's sent a human resources employee to investigate and stop the harassment. The court did note that offering to transfer Brenneman, rather than Ryburn, was not ideal. Overall, the court found that Famous Dave's took reasonable care to prevent harassment. Next, Brenneman unreasonably failed to take advantage of corrective measures. It was unreasonable for Brenneman to not cooperate with human resources. Brenneman's claim that she feared retaliation from Ryburn was not persuasive because human resources was the superior to Ryburn and appeared to be in charge. As a result, the district court properly granted summary judgment on the hostile work environment claim. Additionally, the court found that Brenneman could not establish a prima facie case of retaliation because she was not constructively discharged.

Gross v. FBL Fin. Servs., Inc., 526 F.3d 356 (8th Cir. May 14, 2008) (Iowa).

Facts: Since 1987 Jack Gross has worked for FBL Financial Group. In 2001 the company went through a reorganization. At that time Gross was 53 years old. He was re-assigned to the position of Claims Administration Director. His job responsibilities did not change but he viewed the reassignment as a demotion because ultimately it reduced his points under the company's point system for salary grades. Then, in 2003, FBL reassigned Gross to the position of Claims Project Coordinator. Another employee, Lisa Kneeskern, an employee in her early 40s, took over a new position and Kneeskern was responsible for many of the responsibilities that Gross formerly had. Gross argued that the reassignment was a demotion because Kneeskern assumed the functional equivalent of Gross' former position. During this reorganization Gross' salary did not change nor did the points associated with salary grades. Gross brought suit for age discrimination in violation of the ADEA. The case was tried before a jury in the Southern District of Iowa. The jury found in favor of Gross and awarded him $46,945 in lost compensation. After the trial FBL renewed a motion for judgment as a matter of law based on the sufficiency of the evidence. The district court denied this motion.

Holding: The Eighth Circuit found that Judge Pratt's jury instruction improperly instructed the jury because it required that the jury find in favor of Gross if age was a "motivating factor" in FBL's decision to reassign Gross despite a lack of evidence. The Eighth Circuit found that this instruction improperly shifted the burden of persuasion and that the instruction could not be deemed a harmless error. The court reversed and remanded the case for a new trial.

Analysis: The bulk of FBL's appeal dealt with jury instructions given by the court. FBL had argued that the appropriate jury instruction on an age discrimination case in which there was no direct evidence was whether age was a determinative factor in FBL's decision to reassign Gross. Gross argued that the proper instruction was motivating factor in light of the Supreme Court's decision in *Desert Palace, Inc. v. Costa*. Under *Price Waterhouse* the burden of persuasion on the issue of causation may be shifted to the defendant if the

plaintiff is able to show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. Direct evidence requires a specific link between the alleged discriminatory animus and the challenged decision. When the plaintiff makes the necessary showing of direct evidence, the burden is shifted to the employer to convince the trier of fact that it is more likely than not that the decision would have been the same regardless of the illegitimate consideration. Without direct evidence, the burden remains with the plaintiff. Plaintiff did not contend that direct evidence of age discrimination was presented in this case. The instruction in this case improperly shifted this burden because it directed that "if Gross proved by any evidence – direct or otherwise – that age was a 'motivating factor' in the employment decision, then the burden shifted to FBL to prove that its decision would have been the same absent consideration of Gross's age." Gross asserted that this was improper in light of the *Desert Palace* decision. The Eighth Circuit rejected this argument and found that the provision of Title VII relied upon in *Desert Palace* did not apply to claims arising out of the ADEA. The Fifth Circuit Court of Appeals has applied *Desert Palace* to the ADEA at the summary judgment stage. The Eighth Circuit noted that "[e]ven if some of the analysis in *Desert Palace* may seem inconsistent with the controlling rule from *Price Waterhouse*, the court did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable." Accordingly, the jury instruction in the present case was improper in light of *Price Waterhouse* and *Desert Palace* did not alter this conclusion.

Batiste-Davis v. Lincare, Inc., 526 F.3d 377 (8th Cir. May 19, 2008) (Ark.).

Facts: Batiste-Davis was promoted to center manager with her employer, Lincare. She was in charge of the filing, but this was a task that she found overwhelming. A Lincare patient volunteered to assist with the filing and Davis permitted her. On at least one occasion, the patient took records home. Davis also regularly took paperwork, including patient records, home. Davis's supervisor discovered that this was occurring, and Davis was suspended without pay. Davis was informed that she had violated the Health Insurance Portability and Accountability Act (HIPPA). Davis was terminated because of the violations of patient confidentiality and substandard work performance. Davis alleged that she was terminated because of her race. She testified that her supervisor used racially derogatory language and permitted other volunteers to work with patient records. Davis's supervisor disputed these charges. The case went to trial. Davis lost at trial and appealed the district court's refusal to exclude evidence that Davis filed an age discrimination suit against an employer six years prior to the present complaint and the district court's refusal to exclude evidence of past treatments of depression, including electroconvulsive therapy.

Holding: First, the court found that admission of one prior age discrimination lawsuit six years prior to the present lawsuit was improper. Evidence of this prior suit was prejudicial and its probative value did not outweigh the prejudice. However, the court found that this was a harmless error because Davis's credibility was attacked at trial in a number of ways. Second, the court found that admission of Davis's prior treatment for depression was relevant because it directly related to

damages. Lincare impeached Davis with evidence that she received shock therapy in the past because Davis denied treatment for on-going depression problems. As a result, the district court's ruling was affirmed.

Analysis: The standard of review on evidentiary rulings is abuse of discretion. Lincare sought to introduce evidence of prior acts, or evidence that Davis had previously filed an age discrimination suit against her prior employer. The district court ruled that evidence of the prior lawsuit was admissible to show Davis's motive in filing the present case. Lincare also argued that evidence of the prior suit had a bearing on Davis's credibility, state of mind, and pattern or planning of asserting false claims. While certain circuits do not permit evidence of prior suits unless the prior suit was fraudulently filed, the Eighth Circuit permits this evidence if the prior suit was relevant, similar, and within close proximity to the present suit. The court found that the district court abused its discretion in admitting this evidence because the probative value did not exceed the danger of unfair prejudice. The prior lawsuit was six years old and consisted of only one suit. Generally, a charge of litigiousness is a serious one and there is a danger of prejudice. Nevertheless, the court found that the error was harmless because Davis's credibility was impeached at numerous other points in the trial. The court found that the improperly admitted evidence did not have a substantial effect on the jury's verdict.

Second, the court considered whether admission of shock therapy for depression was admissible. The district court admitted this evidence because it was relevant to the issue of damages. Davis argues that this evidence was extremely prejudicial. Because Davis's mental condition was at issue, it was proper to admit evidence of her prior mental condition and treatment. Additionally, Lincare used this evidence as impeachment. Davis refused to acknowledge on-going treatment for depression at trial. Davis argued that this was collateral to her impeachment because it dealt with prior treatment. The court found that this was directly relevant to damages, and thus, it was not collateral. The judgment of the district court was affirmed.

Van Horn v. Best Buy Stores, L.P., 526 F.3d 1144 (8th Cir. May 23, 2008) (Iowa).

Facts: Van Horn was a sales manager in-training at the West Des Moines Best Buy store. Two months after she began employment, Clark the general manager of the Best Buy store in Ames, Iowa, hired Van Horn has the store's inventory manager. Approximately one year later, Clark terminated Van Horn at the same time that a company reorganization eliminated her position of inventory manager. Van Horn asserted that Clark could have placed her in another position, but she was discharged, in part, because she had reported sexual harassment by two sales managers. Van Horn brought suit against Best Buy and Clark for retaliatory discharge under Title VII and the Iowa Civil Rights Act.

Holding: The Eighth Circuit found that *Price Waterhouse* does not apply in a retaliation case, and thus, the standard is whether the protected conduct was a "determinative" factor in the adverse employment decision as opposed to a "motivating" factor which the plaintiff sought. The court affirmed summary

judgment, finding that there was insufficient evidence to support the claim for retaliatory discharge.

Analysis: The court first addressed a tangential issue that was raised by Van Horn. Van Horn sought to strike documents filed by defendants in support of their motion for summary judgment. The court found that there was no merit to Van Horn's argument that defendant's documents "were not authenticated properly, by affidavit or in some other lawful manner" under Rule 56(e). Van Horn never argued that the documents were not what they purported to be, but only that defendants failed to comply with the rules for authentication. In moving to the substantive portion of the case, the court found that the district court properly granted summary judgment in favor of Clark on the Title VII claim because federal law does not provide for an action against and individual supervisor. In turning to the retaliation claim, the only disputed issue was causation. Van Horn argued that she only needed to show that her reports of sexual harassment were "a motivating factor" in her termination. The court found that the *Price Waterhouse* standard does not apply in retaliation claims, and thus, a plaintiff must show that the protected conduct was a "determinative" factor not merely a "motivating" factor in the adverse employment decision. The court found that Van Horn could not meet her burden of establishing that her protected activity was a determining factor in her termination because her last report of sexual harassment was eight months prior to her termination. While timing is not dispositive, it is an important factor in evaluating whether there is a causal connection between the protected activity and the adverse action. Van Horn's second report of sexual harassment was two months prior to her termination. Two months is too long to support an inference of retaliation. Van Horn also asserted that her poor working relationship with Clark demonstrated retaliation. Clark would say "HR" and "game off" when Van Horn entered the room. The court found that Clark's comments could be interpreted as mocking Van Horn's focus on rule enforcement. The court found that Clark's comments coincided with Van Horn's disapproval of Clark's own conduct. The Court found that this evidence does not support an inference that Clark terminated Van Horn for engaging in protected activities, but rather it supported an inference that Clark may have disliked Van Horn for entirely different reasons. Ultimately, the court found that the evidence simply did not support a reasonable inference, as opposed to a speculative guess, that Van Horn's acts of protected conduct were a determinative factor in Van Horn's termination.

Weddum v. Davenport Cmty. Sch. Dist., 750 N.W.2d 114 (Iowa June 6, 2008).

Facts: Weddum was a teacher in the Davenport Community School District in 2004. She had been with the district since 1972. The district implemented an early retirement incentive plan for the 2004-2005 school year. Several requirements had to be met in order to qualify for the plan. Weddum met all of the eligibility requirements except the age requirement that she be fifty-five or older by June 30, 2005. Weddum missed the age requirement by nearly three months. Weddum submitted a letter to the district informing them that she was exercising her early retirement options. The district accepted this as a resignation, but refused to classify her departure as retirement. The evidence showed that the school district had moved back the deadline that applicants

must turn the requisite age as well as lowered the requirement of years of service in the district. After Weddum was denied retirement, she filed suit alleging age discrimination in violation of the Iowa Civil Rights Act (ICRA). The district court denied summary judgment, finding a fact issue as to the district's motives in excluding Weddum from the plan. The district filed an interlocutory appeal, which the court granted.

Holding: The court was asked to consider whether the ICRA permitted claims for reverse age discrimination. The court did not address the issue because it found that the ICRA plainly permits early retirement programs. The Iowa legislature established school district early retirement plans, and there was no indication that the district's application of the program with Weddum was a subterfuge for age-based discriminatory animus. The court overruled the district court and granted the school district's motion for summary judgment.

Analysis: Weddum's argument is that she faced age discrimination because she was not "old enough" to qualify for the early retirement program. The ICRA is broader than the ADEA because the ICRA is "age neutral", meaning that there is no age requirement. While the ADEA recognizes a claim for reverse age discrimination, the court had not previously determined whether the ICRA supported such a claim. The court avoided this determination when it concluded that the ICRA "plainly allows early retirement plans with minimum age requirements." Iowa Code section 216.13 provides an exception to discrimination laws through retirement plans unless the plan is a "mere subterfuge" for discrimination. The court found no evidence in the record to suggest the district discriminated against Weddum based upon her age. In addition, the district provided a legitimate reason for setting the minimum age requirement. Early retirement plans are funded through a "management levy". In order to use these funds, the early retirement plan must apply to employees between the ages of fifty-five and sixty-five according to Iowa Code section 279.46. When fewer than expected employees applied for the program, the district decreased the years-of-service requirement. There was no age-based phase out in the plan, similar to other early retirement plans that have been found to be discriminatory. As a result, the court overruled the district court and granted the district's motion for summary judgment.

Heaton v. The Weitz Co., 2008 WL 2831852 (8th Cir. July 24, 2008) (Iowa).

Facts: Edward Heaton, a man of partial Hispanic descent was a journeyman iron worker for Weitz. He was hired in 2000 and aggressively promoted. Heaton reported directly to Weitz Vice-President Michael Novy. In March or April of 2003 a Union Superintendent, Noel Huber, instructed some of the Union members to tell Heaton he was a "fucking spic". Heaton was also informed that Huber had told other employees "the only thing worse than having his daughter marry a fucking nigger would be to have his daughter marry a fucking spic like Heaton". Heaton reported the incident to Weitz' Human Resources. Heaton specifically requested that Human Resources not assign Novy to investigate his claim of discrimination because Heaton knew that Novy and Huber were good friends outside of work. In spite of Heaton's request, Human Resources assigned the complaint to Novy for investigation. Novy told Heaton that he

hadn't known about his Spanish and Italian background. When Heaton asked if that was a problem, Novy did not respond. Several weeks later, Novy then informed Heaton that he had let Huber go but had hated to do so. Novy had determined that Huber had made discriminatory comments and offered Huber either a demotion or early retirement. Huber chose early retirement. Several weeks later Heaton got into an argument with a co-employee, Brian Henecke. During the argument Henecke called Heaton a "spic." After Novy learned about this argument, he told Heaton that he was fired because Heaton "was acting like a fucking Union Steward". Novy had prepared Heaton's last two paychecks and was ready to terminate him. Heaton specifically asked if he was being fired because of his discrimination complaint against Huber. Novy immediately revoked the termination and gave Heaton a "second chance". Novy decided that Heaton would not be allowed to work on projects with Henecke. Despite that prohibition Heaton was again assigned to jobs with Henecke. On one of these jobs with Henecke, Henecke removed two of Heaton's workers from his crew. Heaton described these workers as his two "right-hand men". Henecke stated that he removed those workers because they failed the necessary background check, however, those workers had previously worked on jobs. The removal of these two crew members caused Heaton to fall behind on the project. When Heaton complained about this particular project. Novy told Heaton that he could either be demoted to journeyman or he could choose to be laid off. Heaton chose to be laid off because a demotion would have taken away important job protections. Novy required Heaton to turn in his company truck, tools and cell phone. Typically, when superintendents were laid off they retained those items during the temporary lay-off. Heaton again filed a complaint with Human Resources stating that he felt he was being retaliated against by Novy because of his original discrimination claim against Huber. Human Resources told Heaton that she had been informed that Heaton had been offered work three or four times which Heaton had declined. Heaton disputed this fact. Several other positions opened up at Weitz and Heaton was passed over for those positions. Human Resources again assigned the claim of retaliation for investigation to Novy despite Heaton's request not to do so. During trial Weitz moved for judgment as a matter of law under Rule 50. Judge Reade of the Northern District of Iowa denied Weitz' motion. The case went to the jury where the jury found for Heaton and awarded him $137,000 in compensatory damages which included $73,000 in damages for emotional distress. The jury also awarded Heaton $25,000 in punitive damages.

Holding: The Eighth Circuit affirmed the jury's award for retaliation because the court gives great deference to a jury's verdict. On the issue of punitive damages the court found that although it was a close question for the court there was not a complete absence of probative facts to support the verdict. The court also affirmed the damages for emotional distress and the attorney's fees.

Analysis: On the retaliation claim Weitz argued that there was insufficient evidence for a reasonable jury to find any causal connection between Heaton's discrimination complaint and either Weitz' decision to lay Heaton off or not to re-hire Heaton. Weitz relied upon the passage of time between the events. The court noted that Weitz essentially argued that the evidence failed to *strongly* demonstrate causation. The court would not substitute its judgment for that of a jury. While

there was a six-month period of time between Heaton's discrimination complaint and the time he was laid off there were intervening events, such as the argument with Henecke and Novy's initial threat of termination that was revoked. Generally the alleged retaliatory act must be very close, however, in this case there was sufficient evidence of retaliation between the initial discrimination complaint and the ultimate decision to lay Heaton off. The court found that in light of the standard of Rule 50 that there must be a complete absence of probative facts to support a verdict the jury's decision would be affirmed. Next, the court determined whether the jury's award of punitive damages for actions taken by the Human Resources Department was appropriate. An employer cannot be vicariously liable for decisions of agents when those decisions were contrary to the employer's good faith efforts to comply with Title VII. Weitz argued that it made a good faith effort to respond to the discrimination claim. The court noted that although Weitz initially responded appropriately to Heaton's complaint, Weitz failed to react appropriately thereafter. A reasonable jury could find the actions by the Human Resources Department undercut Weitz' defense that they acted in good faith. Human Resources assigned the second complaint of retaliation to Novy when Novy was essentially investigating himself. The court noted that punitive damages were a close question, however there was not a complete absence of probative facts to support the verdict. Viewing the evidence in a light most favorable to Heaton, a reasonable jury could find that Human Resources placed a biased or partial-person (Novy) in charge of the investigation and that the investigations were merely cursory and indifferent which contradicted Weitz' argument that it acted in good faith. Next, Weitz argued that there was insufficient evidence to support the jury's verdict for emotional distress. The court found that the testimony of Heaton and his spouse, namely that Heaton felt inadequate, sought psychological treatment and was taking anti-depressant medication supported the award for emotional distress. Lastly, the court considered the district court's award of attorney's fees. Weitz argued that the district court abused its discretion in failing to reduce the attorney's fees because Heaton abandoned three of his five original claims at the summary judgment stage of the case. The district court took that into consideration and reduced the attorney fees by 10%. The district court found that Heaton's attorneys devoted time generally to the litigation in total and that it was difficult, if not impossible, to define the hours based on each claim. The district court also considered Heaton's overall level of success, namely that the jury awarded him $137,000 in compensatory damages and $25,000 in punitive damages. Ultimately the court found that the district court did not abuse its discretion in reducing the attorney's fees by 10% and refusing to reduce the attorney's fees anymore.

II COMMERCIAL

Northwest Inv. Corp. v. Wallace, 741 N.W.2d 782 (Iowa July 13, 2007).

<u>Facts:</u> Defendants were shareholders in River Cities Investment Co. The majority shareholder was Northwest Investment Corp. In 2003, the shareholders adopted by resolution to reduce the aggregate number of shares and not permit fractional shares, which is known as a reverse stock split. This effectively

eliminated the minority shareholders interest. The Board of Directors for River Cities determined the fair market value of the old stock. The minority shareholders made a timely demand for further payment under Iowa Code section 490.1326 based upon an appraisal that they conducted. Northwest brought this action to determine the fair market value.

Holding: The court permitted a valuation with a control premium added, which is the added value a majority shareholder pays to acquire that majority control. Under the modern approach, control premiums are permissible.

Analysis: The major disagreements between the parties' valuation concerns the addition of a control premium on the valuation conducted by the minority shareholders. Northwest contends that a control premium is unwarranted because Northwest is a well-run, efficient bank and control premiums are only permissible when there is "substantial evidence of the inefficient use of assets of the company being appraised." Shareholders have appraisal rights under Iowa law. Thus, this matter comes down to the valuation. There is no perfect formula for determining fair market value. In the 1999 amendments to the Model Business Code discounting for lack of marketability or minority status was expressly prohibited. As a result, jurisdictions are split between discounts under the previous model and the new model in which discounts are prohibited. The official comment to this provision of the Model Business Code states that "a more modern view that appraisal should generally award a shareholder his or her proportional interest in the corporation after valuing the corporation as a whole." When a corporation is valued as a whole, a control premium is proper. This is the additional consideration an investor would pay over the value for a minority interest in order to win a controlling interest in the common stock of a company. The court found that Iowa adopts this modern view and permits control premiums.

The court found a control premium as provided for in the minority shareholders' valuation was proper here. Northwest argued that defendants' valuation was inflated with "synergistic value" or the value added because two assets are more valuable in combination than in isolation. The court found that there is nothing wrong with basing an opinion on the aggregations of actual sales data involving mergers and acquisitions because it reflects the market price.

HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927 (8th Cir. Aug. 10, 2007) (Iowa).

Facts: HOK is the largest architectural firm in the United States with extensive experience in designing stadiums. Krause, a defendant, is the president and CEO of Kum & Go. Krause owns 90% of FC Des Moines, the owner of the Des Moines Menace soccer team. Krause wanted a new stadium built in Urbandale for the team. In 2001, Krause created TSF a non-profit corporation for the benefit of constructing a stadium in Urbandale. Krause was TSF's only member of its board of directors and the sole officer. Krause did not always treat TSF and the Menace as separate entities. For example, for a long period of time TSF lacked a bank account and its funds were commingled with the Menace's funds. In 2000, the Menace sent out a request for proposals for architectural services. The Menace selected HOK for the project. HOK began

work on the middle phases of the project, the construction manager submitted an estimate for costs, which exceeded the construction budget. Krause then ordered HOK to delay the design and construction and begin cutting features. In response, HOK stopped work when it was 75% complete. The City of Urbandale then denied the project. Krause then sought other cities for the project. HOK submitted a final bill of $710,000, which remained unpaid because it exceeded budget. HOK filed a complaint. Defendants moved for summary judgment. The remaining claims went to trial where the jury awarded HOK $436,800 in damages.

Holding: The Eighth Circuit, in applying Iowa law, considered whether the sole director of a nonprofit corporation, could be personally liable under an alter ego doctrine or piercing the veil theory. The court found that the Iowa statute governing the liability of a nonprofit corporation's directors did not preclude piercing the veil or limit the liability of directors. A nonprofit corporation is subject to piercing of the corporate veil if it is undercapitalized or fails to hold meetings.

Analysis: Krause objected to jury instructions regarding the alter ego doctrine and the doctrine of piercing the corporate veil. Krause argued that such doctrines do not apply to a nonprofit corporation in light of Iowa Code section 504A.101. The court found that the statute did not preempt common rights because the statute did not clearly bar those claims. Rather the statute merely reiterated the common law principal that generally stockholders are not liable for corporate debts and that officers of a nonprofit will not be liable solely based on their status as a nonprofit corporation. Lastly, the statute permits liability to the same extent as directors of a corporation. Defendants also argued that the jury could not have been instructed that TSF's corporate form could be disregarded if TSF was undercapitalized. Defendants asserted that the very nature of a nonprofit corporation contemplated this. The court found that a nonprofit corporation's veil may be pierced only if it is undercapitalized in the context of the business it conducts. If a nonprofit engages in commercial transactions and operates as a sophisticated business, the nonprofit may need to be capitalized to the same extent that a for-profit business should be capitalized. Accordingly, the veil of a nonprofit could be pierced. Defendants also argued that the court erred in instructing the jury that TSF's corporate form could be disregarded if TSF failed to follow corporate formalities. The Iowa Limited Liability Company Act specifies that a failure to hold formal meetings shall not affect the personal liability of members or managers. The issue in this case was whether the nonprofit corporation should be treated as a limited liability company or corporation for purposes of piercing the veil. The court found that the factors that support piercing the veil of a corporation also support piercing the veil of a nonprofit corporation. The failure to hold meetings may support piercing as a nonprofit. This was partially based on the idea that nonprofit corporations operate in a manner similar to corporations. Ultimately, the court found that there was sufficient evidence to hold Krause personally liable for the actions of TSF.

Anderson v. Nextel Partners, Inc., 745 N.W.2d 464 (Iowa Feb. 22, 2008).

Facts: In 2002, Anderson purchased two cell phones from and entered into a contract for service with Nextel. The agreement was for a one-year term, but it did permit the parties to cancel during that term. Anderson signed a "new customer checklist" and she indicated that she understood the termination penalty of $200 for early cancellation of the contract. Anderson paid her monthly bill thereafter for several months. At some point, she lost one of the phones and she called to cancel the contract. She received a bill from Nextel for $532.04, including cancellation fees. Anderson refused to pay the bill, claiming that the Nextel agent told her at the time of sale that she could only be responsible for four months of the service under Iowa law. Because she had paid for nine months, she argued that she was not liable for the cancellation fees. Anderson claimed that the Nextel agent showed her an email that represented an email from the Iowa Attorney General's office attesting that the early termination fee was illegal in the state of Iowa. Nextel referred Anderson's account to collection, and she filed suit alleging that the cancellation fees were illegal under the Iowa Consumer Credit Code (ICCC) and Iowa Debt Collection Practices Act. Anderson also alleged that Nextel fraudulently misrepresented the terms of her agreement. The parties reached a settlement on that claim. Nextel filed for summary judgment on the ICCC claim. The district court granted this motion, finding that the agreement is not subject to the ICCC.

Holding: The court affirmed the district court's finding that the cell phone agreement was not a credit transaction subject to the ICCC. The agreement was terminable at any time by the parties and merely because Nextel ran a credit check did not turn this into a credit transaction. Summary judgment was properly granted for Nextel.

Analysis: The ICCC applies to "consumer credit transaction[s]", which is defined as "a consumer credit sale or consumer loan, or a refinancing or consolidation thereof, or a consumer lease, or a consumer rental purchase agreement." Thus, the entire issue is whether the cell phone agreement was "credit" to Anderson. Anderson argued that this was a credit transaction because the agreement was contingent on a credit check of Anderson and she was obligated for a year of fees that was paid monthly. Simply because Nextel did a credit check, does not turn this into a credit transaction. A credit check is also done to ensure that bills are timely paid. The agreement could be terminated by either party, so it did not hold Anderson to a year of fees. Anderson was obligated to pay her bill every month. The court affirmed the district court's finding that this did not fall within the statutory definition of a credit transaction to fall within the purview of the ICCC.

Cemen Tech, Inc. v. Three D. Indus., L.L.C., 753 N.W.2d 1 (Iowa May 2, 2008).

Facts: CTI is the manufacturer of mobile volumetric concrete mixers that mix concrete at job sites. The individual defendants, Longnecker and Enos, through their business, Three D Industries were interested in purchasing CTI. Letters of intent were sent and confidentiality agreements were signed. CTI then provided the Defendants with business information. By spring of 2001, it was

clear that Longnecker and Enos were not going to purchase CTI. On June 5, 2001, CTI terminated Three D Industries' latest letter of intent. Discussions continued over a possible purchase of a portion of CTI's business. In July 2001, an employee of CTI approached Longnecker and Enos regarding starting their own business. By the end of 2001, several CTI employees were moving over to Three D Industries and began developing mobile concrete mixers. In January 2002, the defendants unveiled a prototype of a cement mixer that closely resembled CTI's mixer. CTI filed suit. Defendants moved for summary judgment, which was granted in part and denied in part by the district court.

Holding: The Iowa Supreme Court affirmed some of the district court's rulings and reversed others. Summary judgment was affirmed on the breach of contract claim but the misappropriation of trade secrets, unfair competition, and breach of fiduciary duty claims were remanded for trial.

Analysis: With respect to the breach of contract claims, CTI made several allegations against the defendants. The court considered whether Longnecker, Enos, and Three D Industries breached a letter of intent dated January 2001. The district court found that Enos had not signed the letter and Longnecker signed only as a corporate representative. Three D *Company* was the entity that signed the letter of intent. The court agreed with the district court because it is a central component of corporation law that an entity is separate from its owners. Enos and Longnecker could not be liable. CTI did not sue the entity that signed that letter of intent—Three D *Company* as opposed to Three D *Industries*. While Longnecker and Enos created and operated a number of different entities, the analysis of the court is no different. Each were separate and distinct entities and the court found they should be treated as such. "Just as individuals cannot be held liable on a contract to which they were not parties, neither can a corporation." The court denied a piercing of the veil argument because CTI showed no evidence to create an issue of fact on a piercing argument.

The court also addressed the claim of misappropriation of trade secrets. The court found that summary judgment was not proper in favor of the employee defendants because a reasonable jury could find that those employees took advantage of their positions at CTI to obtain proprietary information. These employees all signed confidentiality agreements and patent agreements. Further, CTI presented sufficient evidence to generate a fact question on the trade secrets issue with Three D, Longnecker, and Enos. The court granted summary judgment on the misappropriation claim against a former customer of CTI.

On the unfair competition claim, defendants argued that because CTI did not plead a "reverse palming" claim, they should be barred from asserting that. Palming off occurs when a defendant sells its product under the plaintiff's name. Reverse palming off occurs when a defendant sells the plaintiff's product under the defendant's name. The court overruled the district court and found that CTI's general claim that the defendants wrongfully marketed their machine was sufficient to maintain a claim for reverse palming off. CTI was not required to identify a particular variety of fraud-palming off or reverse palming off.

On a claim for breach of fiduciary duty, the district court found there was not a fiduciary relationship. However, here the defendants executed confidentiality and nondisclosure agreements. A jury could find that this was a relationship of trust. The court reversed the district court, finding that sufficient facts existed regarding a breach of fiduciary duty.

III CONSTITUTIONAL

State v. Smokers Warehouse Corp., 737 N.W.2d 107 (Iowa Aug. 3, 2007).

Facts: In 2003, the Iowa Attorney General filed a consumer fraud lawsuit against Smokers Warehouse Club, Inc., an Illinois corporation. The attorney general argued that Smokers Warehouse falsely advertised to Iowans that they could purchase tax-free cigarettes and failed to exercise due care to ensure that minors did not purchase cigarettes. The lawsuit was dismissed with prejudice upon motion of Smokers Warehouse Corp., a Mississippi corporation, based upon the state's failure to name and serve the proper entity. Rather than filing another lawsuit, the attorney general employed investigative tools and sent a civil investigative demand to Smokers Warehouse. Smokers Warehouse sought a protective order, which the court denied because there was no pending lawsuit. Smokers Warehouse still refused to comply and the state moved for enforcement of the subpoena. The court ordered that the Smokers Warehouse comply with the order.

Holding: First, the court considered whether the attorney general is empowered to issue a civil investigative demand. While the statute does not read with that exact language, Smokers Warehouse interpretation was too narrow. The attorney general may issue subpoenas, and a civil investigative demand is an equivalent. Second, the court addressed a substantive due process challenge. The court easily dismissed that challenge finding a reasonable fit between the purpose and the statute.

Analysis: Smokers Warehouse asserted that nowhere in the Iowa Consumer Fraud Act is the attorney general empowered to issue a civil investigative demand. The court found that the defendant's interpretation of the statute was too narrow and constrictive. While the statute does not use the term "civil investigative demand", the attorney general is given authority to issue subpoenas. Essentially, the terms are synonymous. The court found that to adopt the defendant's argument would place form over substance and would contradict the broad interpretation that is traditionally given to the investigative power of administrative agencies. Secondly, the defendants argued that the statute violated their due process rights because the attorney general is not required to have "reasonable cause" to initiate an investigation. While some states do require "reasonable cause", the Iowa statute does not. Because a fundamental right was not implicated in this case, the due process clause only mandated a reasonable fit between the government purpose and the means chosen to advance that purpose. The court concluded that there was indeed a reasonable fit between the legislative purpose to eliminate consumer fraud, and the authorization of the attorney general to investigate a violation of the law.

Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. Dec. 3, 2007) (Iowa).

<u>Facts:</u> InnerChange and its affiliate Prison Fellowship offer a residential inmate program within the Newton prison facility. The purpose of the program is to reduce the rate of reoffense with the use of a faith-based program of work and study. The Department of Corrections has no control over the teaching of the curriculum or its personnel. The program is voluntary for prisoners. InnerChange began working in Iowa when the prison system faced budgetary constraints in 1997. In order to meet programming needs, the DOC sought outside programs. InnerChange was the only program that offered a long-term program with excellent post-release services. While state officials were concerned with the constitutionality of InnerChange's religious model, the state determined it was the only way to provide necessary programming because of the financial status. From 1999 through 2002, the state paid a portion of InnerChange's operating costs. Eventually, this was switched to a per diem cost per prisoner. In 2007-2008, InnerChange operated without state funding. The plaintiffs brought the present action against defendants for violations of the Establishment Clause. The case was brought within the Southern District of Iowa, and Judge Pratt found that defendants had violated the Establishment Clause.

<u>Holding:</u> On initial questions of standing and mootness, the court found that the prison inmates, advocacy group and individual taxpayers possessed standing. The claims were not moot either. The court found that the prison fellowship actors were state actors subject to § 1983 because they were willful participants. While the court found that the funding constituted an endorsement of religion, the district court's order seeking recoupment of funding prior to enjoining the program was improper.

<u>Analysis:</u> First the court addressed issues of justiciability—standing and mootness. There were a variety of types of plaintiffs that filed suit—inmates, American United, Iowa taxpayers, and contributors to inmates' telephone accounts. The court found that the only type of plaintiff that lacked standing were the contributors to the inmates' telephone accounts because this was a voluntary contribution rather than a mandatory excise tax. Second, the court addressed the issue of mootness. The defendants argued that the contract was fully performed and thus there was no need for an injunction. The court rejected this argument because the district court did not enjoin an already executed contract, but rather it addressed further operation of the program within the prison system. The court characterized the defendants' arguments as asking the court to vacate an injunction without any assurance that they will not resume the prohibited conduct.

Second, the court addressed the claim that Prison Fellowship and InnerChange were not actors under color or state law for purposes of § 1983. The issue was whether "the alleged infringement of federal rights [was] fairly attributable to the State." The court found that the violations were possible because of the privileges created by the state and the defendants were willful participants in a joint activity with the state. Thus Prison Fellowship and InnerChange were appropriate parties under § 1983.

Next, was the issue of whether the defendants violated the Establishment Clause. The court first considered the direct aid payments that were made from the years 2000-2004. The court noted that there was no pervasive monitoring by the state. This amounted to indoctrination of religious beliefs and constituted improper entanglement between the state and religion. Thus, the direct aid payments violated the Establishment Clause. Next was the issue of whether the per diem payments for 2005 through 2007 constituted a violation as well. The state sought to avoid a constitutional issue through an indirect aid program. The court found that there was no independent private choice involved because an inmate could *only* choose InnerChange. The per diem expense could not be directed to a secular program. As such, the per diem expense violated the Establishment Clause.

Lastly, the Eighth Circuit found that the district court abused its discretion in ordering recoupment for services. The court gave no consideration to the fact that specific statutes provided funding for the program. There was no evidence of bad faith on part of the legislature. When the district court enjoined this program, the legislature stopped funding it. There was evidence that the program was beneficial to the participants. Accordingly, the district court cannot order recoupment for services rendered before the order enjoining the program.

State v. Groves, 742 N.W.2d 90 (Iowa Dec. 7, 2007).

Facts: In 1997, Benjamin Groves was convicted of lascivious acts with a child. As a result he was required to register on the sex offender registry. In 2002, the legislature enacted the sex offender statute, which, among other things, prohibited registered sex offenders from residing "within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility." In 2006, Groves was charged for violating this provision. Groves challenged through the rule and attempted to dismiss the trial information. The district court found that the defendant's right to substantive due process were violated through the application of the statute to Groves. Upon appeal, Groves only argued that his substantive due process rights were violated. Groves did not address a number of other constitutional grounds that he had argued before the district court.

Holding: The Iowa Supreme Court summarily rejected a challenge to the state's rule prohibiting registered sex offenders from living within two thousand feet of schools or child care centers. After applying a rational basis standard, the court found that the defendant had not presented enough evidence to find that the statute impacted the decision.

Analysis: The court found that the right to choose where one lives is not a fundamental right. Accordingly, the test is whether there is a reasonable fit between the two thousand foot rule and the government's interest. The Eighth Circuit addressed the constitutionality of the statute in 2005. *See Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005). Groves did not present evidence before the district court regarding the impact of the statute on him. Without that evidence, the Supreme Court

found that it was unable to determine whether the statute precludes him from living somewhere that meets basic living standards. Ultimately, the court found that Groves failed to submit enough evidence to establish that the statute fails to rationally advance some legitimate government purpose.

IV CONTRACTS

Speight v. Walters Dev. Co., 744 N.W.2d 108 (Iowa Feb. 1, 2008).

Facts: The Speights purchased a home in 2000. This home was custom built by Walters Development in 1995. Sometime after purchasing the home, the Speights found water damage and mold which were attributed to a defectively constructed roof and defective rain gutters. The Speights filed suit against Walters in 2005, alleging a breach of implied warranty of workmanlike construction and general negligence. The parties moved for summary judgment. Walters argued that the Speights, as remote purchasers, could not maintain the claim for implied warranty of workmanlike construction and that the claim was barred by the statute of limitations. The district court and the court of appeals found in favor of Walters.

Holding: The Supreme Court reversed the prior decisions and found that Iowa permits remote purchasers to maintain a claim for implied warranty of workmanlike construction. The statute of repose would provide a limit to this liability. The five-year contractual statute of limitations began to run when the subsequent purchasers discovered the defective construction.

Analysis: The implied warranty of workmanlike construction is designed to protect an innocent home buyer by holding the experienced builder accountable for the quality of the construction. This is an exception to the general rule of *caveat emptor* because it is believed that home buyers are generally in an inferior position when purchasing a home from a builder-vendor. The Iowa Supreme Court in 1985 found that the implied warranty of workmanlike construction applied to the sale of a home by the building to the first owner. The Speights sought to extend that doctrine to purchasers beyond the initial purchaser. There is a split in jurisdictions on this issue. Some jurisdictions do not permit subsequent purchasers to maintain this cause of action because there is a lack of contractual relationship or privity between the parties. These courts have found that the justification for eliminating the privity requirement in certain products liability cases did not exist in the sale of real estate. For example, a house is not a product of mass marketing scheme or designed as a temporary dwelling that generally changes owners frequently. On the other hand, some jurisdictions permit these claims by subsequent purchasers and find that the lack of privity is not an impediment to these claims. While the cause of action has roots in contracts, it exists independently of the contract. Privity has been disfavored in many jurisdictions in products liability cases. The Supreme Court of Iowa found that Iowa should follow this trend because the court had already eliminated the privity requirement in products liability cases raising a claim for breach of implied warranty. This claim is a judicial creation and does not, in itself, arise from the language of any contract between the builder-vendor and the original purchaser. Further policy justifications supported this position.

There is no difference between an original purchaser and subsequent purchasers if a latent defect is discovered later. Walters argued that this rule would lead to increased building costs, but the court rejected that argument saying that all builders are "currently required to build a home in good and workmanlike manner." Additionally, the court rejected the claim that this policy permits unlimited liability for a builder because the statute of repose still remains in effect. The statute of repose begins upon completion of construction of the building.

Next, the court addressed the applicable statute of limitations to this case. Walters argued that the statute of limitations accrued in 1995 when the house was sold by the defendant to the original purchaser. This was based upon the application of Iowa Code section 554.2725(2), finding that statute of limitations on all actions for breach of implied warranty accrue at the time of delivery, not at the time the damage is discovered. That statute is part of the Iowa UCC, and the Speights asserted that the house is not a "good" to fall within the purview of the UCC provisions. The court agreed because a good is defined as "all things . . . which are movable at the time of identification to the contract for sale." Accordingly, the court found that the discovery rule is applicable to this case. No actual or imputed knowledge could be imputed to the Speights because they did not own the home prior to 2000. There was no indication that previous buyers had knowledge of this defect. As a result, the statute of limitations did not bar this cause of action.

Lee v. Bradford, 2008 WL 2042518 (Iowa Ct. App. May 14).

Facts: Plaintiffs and defendants own adjoining property in De Soto. In April 2003, the Lees filed an action against Bradford for nuisance, trespass, and negligence. On the day of trial, the parties reached a settlement agreement in which Bradford agreed to pay $6,500 in exchange for the purchase of a twenty-foot strip of land along the southern border of the Lees' property. IN addition, Bradford agreed to "use [his] best efforts and be removed from [his] current residence on or before December 10, 2005." Bradford encountered difficulties with construction of a new home and he did not move from the De Soto home until August 15, 2006. He then moved back in on December 1, 2006. The Lees filed a petition alleging breach of a settlement agreement. Following a bench trial, the judge ruled that that Lees failed to establish damages, but they were entitled to specific performance and ordered him to vacate the De Soto home.

Holding: The Iowa Court of Appeals affirmed specific performance of the settlement agreement, which ordered that defendant vacate his residence. The court indicated that while the settlement agreement did not state that the defendant was prohibited from moving back into the home, the intent and terms of the settlement agreement should not be disregarded just because the defendant no longer found the terms acceptable.

Analysis: The court noted that ordinarily specific performance should not be ordered unless the contract is express that the court can reasonably determine the duty of each party and conditions under which performance is due. Bradford

asserted undue hardship and argued that the settlement agreement only required him to move out and did not indicate that he could not move back in. The court noted that when the intent is clear from the contract, the parties should not be able to avoid its terms. Although the agreement did not specify that Bradford was prohibited from moving back into the home, that was obviously the intent of the parties—Bradford should not live in that home while the Lees remained there. The court noted that Bradford owned other residences outside of De Soto and the terms of the settlement agreement should not be disregarded "simply because the defendants no longer find them advantageous."

Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430 (Iowa July 11, 2008).

Facts: Pillsbury had a contract in place with Wells Dairy for production of Haagan-Dazs ice cream in the Wells LeMars plant. Several months after the contract was formed, there was a large explosion at Wells' manufacturing facility. Then, Pillsbury entered into a Contribution and Assumption Agreement with Nestle to form a joint venture or Ice Cream Partners in order to combine the Nestle ice cream assets with the Haagen-Dazs division. In 2000, Pillsbury filed suit against Wells seeking damages resulting from the explosion under contract and negligence theories. Wells filed several motions for summary judgment, arguing that the force-majeure clause of the contract excused Wells' inability to perform under the contract. Wells also argued that Pillsbury was not the party in interest. The district court granted summary judgment in favor of Wells.

Holding: The court clarified the meaning of real party in interest in this case, which had gotten confused with the definition of standing. Then, the court considered whether the force-majeure clause permitted summary judgment in favor of Wells. Wells argued that because an explosion was covered under the clause, it was entitled to summary judgment. The court found that the force-majeure clause, when reading the contract as a whole, only excused performance that was not within the control of the parties. Accordingly, there was a fact question as to whether the explosion was entirely unanticipated or could be attributed to Wells.

Analysis: First, the court considered the real party in interest argument. While Wells asserted that Pillsbury lacked standing, the court addressed this from a party in interest standpoint. Standing refers to whether a party has injury whereas a real party in interest concerns whether the party is the true owner of the right sought to be enforced. The court found that there was a genuine issue of material fact as to whether Pillsbury assigned its interest in the action. Second, the court considered the force majeure clause of the contract; however, this analysis used Minnesota law as directed by the contract. The district court had concluded that the provision was ambiguous because the clause could be susceptible to two reasonable meanings. The force-majeure clause stated that neither party would be liable for a specific list of problems, including explosions, and for "any other cause that is beyond the reasonable control of that party." The district court found that "beyond the reasonable control" could either modify the enumerated list or only modify "any other cause." In reading the record and the contract as a whole, the Supreme Court found that the parties did not

negotiate what would constitute a force-majeure event, but rather the discussion centered upon what would happen if such an event occurred. Generally, a force-majeure refers to "an event that can be neither anticipated nor controlled." The court found that there was nothing to indicate that the parties intended to depart from this ordinary meaning. If the parties intended to "change the common meaning of the force-majeure clause, the parties should have had a discussion regarding the definition of a force-majeure event." Further, the entire point of the contract was for Wells to provide a specific amount of product within a specified period of time. If Wells were permitted to simply get out of this requirement with actions, including those actions where the fault could be attributed to Wells, that would contradict the very purpose of the contract. Rather, the cause "beyond the reasonable control of that party " modified all of the events enumerated by the parties in the force-majeure clause. Accordingly, there was no ambiguity and Wells was not entitled to summary judgment. The case was remanded to the district court for a determination of whether the explosion was within the control of Wells.

V DAMAGES

Ne. Iowa Ethanol, LLC v. Global Syndicate Int'l, Inc., 247 F. App'x. 849 (8th Cir. Sept. 10, 2007) (Iowa) (per curiam).

Facts: Drizin, a pro se defendant, appeals Judge Jarvey's order and judgment in favor of Northeast Iowa Ethanol, LLC (NIE). NIE fell prey to a scam of embezzling money out of escrow funds to form an ethanol plant. The Northern District of Iowa found that exceptional circumstances existed to justify piercing the corporate veil against Drizin. The court awarded $3.8 million in compensatory damages and $7.6 million in punitive damages for the misappropriation of funds.

Holding: The Eighth Circuit in a per curiam opinion affirmed the large damage award against the defendant.

Analysis: First, the court found that the district court did not err in exercising personal jurisdiction over the defendant, a Nevada resident. Defendant answered and waived this defense. Second, the court affirmed the district court's credibility determinations and inferences because they were not clearly erroneous. In light of the court's factual findings, damages were proper. There was evidence that $3.8 million dollars belonged to NIE and was converted by Drizin. With respect to the punitive damages award, the court found that the evidence supported the conclusion that the actions showed willful and wanton disregard of the rights of others.

Schooley v. Orkin Extermination, Co., 502 F.3d 759 (8th Cir. Sept. 19, 2007) (Iowa).

Facts: The Schooleys purchased their home in 1978 and observed no termite activity until 1992. The Schooleys purchased an Orkin package. The Orkin representative promised that it would be a complete terminate barrier package. This package included an annual inspection. In 1993, the inspection revealed

no problems. In 1994, while remodeling, the Schooleys noted terminate activity and contacted Orkin. Orkin sprayed the area and assured the Schooleys that problem was under control. At trial, an Orkin representative testified that a reoccurrence within two years meant the initial treatment was inadequate. Orkin did not appear for the inspection in 1995, and the Schooleys found more evidence of terminate activity. The Schooleys again contacted Orkin and the representative recommended an entire treatment. The branch manager would not approve the complete treatment, and a spot treatment was applied. Another spot treatment was performed in 1996. In 1997, the Schooleys undertook a remodeling effort. Shortly thereafter, they found additional termite damage to the newly remodeled basement. Orkin installed a bait system and this process continued into 2001 where Orkin assured the Schooleys the problem was under control; however, additional evidence of an infestation would crop up shortly. In June 2001, the Schooleys found damage to the main floor of the home. In the fall of 2002, the Schooleys discontinued their relationship with Orkin and hired a different terminate control business. Schooleys filed suit, and a jury found in their favor at trial. They were awarded $138,000 in compensatory damages and $276,000 in punitive damages. The district court granted Orkin's judgment as a matter of law on the punitive damages and granted a new trial on the issue of compensatory damages.

Holding: The Eighth Circuit Court of Appeals found that the jury's finding of fraudulent misrepresentation was supported by sufficient evidence. The court reversed the district court's judgment as a matter of law on punitive damages, finding there was sufficient evidence. Finally, the Eighth Circuit found that the district court abused its discretion in granting a new trial on compensatory damages.

Analysis: Orkin moved for judgment as a matter of law on the fraudulent representation claim because there was no evidence that Orkin intended to deceive the Schooleys or that the Schooleys relied upon the alleged misrepresentation. In order to prove that Orkin had the requisite scienter, there must be actual knowledge of the falsity, reckless disregard for the truth, or falsely stated or implied representations. This is a subjective standard in view of the plaintiffs. There was evidence presented at trial that Orkin had reason to believe as early as 1994 the initial treatment was ineffective. Orkin did not advise the Schooleys of this information. While Orkin attacks the evidence, Orkin does not argue that, if believed, the evidence is insufficient to sustain a finding of fraudulent misrepresentation. Accordingly, judgment as a matter of law was appropriate.

The Schooleys argue that the court erred in granting Orkin's judgment as a matter of law on the issue of punitive damages. Punitive damages are appropriate in a fraud case if there is some aggravating factor, such as legal malice. There was evidence that Orkin failed to apply the amount of chemical that was necessary at the initial treatment. The Schooleys argued that this was in an effort to save money. There was also evidence that Orkin knew, as early as 1995, that there was a problem, but Orkin failed to act appropriately. There was also evidence that branch managers had an incentive not to order a full treatment and were rewarded with an internal credit for each spot treatment that was ordered. Viewing this evidence in a light most favorable to the jury's verdict, the court improperly weighed the evidence.

The Schooleys appealed the district court's order granting Orkin's motion for a new trial on the compensatory damages. The district court found the compensatory damages calculation suspect because it correlated to evidence on net worth. Orkin cross-appealed that the jury instruction on compensatory damages misstated the law. The court may not set aside a verdict simply because it might have reached a different conclusion. The court found that the verdict was well within the range of potential awards. The court found nothing in the evidence to suggest $138,000 was excessive or shocking to the conscience.

Cawthorn v. Catholic Heath Initiatives Iowa Corp., 743 N.W.2d 525 (Iowa Nov. 30, 2007).

Facts: Cawthorn sued Mercy Hospital as well as several other defendants, including his treating physician, Dr. Muilli, for damages arising out of treatment. The case went to trial and the jury returned a verdict for Cawthorn. Seventy percent of the fault was allocated to Dr. Muilli, who had settled prior to trial. Thirty percent of the fault went to Mercy. Mercy moved for a new trial, asserting that the verdict of over $10 million was excessive. The district court ordered a new trial unless the plaintiff agreed to a remitter and Cawthorn appealed. Mercy cross-appealed.

Holding: The court found that the evidence was not present to find that the hospital acted willfully and wantonly with malice against the patient, when a doctor committed medical malpractice. The court found that the refusal to submit punitive damages to the jury was proper.

Analysis: The district court granted Mercy's request for a directed verdict on the issue of punitive damages. Cawthorn had the burden of proving "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant . . . constituted willful and wanton disregard for the rights or safety of another." Cawthorn admitted that Mercy did not likely have actual malice toward him, but he argues that the record was sufficient for the court to submit punitive damages on the basis of legal malice. Cawthorn's basis for punitive damages was the assertion that Mercy was aware that Dr. Muilli was likely to injure a patient through negligent treatment. Even though there is evidence that Mercy was aware of issues with Dr. Muilli's competency, the court found that the evidence did not support a finding of willful and wanton conduct.

Other issues in this case were whether the district court properly admitted evidence of the IBME investigation of Dr. Muilli and the resulting discipline. Mercy sought to keep the information revealed in the Iowa Board of Medical Examiner's investigation of Dr. Muilli confidential under Iowa Code § 272C.6(4). The court held that the statute prohibited the admission of the investigative evidence. The court also noted that the issue of whether Iowa permits a common law claim against hospitals for the negligent credentialing of doctors practicing in hospitals was not presented on appeal.

Ladco Props. XVII v. Jefferson-Pilot Life Ins. Co., 531 F.3d 718 (8th Cir. June 26, 2008) (Iowa).

Facts: Ladco joined with Mercy Medical Center in 2002 to develop a Mercy medical office building in Ankeny. In 2004, Ladco hired a mortgage broker to assist in obtaining financing. The broker provided three loan proposals and Ladco chose to apply for financing with Jefferson-Pilot for a $12.6 million dollar loan. The parties signed a commitment agreement in 2005 for this loan. The terms of the agreement required that Ladco pay Jefferson-Pilot a deposit in the amount of $377,000 or 3% of the loan amount. In the event the loan did not close by the specified date, Ladco would forfeit the deposit as liquidated damages. The agreement specified that the deposit represented a "reasonable estimate of [Jefferson-Pilot's] costs and expenses." Ladco breached the agreement and Jefferson-Pilot retained the deposit as liquidated damages according to the terms of the agreement. Ladco brought suit, alleging that the liquidated damages deposit amounted to an unenforceable penalty because 3% of the loan amount was not reasonable estimate of Jefferson-Pilot's probable damages. The parties filed cross-motions for summary judgment. Judge Pratt of the Southern District of Iowa granted summary judgment in favor of Jefferson-Pilot.

Holding: The court applied North Carolina law, pursuant to the express terms of the agreement, to determine whether the liquidated damages provision of the agreement was enforceable. Ladco has the burden to prove that the provision was unenforceable. The court affirmed the district court, finding that liquidated damages of 3% was reasonable based upon the freely negotiated terms of the agreement. The parties stipulated that the liquidated damages were reasonable. The court rejected Ladco's argument that the liquidated damages did not represent the actual costs of Jefferson-Pilot.

Analysis: A liquidated damages provision is used to discourage a party from breaching an agreement and to avoid an argument over the resulting damages if such a breach occurred. These are enforceable if the liquidated damages amount represents an estimate of actual damages likely to result from the breach. The party seeking to invalidate such a provision has the burden of showing that the damages amounts to an unenforceable penalty. The court applied North Carolina law under the terms of the agreement in order to determine whether the liquidated damages provision was unenforceable. The agreement specifically stated that the liquidated damages amount represented a reasonable amount of damages. Under Ladco's argument, the court would be forced to ignore this statement within the agreement. Ladco argued that was merely boilerplate; however, Ladco could not be considered an unsophisticated party in negotiating this agreement. Ladco' s attorney reviewed the agreement, including the statement that the liquidated damages were reasonable. Ladco argued that the liquidated damages did not amount to the actual costs of Jefferson-Pilot, and that Jefferson-Pilot should be required to estimate actual damages by calculating administrative costs and any other costs. However, Jefferson-Pilot asserted that 3% is reasonable in the industry and that the other agreements that Ladco was presented with involved similar liquidated damages amounts. The court found that the record supports the conclusion that 3% was reasonable because it was within the industry standards. The provision was

freely negotiated by sophisticated buyers. Accordingly, the liquidated damages were enforceable.

VI GOVERNMENT

Iowa Ass'n of Sch. Bds. v. Iowa Dep't of Educ., 739 N.W.2d 303 (Iowa Sept. 28, 2007).

Facts: School districts have had a difficult time budgeting for the ever-rising and ever-fluctuating costs of fuel necessary for the transportation of students. Budgets are finalized far in advance which complicates this process. The Iowa Association of School Boards, a nonprofit association, devised the Iowa Joint Utilities Management Program to deal with this situation. The IJUMP offers contracts for purchase of fuel at a set price throughout the fiscal year. The district also has to pay a "risk management fee" that assists in paying the difference between the guaranteed fuel price and the actual price of fuel. At the end of the fiscal year, any remaining fee may be rolled over for the next year. Districts tried to pay for this fee through a special district management levy, which permits a district to levy a property tax in addition to the property taxes for the general school fund. This levy can only be used for specific purposes as Iowa Code section 298.4 details. In January 2005, the association filed petitions for declaratory order stating that the program complied with the statute. The association contended that the expenditure was authorized by the statute that allowed payments from the district management levy fund "[t]o pay the costs of insurance agreements under section 296.7." The Iowa Department of Education and the Iowa Auditor of State ruled that the fleet services program was not "insurance." There was no risk assumed by the IJUMP. Rather the program was more akin to a budget billing plan.

Holding: The court upheld the agency's ruling after finding that the agency's decision was not irrational, illogical, or wholly unjustifiable. Under this high standard, the court concluded that the fleet services program was essentially a budget billing program that did not address the risk of loss that is an essential requirement of insurance. As a result, the school districts are not permitted to use the levy to fund this program.

Analysis: The court found that in reviewing the agency decision the standard for reversing the agency's decision was whether the agency's interpretation of the statute was "irrational, illogical, or wholly unjustifiable" because the legislature intended to vest the department's director with the discretion to interpret these statutes. The Iowa Department of Education is charged with the oversight of these types of levies. Accordingly, the standard of review was high. The Iowa Department of Education interpreted the term "insurance agreements" in the traditional sense, holding that an agreement must transfer the risk of loss from one party to another to fall within the purview of the statute. Yet, the association asserts that the statute permits the school districts to protect against any risk associated with the operation of the district. Further, the legislature's inclusion of self-insurance programs and local government risk pools indicates that the statute "is not limited to only traditional insurance agreements or insurance policies." Because the term insurance and risk were not defined in the statute, the court considered the common meanings of those words. The fleet services

agreement does not protect the district against a risk of loss. The agency was correct in concluding that the program is a budget-billing plan that allows the district to defer payment of fuel costs in excess of the guaranteed prices to the next fiscal year. The program does not provide for loss protection. The agreement does not even "remotely address the coverage of losses caused by a realization of the risk" of a disruption of services. The court also rejected the argument that the inclusion of self-insurance agreements and risk pools showed a broader interpretation of the statute. Self-insurance and risk pools, while not technically insurance, are recognized as alternatives to insurance that are designed to accomplish the same purpose. Accordingly , the agency's decision was not illogical or irrational.

Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment, 748 N.W.2d 483 (Iowa March 7, 2008).

Facts. Shelter House is a nonprofit in Iowa City that operates transient housing. The facility located on Gilbert Street is known to turn people away due to lack of space. In 2004, Shelter House sought to expand to Southgate Avenue, which is zoned for intensive commercial use and needed a special permit to open transient housing. The Iowa City Department of Planning and Community Development reviewed the request for the exception to zoning and approved the plan. This was done at a well-attended meeting in which many people voiced concern over the project. Neighboring landowners filed a writ of certiorari to the district court. The district court reversed the board's decision, concluding that Shelter failed to present substantial evidence that the special exception would not substantially diminish or impair property values in the neighborhood.

Holding: The Iowa Supreme Court clarified the standard of review for a district court sitting on certiorari review of a board of planning's decision. Some case law indicated that a district court could review the facts de novo. The Supreme Court found that courts may not make new factual findings on issues that were before boards for review. Fact finding should be reviewed under a substantial evidence standard that is traditionally employed on certiorari review. In this case, the court found that there was substantial evidence for the board's decision. The district court was overruled.

Analysis: The court found that on an issue regarding parking spots, specifically that the board improperly interpreted a city ordinance on the number of parking spots, was not properly preserved for appeal. There was no record that the parking spots were challenged before the board. Next, the neighbors urged that the was insufficient factual findings regarding the impact on property values. The board failed to make a specific finding or conclusion in its written decision regarding the effect of the exception on property values. This is required for an exception. Iowa courts permit "substantial compliance" with a statute or rule. Considering the meeting, in which property values were discussed, there was substantial compliance with the statute. Finding substantial compliance, the court had to determine the proper standard for the district court to review the board's findings. Shelter House urged for a substantial evidence standard—whether the board's decision had substantial evidence to support it. The

opponents claimed that the district court is entitled to find the facts anew on appeal and the board's findings are only binding if there is substantial evidence. The problem stems from Iowa Code section 414.18 which states that a review process "shall be tried de novo". The court overruled prior law to find that to the extent prior law permitted the court to make new factual findings on issues that were before the board for decision. Fact finding is to be reviewed under the substantial-evidence test traditionally employed in certiorari reviews. Ultimately, the court found that there was substantial evidence to support the board's decision.

City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa March 14, 2008).

Facts: In 2004, Leo Parks, owner of Okoboji Barz purchased a restaurant that formerly operated as O'Farrell Sisters. The restaurant opened in 1958 and throughout the years, the zoning changed. The restaurant was given a nonconforming use permit to continue operations in the newly zoned residential area. The restaurant formerly sold alcohol, but the permit expired in 1994. Parks sought to continue the restaurant and serve alcohol. He applied for a Class "C" liquor license. The city denied this application because it would violate the zoning ordinance. Parks appealed this ruling to the Iowa Department of Commerce, Alcoholic Beverages Division. At the same time, the city filed a petition in the district court for a temporary and permanent injunction to prohibit Parks from operating a "bar or tavern" on the premises. The district court denied the injunction, but also found that Parks could not sell alcohol because it would constitute a separate and distinct nonconforming use and an expansion of an existing nonconforming use.

Holding: The district court's order was reversed. The Iowa Supreme Court found that the sale of alcohol was not prohibited as a matter of law under the ordinances of the city. Additionally, the sale of alcohol, by itself, does not constitute an unlawful expansion of a nonconforming use. The court did not rule out the possibility of a nonconforming use in the future given the right facts.

Analysis: The court found that the real question was whether the sale of alcohol was an accessory use under the ordinance that permits nonconforming uses to restaurants. An accessory use is permitted, unless the ordinance states otherwise, if the accessory use is customary and incidental to the principal use of the property. The court concluded that sale of alcohol was an accessory use that was not prohibited under the statute. Then the court turned to whether the sale of alcohol would constitute an expansion of a nonconforming use. In looking to other jurisdictions this question, when alcohol is involved, is driven by particular facts and circumstances. The court did not consider whether Parks would be expanding a nonconforming use. The court found that the sale of alcohol alone would not constitute an unlawful expansion of a nonconforming use. The court found that the district court erred in granting the requested relief to the city. Rather, alcohol is not prohibited under the ordinance and it does not constitute an expansion of a nonconforming use as a matter of law. The court did not answer whether Parks should be granted a liquor license or whether his use in the future may be considered an unlawful expansion of a nonconforming use.

Horak Prairie Farm, L.P. v. City of Cedar Rapids, 748 N.W.2d 504 (Iowa May 9, 2008).

Facts: In 2003, the city of Cedar Rapids adopted an improvement project. The plaintiffs were specially assessed for improvements and for the installation of traffic signals. The city also applied for a RISE grant in connection with the project and used that money to fund the public's portion of the project costs. The plaintiff's argued that the city improperly applied the RISE funds only to the public's share of the project cost, rather than applying it to the total cost of the project.

Holding: The court addressed whether a city may apportion grant funds only to the public portion of an assessment or whether it should be apportioned to the entire project. The court found that it would be improper to apportion RISE funds, enacted for the public, to the entire cost of the project. Assessments require that private landowners pay for the benefit they receive, and thus, the assessment was proper. Additionally, the court found that the assessment was proper with respect to one portion, but found that another assessment was excessive.

Analysis: The RISE program was specifically enacted for the improvement of roads and streets by the Department of Transportation. The program is funded through motor fuel and special fuel excise taxes. Nothing in the statute enacting the RISE program dictates how the funds are to be dispersed—whether they should be applied to an entire project or to only the public portion of the project. However, the statute prohibits use of the funds for "private road projects or for any other private purpose." Applying the funds only to the public portion is consistent with the purpose of the special assessment program at issue. Special assessments require that private landowners reimburse the city for the cost of the public improvements that specially benefit the landowners. The plaintiffs argued that applying RISE to the public portion means that the city profits by avoiding paying its share of the costs. The court dismissed this argument because the city did not receive money in excess of the project. The plaintiffs also argued that their assessment was excessive. While theses properties are currently used for an agricultural process, the highest and best use of the property is commercial and industrial use. The future use of these properties necessitated traffic signals, and Iowa law permits assessments for the benefit of future use of a property. The court affirmed the assessment with respect to the traffic signals. However, the plaintiffs were assessed 100% for grading and drainage work and the court found that to be excessive.

City of Waterloo v. Bainbridge, 749 N.W.2d 245 (Iowa May 23, 2008).

Facts: Pursuant to Iowa Code § 657A.10A, the city of Waterloo filed a petition in May 2006 requesting ownership of an abandoned piece of property. HLS US Bank had an interest in the property because it had purchased the tax sale certificate on the property in 2003. Under § 657A.10A the city properly acquired title to the abandoned property. Under the statute, the city files a petition naming the owner, all lien holders, and any other person of interest. The city must give notice to those parties, and after 60 days, the city may request a hearing. If a person with interest does not make a good faith effort to comply with an order of

a local business inspector, the court may award title to the city free and clear. HLS asserted that § 657A.10A is facially unconstitutional. HLS also argued that § 657A.10A contradicts § 445.28. In a bench trial, the court granted the city title to the properties free and clear of any claims, liens, or encumbrances.

Holding: The court found that § 657A.10A is clear in its meaning and that it overrode a tax lien because the statute mandated that the city take the property free and clear. Second, even though HLS's tax lien was created before the effective date of the statute, the statute applied retroactively and did apply to the tax lien held by HLS. The court avoided the issue of the constitutionality of the statute because it was not properly preserved for appeal.

Analysis: The three issues on appeal where as follows: 1) whether the legislature intended § 657A.10A to override the lien created by § 445.28; 2) whether § 657A.10A applies to tax liens created before its effective date; and 3) whether § 657A.10A is constitutional. The court found that the third issue regarding constitutionality was not properly preserved. HLS did not cite any authority for its position, which waived the issue. First, the court addressed whether the legislature intended § 657A.10A to override a lien created by § 445.28. HLS argued that the court should use the principles of statutory construction to determine that § 657A.10A should not override other statutes. The court did not resort to those principles because the statute was plain in its meaning. The court found that the language of the statute was susceptible only to one meaning. Section 657A.10A clearly mandate that if the court awards title of the property to the city, title of the property "shall be free and clear of any claims, liens, or encumbrances held by the respondents." The legislative history of the statute further provided evidence of this intention. Prior to its enactment, a city could appoint a receiver to manage the property and bring it up to code. The legislature then enacted § 657A.10A to avoid appointment of a receiver. If the city did not take clear title, there would be little incentive for the city to take title to the property. If the city had to pay the tax lien, there would be less money for the city to recoup its costs when it transferred the property for development. Thus, § 657A.10A overrides tax liens on abandoned properties.

Second, the court addressed whether § 657A.10A applied to tax liens created before the effective date of the statute. The court analogized this case to situations in which the legislature shorts a statute of limitations to enforce a right. The rule is that the period of limitation in effect at the time the suit is brought governs an action even though it may shorten an earlier period of limitation. The enactment of § 657A.10A did not in and of itself defeat HLS's interest in the property. The passage of the statute had the effect of shortening the time for HLS to exercise its option to give notice of the right of redemption under those applicable statutes. Thus, § 657A.10A applies to tax liens created before its effective date.

City of Coralville v. Iowa Utilities Bd., 750 N.W.2d 523 (Iowa May 30, 2008).

Facts: In 2000, MidAmerican and Coralville disputed charges related to the plan to widen a street in the city. The plan required MidAmerican to relocate overhead power lines. MidAmerican determined that the lines should be placed

underground, and MidAmerican filed a tariff with the Iowa Utilities Board (IUB) to charge those costs to the city. In a case related to that tariff, a district court determined that the city was not acting as a customer but instead was acting incident to its police power and the city could order the movement of the lines "at the utility's expense." In 2005, the city determined that power lines on another street should be placed underground to facilitate a public project. The city ordered that MidAmerican relocate the wires at its own expense. MidAmerican did so, but reserved the right to charge the city and its customers for this expense. The city filed a petition in district court seeking to enjoin MidAmerican from seeking a tariff against city residents. MidAmerican filed a petition before the IUB seeking a declaration that the IUB has exclusive jurisdiction over rates and tariffs. The city intervened in that action. The IUB issued a declaratory order finding in favor of MidAmerican.

Holding: The court affirmed the IUB decision. The city challenged the decision on a number of grounds. First, the prior IUB decision with the city did not bar the present dispute because the issues were not similar enough to apply issue preclusion. Second, the decision did not infringe upon the city's right to control right-of way because the city could order movement of utilities for a public improvement, but that did not control how and when the utility chose to allocate the costs of that project. Lastly, the city's equal protection argument was rejected. Simply because residents may pay different rates for utilities did not amount to an equal protection violation.

Analysis: Because this involved review of an agency's interpretation of a statute that has clearly been vested in the agency's discretion, the standard is whether the agency's interpretation was "irrational, illogical, or wholly unjustifiable." The city argued that issue preclusion of the first IUB decision barred this matter. The court rejected that argument because the issues decided where not identical. In the first decision, the issue was whether the city had authority to order MidAmerican to move lines underground at the utility's expense. Whether MidAmerican could pass that cost onto its customers was not decided. The City also contended that the tariff exceeded the IUB's authority because it illegally regulated and infringed upon the city's right to control right-of-way. The court disagreed with this argument because it found there was no true conflict between the city and the IUB. The city is able to control and demand that a utility relocate equipment situated in the right-of-way, but the utility is empowered with the decision to allocate and recover those costs. The city argued that MidAmerican, and the IUB's decision, infringed upon home rule authority. While prior to 1963, cities regulated utilities, the Iowa legislature vested that power within the IUB when it was created. The court affirmed the agency's rejection of the city's home rule argument. The city made several constitutional arguments, namely that the tariff system violated the Iowa uniformity clauses. The court rejected this equal protection argument.

Baker v. City of Iowa City, 750 N.W.2d 93 (Iowa May 30, 2008).

Facts: Baker owns a home in Iowa City, but he resides out of state. He employs a resident manager for the property. In 2003, Baker advertised for a new manager and rejected a female employee because she failed to provide the

proper references and she intended to use her 11-year old son to assist with repairs. Baker thought this was unsafe. The female applicant filed a complaint with the Iowa City Human Rights Commission, claiming discrimination on the basis of marital status, race, and sex. Prior to the hearing, Baker filed this action against the city and the commission seeking declaratory relief. In the interim, Baker settled with the applicant before it was heard by the commission. The district court then found that plaintiff's claims were moot through settlement of the underlying discrimination claim. The district court dismissed Baker's claims.

Holding: Baker's settlement of the underlying discrimination claim did not render this case moot. The constitutionality of the ordinances is justiciable because Baker still has a personal stake in that issue. Because the application of discriminatory practices to small businesses, like Baker's business, was inconsistent with the state statutes, the city exceeded its authority with that provision. However, the inclusion of marital status in the local ordinance did not conflict with the state statutes and was within the authority of the city.

Analysis: On the issue of mootness, the court considered whether Baker still had a "personal stake" in this case. Baker was challenging the constitutionality of the city's discrimination ordinances on the basis that they conflicted with state law. The court found that notwithstanding the dismissal of the underlying discrimination claim, Baker "remains constrained by restrictions imposed by the city ordinances." As a result, he continues to have a specific personal interest in whether the ordinances are valid. The district court erred in dismissing Baker's constitutionality claims as moot.

With respect to the constitutionality, Baker argues as follows: the city's inclusion of small employers in the ordinance and the inclusion of discrimination based on marital status conflicts with the Iowa Civil Rights Act. The Iowa Civil Rights Act does not apply to an employer who employs *less* than four individuals. While the ICRA act permits variations in local ordinances with respect to "unfair and discriminatory practices", the court found the ICRA did not authorize the application of discriminatory practices to a broader category of employers. The legislature intended to protect smaller employers. Accordingly, the Iowa City ordinance conflicts with state law and exceeds the city's home rule authority. With respect to the requirement that Baker not discriminate on the basis of marital status, the ICRA does not include the category "marital status." Because local ordinances may prohibit "broader or different categories of unfair and discriminatory practices," the city may include marital status. This is not inconsistent with the ICRA, and thus, it is within the city's home rule authority.

Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Directors, 2008 WL 3177720 (Iowa August 8, 2008).

Facts: In 1998, the Iowa legislature created the opportunity for school districts to impose a local option sales tax for school infrastructure improvements. The tax required voter approval. In November 1999, a proposal to impose a 1% local option sales tax was put before the voters of Polk County. The plan specifically

detailed the infrastructure projects the tax revenue would fund. This proposal passed and the Des Moines School Board began making improvements to the Des Moines district's facilities. However, in 2004, the Board realized that the actual revenues fell under the previous projections. Other factors influencing the decrease in revenues were increased building costs and a decrease in student enrollment in the district. As a result, on July 12, 2005, the Board modified its ten-year plan by deciding to close four elementary schools and sell a central facility building. The Board also approved hiring a construction firm to create a management plan as well as other modifications to existing buildings that had not previously been part of the long-term strategy. A group of Des Moines residents, taxpayers, and parents of children in the district brought a petition for writ of certiorari to challenge the Board's July 12 decision. Plaintiffs sought to annul the decision. In addition to filing the writ of certiorari, the plaintiff's pursued this action through the Iowa Department of education for agency review. The district moved for summary judgment of the writ of certiorari and summary judgment was granted.

Holding: The Iowa Supreme Court affirmed summary judgment in favor of the district, finding that a writ of certiorari was an extraordinary remedy. In order to reverse the district court, the school district's decision needed to be considered a judicial or quasi-judicial function. Determining where to spend money and which infrastructure improvements should be made is solely within the district's discretion, and as such, the district was not acting in a judicial capacity.

Analysis: The court initially noted that certiorari is an extraordinary remedy when an inferior tribunal has exceeded jurisdiction. Iowa Rule of Civil Procedure states that a writ of certiorari shall only be granted when it is 1) specifically authorized by statute, or 2) where an inferior tribunal, while exercising judicial functions, exceeded proper jurisdiction or otherwise acted illegally. The plaintiffs did not allege any statutory authorization. As a result, the plaintiff's claim could only survive if the district was exercising "judicial functions" when it made its July 12 decision. To determine whether an action is judicial or quasi-judicial, the court considers whether the action involved a proceeding that notice and an opportunity to be heard are required, whether a determination involves a question of applying law to facts, or whether the act involves a determination of some right that is peculiar to the courts. The plaintiffs did not identify any entitlement to notice or an opportunity to be heard. Likewise, the plaintiffs did not identify any right that required an application of the law to the facts. The July 12 decision did not jeopardize any student's right to receive an education. The district's decision merely changed which schools those children could attend. Determining where any given student will attend public school is a legislative decision that only a school board is authorized to make. Additionally, appropriation of money is a legislative function left up to the discretion of the political system. The court found that it was inappropriate to classify the district's July 12 decision as a judicial or quasi-judicial function. There was no indication that the district acted illegally. The long-term plan was not set in stone, but rather it was made clear that it was a preliminary plan and subject to change. No taxpayer vote was required to modify that plan because the statute requiring voter approval was enacted after the sales tax was approved and the plan was made. While the court sympathized with the plaintiffs, the school district has the ability to determine the number and location of schools. Not

only did the plaintiffs fail to establish that the district's July 12 decision was a judicial function, but the plaintiffs failed to demonstrate that the district acted illegally or exceeded its jurisdiction.

Legislative Update

Iowa Defense Counsel Association
Annual Meeting
September 18, 2008

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2008 Legislative Report
By
Robert M. Kreamer

The Iowa Democrat Party in 2008 controlled the legislative process in Iowa with a 54-46 margin of control in the Iowa House of Representatives and a 30-20 margin in the Iowa Senate. Additionally, with Democrat Chet Culver as Governor, the Democrat Party had total control of the legislative process, something that had not occurred since 1965.

With this control by the Democrat Party, several 2008 IDCA legislative initiatives became jeopardized because they had been historically opposed by organized labor and by the Iowa Trial Lawyers Association, two key support groups of the now-majority party. These IDCA legislative initiatives were:

1. Comparative Fault Caps—IDCA opposes the current cap contained in Iowa's Safety Belt and Safety Harness Law (Iowa Code Section 321.445) that restricts the ability of a jury to assess fault in actions brought under this section of Iowa law. IDCA supported Senate File 166 which eliminates 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 seat belt or safety harness in violation of the Iowa law contributes to the plaintiff's claimed injury or injuries. Senate File 166 received no consideration in 2008.

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. IDCA supported House File 383 which eliminated 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. House File 383 received no consideration in 2008.

3. Offers 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. IDCA supported House File 378 but it received no consideration in 2008.

While none of the above IDCA legislative initiatives received any consideration by the Iowa Legislature, 2008 was another extremely active and successful year for IDCA in resisting numerous proposals to increase or expand the theories and recoveries available to plaintiffs. IDCA joined forces with other interest groups

and played a major role in successfully resisting the following plaintiff-oriented proposals:

1. HF 2608 (successor to HSB 771)—This legislation would allow an injured employee the right to select their own doctor and health-care in Worker's Compensation cases. HF 2608 was approved by the Iowa House Committee on Labor and placed on the House Debate Calendar. There, this bill received no attention and would have been funneled but for an extra-ordinary effort by the House majority leadership team to refer HF 2608 to the House Appropriations Committee. Legislation in the Appropriations Committee is exempt from all funnel rules for the duration of the legislative session but fortunately AHF 2608 received no further consideration and died with the adjournment of the session.

2. HF 2583 (successor to HSB 668)—This bill would require an insurance company to disclose the policy limits to a claimant or the representative of a claimant within 30 days of the request. This legislation was approved by the House Judiciary Committee but did not survive the funnel rule. Megan Antenucci, representing IDCA, gave excellent testimony at a legislative hearing opposing this legislation.

3. HF 2590 (successor to HF 2142)—HF 2142 would allow a private cause of action for a violation of the Iowa Consumer Fraud Act. This legislation was drafted by the Iowa Attorney General and was generally recognized, if enacted, to be one of the most liberal laws of its type in the nation. David Phipps, representing IDCA, appeared at a legislative hearing, along with numerous other lobbyists representing organizations opposed to this legislation. HF 2142 did not have a sufficient number of votes to pass the House Judiciary Committee. In order to avoid the funnel deadline, the committee leadership was successful in winning approval of HF 2590, a "shell bill" to keep the concept of HF 2142 alive. HF 2590 received no further action and eventually failed to survive a funnel deadline date.

4. HF 797—This legislation would have repealed our prior successful legislative efforts that require an apportionment of the damages in instances where there has been a second injury in Worker's Compensation cases. This legislation received little attention and did not survive the funnel.

5. SF 2343—This legislation relates to the imposing of liability on social hosts where alcohol is made available to underage guests. SF 2343 was unanimously approved by the Iowa Senate and unanimously approved by the House Judiciary Committee but failed to receive the

attention of the Iowa House of Representatives before final adjournment of the Iowa Legislature.

While the above five legislative proposals failed to become law because of the efforts by IDCA and other organizations sharing our beliefs and values, I am confident these proposals wills surface again, along with other troublesome issues, in 2009. Our opposition will be working hard this fall to elect legislative candidates sympathetic to their position. It is critical that you inform your legislative candidates where you stand on these critical issues, know what their positions are on these issues, and then vote accordingly if we are going to continue enjoying a level playing field in civil litigation.

In closing, I would like to thank President Martha Shaff, President-Elect Megan Antenucci, and Legislative Committee Chair Greg Witke for their constant support and assistance in making this difficult session so successful.

Finally, thanks to you, the members of IDCA, for allowing me the opportunity to represent you everyday at the Capitol. Thank you very much!

Bob Kreamer

RMK:cc

Functional Capacity Evaluations and the Defense of the Claim

Iowa Defense Counsel Association
Annual Meeting
September 18, 2008

Gina Boomershine
Accelerated Rehabilitation Center
13375 University Avenue, Suite 300
Clive, IA 50325
(515) 327-1454

PHYSICAL CAPABILITIES SHEET

Client Name:				Date:	
Physical Demands	**Constant 66 - 100% of Day**	**Frequent 33 - 65% of Day**	**Occasional 1 - 33% of Day**	**Not Performed**	**Comments**
Sitting			x		Mild difficulty with tendency to stand up. 5- 35 min x3 intervals. Total 1 hr 10 min. Av 23 min 20 sec. 31% of FCE.
Standing		x			1 hr 20 min to 1 hr 35 min. Total 2 hr 55 min. Avg 1 hr 27 min 30 sec. 78% of FCE. No difficulty.
Walking		x			Not specifically tested, but demonstrated no difficulty walking between tolerances.
Ladder Climbing		x			Job Specific reciprocal climb up/down 5 ladder rungs x10 rep.
Stooping			x		Mild difficulty with stooping during Whole Body ROM testing.
Squatting			x		Job-specific 10 rep without difficulty.
Bilateral Reaching		x			No difficulty during Whole Body ROM.
Bilateral Handling	x				Excellent manipulation and handling of medium dexterity tasks.
Lifting (2-Hand)			80# 8"-wst 60# flr-sh 40# flr-oh x10 ft carry		Good body mechanics.
Carrying (1-Hand)			Job Specific 55# RUE bucket carry x25 ft 50# LUE bucket carry x25 ft		Gait not antalgic.
Shoulder Carry			Job-specific 55# on (L) shoulder x50 ft		Non-antalgic gait.
Push/Pull (2-Hand)		75# (26.5# force) x25 ft x15 rep	Job-specific 150# (44# force) x25 ft		No difficulty.

PHYSICAL CAPABILITIES SHEET

Shoulder Carry on ladder			Job Specific 51# shoulder carry up 3 ladder rungs x2 rep		Mild fatigue with this task.
Functional Simulation			x		1. Shoulder carry of 41# 2x4 x20 ft. 2. Reciprocal climb up and down 3 ladder rungs x5 repetitions with 41# 2x4 on the (L) shoulder. 3. 41# 2x4 shoulder carry x20 ft. 4. 2-hand push/pull of 100# on a sled (32.5# of force) x50 ft on commercial carpeting. 5. Kneel and simulate job tasks by rolling a weight and crawling back and forth x10 ft x5 minutes. 6. 3 repetitions of lumbar extension. 7. Walk 50 ft. 8. 1-hand 40# bucket carry x50 ft. 9. 2-hand lift of 50# from 8”-waist-8” level. Circuit was completed x2 repetitions in 15 minutes 35 seconds. Initial HR: 88 BPM, post HR: 124 BPM Client demonstrated fatigue with the crawling position and was unable to continue this during the second repetition with good body mechanics. He also demonstrated fatigue with the lifting on the second repetition of the circuit.

Functional Capacity Evaluation

Client Name:		**Date:**	February 14, 2007
Doctor:	Dr.	**Diagnosis:**	Low Back Pain
Employer:		**Insurance:**	Wausau
Case Manager:		**Adjuster:**	

History:
Mr. is a 32-year-old, (R)-dominant Roofer, who reportedly sustained a work-related injury to his low back in the summer of 2005, while he was working as a Roofer. He was on restricted duty for approximately 2 months and received some physical therapy in Huxley, Iowa. He then returned to full duty work in the fall of 2005. He re-injured his back in August, 2006. He was placed on restrictions, which include no greater than a 5# lift, and 2-hand push/pull of 50#. He received physical therapy at Accelerated Rehabilitation Center from 11/06/06 until 01/02/07 and from 01/08/07 until 02/01/07. He has had an MRI and X-rays performed. He has also received three epidural injections. No surgery has been performed.

Client is currently working modified duty.

Reason for Referral:
Mr. is being referred for a **Job Specific** Functional Capacity Evaluation, to determine his feasibility to return to work as a Roofer and to determine the physical barriers that may exist, which prevent him from returning to work. A formal job description was available at the time of this evaluation.

Evaluation Results:
The overall results of this evaluation are **valid,** secondary to the **maximum effort** demonstrated by Mr. during his performance of a variety of functional tasks. (Validity is determined by evaluating heart rate, blood pressure, exertion, recruitment of muscles, postural changes, and a battery of objective tests.) The overall results of this evaluation **do** represent a true and accurate representation of Mr. Cunningham's overall physical capabilities and tolerances at this time.

Mr. demonstrates the physical capabilities and tolerances to function **between the Medium-Heavy and Heavy categories of work** (as defined by the US Department of Labor), which is indicative of 2-hand maximum lift/carry of 80# from 8"-waist level.

Based upon the job description, the client needs to function **between the Medium-Heavy and Heavy categories of work**, as delineated by the following critical demands:

- 2-hand lift of 90#.
- 2-hand push of 200#.
- Frequent kneeling.
- Reciprocal climb up and down a 60 ft ladder.
- 80# should carry up a ladder.

Mr. **does not** demonstrate the physical capabilities and tolerances to meet all the essential physical demands of the job. His deficits include:

- Inability to lift greater than 80# from 8"-waist level, and 60# from floor to shoulder.

- Inability to push greater than 150#.
- Inability to shoulder carry up the ladder greater than 51#.

He consistently demonstrated good body mechanics throughout his participation in the Functional Capacity Evaluation. He required minimal verbal cueing to maintain proper body mechanics with good consistency of follow-through.

Mr. demonstrated **mild** findings during his Musculoskeletal Evaluation, which would have a negative impact on his overall level of physical functioning.

Recommendations:

1. Mr. is employable at this time. If a position is available, Mr. should be placed in a position respectful of the physical capabilities and tolerances as outlined in this report.
2. It is recommended that Mr. participate in a daily Work Conditioning program for 4 hours per day, 5 days per week, for 2 weeks in order to increase the client's overall physical capabilities and tolerances in the areas of:
    - 2-hand lift of 90#.
    - 2-hand push of 200#.
    - 80# shoulder carry up the ladder.

Significant Musculoskeletal Findings (Right-Dominant):

1. POSTURE: Client presents with upright and erect posture.
2. PALPATION: There is mild tenderness to palpation at L4-5.
3. REFLEXES: Symmetrical and intact bilateral Achilles and patellar tendons.
4. SENSATION: Intact to BLE sharp/dull.
5. LUMBAR ROM: Lumbar flexion 17.5° (norm 60°), lumbar extension 20° (norm 25°), (R) side bending 9° (norm 25°), (L) side bending 11.5° (norm 25°).
6. BLE ROM: WNL.
7. STRENGTH: 5/5 BLE with the exception of bilateral knee flexion and hip extension, which measure 4+/5.
8. SPECIAL TESTS: Negative SLR, negative Faber's, negative hip provocation, negative Hoover's, negative dural stretch, negative ASIS compression. SLR is to 80° bilaterally.
9. GAIT: Client ambulates without an antalgic gait. He is able to heel and toe walk x20 ft each.

Functional Performance:
Lifting:
Mr. demonstrated the ability to perform a 2-hand maximum lift/carry of 80# from 8”-waist level, 60# from floor-shoulder level, and 40# from floor-overhead level x10 ft carrying distance.
Initial HR: 91 BPM, post HR: 121 BPM

The 80# load was lifted from 8”-waist level x5 repetitions throughout the Functional Capacity Evaluation.

Mr. demonstrated good body mechanics throughout the Functional Capacity Evaluation and required minimal verbal cueing with good consistency of follow-through to maintain proper lifting techniques.

Carrying:
Mr. demonstrated the ability to perform a job specific carry of a 55# load in the RUE in a bucket x25 ft without any objective difficulty.
Initial HR: 90 BPM, post HR: 120 BPM

With the LUE, he carried a 50# load in a bucket x25 ft without any objective difficulty.
Initial HR: 99 BPM, post HR: 110 BPM

He also demonstrated a job specific shoulder carry of 55# of a 2x4 for 50 ft.
Initial HR: 90 BPM, post HR: 120 BPM

Push/Pull:
Mr. demonstrated the ability to perform a 2-hand job-specific push of 150# on a sled (44# of force) x25 ft on commercial carpeting.
Initial HR: 95 BPM, post HR: 132 BPM

He also demonstrated the ability to perform a 2-hand job-specific frequent push/pull of 75# on a sled (26.5# of force) x25 ft on commercial carpeting x15 repetitions.
Initial HR: 84 BPM, post HR: 138 BPM

He demonstrated good BUE weightbearing during the pushing and pulling involved in this task.

Sitting:
Mr. exhibited sustained sitting during other testing ranging from 5 minutes to 35 minutes x3 intervals for a total of 1 hour 10 minutes of sitting. Average sit time was 23 minutes 20 seconds. This constituted 31% of testing today. He demonstrated mild difficulty with this posture, as evidenced by his tendency to occasionally shift in sitting and also to stand up to avoid prolonged sitting.

Standing:
Mr. displayed dynamic standing tolerances for 1 hour 20 minutes to 1 hour 35 minutes x2 intervals for a total stand time of 2 hours 55 minutes and an average stand time of 1 hour 27 minutes 30 seconds, which equates to 78% of testing today. He exhibited mild difficulty with standing, as evidenced by his tendency to shift weight from one leg to the other.

Walking:
Walking was not formally assessed; however, the client did not demonstrate any difficulty walking between tasks today.

Climbing:
Mr. demonstrated the ability to perform a job-specific reciprocal climb up and down 5 ladder rungs x10 repetitions with good UE support.
Initial HR: 94 BPM, post HR: 118 BPM

Functional Simulation/Job Specific Simulation:
Shoulder carry on ladder:
The client was able to carry a 51# 2x4 on his (L) shoulder and ascend and descend 3 ladder rungs x2 repetitions.
Initial HR: 90 BPM, post HR: 120 BPM
There was mild fatigue at the end of this task.

Functional Capacity Evaluation, pg. 4

Client participated in a functional job circuit which involved the following tasks:
1. Shoulder carry of 41# 2x4 x20 ft.
2. Reciprocal climb up and down 3 ladder rungs x5 repetitions with 41# 2x4 on the (L) shoulder.
3. 41# 2x 4 shoulders carry x20 ft.
4. 2-hand push/pull of 100# on a sled (32.5# of force) x50 ft on commercial carpeting.
5. Kneel and simulate job tasks by rolling a weight and crawling back and forth x10 ft x5 minutes.
6. 3 repetitions of lumbar extension.
7. Walk 50 ft.
8. 1-hand 40# bucket carry x50 ft.
9. 2-hand lift of 50# from 8"-waist-8" level.

Circuit was completed x2 repetitions in 15 minutes 35 seconds.
Initial HR: 88 BPM, post HR: 124 BPM

Client demonstrated fatigue with the crawling position and was unable to continue this during the second repetition with good body mechanics. He also demonstrated fatigue with the lifting on the second repetition of the circuit.

Functional Joint Mobility Test:
Mr. did not demonstrate any apparent difficulty with cervical AROM in any direction or plane. He demonstrated good UE functional mobility and good LE functional mobility in sitting. He was able to perform a job-specific crawl x50 ft, a job-specific kneel for 5 minutes x2 repetitions, and job-specific squatting x10 repetitions.

Mr. demonstrated good single stance static balance on RLE and LLE for the required 30 seconds for each.

Whole Body ROM Test:
Mr. did not objectively demonstrate difficulty with reaching to all levels. He exhibited excellent manipulation and handling of medium dexterity tasks.

Mr. demonstrated mild difficulty with standing and stooping, as evidenced by his tendency to shift weight from one leg to the other. He performed a half-kneel instead of a squat for 7 minutes 3 seconds over 6 intervals with no difficulty evident. There was mild difficulty with transferring in and out of this position.

Consistency/Validity:
Mr. appeared to be putting forth **maximum effort** as substantiated by:

There were 20 objective tests for validity in 6 major categories, which indicate whether or not the client is performing with maximum effort, and whether or not the test results are valid. Mr. passed 19 of the 20 objective validity criteria, indicating that the test results are **valid.**

Dr., Ms. and Ms., thank you very much for the opportunity to work with your client. If you have any questions or concerns regarding this Functional Capacity Evaluation, please feel free to contact me at (515) 265-8272.

Sincerely,

Gina Boomershine, PT, CEAS
Industrial Rehabilitation Specialist
ARC – Des Moines

cc: Cynthia G. Rega, PT, MS HSA, CEAS-II
VP of Industrial Rehabilitation

Accident Reconstruction

Iowa Defense Counsel Association
Annual Meeting
September 18, 2008

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New Technology in Evidence Preservation and Scene Documentation

Measurements have been an important part of man since the time he left a nomadic lifestyle and started using building materials. As mankind grew his capabilities, so has technology grown and with this has come a great many means of measurement. From micro electronics to the distances between planets, the accuracy and speed from these technologies has filtered its way into the hands of just about everyone.

It wasn't too long ago that the standard for field measurements was tape measures and walking sticks. This was fine for 2D measurements, but requires two readings per point. It was time consuming and not very accurate. The need for three dimensional measurements with greater accuracy forced most investigators into the surveying world with the release of 3D Total Stations in the late 1980's. The problem with Total Stations is the need of two people to run and gather data at a fairly slow, but improved, rate. The next logical set was to try and remove the necessity of a "rod man" with the next generation of total stations. A prism-less laser was added in the mid 1990's for situations where the rod holder would be in harms way or unable to reach the target. This exceedingly opened up the versatility of total stations, but only marginally increased productivity. A typical good day of total station work would be anywhere from 200 to 1,000 measured data points.

Laser Scanning Stations are the next evolution in this progression. I like to consider a laser scanner as a total station on steroids. Modern laser scanners are capable of measuring 3,000 to 150,000 3D data points per second. The best way to describe this is the scanner is painting everything in its line of sight with a point that could be as close together as the operator desires. This closeness of points is referred to as density and a group of points is a "point cloud". With greater density comes longer scan times. Modern laser scanners provide the ability to document topography, objects, and just about everything in sight, so omitting something is no longer an issue.

Laser scanners used in scene documentation are grouped into two categories. There are long range and medium range systems. The medium range station's measurements are usually based on a phase shift method where long range stations generally use a time of flight laser. Phase shift lasers are much faster in gathering measurements but are limited in distance. Typically phase shift lasers acquire data at 120,000 samples per second at a range of up to 200 feet, where as a time of flight laser will measure out to 1000 feet, but at a reduced 3,000 to 6,000 samples per second. The second consideration of scanning a scene would be deciding the scanner positions. Since laser scanners are "line of sight "measuring tools, the location of the scanner is crucial to seeing enough of any object to capture its shape and location properly. A scanner would have to be placed in at least two positions to see the entire surface of a pole. To scan a scene demanding a high level of detail and to identify a large number of artifacts, many scanner locations would be necessary. This is where a scanner with a higher data rate would be necessary. Longer range scanners are used in areas that aren't reachable or within the mid-range scanners

capability. Choosing between either types of scanner is up to the individual and the application.

The next consideration is how to tie the individual point clouds together. There are two generally accepted means to accomplish this. The first is by the use of visible targets in a scene. The targets could be as simple as a sphere, a circle on a sheet of paper, or as complex as a surveyor permanent control point. The purpose is to see at least three of these targets from two adjacent scanner locations and use these common points to align the point clouds together. Since these objects are part of the scene, care has to be taken on placement of these targets so they don't block a desired scan area and are visible in both or all scans. The other method is called "featured based alignment". This method is used when targets aren't placed in a scene. Features contained with the individual scans, such as columns, walls, or any other unique object, are used to align the different point clouds.

While most laser scanners are capturing the dimensional information, a measurement of the laser reflection intensity is also being captured. This assigns a representative level of grey to the points for visualization on a computer screen. The result is what appears to be a very high resolution black and white photo. In reality, this image is the actual data captured for immediate verification and minor measurements.

Once the point clouds are aligned, the data is extracted to a variety of other software. They can be converted into surfaces for use in animations or made into cross sections for export to a CAD based package for dimensional analysis. Any way you use the data, the bottom line is a far greater amount of information is captured that no other means can accomplish. As a result, you're left with far superior measurements of any scene or object, in far less time that equates to far lower overall costs.

Laser scanning is a tool for capturing large amounts of data very quickly. This is very useful when a project has been halted do to a catastrophe. Evidence is captured, preserved, and can be shared with all parties involved at a later date allowing construction to continue sooner. Scanning is ideal in an area where the environment would destroy or deteriorate witness marks over time. Line of site issues are easier to deal with since trees, bushes, fences, and other obstructions are scanned. Historic buildings with large amounts of architectural detail can be preserved for future renovations. Piping runs in builds are documented in 3D space so designers can make changes or add around them without the fear of interference problems. Capturing important information at a crime scene such as blood spatter or calculating bullet trajectories are also possible from captured point clouds. There are almost no ends to the versatility of a modern laser scanning station.

Thomas E. Long
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IOWA APPELLATE CASE LAW UPDATE II

NEGLIGENCE, TORTS, AND INDEMNITY

2007 – 2008

Iowa Defense Counsel Association
44th Annual Meeting and Seminar
September 18-19, 2008

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I. NEGLIGENCE: DUTY

A. Standard of Care

Schroeder v. Albaghdadi, 744 N.W.2d 651 (Iowa 2008).

Facts: Two weeks after Homer Schroeder underwent open-heart surgery, he presented to the emergency room with increasing shortness of breath, nausea and anxiety. The emergency room physician, Dr. Randall Hinrichs, conducted several tests, which revealed abnormalities, including an elevated potassium level. Dr. Hinrichs felt that Homer should be admitted to the hospital, but as the emergency room physician, he did not have admitting privileges. Consequently, Dr. Hinrichs contacted Dr. Saadi Albaghdadi, the on-call cardiologist, who possessed authority to admit patients. A factual dispute exists regarding how many telephone conversations took place between Drs. Hinrichs and Albaghdadi and the substance of those conversations. Eventually, Dr. Hinrichs discharged Homer from the emergency room, but Homer returned to the emergency room the next morning. Homer later went into cardiac arrest and died. Homer's wife and executor, Betty Schroeder, brought a medical negligence action against Drs. Hinrichs and Albaghdadi. Plaintiff settled her claims against Dr. Hinrichs prior to trial; the claims against Dr. Albaghdadi proceeded to jury trial.

Plaintiff tried the case on the theory that the jury would believe Dr. Hinrichs's version of events, specifically, that Dr. Albaghdadi told Dr. Hinrichs to fax Homer's EKG test results to his house, and that based on his interpretation of the test results, Dr. Albaghdadi believed Homer should be released and seen by his treating cardiologist in a day or two. Under this theory, Plaintiff's expert witnesses opined that Dr. Albaghdadi breached the standard of care by failing to (1) properly interpret the EKGs; (2) examine Homer in the emergency room; (3) properly diagnose Homer in the emergency room; (4) direct that Homer be admitted to the hospital as an inpatient; and (5) properly treat Homer. On the other hand, Dr. Albaghdadi testified that he never requested Homer's EKGs, but rather they were sitting in his fax machine when he arrived at home. He insisted that Dr. Hinrichs only requested an interpretation of Homer's EKGs. He also testified Dr. Hinrichs never told him about Homer's elevated potassium level. Under this version of events, Plaintiff's expert opined that Dr. Albaghdadi was only required to properly interpret the EKGs. Neither of Plaintiff's experts testified Dr. Albaghdadi's actions fell below the standard of care if Dr. Albaghdadi's version of events was true.

In the face of this factual dispute, the district court used two verdict forms in instructing the jury. The first form would be used if the jury believed Dr. Albaghdadi's version of events; this verdict form only allowed the jury to find Dr. Albaghdadi negligent for failing to properly interpret the EKGs. Verdict form two would be used if the jury believed Dr. Hinrichs's version of events. This verdict form would allow the jury to find Dr. Albaghdadi negligent under any of the five specifications of negligence set forth by Plaintiff.

The jury, determining Dr. Albaghdadi's version of events was correct, used the first verdict form and concluded Dr. Albaghdadi was not negligent by failing to

properly interpret the EKGs. The district court entered a defense verdict. Plaintiff appealed. The Court of Appeals reversed the judgment and remanded for a new trial. Defendant Albaghdadi sought further review.

Holding: The Iowa Supreme Court vacated the decision of the Court of Appeals and affirmed the judgment of the district court.

Analysis: *Specifications of Negligence.* On appeal, Plaintiff argued the district court should have submitted all five specifications of negligence to the jury regardless of the factual dispute, solely on the basis that Dr. Albaghdadi was the on-call cardiologist when Homer went to the emergency room. A physician or surgeon who holds himself out as a specialist, such as Dr. Albaghdadi, is "required to exercise that degree of skill and care ordinarily used by similar specialists in like circumstances, having regard to the existing state of knowledge in medicine and surgery, not merely the average skill and care of a general practitioner." *Schroeder*, 744 N.W.2d at 655-56. A failure to follow this standard of care is negligence. Expert testimony is required to establish the standard of care and any breach thereof. The Court concluded the expert testimony only generated an issue on Plaintiff's five specifications of negligence if the jury found Dr. Hinrich's version of events took place. On the other hand, if the jury believed Dr. Albaghdadi's version of events, the only issue generated by the expert testimony was whether Dr. Albaghdadi was negligent for failing to properly interpret the EKGs. Plaintiff presented no expert testimony stating that Dr. Albaghdadi was negligent as to the five specifications solely because he was the on-call cardiologist. Thus, the district court properly instructed the jury on the specifications of negligence supported by the evidence by using the two verdict forms.[1]

Improper Comment on the Evidence. Plaintiff also argued that, by using two verdict forms, the district court impermissibly commented on the evidence. The Court disagreed, stating that instructions designed to determine a physician's duty of care do not constitute an impermissible comment on the evidence. The Court concluded the verdict forms allowed the jury to determine the applicable standard of care once it decided the disputed facts given that the parties based their theories of negligence on two different sets of facts that were mutually exclusive. The verdict forms were consistent with the manner in which the parties tried the case. The Court suggested there may have been a better way for the district court to instruct the jury, such as using special interrogatories, but ultimately concluded the district court did not improperly comment on the evidence by using the two verdict forms.

B. Pecuniary Losses

Tinnian v. Yellow Book USA, 06-2005, 2007 WL 4553643 (Iowa Ct. App. Dec. 28, 2007).

Facts: Plaintiffs sued Defendant for breach of contract and negligence when Plaintiffs

[1] The *Schroeder* decision is cited in H.H. Henry, Annotation, *Necessity of Expert Evidence to Support an Action for Malpractice Against a Physician or Surgeon*, 81 A.L.R.2d 597 (1962) as authority that expert witness evidence is essential to support a medical malpractice action against a physician or surgeon.

discovered errors and omissions in the telephone directories and Internet listings that Plaintiffs contracted for with Defendant. At trial, Defendant moved for a directed verdict, which was partially granted. The district court ruled contract damages were limited by the contracts' limitations of liability section. The court also ruled Defendant had no duty to Plaintiffs outside the contract for those listings; thus, a negligence claim was not allowed for the contracted listings. The court, however, overruled Defendant's motion concerning negligence claims for erroneous listings/omissions not included in the contracts. The jury awarded contract damages to both Plaintiffs, but only awarded damages for negligence to Plaintiff Turvin. At trial, Turvin presented evidence showing errors and omissions in his information in the free yellow page listings of the telephone directories. Defendant appealed, claiming there was not a sufficient relationship between the parties independent of the contract to create the legal duty required for negligence.

Holding: The Iowa Court of Appeals reversed and remanded for dismissal of Plaintiff Turvin's negligence claim. While the district court properly submitted the contractual issues to the jury, the Court concluded the district court should have granted Defendant's motion for directed verdict on Plaintiff Turvin's negligence claim.

Analysis: The Court found Plaintiff Turvin failed to establish a duty owed to him by Defendant. Where privity of contract is lacking, there is no duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons or tangible things. A plaintiff who merely suffers pecuniary damages does not have a legally cognizable or compensable injury under the negligence theory. The Court found that Plaintiff Turvin suffered no tangible physical harm and his damages for loss profits were clearly pecuniary damages. The Court also noted that Plaintiff Turvin cited no statutory or case law in Iowa or any jurisdiction for the existence of an independent duty owed to him concerning a free yellow pages listing. The relationship between Plaintiff Turvin and Defendant was contractual and there were no special circumstances or relationships created by a free listing under statute or common law. The Court declined to extend tort liability to the pecuniary losses caused by negligent errors or omissions in free telephone book directory listings.

C. Duty to Third Persons

Van Fossen v. MidAmerican Energy Co., 06-1691, 2008 WL 141194 (Iowa Ct. App. Jan. 16, 2008).

Facts: Plaintiff Roger Van Fossen was employed as an ironworker by two independent contractors from 1973 until he retired in 1997. The predecessor to Defendant MidAmerican Energy Company hired the independent contractors to do construction and maintenance work on the electricity generating units at the Port Neal generating station in Sioux City. Plaintiff claims that while working on or near the Port Neal generating units he was exposed to various asbestos-containing products, and he carried asbestos dust home on his work clothes. Plaintiff alleges his wife contracted peritoneal mesothelioma as a result of

washing Plaintiff's work clothes. Plaintiff's wife died of peritoneal mesothelioma in July 2002. Plaintiff filed suit against Defendants for the wrongful death of his wife. Defendants MidAmerican Energy Company and Interstate Power and Light Company moved for summary judgment, arguing they owed no duty to Plaintiff's wife and could not be held liable for her death. The district court granted Defendants' motion for summary judgment, concluding Defendants did not owe a duty to Plaintiff's wife. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the district court's grant of summary judgment in favor of Defendants.

Analysis: The Court noted the district court correctly cited the three factors Iowa courts balance to determine whether a duty exists – the relationship between the parties, reasonable foreseeability of harm to the injured person, and public policy considerations. The Court reiterated the district court's holding that Defendants, as landowners, did not owe a duty of care to the spouse of an employee where "the employee who brings asbestos fibers to the home is not the employee of the landowner but rather [is] the employee of an independent contractor . . . who was in control of the premises when the exposures occurred." *Van Fossen*, 2008 WL 141194 at *2. The Court agreed with the district court's findings of fact, conclusions of law and decision.

IMPORTANT NOTE: The *Van Fossen* Court concluded its opinion with the following statement: "We leave any extension of the law in this area to the legislature or our supreme court." *Id.* On April 3, 2008, the Iowa Supreme Court granted Plaintiff's application for further review. The Iowa Supreme Court is scheduled to hear oral arguments in this appeal on September 4, 2008.

D. Duty Owed By Possessor of Dog

Crabtree v. Johnson, 07-0929, 2008 WL 1887530 (Iowa Ct. App. April 30, 2008).

Facts: Defendant Mark Johnson received a German Shepherd dog from his girlfriend. Mark and the dog moved into an apartment house owned by Mark's father, Defendant Raymond Johnson. The house adjacent to the apartment house was occupied by Plaintiff Wanda Crabtree and her son Christopher. On one occasion, the dog broke loose from its chain in the yard and bit Wanda Crabtree. Defendants later built a fence around the backyard of the apartment house. Raymond expressed concern about having the dog on the property, but Mark refused to give up the dog. Mark was later incarcerated on matters unrelated to the dog. The dog remained in the fenced-in back yard. Raymond again expressed his desire to have the dog removed from the property, but Mark was not agreeable to this suggestion. Mark's girlfriend and Raymond occasionally came by the property and threw food over the fence to the dog. Another individual, Bill Frey, moved into the apartment house and began caring for the dog. One day while Frey was caring for the dog, the dog escaped and severely bit Wanda's son, Christopher. Wanda filed suit against Mark and Raymond Johnson on behalf of herself and her son on three theories of liability: (1) dog owner's liability under Iowa Code section 351.28; (2) landowner's liability; and (3) negligence. The district court granted a directed verdict in favor

of Raymond on all three claims. A jury found against Mark. Plaintiffs appealed from the directed verdict in favor of Raymond Johnson.

Holding: The Iowa Court of Appeals affirmed in part, reversed in part, and remanded.

Analysis: *Iowa Code Section 351.28.* Section 351.28 provides that a dog owner is strictly liable for injuries caused by the dog. Plaintiffs argued Raymond effectively became the dog's owner after Mark was incarcerated, subjecting him to strict liability under this statute. The Court disagreed. An "owner" has been narrowly defined as "the person to whom the dog legally belongs." *Crabtree*, 2008 WL 1887530 at *2 (quoting *Alexander v. Crosby*, 143 Iowa 50, 53, 119 N.W. 717, 718 (1909)). The Court found the evidence established as a matter of law that that Mark, not Raymond, was the dog's legal owner. It was undisputed that Mark received the dog as a gift and did not transfer ownership of the dog to anyone else. Thus, the district court did not err in granting Raymond's motion for directed verdict on this claim.

Common Law Dog Bite Claim. The Court noted that although pled as a "landowner's liability" claim, Plaintiffs second claim was a common law claim based on harboring a dangerous dog. Applying Restatement (Second) of Torts section 509 and finding the comments to section 509 instructive, the Court found Plaintiffs generated a fact question on this claim. Although Raymond was not an owner of the dog, a reasonable fact finder could conclude he was a "possessor" of the dog after Mark left the apartment house. Additionally, Raymond allowed the dog to stay in the fenced in yard, and fed and water the dog. Based on the evidence in the record, the Court concluded the claim should have been submitted to the jury for resolution. Thus, the Court reversed the district court's grant of directed verdict as to this claim.

Negligence. The Court concluded that Plaintiffs also generated a fact question as to whether Raymond owed a duty as a lessor under Restatement (Second) of Torts section 379A. The Court found Plaintiffs generated a fact issue on two of the six specifications of negligence asserted by Plaintiffs, specifically, whether Raymond acted negligently by allowing a dangerous dog to remain on his property and by failing to warn Frey of the dog's dangerous propensity. Thus, these specifications of negligence should have been submitted to the jury. The Court concluded Plaintiffs also generated a fact question whether such breaches were the proximate cause of Christopher's damages. Thus, the Court reversed the grant of directed verdict in favor of Raymond on those two specifications of negligence.

II. NEGLIGENCE: CAUSATION

Easton v. Howard, 751 N.W.2d 1 (Iowa 2008).

Facts: After consuming several beers at a private reside, Plaintiff Steven Easton and his girlfriend, Defendant Jeannette Howard, went to a local park in order to have a discussion outside the presence of their children. There, they argued. Defendant drove to and from the park, with Plaintiff riding in the front passenger seat. Upon leaving the park, Defendant turned in the opposite direction of their

home. She drove approximately one mile in the wrong direction before making a u-turn. Before Defendant completed the u-turn, Plaintiff "emerged from the passenger-side door of the pickup truck." *Easton*, 751 N.W.2d at 3. There were no other vehicles on the road at the time and no witnesses to the accident. Defendant did not know how fast she made the u-turn but she stated she did not turn the vehicle any sharper than she ordinarily did when making such a turn. There were no marks on the road indicating the speed or path of the pickup truck. Defendant testified she was still drunk at the time she left the park and at the time she made the u-turn. Plaintiff had no memory of the accident and Defendant did not see how Plaintiff left the vehicle.

Plaintiff filed a petition alleging Defendant's negligence was the proximate cause of damages he sustained when he hit the ground. Plaintiff joined American Family Mutual Insurance Company ("American Family") as the uninsured motorist carrier. Three theories were presented at trial as to how the accident occurred: (1) the door was defective and Plaintiff fell out of the truck; (2) Defendant made a sharp u-turn and as a result Plaintiff accidentally pulled on the passenger-side door handle, opened the door himself, and fell out; or (3) Plaintiff voluntarily opened the door of the truck and jumped out. Defendant's expert engineer could not conclusively rule out any of these theories. Evidence was presented as to each possible theory.

At the close of the evidence, American Family moved for a directed verdict on the grounds that there was insufficient evidence to prove Defendant was negligent or that her negligence caused Plaintiff's injury. The district court overruled the motion and the case was submitted to the jury on two specifications of negligence – whether Defendant was operating the vehicle while intoxicated and whether she failed to maintain control of the vehicle. The jury was instructed they had to find Defendant negligent in both respects for Plaintiff to recover. The jury returned a verdict in favor of Plaintiff. American Family filed a motion for judgment notwithstanding the verdict, and, in the alternative a motion for new trial, arguing Plaintiff failed to prove negligence and proximate cause. The district court denied the motion, and American Family appealed. The Court of Appeals affirmed the judgment, and American Family sought further review.

Holding: The Iowa Supreme Court vacated the decision of the Court of Appeals, reversed the judgment of the district court as to American Family, and remanded the case to the district court to enter judgment in favor of American Family.

Analysis: The district court's marshalling instruction required Plaintiff to prove that Defendant, in addition to operating the vehicle while intoxicated, failed to maintain control of the motor vehicle. "The record must show substantial evidence to support that [Defendant] failed to maintain control of her vehicle in order for [Plaintiff's] negligence claim to survive American Family's motion for directed verdict." *Id*. at 5. Plaintiff bears the burden of proving fault by a preponderance of the evidence. Negligence is not to be assumed from the mere fact of an accident and an injury. "Without presenting any evidence other than the fact that [Defendant] was intoxicated and that [Plaintiff] left the vehicle when [Defendant] attempted to execute the u-turn, the jury is left to speculate

as to whether she lost control of her vehicle at the time of the accident." *Id.* at 6. Citing precedent from 1918, the Court wrote:

> Undoubtedly it is not enough there is a mere possibility that the injury is chargeable to the negligence of defendant, and a recovery may not rest wholly upon conjecture. There is no case for a jury where the evidence leaves the happening of the accident a mere matter of conjecture and as consistent with the theory of absence of negligence as consistent with its existence. Undoubtedly the plaintiff fails if as a matter of law the testimony is in equipoise. Undoubtedly it does not suffice where a conclusion which is consistent with the theory of the plaintiff is equally consistent with some other theory.

Id. (quoting *George v. Iowa & S.W. Ry.*, 183 Iowa 994, 997-98, 168 N.W. 322, 323 (1918)). The Court concluded the evidence supporting Plaintiff's theory that Defendant failed to maintain control her vehicle was equally consistent with American Family's theory that Plaintiff voluntarily exited the vehicle. Accordingly, substantial evidence did not support the jury's finding that Defendant failed to maintain control of her vehicle when she made the u-turn.

III. NEGLIGENCE: DEFENSES

A. Comparative Negligence

Reed v. Lyons, 07-1256, 2008 WL 2041686 (Iowa Ct. App. May 14, 2008).

Facts: Defendant performed two surgeries on Plaintiff's right knee. Plaintiff later developed a serious infection in his right leg and was hospitalized. Plaintiff filed a medical malpractice action against Defendant asserting Defendant provided negligent care which was the proximate cause of Plaintiff's infection and further knee problems. Defendant denied Plaintiff's allegations and claimed Plaintiff's own conduct contributed to the infection. Over Plaintiff's objection, the district court submitted the issue of Plaintiff's comparative fault to the jury. The jury found Plaintiff ninety percent at fault and Defendant ten percent at fault. The district court overruled Plaintiff's motion for new trial. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the district court's denial of Plaintiff's motion for new trial.

Analysis: Prior to receiving treatment from Defendant, Plaintiff self-aspirated (drained) his swollen knee. He was advised by a physician's assistant to stop self-aspirating because it could lead to infection. Even after two surgeries, Plaintiff's knee continued to swell. Plaintiff was hospitalized for three weeks with a severe infection in his right knee and leg. At trial, the jury was instructed that Plaintiff could be apportioned fault if the jury was convinced that Plaintiff was negligent for self-aspirating and this negligence was a proximate cause of the damage. Comparative negligence is applicable in medical malpractice actions under certain conditions:

> [A] patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with the negligence of the malpractitioner, must have entered into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based.

Reed, 2008 WL 2041686 at *3 (quoting *Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 732 (Iowa 2003)). The Court concluded that, viewing the evidence in the light most favorable to the party favoring admission of the comparative fault instruction, Defendant, there was substantial evidence to support the instruction because a reasonable person could infer that Plaintiff contributed to his knee infection by self-aspirating his knee after his surgeries but before being admitted to the hospital. Plaintiff also argued the instruction was improper because even if there was proof he self-aspirated his knee before being treated by Defendant, this negligent conduct cannot be used as a defense in a medical malpractice action. The Court rejected this argument, noting that Defendant did not argue Plaintiff's self-aspiration before the surgeries contributed to the infection, but rather Defendant argued the jury could find from the circumstantial evidence Plaintiff self-aspirated after the surgeries, against medical advice, which caused or exacerbated the infection. The Court concluded the district court properly submitted the issue of comparative fault to the jury and correctly overruled Plaintiff's motion for new trial.

B. Immunity

1. Governmental Immunity

i. Discretionary Function

Query v. Polk County, 06-1665, 2007 WL 2963674 (Iowa Ct. App. Oct. 12, 2007).

Facts: Plaintiff, an inmate in the Polk County Jail, was injured when another inmate suffered a seizure, pulling Plaintiff to the ground. This was the inmate's second seizure; she was returned to the general inmate jail population with no medical restrictions following her first seizure. Plaintiff sued the County, alleging the County was negligent for not segregating the inmate from the general jail population after her first seizure. The County moved for summary judgment asserting the affirmative defense of discretionary function immunity. The district court granted the motion. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the district court's grant of summary judgment in favor of the County.

Analysis: A governmental subdivision is entitled to discretionary function immunity from claims brought under Iowa Code chapter 670 if the claim is "based upon an act or omission of an officer or employee . . . based upon the exercise or performance or failure to exercise or perform a discretionary function . . . whether or not the discretion is abused." Iowa Code § 670.4(3). In order for the exception to apply, the governmental action must pass a two-part test: First,

the action must have some element of judgment or discretion upon the part of the government official. Second, the governmental action must be of the kind that the exception was intended to protect. The Court held the County demonstrated there was some discretion exercised in the decision not to segregate the inmate from the general jail population. The Court also found the decision to segregate an inmate is the type of act the immunity is designed to protect. Thus, the district court correctly concluded discretionary function immunity attached to the County's decision not to administratively segregate the inmate from the general jail population.

ii. Emergency Response

Harrod v. City of Council Bluffs, 07-0864, 2008 WL 2200083 (Iowa Ct. App. May 29, 2008).

Facts: Plaintiff was shot and seriously wounded by Council Bluffs police officers who were responding to a reported hijacking of Plaintiff's automobile. Plaintiff sued the City of Council Bluffs, asserting he was injured as a result of the officers' negligence. The district court granted Defendant's motion for summary judgment after finding the officers were making an emergency response when the shooting occurred, thus Defendant had immunity under Iowa Code section 670.4(11). The district court also rejected Plaintiff's constitutional claims. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the district court's grant of summary judgment in favor of Defendant.

Analysis: *Iowa Code Section 670.4(11).* Pursuant to chapter 670, every municipality is liable for the torts of its officers and employees unless such torts fall within one of the exceptions in section 670.4. At issue here is the emergency response exception, the language of which plainly states that the only relevant inquiry in determining whether a city has immunity is whether Plaintiff's claim "is based upon or arising out of an act or omission in connection with an emergency response" by officers or employees carrying out their official duties. The Council Bluffs police officers were responding to a reported carjacking of Plaintiff's automobile. In the struggle between Plaintiff and the carjacker, Council Bluffs police officers shot Plaintiff. The Court concluded the district court correctly found that section 670.4(11) provided immunity to the City under the emergency response exception.

Constitutional Claim. Plaintiff argued section 670.4(11) violated due process and equal protection where police conduct under state action involved Plaintiff's life and liberty interests. The Court found there were no facts to support Plaintiff's constitutional claim. "The question whether the officers' actions were an abuse of power turns on whether the actions shock the conscience in such a way as to violate the rights protected by the Fourteenth Amendment." *Harrod*, 2008 WL 2200083 at *4. The Court continued: "In rapidly evolving, fluid, and dangerous situations that preclude the luxury of calm and reflective deliberation, a state actor's action will shock the conscience only if the actor intended to cause harm." *Id.* The Court concluded there was no evidence the officers intended to harm Plaintiff. Thus, the district court correctly granted

summary judgment to Defendant.

iii. Municipal Immunity Under Section 668.10

Brown-Kirkwood v. City of Cedar Rapids, 06-1950, 2007 WL 3085799 (Iowa Ct. App. Oct. 24, 2007).

Facts: Plaintiff Monica Brown-Kirkwood fell on an ice and snow covered brick sidewalk in front of the Crowne Plaza Hotel in Cedar Rapids. She sustained a fractured ankle and later underwent three surgeries. Plaintiff and her husband sued Defendant, the City of Cedar Rapids. A jury returned a verdict in Plaintiffs' favor. The district court denied Defendant's motion for judgment notwithstanding the verdict. Defendant appealed, claiming the district court erred by not directing a verdict based on Iowa's statutory immunity provisions in Iowa Code section 668.10.

Holding: The Iowa Court of Appeals reversed and remanded, finding the district court should have submitted the issue of municipal immunity to the jury.

Analysis: Iowa Code section 668.10(2) confers immunity upon a municipality for the failure to remove snow or ice on a "highway, road or street" if the "municipality establishes that it has complied with its policy or level of service for snow and ice removal or placing sand, salt or other abrasive material on its highways, roads or streets." At issue for the Court was whether the statutory language of "highway, road or street" includes the sidewalk where Plaintiff fell. The Court relied on Iowa Code section 306.3 for the definition of "road or street" to include "every way or place of whatever nature when any part of such way or place is open to the use of the public, as a matter of right for vehicular purposes." The definition of "street" includes the entire way dedicated to public use, any portion of which is dedicated to vehicular use. This definition does not exclude the sidewalk, and if the statute meant to exclude the sidewalk, the legislature could have defined "street" to be a public way open to vehicular traffic. Instead, the statute includes the entire publicly-owned tract if any part of that tract is open for vehicles. Thus, the Court concluded that the term "street" in the immunity statute includes the sidewalk on which Plaintiff fell. The Court noted that on remand for a new trial, it will be up to the jury to consider the facts in light of the immunity statute and determine whether Defendant had a policy or level of service to remove snow and ice, and whether Defendant complied with its policy.

2. Immunity in Making Report of Child Abuse

Howell v. Metropolitan Med. Lab., P.L.C., 06-1696, 2007 WL 3376753 (Iowa Ct. App. Nov. 15, 2007).

Facts: To evaluate the minor Plaintiff for a possible urinary tract infection, a doctor ordered a urinalysis which was performed by Defendant lab. Defendant lab reported to the doctor the presence of trichomonad, parasites in the child's urine, an indication of trichomoniasis, which may be transmitted through sexual

contact. The doctor notified the Iowa Department of Human Services of suspected child abuse. The allegations were investigated but it was later determined there was no trichomonad infestation. Plaintiffs brought suit against the doctor, his employer and Defendant lab claiming medical or professional negligence. Plaintiffs later dismissed the doctor and his employer, conceding the doctor was a mandatory reporter and was entitled to immunity under Iowa Code section 232.73. Defendant lab moved for summary judgment, which the district court granted, finding that Defendant lab was participating in the making of a child abuse report, or aiding and assisting in the assessment of that report, and therefore was immune from liability under section 232.73.

Holding: The Iowa Court of Appeals reversed the district court's grant of summary judgment in Defendant lab's favor.

Analysis: Iowa Code section 232.73 provides immunity from civil liability to persons "participating in good faith in the making of a report . . . or in the performance of a medically relevant test pursuant to this chapter, or aiding and assisting in an assessment of a child abuse report pursuant to section 232.71B." The determination of whether a person is acting in good faith in making or assisting in the making of a child abuse report is subjective and rests on whether Defendant lab believed it was aiding and assisting in the investigation of a child abuse report. The Court found there was no basis that Defendant lab could have believed it was aiding or assisting in the investigation of a child abuse report. The evidence showed that Defendant lab simply ran a test as requested by the doctor, who at the time had no suspicion of child abuse. Thus, nothing in the record supported a finding that Defendant lab had a good faith belief it was aiding or assisting in the investigation of a child abuse report at the time it was conducted. The Court concluded the district court erred in granting summary judgment in favor of Defendant lab.

3. AED Immunity

2008 Iowa Acts, S.F. 505, § 1 – Amendment to Iowa Code § 613.17

Iowa Code section 613.17, which provides immunity to persons who, in good faith, render emergency aid, was amended in 2008 to provide additional immunity to persons rendering emergency aid in the event of a sudden cardiac arrest emergency, necessitating the use of an automated external defibrillator ("AED"). The amended section provides, in relevant part:

> 2. The following persons or entities, while acting reasonably and in good faith, who render emergency care or assistance relating to the preparation for and response to a sudden cardiac arrest emergency, shall not be liable for any civil damages for acts or omissions arising out of the use of an automated external defibrillator, whether occurring at the place of an emergency or accident or while such persons are in transit to or from the emergency or accident or while such persons are at or being moved to or from an emergency shelter:

> a. A person or entity that acquires an automated external defibrillator.
>
> b. A person or entity that owns, manages or is otherwise responsible for the premises on which an automated external defibrillator is located if the person or entity maintains the automated external defibrillator in a condition for immediate and effective use at all times, subject to standards developed by the department of public health by rule.
>
> c. A person who retrieves an automated external defibrillator in response to a perceived sudden cardiac arrest emergency.
>
> d. A person who uses, attempts to use, or fails to use an automated external defibrillator in response to a perceived sudden cardiac arrest emergency.
>
> e. A person or entity that provides instruction in the use of an automated external defibrillator.

The effect of the amendment to Iowa Code section 613.17 means that Iowa law now provides Good Samaritan protection similar to the federal immunity provision in 42 U.S.C. section 238q, which is part of the Cardiac Arrest Survival Act ("CASA"). However, while the federal statute provides immunity to persons who use or attempt to use an AED, *see* 42 U.S.C. § 238q(a), Iowa Code section 613.17 provides immunity to persons who "use[], attempt[] to use, or *fail*[] to use" an AED. Iowa Code § 613.17(2)(d) (2008) (emphasis added).

C. Real Party in Interest

Lobberecht v. Chendrasekhar, 744 N.W.2d 104 (Iowa 2008).

<u>Facts:</u> Plaintiff Cassandra Lobberecht underwent gastric bypass surgery on December 18, 2002 by Defendant doctor. Thereafter, she began experiencing abdominal pain and sought treatment from Defendant, who suspected Cassandra's gallbladder was inflamed. Defendant removed Cassandra's gallbladder, but her pain continued. A test revealed a fistula along the staple lines of Cassandra's stomach pouch. She presented to Defendant with continued complaints of abdominal pain and a possible hernia. She eventually underwent surgery on April 27, 2003, for the hernia but the fistula was not addressed due to excessive scar tissue. On May 28, 2003, Plaintiffs filed for chapter 7 bankruptcy, but did not list on their bankruptcy forms any potential medical malpractice claims against Defendants. Plaintiffs received their discharge in bankruptcy on August 26, 2003.

On December 14, 2004, Plaintiffs filed suit against Defendants, alleging negligent performance of the gastric bypass surgery, negligent postoperative treatment, and wrongful performance of unnecessary gallbladder surgery. Defendants moved for summary judgment arguing Plaintiffs lacked standing to

bring the lawsuit because the bankruptcy trustee was the real party in interest. The district court granted Defendants' motion for summary judgment. On appeal, the Iowa Court of Appeals affirmed. Plaintiffs sought further review.

Holding: The Iowa Supreme Court vacated the decision of the Court of Appeals, affirmed the judgment of the district court in part and reversed it in part, and remanded the case to the district court.

Analysis: The issue presented on appeal was whether Plaintiffs' medical malpractice cause of action belonged to them, as individuals, or to the bankruptcy estate. A bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Such property includes all causes of action the debtor could have brought at the time of the bankruptcy petition. The issue, therefore, becomes when Plaintiffs' cause of action accrued to determine whether it is part of the bankruptcy estate. A cause of action accrues when "an aggrieved person has a right to institute and maintain a lawsuit." *Lobberecht*, 744 N.W.2d at 107.

Plaintiffs, relying on the medical malpractice statute of limitations in Iowa Code section 614.1(9), argued their cause of action did not accrue until they knew or should have known they were injured. They asserted their claim could not have accrued as of the date of the bankruptcy petition because as of that date they did not know and could not reasonably have known of their injury. The Court disagreed and found the case was not a statute-of-limitations case, in which the determination focuses on when a cause of action is *lost* by the passage of time. Rather, for bankruptcy purposes, the focus is on when the cause of action was *acquired*. Relying on an analysis set forth in a Fifth Circuit decision, *In re Swift*, 129 F.3d 792 (5th Cir. 1997), the Court concluded that "accrual for statute-of-limitations purposes is irrelevant to determining whether a cause of action has accrued for bankruptcy purposes." *Id.* at 107.

All of the allegations of negligence set forth in Plaintiffs' petition occurred on December 18, 2002, the date of the surgery. As of that date, the medical malpractice cause of action accrued for bankruptcy purposes; Plaintiffs' right to sue was complete. Because Plaintiffs could have brought suit against Defendants prior to the date of their bankruptcy petition, their cause of action belonged to the bankruptcy trustee. The Court held the district court and Court of Appeals properly concluded Plaintiffs were not the real parties in interest. "However, the proper remedy is not to dismiss, but to allow a reasonable time, as determined by the district court, for substitution of the real party in interest." *Id.* at 108 (citing Iowa R. Civ. P. 1.201).

D. Statute of Limitations

1. Medical Malpractice

Rathje v. Mercy Hosp., 745 N.W.2d 443 (Iowa 2008).

Facts: In March 1999, sixteen-year-old Georgia Rathje was admitted to an outpatient alcohol abuse treatment center at Defendant hospital. She was given

Antabuse, which causes the body to produce an alcohol sensitivity that results in a highly unpleasant reaction to the ingestion of alcoholic beverages. About a week after taking the drug, Georgia began to feel sick and nauseated. On April 27, 1999, she was diagnosed with drug-induced hepatis secondary to Antabuse; she later received a liver transplant. On April 26, 2001, Plaintiffs, Georgia and her parents, filed a petition against several health care providers, including Defendant hospital and the medical director of the treatment center, claiming Defendants were negligent in prescribing Antabuse and in their treatment of Georgia for alcohol abuse, and such negligence was the cause of her irreversible liver damage and transplant.

Defendants moved for summary judgment based on the two-year statute of limitations in Iowa Code section 614.1(9). The district court granted Defendants' motion for summary judgment, finding the facts were undisputed that Georgia's injury had physically manifested itself prior to April 26, 1999, more than two years before Plaintiffs filed suit; thus, Plaintiffs' claims were barred by the statute of limitations. Plaintiffs appealed.

Holding: The Iowa Supreme Court reversed the district court's grant of summary judgment and remanded for further proceedings.

Analysis: The Court conducted an extensive analysis of the development of case law interpreting statutes of limitations, and specifically, section 614.1(9). The Court reiterated that the statute of limitations begins to run when the plaintiff knows, or through the use of reasonable diligence, should know of the physical harm. The Court also recognized that it has severely restricted the discovery rule, essentially using it to require only inquiry notice of physical harm. However, the Court realized it had not considered the role of any form of causation as part of the analysis. The Court expressed concern that if the limitations period is interpreted to begin once the plaintiff gains sufficient information of the injury or physical harm without regard to its cause, "some plaintiffs may not know enough to understand the need to seek expert advice about the possibility of a lawsuit to protect themselves from the statute." *Rathje*, 745 N.W.2d at 461.

The Court held that the statute of limitations for medical malpractice actions does not begin to run until the discovery of both the injury and its factual cause. "The statute begins to run only when the injured party's actual or imputed knowledge of the injury and its cause reasonably suggest an investigation is warranted." *Id.* at 461-62. However, the plaintiff does not need to know the full extent of the injury before the statute of limitations begins to run. The Court concluded that it was clear Plaintiffs knew Georgia was suffering from physical harm: liver damage. However, a reasonable jury could find Plaintiffs did not know the cause of the harm until April 27, 1999, the date Georgia was diagnosed with drug-induced hepatitis secondary to Antabuse. Additionally, a jury could find that until that time, no facts were available that would have alerted a reasonably diligent person that the cause of the injury may have originated in Georgia's medical treatment so as to put Plaintiffs on notice of the need to investigate.

Therefore, a reasonable jury could conclude Plaintiffs filed their petition within the two-year statute of limitations.[2]

Murtha v. Cahalan, 745 N.W.2d 711 (Iowa 2008).

Facts: Plaintiff discovered a lump in her breast in 1997. A 1998 biopsy resulted in a diagnosis of a noncancerous mass. Plaintiff underwent annual mammograms in 1998, 1999, 2000, and 2001. During a December 4, 2001 needle biopsy, a doctor noted the area of the lump felt gritty, which could be a sign of cancer. The results of the biopsy were inconclusive; however, after two doctors' recommendations, Plaintiff underwent an excisional breast biopsy on June 14, 2002. Further testing revealed breast cancer. Plaintiff filed suit on September 5, 2003, against several Defendant medical providers, alleging negligent misdiagnosis of the lump beginning in 1997.

Defendants moved for summary judgment, which the district court granted on the basis that Plaintiff's suit was barred by the statute of limitations in Iowa Code section 614.1(9). Plaintiff appealed.

Holding: The Iowa Supreme Court reversed the district court's grant of summary judgment and remanded for further proceedings.

Analysis: Iowa Code section 614.1(9) sets forth the applicable statute of limitations in medical malpractice actions. Such claims must be brought "within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known . . . of the existence of, the injury . . . for which damages are sought." Relying on its holding from *Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008), the Court noted that the statute is triggered upon actual or imputed knowledge of both the injury and its cause in fact. Knowledge of the wrongfulness of Defendant's conduct is not required to commence the statute of limitations. Determining when the statute of limitations is triggered in a medical malpractice case is a two step process. First, Plaintiff must have knowledge or imputed knowledge, of an injury (physical or mental harm). Second, Plaintiff must have knowledge, or imputed knowledge, of the cause in fact of such injury.

The Court's analysis focused on the meaning of "injury" in section 614.1(9) in cases alleging negligent misdiagnosis. Relying on other jurisdictions, the Court concluded that in a case involving a condition that is not immediately diagnosed, the "injury" does not occur merely upon the existence of the

[2] The *Rathje* decision is cited in E.H. Schopler, Annotation, *When Statute of Limitations Commences to Run in Malpractice Action against Physician, Surgeon, Dentist, or Similar Practitioner*, 80 A.L.R.2d 368 (1961) for two propositions: (1) A plaintiff in a medical malpractice case cannot separate her injuries arising from the same conduct so as to avoid the accrual of a cause of action under the discovery rule on latter discovered injuries and delay the commencement of the statute of limitations. The law does not allow the splitting of a cause of action, and a plaintiff cannot separate her injuries and give rise to different triggering dates for statute of limitations purposes; and (2) Under the discovery rule, a plaintiff need not discover that her injury was caused by the negligence or wrongdoing of a physician in order for her cause of action to accrue and the two-year statute of limitations to commence; the plaintiff only has to have actual or imputed knowledge of the cause of her injury.

continuing undiagnosed condition. "Rather, the 'injury' for section 614.1(9) purposes occurs when 'the problem [grows] into a more serious condition which poses greater danger to the patient or which requires more extensive treatment." *Murtha*, 745 N.W.2d at 717 (citing *DeBoer v. Brown*, 138 Ariz. 168, 673 P.2d 912, 914 (1983)). Once the injury is identified, the statute of limitations requires the fact finder to determine when Plaintiff knew or should have known of the injury and the cause in fact of the injury. Such inquires are highly fact-specific.

The Court held that a reasonable fact finder could have concluded that none of the events before September 5, 2001 (the beginning of the two-year period preceding the filing of Plaintiff's petition) were "injuries" within the meaning of the statute of limitations. Fact questions existed as to when Plaintiff suffered an "injury" and when Plaintiff knew or should have known of the injury and its cause in fact. A reasonable fact finder could conclude Plaintiff should have known of her injury and its cause only after the December 4, 2001 needle biopsy – a date well within the two-year statute of limitations. As fact questions existed, the issue was not properly resolved by summary judgment.

Bergstrom v. Iowa Health Sys., 06-1053, 2007 WL 2376625 (Iowa Ct. App. Aug. 22, 2007).

Facts: Plaintiff suffered from chronic pain syndrome for which she sought treatment from Defendants. Plaintiff was discharged from the chemical dependency unit on August 15, 2003, following a disagreement with Defendant doctor. She went to the emergency room shortly after her discharge complaining of uncontrollable shaking and tremulousness; she was also disoriented and hallucinating. She was admitted to the hospital and treated there until August 18, 2003. On August 16, 2005, Plaintiff filed a petition against Defendants asserting claims of "medical battery," "outrageous conduct," and "medical malpractice – negligent treatment" arising out of her discharge on August 15, 2003. Defendants moved for summary judgment, asserting the petition should be dismissed because it was filed one day after the applicable statute of limitations had run. The district court granted Defendants' motion for summary judgment and dismissed Plaintiff's claims. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the district court's summary judgment ruling in part and reversed it in part.

Analysis: *Knowledge of Injury.* Iowa Code section 614.1(9)(a) sets forth the two-year statute of limitations for medical malpractice actions. The statute of limitations begins to run when the patient knows or through the use of reasonable diligence should know of the injury for which damages are sought. Plaintiff argued there was a genuine issue of material fact as to whether she knew, or through the use of reasonable diligence, should have known of her injuries due to her impaired physical and mental condition on August 15, 2003. The Court concluded reasonable minds could differ regarding whether Plaintiff's physical and mental condition prevented her from knowing or discovering her injuries on August 15, 2003. Specifically, Plaintiff was disoriented and experiencing hallucinations as of August 15, 2003. She reported experiencing tremulousness, reported she may have experienced a seizure, and remained

spastic and disoriented until receiving IV medications. She was more alert that evening, but the following day she was not alert to place or time. The Court concluded a genuine issue of material fact existed as to whether Plaintiff's physical and mental condition on August 15, 2003 prevented her from knowing of or discovering her injuries. Thus, the district court erred in granting summary judgment in favor of Defendants.

Continuous Treatment Doctrine. Plaintiff also argued the continuous treatment doctrine tolled the running of the statute of limitations on her claims. The Court held that, assuming without deciding that the continuous treatment doctrine was recognized in Iowa, the district court correctly concluded the single act exception precluded the application of the continuous treatment doctrine in this case. "According to the single act exception, if there is a single act of malpractice, subsequent time and effort to merely remedy or cure that act does not toll the statute of limitations." *Bergstrom*, 2007 WL 2376625 at *4 (quoting *Langner v. Simpson*, 533 N.W.2d 511, 521 (Iowa 1995)). Plaintiff alleged a single, identifiable act by Defendants, the events involved in her discharge on August 15, 2003, as the basis for her clams. No continuing course of treatment could undo her allegedly improper treatment on that date. Thus, the district court was correct in concluding the continuous treatment did not apply to toll the running of the statute of limitations.

2. Products Liability

Buechel v. Five Star Quality Care, Inc., 745 N.W.2d 732 (Iowa 2008).

Facts: On January 20, 2001, Juanita Buechel, a nursing home resident, was found asphyxiated in her room, lodged in the wide space between the mattress and the bed rails. An autopsy revealed her death was the result of accidental asphyxiation due to compression of her neck. On January 15, 2003, Plaintiffs filed a negligence action against the nursing home. The petition also included a products liability claim against the unnamed manufacturer of the bed. Pursuant to Iowa Code section 613.18(3), the petition certified that the manufacturer of the bed had not been identified. On September 15, 2003, through discovery, Plaintiffs learned the identity of the bed manufacturer. However, Plaintiffs did not move to amend their petition to include the named manufacturer until October 28, 2003. After the motion to amend was granted, the manufacturer moved for summary judgment, arguing the two-year statute of limitations barred Plaintiffs' claims. The manufacturer also raised a statute of repose argument. The district court granted the motion for summary judgment. Plaintiffs appealed.

Holding: The Iowa Supreme Court affirmed the district court's grant of summary judgment.

Analysis: *Interlocutory Appeal.* Before addressing the merits of the statute of limitations argument, the Court examined a jurisdictional issue regarding the finality of the district court's decision. When one defendant in a multi-defendant action is dismissed, the question whether the dismissal is final for purposes of appeal hinges on whether the interest of the dismissed defendant is severable from the

other defendants. If the interest is severable, the judgment dismissing that defendant is final. In the present case, the manufacturer's dismissal was not severable from the interests of the nursing home and other Defendants because the manufacturer's dismissal potentially affected the percentage of fault awarded to the remaining Defendants. Iowa's comparative fault statute precludes fault sharing with a defendant not a party to a suit. Noting that it could treat an appeal improperly filed as a matter of right as an application for interlocutory appeal, the Court granted the interlocutory appeal in the interests of the substantial rights of the parties and judicial efficiency.

Statute of Limitations. The two-year statute of limitations for strict liability claims resulting in personal injury is tolled in product liability cases against a manufacturer upon a certification the manufacturer's identity is unknown. Iowa Code § 613.18(3). In the present case, the statute of limitations as to the manufacturer was tolled by the filing of Plaintiffs' petition on January 15, 2003. The parties agreed the statute was tolled from January 15, 2003 to September 15, 2003, the date when the manufacturer's identity was disclosed. The parties disputed, however, when the cause of action accrued. A cause of action accrues when a plaintiff discovers or in the exercise of reasonable care should have discovered (i.e., inquiry notice) the elements of the cause of action. Under the inquiry notice prong, once a person is aware a problem exists, the person has a duty to investigate even though the person may not have knowledge of the nature of the problem that caused the injury.

Plaintiffs argued they initially thought an improperly sized mattress was responsible for Juanita's death and did not know the bed's design was at fault until they hired an attorney who was experienced in products liability cases. The Court rejected this argument, concluding Plaintiffs were placed on inquiry notice on January 21, 2001, the date Plaintiffs were told Juanita had died by asphyxiation and that her head was caught in the rails of the bed. Although they did not know the nature of the defect, Plaintiffs were aware that an unusual event occurred – an accidental death by positional asphyxiation involving compression of Juanita's throat between the mattress and bed rail. Additionally, Plaintiffs should have been further alerted when the medical examiner recommended the nursing home replace the beds.

Only five days remained in the two-year statute of limitations when Plaintiffs filed their petition on January 15, 2003. The statute was tolled from January 15 to September 15, 2003, until the manufacturer's identity became known. At that time, the statute of limitations began to run again, but expired on September 20, 2003. Plaintiffs did not move to amend their petition until October 28, 2003. By that time, Plaintiffs' claims against the manufacturer were barred by the two-year statute of limitations. Having affirmed the district court's grant of summary judgment on the statute of limitations issue, the Court found it unnecessary to address the statute of repose argument.

IV. OTHER TORTS AND THEORIES OF RECOVERY

A. Anticipatory Nuisance

Simpson v. Kollasch, 749 N.W.2d 671 (Iowa 2008).

Facts: Defendants filed applications with the Iowa Department of Natural Resources ("DNR") for permits to construct two confined animal feeding operations ("CAFOs"), only one of which is relevant to the crux of this appeal. After considering a list of concerns submitted to it by the county board of supervisors, the DNR issued permits for the construction of the CAFOs. Prior to the issuance of the permits, Plaintiffs, neighbors of the proposed facilities, filed claims with the district court for nuisance and anticipatory nuisance. The nuisance claim was dismissed on Defendants' motion for partial summary judgment. Following a bench trial on the anticipatory nuisance claim, the district court found Plaintiffs failed to prove an anticipatory nuisance and dismissed their petition. Plaintiffs appealed.

Holding: The Iowa Supreme Court affirmed the district court's denial of Plaintiffs' requested injunction.

Analysis: A nuisance is "[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property." *Simpson*, 749 N.W.2d at 674 (quoting Iowa Code § 657.1). An anticipatory nuisance would be that which threatens to fulfill the statutory definition, were it to come to fruition. The Court indicated that the standard for an anticipatory nuisance is the equivalent of a "clear and convincing evidence" standard: An anticipatory nuisance will not be enjoined unless it appears a nuisance will necessarily result from the act sought to be enjoined. Further, "[r]elief will usually be denied until a nuisance has been committed where the thing sought to be enjoined may or may not become such, depending on its use or other circumstances." *Id.* at 675.

An injunction based on an anticipatory nuisance is an extraordinary remedy, requiring proof that a nuisance will necessarily result from Defendants' proposal. While the Court acknowledged Plaintiffs' concerns were understandable, the Court agreed with the district court that Plaintiffs had not met their high burden to prove an anticipatory nuisance. Despite the fact that several Plaintiffs testified about their personal health conditions and potential adverse effects from the CAFOs, the Court noted that when determining whether a nuisance exists, the fact finder uses a "normal person standard" to determine whether a nuisance involving personal discomfort or annoyance is significant enough to constitute a nuisance. Further, none of the Plaintiffs claimed present adverse effects from other CAFOs in the vicinity, evidence concerning health issues was speculative due to the distance Plaintiffs lived from the proposed sites, Plaintiffs failed to prove groundwater contamination would necessarily result from the CAFO, until the CAFO was in operation, it could not be said that the CAFO inevitably would produce odors which qualify as a nuisance, and there was conflicting evidence that property values would necessarily or certainly decline should the CAFO be built. In sum, Plaintiffs'

experts could not be certain a nuisance would necessarily result if Defendants were allowed to develop and operate the hog confinement operation.

B. Blacklisting

Conrad v. Iowa Cent. Cmty. Coll., 07-0818, 2008 WL 2746324 (Iowa Ct. App. July 16, 2008).

Facts: Plaintiff taught classes at Iowa Central Community College ("ICCC") and Buena Vista University ("BVU"). Upon retiring from ICCC, she continued to teach as an adjunct professor for BVU on ICCC's campus. Defendant Robert Paxton, the president of ICCC, informed BVU that he did not want Plaintiff on the ICCC campus because of his concerns about her negativity. Plaintiff's adjunct teaching position for BVU on the ICCC campus later came to an end. Plaintiff sued ICCC and Paxton alleging they intentionally interfered with a prospective business advantage and blacklisted her. At the close of Plaintiff's case at trial, the district court granted Defendants' motion for directed verdict. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the district court's grant of directed verdict in favor of Defendant Paxton on Plaintiff's blacklisting claim, reversed the district court's grant of directed verdict in favor of ICCC and Paxton on the intentional interference with prospective business advantage claim,[3] reversed the district court's grant of directed verdict in favor of ICCC on the blacklisting claim, and remanded for new trial.

Analysis: Plaintiff's blacklisting claim arose out of Iowa Code section 730.2. This statute has not been construed by the Iowa state appellate courts. In fact, the only Iowa opinion addressing this provision comes from the federal district court for the Southern District of Iowa. *See Glenn v. Diabetes Treatment Ctrs. of America, Inc.*, 166 F. Supp. 2d 1098, 1103-04 (S.D. Iowa 2000). To succeed on a blacklisting claim, Plaintiff must show: (1) Defendant discharged Plaintiff; (2) thereafter, by word, writing or other means Defendant prevented or attempted to prevent Plaintiff from obtaining other employment; (3) Defendant acted with the predominant purpose of preventing Plaintiff from obtaining future employment; and (4) Defendant's conduct was a proximate cause of damage to Plaintiff. *Glenn*, 166 F. Supp. 2d at 1103-04. The Iowa Court of Appeals concluded that based on the plain language of section 730.2, which applies to "any discharged employee," the statute affords Plaintiff a civil remedy notwithstanding the fact that she voluntarily retired from ICCC. However, the Court found that Plaintiff had no blacklisting claim against Defendant Paxton individually because section 730.2 only applies to "any railway company or other company, partnership or corporation." On the other hand, the Court found that Plaintiff's blacklisting claim as to ICCC should have been submitted to the jury because there was substantial evidence that Paxton acted with the authority of ICCC when he told BVU employees that he did not want Plaintiff on campus.

[3] The reader is advised to consult the *Conrad* decision for the Court's discussion of Plaintiff's intentional interference claim as this Appellate Case Update is confined to the tort of blacklisting, which is not often addressed by the Iowa courts.

C. Defamation

Davenport v. City of Corning, 06-1156, 2007 WL 3085797 (Iowa Ct. App. Oct. 24, 2007).

Facts: Plaintiff filed suit against Defendants, the City of Corning, Marvin Steffen (Corning's former mayor), and Larry Drew (Corning's chief of police), alleging claims for conspiracy, defamation, harassment, and invasion of privacy. Defendants moved for summary judgment, which the district court granted, dismissing Plaintiff's claims. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the judgment of the district court in part, reversed in part, and remanded for further proceedings.

Analysis: *Conspiracy.* Plaintiff failed to preserve error on his theory that Defendant City and Defendant Steffen were liable for Defendant Drew's alleged tortious conduct based on a conspiracy between Defendants. Thus, the Court concluded the district court correctly dismissed all of Plaintiff's claims against Defendant Steffen.

Defamation. Defamation is the invasion of another person's interest in his or her reputation or good name and comprises the torts of libel and slander. The tort alleged in this case is slander based on Defendant Drew's statements to (1) two "private investigators" hired by Plaintiff; (2) a former Corning police officer; and (3) "other Corning residents," regarding Plaintiff's supposed abuse of his wife. Publication is an essential element of defamation, and simply means a communication of statements to one or more persons. A defamatory statement is not published unless it is heard and understood by a third person to be defamatory. If the communication of the defamatory statement is in answer to a request from an agent of the one defamed, the publication may not be actionable. The Court agreed with the district court that the statements made to the "private investigators" were not published because the investigators were hired by Plaintiff and they contacted Defendant Drew at Plaintiff's request. Further, Defendant Drew's statements to the investigators were in response to artfully phrased questions from the investigators designed to induce Defendant Drew to say something defamatory about Plaintiff. As for the statements Defendant Drew made to the former Corning police officer, the Court agreed with the district court that the claim was barred by the two-year statute of limitations in Iowa Code section 614.1(2). The statements were made more than two years before Plaintiff filed suit and the discovery rule does not toll the statute of limitations on claim of a defamation. Rather, the two-year statute of limitations for slander claims begins to run on the date of publication. The Court also concluded the district court was correct in dismissing Plaintiff's defamation claims as to the statements Defendant Drew supposedly made to "other Corning residents" because Plaintiff failed to submit any evidence as to the content, dates or to whom such statements were made.

Harassment. The district court found that harassment is not a civil cause of action and dismissed Plaintiff's claim for harassment against Defendant Drew and Defendant City. The Court agreed with this conclusion, finding that Plaintiff

failed to submit any authority to support his contention the legislature intended a violation of Iowa Code section 708.7, the criminal statute on harassment, to give rise to a civil cause of action for harassment. Additionally, it does not appear by express terms or clear implication that such a cause of action was intended by the legislature.

Invasion of Privacy. The right of privacy is "the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity." *Davenport*, 2007 WL 3085797, at *7 (quoting *Bremmer v. Journal-Tribune Publishing Co.*, 247 Iowa 817, 821, 76 N.W.2d 762, 764 (1956)). One's right of privacy may be invaded by an unreasonable intrusion upon the seclusion of another. However, a defendant is not liable for intrusion upon seclusion if the plaintiff is already in public view. Plaintiff's invasion of privacy claim alleged that Defendant Drew intruded upon Plaintiff's seclusion by continuously driving by Plaintiff's business and home. The Court agreed with the district court's conclusion that Defendant Drew did not intrude upon Plaintiff's seclusion by driving by his public place of business. However, the Court found there were questions of material fact as to whether Defendant Drew unreasonably intruded upon Plaintiff's seclusion in driving by and looking at him in his house. Thus, the district court erred in granting summary judgment to Defendant City and Defendant Drew on Plaintiff's invasion of privacy claim relating to Defendant Drew's alleged surveillance of Plaintiff's home.

Kono v. Meeker, 06-1554, 2007 WL 4322060 (Iowa Ct. App. Dec. 12, 2007).

Facts: Plaintiff and Defendants conducted business with each other over the Internet. When Defendant Lawrence Meeker became disgruntled over the items he purchased from Plaintiff Dana Kono, Defendant posted a "watch page" on the Internet entitled the "Dana Kono Watch Page," which explained that it was intended as a "service" to "all who may have occasion to do business with" Plaintiff. The watch page labeled Plaintiff as an "admitted liar," a "thief," and a "drunk," among other statements about the parties' transactions and several other strong characterizations of Plaintiff. (For additional details on the substance of Defendants' statements, the reader is advised to consult the *Kono* decision.) Defendant Lawrence Meeker also sent Plaintiff a series of profane and threatening emails, and made several hostile telephone calls. Plaintiff filed an action against Defendants, alleging defamation, false light invasion of privacy based on the content of the watch page, and intentional infliction of emotional distress based on a combination of the emails, telephone calls and the watch page. Defendants counterclaimed for fraudulent misrepresentation. A jury returned a verdict in favor of Plaintiff and rejected Defendants' counterclaim. Defendants filed a motion for new trial, which the district court denied. Defendants appealed.

Holding: The Iowa Court of Appeals affirmed the judgment in favor of Plaintiff.

Analysis: The Court concluded the district court did not abuse its discretion in denying Defendants' motion for new trial because there was sufficient evidence to sustain the verdict. The watch page explicitly accused Plaintiff of being a disreputable person who makes business dealings while under the influence of

alcohol and was intended to dissuade third persons from doing business with Plaintiff. The Court believed the accusations on the watch page were more than mere name calling or venting personal frustrations and reflected Defendants' attempt to tarnish Plaintiff's reputation and business. "These accusations go to the heart of a defamation claim, which is described as the 'malicious publication . . . in writing . . . tending to injure the reputation of another person or to . . . injure [the person] in the maintenance of [the person's] business.'" *Kono*, 2007 WL 4322060 at *4 (quoting *Vinson v. Linn-Marr Cmty. Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1984)). The Court also found Defendants' statements could accurately be described as "attacking a person's moral character or integrity." *Id.*

D. Legal Malpractice

Pickens v. Gardner, 05-1575, 2008 WL 141153 (Iowa Ct. App. Jan. 16, 2008).

Facts: Plaintiff sued his employer under the Americans with Disabilities Act ("ADA"). A jury awarded him damages, but a federal district court granted the employer's motion for judgment notwithstanding the verdict. Plaintiff then brought suit against Defendants, the lawyer and law firm representing him in the ADA action, alleging they committed legal malpractice by failing to dispute certain allegations and contentions proffered by the employer in the ADA lawsuit. Defendants moved for summary judgment, which the district court granted. Plaintiff appealed.

Holding: The Iowa Court of Appeals affirmed the district court's grant of summary judgment in Defendants' favor.

Analysis: "Legal malpractice consists of the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake." *Pickens*, 2008 WL 141153, at *1. To establish a claim of legal malpractice, Plaintiff had to prove: (1) the existence of an attorney-client relationship; (2) breach of duty; (3) proximate cause; and (4) injury. As to the proximate cause issue, the injured party must show that but for the attorney's negligence the loss would not have occurred. For a claim that an attorney negligently handled a lawsuit, a plaintiff must prove that absent the attorney's negligence, the underlying suit would have been successful. Contrary to Plaintiff's allegation, the record demonstrated that in the ADA case, Defendants disputed the cited contentions proffered by the employer during the course of litigating Plaintiff's ADA case. Even with this evidence in the record, the federal district court granted the employer's motion for judgment notwithstanding the verdict. "As a matter of law, therefore, the lawyer and law firm's conduct during the ADA trial could not have been the proximate cause of the federal district court's ruling on [the employer's] motion for judgment notwithstanding the verdict." *Id.* at *3. Thus, Plaintiff could not prove that Defendants' inaction proximately caused the loss of his jury award in the ADA case, and the district court did not err in granting Defendants' motion for summary judgment.

E. Malicious Prosecution

Schneider v. Rodgers, 07-0471, 2008 WL 508481 (Iowa Ct. App. Feb. 27, 2008).

Facts: Plaintiff Dennis Schneider brought an action against Defendant Debra Rodgers, his former wife, for malicious prosecution and fraud after Debra filed a petition to modify the parties' dissolution decree. In the request for modification, Debra sought physical care of the parties' son and temporary and permanent child support. In this action, Dennis alleged Debra perpetrated a fraud when filing the petition for modification, intentionally misled the court, and tried to prolong the proceedings by claiming the parties' son had a mental disability even though Debra did not really believe their son was mentally disabled. The district court dismissed Dennis's claims. Dennis appealed.

Holding: The Iowa Court of Appeals affirmed the dismissal of Plaintiff's malicious prosecution and fraud claims.

Analysis: *Malicious Prosecution.* An action for malicious prosecution is based on an alleged wrongful initiation of an unsuccessful civil or criminal proceeding with malice and without probable cause. Debra instituted the modification action because she believe their son's decision to move out of Dennis's home prior to the completion of high school constituted a substantial change of circumstances not contemplated in the original decree. The parties' son was 18 years old at the time of the modification action. Debra argued their son's diagnosed dyslexia, expressive language problems and uneven cognitive development was a "mental disability" that made him dependent on his parents for care and fell within the exception to the general rule that parents are no longer financially responsible for a child that has reached legal age. The Court concluded that Debra had probable cause to seek a modification of the decree because the relevant Iowa statute did not define "mental disability" for purposes of making someone dependent on their parents for support and it was not unreasonable for Debra to make this argument to the district court. Thus, the Court held that the district court properly dismissed Dennis's claim for malicious prosecution.

Fraud. Dennis claimed Debra committed fraud because she misrepresented facts to the court and tried to mislead the court. The elements for recovery in a fraud action are: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent; (6) justifiable reliance; and (7) resulting injury. A party is required to prove these elements by a preponderance of the clear, satisfactory and convincing evidence. The Court concluded there was nothing in any of Debra's statements or arguments throughout the proceedings that constituted a material misrepresentation of fact and there was no evidence that Debra acted with the intent to deceive either Dennis or the court. Thus, Dennis failed to prove clear, satisfactory and convincing evidence in support of his fraud claim.

F. Municipal Tort Claims Act

Goings v. Chickasaw County, 523 F. Supp. 2d 892 (N.D. Iowa 2007).

Facts: Plaintiffs, a Chickasaw County homeowner and her two adult children, brought an action against Defendants, the county, county sheriff, and deputy sheriff, alleging violations of 42 U.S.C. § 1983 and common law tort claims for defamation, false arrest and malicious prosecution. The claims arose out of a search of the property, and the arrest and subsequent prosecution of the homeowner's adult son for possession of 2,200 marijuana plants. Defendants moved for summary judgment on all claims.

Holding: The United States District Court for the Northern District of Iowa granted the motion in part and denied the motion in part. Of relevance to this Appellate Case Law Update, the Court dismissed Plaintiffs' common law tort claims for failure to comply with the notice provisions of Iowa Code section 670.5.[4]

Analysis: Notice Under Iowa Code 670.5. Defendants argued Plaintiffs' tort claims should be dismissed for failure to comply with the notice-of-claim provision of Iowa Code section 670.5, which required a person claiming damages against a municipality to commence an action within six months after the injury or provide written notice to the local government within sixty days after the injury. (Section 670.5 was amended in 2007 to eliminate the notice provisions; however, the 2007 amendment only has prospective effect and the actions giving rise to Plaintiffs' claims occurred in 2004.) The search of the property occurred September 8, 2004; thus, under the plain language of the statute, Plaintiffs were required to file their lawsuit within six months of September 8, 2004 or given written notice to the county board of supervisors within sixty days of September 8, 2004. Plaintiffs did neither. In 1986, the Iowa Supreme Court held that section 670.5's requirement that a plaintiff commence an action within six months after the injury unless notice was provided to the municipality within sixty days was a denial of equal protection and, thus, unconstitutional. *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 780 (Iowa 1986). The Iowa Supreme Court later clarified that an injured party still had the opportunity to provide timely notice, but in the event timely notice is not given, the applicable statute of limitations is found in chapter 614. *Clark v. Miller*, 503 N.W.2d 422, 425 (Iowa 1993). Section 614.1(2) requires a plaintiff to file suit within two years of the date of the injury. Plaintiffs relied on these decisions to argue their claims were timely because their claims were filed on September 8, 2006.

The Court, however, indicated that it was not bound by the Iowa Supreme Court's interpretations of the United States Constitution. The Court disagreed with the *Miller* holding that section 670.5 violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Holding that section 670.5 survives the rational basis test, the Court concluded that the plain language of section 670.5 should be enforced. The Court also stated there was no indication in *Miller* that there were adequate and independent bases for the

[4] The *Goings* decision also includes an analysis of: (1) judicial estoppel; and (2) claims under 42 U.S.C. § 1983. As those topics do not fall within the scope of this Appellate Case Law Update, the reader is advised to consult the *Goings* decision for those analyses.

Iowa Supreme Court's decision; rather, the Iowa Supreme Court stated that the federal and state constitutional analyses were similar, collapsed the analyses into one analysis and applied the United States Supreme Court's rational-basis test. Thus, the federal district court "presumes that the Iowa Supreme Court in *Miller* 'decided the case the way it did because it believed federal law required it to do so.'" *Goings*, 523 F. Supp. 2d at 919 (citing *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)). The Court concluded that section 670.5 is constitutional and the plain language of the statute controls, thus, barring Plaintiffs' claims as untimely. The Court dismissed Plaintiffs' claims for defamation, false arrest and malicious prosecution.

But see Crooks v. Lynch, C 07-2080 EJM, 2008 WL 2725812, at *3 (N.D. Iowa July 10, 2008) (refusing to follow *Goings* conclusion that section 670.5 is constitutional and holding, instead, that the limitations imposed by section 670.5 do not apply for the reasons set forth in *Miller*).

False Arrest. Although not required to do so, the Court, in its discretion, chose to address the issue whether there was sufficient evidence in the record to support Plaintiff David Goings's false arrest claim. "In order to prove a claim of false arrest under Iowa common law, a plaintiff must prove two elements: '(1) detention or restraint against one's will, and (2) unlawfulness of the detention or restraint.'" *Goings*, 523 F. Supp. 2d at 920 (quoting *Kraft v. City of Bettendorf*, 359 N.W.2d 466, 469 (Iowa 1984)). A detention is not unlawful where the arresting officers had a reasonable ground for believing that an indictable public offense had been committed and a reasonable ground for believing the person to be arrested has committed it. The Court believed the detention in the present case was not unlawful, thus, Plaintiff David Goings would be unable to prove the claim under Iowa common law.

Malicious Prosecution. The Court briefly addressed Plaintiff David Goings's malicious prosecution claim, concluding he could not prove such a claim under Iowa law. To prove such a claim, "a plaintiff must prove six elements: '(1) a previous prosecution; (2) instigation of that prosecution by the defendant; (3) termination of the prosecution by acquittal or discharge of the plaintiff; (4) want of probable cause; (5) malice on the part of the defendant for bringing the prosecution; and (6) damage to the plaintiff.'" *Goings*, 523 F. Supp. 2d at 921 (quoting *Wilson v. Hayes*, 464 N.W.2d 250, 259 (Iowa 1990)). The Court noted that Plaintiff David Goings could not show he was arrested without probable cause. Further, the proceedings were not terminated by acquittal or discharge; rather, Plaintiff David Goings was found guilty of possession of marijuana.

G. Tortious Interference with Contract

C Plus Northwest, Inc. v. DeGroot, 534 F. Supp. 2d 937 (S.D. Iowa 2008)

Facts: Plaintiffs, a transportation brokerage firm and its majority shareholder, filed suit against the minority shareholders and employees alleging they conspired to transfer the firm's business to a corporation they formed. Plaintiffs asserted claims for conspiracy, breach of fiduciary duty, misappropriation of trade secrets, intentional interference with current business relations, and intentional

interference with prospective business relations. The jury returned verdicts in favor of Plaintiffs on all claims. Defendants filed a post-verdict motion, arguing some of the jury verdicts and awards should be set aside.

Holding: The United States District Court for the Southern District of Iowa affirmed the entry of judgment on the claims for breach of fiduciary duty, interference with current business relations, and interference with prospective business relations. The Court set aside the judgment on the conspiracy claim and entered judgment for Defendants on the misappropriation claim.[5]

Analysis: Defendants argued that Plaintiffs' tortious interference claims failed as a matter of law because Plaintiffs failed to prove Defendants' predominant purpose was to financially harm or destroy Plaintiffs' business. The Court disagreed. The Court recognized that to sustain the jury's verdicts on the tortious interference claims, there must be substantial evidence in the record to permit a conclusion that "the sole or predominant purpose of the actor's conduct was to financially injure or destroy the plaintiff." *C Plus*, 534 F. Supp. 2d at 946.[6] In order to create liability in the event a defendant acts with two or more purpose, his improper purpose must predominate. The predominant purpose test is applicable in situations where one claim is for prospective business relations and the other claim pertains to contracts that are terminable at will. Improper purpose focuses on Defendants' motivation to interfere with Plaintiffs' business relationships. If interference is a necessary consequence of actions taken for a different purpose, the acts may be deemed intentional, but not improper.

The Court found substantial evidence to support a finding of Defendants' improper motive: invoices were altered to divert funds, payments were diverted to the newly formed corporation, property was removed from the offices of Plaintiff corporation, funds were taken out of Plaintiff corporation's accounts, and Defendants failed to properly keep accounting records and wind up the first corporation. "While it is certainly reasonable to think that Defendants diverted business and assets from C Plus to further their own business ventures, this does not preclude a finding that the methods used were also certain to result in the destruction of C Plus." *Id.* at 947. The Court further stated that when there is conflicting evidence as to both intention and predominant purpose, the jury's verdict should be upheld.

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[5] This Appellate Case Law Update will only address the intentional interference with current and prospective business relations claims. The *C Plus* decision also includes an analysis of: (1) the right of a closely-held corporation's majority shareholder to recover damages in his individual capacity; (2) punitive damages claims; and (3) duplicative damages awards. As those topics do not fall within the scope of this Appellate Case Law Update, the reader is advised to consult the *C Plus* decision for those analyses.

[6] The *C Plus* decision is cited in James O. Pearson, Jr., Annotation, *Liability for Interference with At Will Business Relationship*, 5 A.L.R. 4th 9 (1981) regarding the "sole or predominant purpose" element of a claim for tortious interference with business relations.

H. Wrongful Imprisonment Under State Tort Claims Act

State v. McCoy, 742 N.W.2d 593 (Iowa 2007).

Facts: Daryl McCoy was charged with first-degree murder and willful injury. At trial, the State introduced incriminating statements made by McCoy to police officers following his arrest. A jury found McCoy guilty of the charges, and the district court sentenced him to a term of life imprisonment. McCoy appealed. The Iowa Supreme Court reversed the judgment of conviction and sentence, finding McCoy received ineffective assistance of trial counsel because trial counsel failed to seek suppression of the incriminating statements McCoy made to the police. The Court held the statements were involuntary and the admission of the statements was prejudicial. The Court remanded the case for a new trial.

Following the remand, the county attorney moved to dismiss the charges against McCoy on the grounds that the State could not obtain a conviction on retrial without the incriminating statements. The district court granted the motion and dismissed the charges against McCoy. McCoy was released from imprisonment after being confined for more than three years.

McCoy filed an application with the district court requesting a determination that he was a "wrongfully imprisoned person" entitled to damages from the State pursuant to the State Tort Claims Act. The district court held that McCoy was not a "wrongfully imprisoned person." McCoy appealed.

Holding: The Iowa Supreme Court affirmed the decision of the district court.

Analysis: Iowa Code chapter 663A creates a statutory cause of action for wrongful imprisonment that permits a person to commence an action for damages under the State Tort Claims Act. Before proceeding with such a lawsuit, however, an individual claiming to be a wrongfully imprisoned person must request a determination from the district court that the person is entitled to commence a civil action based on two preliminary findings: (1) the claimant is a wrongfully imprisoned person; and (2) the claimant did not commit the offense or the offense was not committed by any person. Iowa Code § 663A.1(2), (3). If the district court makes both of these findings, the person may then present a claim to the State Appeals Board. Otherwise, the person has no right to pursue a claim under the State Tort Claims Act. This additional procedural hurdle for an individual claiming to be a wrongfully imprisoned person, "permits the district court to serve as a gatekeeper of such claims to insure only meritorious claims for damages will be filed with the State Appeals Board." *McCoy*, 742 N.W.2d at 596.

The first finding requires an examination of the seriousness of the charge, form of conviction, term of incarceration, disposition of the conviction and reason for the imprisonment. The district court must reach this finding by examining court records and documents that confirm each criterion. The second finding – that the person did not commit the offense or the offense was not committed by any person – is a fact-intensive process and must be based on "clear and convincing evidence." Iowa Code § 663A.1(2). "The burden imposed on a wrongfully imprisoned person is difficult to meet because it requires the person

to prove a negative." *McCoy*, 742 N.W.2d at 598. The person must show he or she was actually *innocent* of the crime, or no crime occurred. Additionally, the wrongfully imprisoned person must establish more than the absence of guilt in law to establish innocence; the person must be factually innocent, not merely procedurally free from re-prosecution or not guilty. When the crime was, in fact, committed by someone, the person seeking to bring a tort claim for wrongful imprisonment must affirmatively establish by clear and convincing evidence that he or she did not commit the crime or any lesser included crime.

The Court concluded that substantial evidence supported the finding by the district court that McCoy failed to establish his right to sue the State as a wrongfully imprisoned person. Essentially, there were too many unanswered questions about McCoy's role in the murder. "To prove a negative by clear and convincing evidence, it is not enough for a wrongfully imprisoned person to merely create questions and doubts about his or her involvement in the crime of conviction. Instead, the person must affirmatively answer those doubts and questions to the point the district court will be convinced the person did not commit the crime or any lesser included crime." *Id.* at 599.

I. Wrongful Termination

Tiengkham v. Electronic Data Sys. Corp., 551 F. Supp. 2d 861 (S.D. Iowa 2008).

Facts: Plaintiffs were employed with Defendant employer when Defendant employer received from the federal government "no match" letter regarding several Hispanic employees. Some of the affected employees left their jobs with Defendant employer but later returned to their jobs using different names. Plaintiffs informed Defendant employer that workers previously identified as lacking proper documentation had returned to work. Plaintiffs were then terminated by two supervisory employees. Plaintiffs filed a lawsuit in state court alleging Defendant employer unlawfully terminated their employment in violation of public policy. Specifically, Plaintiffs alleged Defendant employer "violated the important public policy of the State of Iowa to prevent any person or employer from enabling illegal aliens to remain in the country by harboring or employment of such aliens." *Tiengkham*, 551 F. Supp. 2d at 864. The lawsuit was removed to federal court based on diversity jurisdiction. Plaintiffs voluntarily dismissed their petition in federal court. Plaintiffs then filed in state court a motion to lift stay and motion to amend pleadings in their original lawsuit against Defendant employer. The state court granted the motions and permitted Plaintiffs to amend their petition by adding the supervisory employees as Defendants. Defendant employer moved the federal court to issue a writ of prohibition to prohibit the state court from taking any further action because the state court lacked jurisdiction over the claim. Defendant employer argued the state court never regained jurisdiction over the lawsuit because the federal court did not remand the lawsuit after Plaintiffs' voluntary dismissal. Defendant employer filed a notice of removal and a motion to dismiss the amended complaint. Plaintiffs moved the federal court to remand the action to state court.

Holding: The United States District Court for the Southern District of Iowa denied

Defendant employer's motion for writ of prohibition and granted Plaintiffs' motion for remand. Because the remand divested the federal court of jurisdiction, the Court deemed Defendant employer's motion to dismiss moot.

Analysis: At issue was whether diversity jurisdiction and federal question jurisdiction existed. Plaintiffs argued complete diversity of citizenship did not exist because the supervisory employees were residents of Iowa as were Plaintiffs. Defendant employer countered that Plaintiffs fraudulently joined the supervisory employees in order to destroy diversity jurisdiction. To determine the fraudulent joinder issue, the inquiry is "whether there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved." *Id.* at 865. Under Iowa law, to prove a wrongful discharge claim based on a violation of public policy, an employee must show: (1) the existence of a clearly defined public policy that protects an activity; (2) this policy would be undermined by a discharge from employment; (3) the challenged discharge was the result of participating in the protected activity; and (4) there was a lack of other justification for the termination. Defendant employer argued there was no reasonable basis existing to predict that Iowa courts would impose liability on the supervisory employees because under Iowa law, supervisors cannot be held liable for wrongful termination in violation of public policy and Plaintiffs failed to identify a well-recognized clearly defined public policy. The Court disagreed with Defendant employer's assertions, finding that there is a reasonable basis to predict Iowa courts may impose liability on the supervisory employees and Plaintiffs did not fraudulently join the supervisory employees.

Diversity Jurisdiction: (A) Supervisory Liability in Wrongful Termination Claims. Iowa courts have only addressed the issue of whether a supervisory employee can be held liable for wrongful termination in violation of public policy in unpublished opinions. However, the Iowa courts have found a supervisor could be held individually liable for unfair employment practices under the Iowa Civil Rights Acts ("ICRA") and that an employee can maintain a cause of action against a supervisor for tortious interference with contract. The Court thus found "that the lack of a published Iowa court opinion on the issue, taken together with the Iowa courts' holdings that a supervisor can be individually liable under the ICRA and for tortious interference with an employment contract, demonstrate that an arguably reasonable basis exists to predict that Iowa courts may impose liability on Defendants [supervisory employees]." *Id.* at 867. *(B) Well-Recognized Clearly Defined Public Policy.* The tort of wrongful termination must be based on a clear, well-recognized public policy, and the existence of such a public policy is a question of law for the court to resolve. The Court found that Plaintiffs' asserted public policy was well-recognized and clearly defined because the asserted public policy was precise and based upon specific federal statutes. The Court also acknowledged that it is important for a state court to decide the parameters of the state public policy exception to the at-will employment doctrine.

Federal Question Jurisdiction. The Court also concluded that, contrary to Defendant employer's assertions, federal immigration law did not completely preempt Plaintiffs' state law claims of wrongful termination in violation of public policy and thus Defendant employer could not remove the case to federal court on the basis of federal question jurisdiction, even though federal law provides a

private cause of action for employees who are retaliated against by employers. Congress has not clearly manifested an intent to make state law actions for wrongful termination in violation of public policy removable to federal court and the federal statute did not cover all activities implicating any provision of immigration laws.

Holding v. Graham Mfg. Corp., 06-1729, 2007 WL 2963676 (Iowa Ct. App. Oct. 12, 2007).

Facts: Plaintiff was terminated from her position with Defendant employer. She filed suit against Defendant alleging Defendant terminated her employment because she sought workers' compensation benefits. A jury concluded Plaintiff was terminated in retaliation and awarded her $1,000,000 in total damages. Defendant filed a motion for judgment notwithstanding the verdict challenging the sufficiency of the evidence behind the verdict and damages award. The district court granted Defendants' motion finding there was insufficient evidence to prove Plaintiff's pursuit of workers' compensation benefits was the determining factor in Defendant's decision to discharge Plaintiff. Because the district court found there was insufficient evidence to prove liability, the court did not reach Defendant's alternative claim regarding the damages awarded by the jury. Plaintiff appealed.

Holding: The Iowa Court of Appeals reversed the district court's grant of judgment notwithstanding the verdict on the issue of liability and remanded for further proceedings.

Analysis: Plaintiff was injured at work on several occasions and placed on doctor-imposed work restrictions. Over the course of her employment, Plaintiff received disciplinary warnings for substandard performance. She was also transferred to other departments because of her work restrictions. During her employment, Plaintiff consulted with an attorney to help her get her workers' compensation benefits paid. Plaintiff was later terminated for receiving too many warnings allegedly related to her work performance.

Generally, an employer may discharge an at-will employee at any time for any reason. Three exceptions have emerged to add protections to the employer/employee relationship: (1) discharges in violation of public policy; (2) discharges in violation of employee handbooks which constitute a unilateral contract; and (3) discharges in violation of a covenant of good faith and fair dealing. The first exception is relevant here because Plaintiff claimed she was terminated for pursuing her statutory right to compensation for a work-related injury. To recover under this exception, Plaintiff must establish: "(1) engagement in a protected activity; (2) adverse employment action; and (3) a causal connection between the two." *Holding*, 2007 WL 2963676 at *4 (quoting *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998)). At issue in this case, was whether Plaintiff proved a causal connection between her pursuit of workers' compensation benefits and Defendant's decision to terminate Plaintiff's employment.

The causal connection is a question of whether Plaintiff's pursuit of workers' compensation benefits was the determinative factor in Defendant's decision to

discharge Plaintiff. "A factor is determinative if it is the reason that tips the scales decisively one way or the other, even if it is not the predominant reason behind the employer's decision." *Id.* at *5 (citations omitted). The Court disagreed with the district court's conclusion that there was not sufficient evidence to prove a causal connection between Plaintiff's efforts to pursue a workers' compensation claim and her eventual termination. Specifically, the Court noted there was circumstantial evidence supporting Plaintiff's causation argument: A reasonable juror could conclude Plaintiff was disciplined under false pretenses because most of the warnings she received for improper performance did not reflect any mistake on her part, and Plaintiff was punished more severely than the employees who actually committed the mistakes. Additionally, following an all-employee meeting at which workers' compensation costs were discussed, a memo was authored by Plaintiff's supervisor suggesting Plaintiff be pushed out of his department; this may be viewed as showing Plaintiff was demoted because of the expenses associated with her workers' compensation benefits. The Court concluded a reasonable person could find Plaintiff's pursuit of workers' compensation benefits was the reason that tipped the scales decisively towards terminating her employment. Because the crux of this case involved a dispute over the reasonable inferences that could be drawn from Defendant's conduct, the jury was the proper entity to resolve the dispute. Thus, Defendant's motion for judgment notwithstanding the verdict should have been denied.

V. INDEMNIFICATION/CONTRIBUTION

A. Statute of Repose and Common Liability for Contribution

Estate of Ryan v. Heritage Trails Assocs., Inc., 745 N.W.2d 724 (Iowa 2008).

Facts: In 2003, two workers were injured when a nurse tank holding anhydrous ammonia ruptured. One of the workers later died due to his injuries. Plaintiffs, the injured worker and the estate of the other injured worker, brought negligence and breach of warranty claims against Defendants, the manufacturer of the anhydrous ammonia, the distributors of the ammonia, and the company hired by their employer to provide safety training. Defendants filed contribution claims against the manufacturer of the nurse tank, which was manufactured in 1976. The tank manufacturer filed a motion to dismiss alleging the contribution claims failed because common liability was lacking. The district court denied the motion. The manufacturer and distributors of the anhydrous ammonia settled with Plaintiffs. The case proceeded to a jury trial on the claims against the safety training company and the contribution claims against the tank manufacturer. The jury returned a verdict in favor of Plaintiffs and against the safety training company, and a verdict against the tank manufacturer on the contribution claims. The tank manufacturer appealed.

Holding: The Iowa Supreme Court affirmed Plaintiffs' judgment against the safety training company, but reversed the district court's judgment against the tank manufacturer, and remanded the case to the district court to vacate the judgments against the tank manufacturer and enter judgment in its favor.

Analysis: The Court was required to analyze the interplay between Iowa Code sections 614.1(2A), the statue of repose for products liability actions, and 668.5, Iowa's contribution statute. The first step in applying a statute of repose is to determine the time when the statute of repose begins to run. Under Iowa Code section 614.1(2A)(a), the statute of repose for product liability claims begins to run "after the product was first purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time by the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product." The time limit in which a party may bring a products liability action against the above-identified entities is 15 years. Upon the expiration of 15 years, the repose period begins. The repose period not only extinguishes claims that accrued more than 15 years prior to the start of the repose period, but also prevents claims from accruing during the repose period. Section 614.1(2A)(a) provides a statutory exception to the repose period for contribution claims. The repose period, therefore, does not prevent a contribution claim from accruing. However, section 668.5(1) controls a party's right to contribution, which requires the party seeking contribution to have "common liability" with the contributor. "Common liability exists when the injured party has a legally cognizable remedy against both the party seeking contribution and the party from whom contribution is sought." *Ryan*, 745 N.W.2d at 730. Common liability is determined at the time of the injury, not at the time the contribution claim is brought.

The Court concluded that common liability did not exist at the time of the workers' injuries because at that time, the fifteen-year statute of repose prevented Plaintiffs' causes of action against the tank manufacturer from accruing. Because the tank manufacturer could not be liable for Plaintiffs' injuries, the tank manufacturer did not have common liability with Defendants. As a matter of law, section 668.5(1) precluded Defendants' contribution claims against the tank manufacturer.

The Court rejected Defendants' suggestion that the contribution exception in section 614.1(2A)(a) eliminates the common liability requirement. The legislature did not intend to relieve a party seeking contribution from proving the elements of contribution. Additionally, when the legislature enacted section 614.1(2A)(a), thirteen years after it enacted section 668.5, it did not include any language in the statute which would lead the Court to believe the legislature had any intent to modify or repeal the statutory requirements of section 668.5. Finally, the purpose of section 614.1(2A)(a), providing a manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of a product with freedom from liability after 15 years, would be frustrated if Defendants' position were adopted. The Court held that the contribution exception in section 614.1(2A)(a) does not eliminate the requirement of common liability in order for a contribution claim to be viable.

[7] The *Ryan* case is cited in Jay M. Zitter, Annotation, *Validity and Construction of Statute Terminating Right of Action for Product-Caused Injury at Fixed Period After Manufacture, Sale, or Delivery of Product*, 30 A.L.R. 5th 1 (1995), noting that the statute of repose barred the products liability claims when the tank ruptured more than 15 years after it was manufactured and the contribution claim against the tank manufacturer was not viable given that the tank manufacturer did not have common liability with the anhydrous ammonia manufacturer and distributor.

In sum, the Court held that the contribution exception in section 614.1(2A)(a) does not prevent a claim for contribution from accruing during the period of repose. "However, for a contribution action to be viable, common liability under section 668.5(1) has to exist between the tortfeasors at the time of the injury out of which the right to contribution arose." *Id.* at 731. As a matter of law, Defendants' contribution claim against the tank manufacturer failed.[7]

B. Common Law Indemnity

John T. Jones Const. Co. v. Hoot Gen. Constr., 543 F. Supp. 2d 982 (S.D. Iowa 2008).

Facts: Plaintiff, a general contractor for a public wastewater project, brought an action against Defendants, an engineering firm, the Wastewater Reclamation Authority ("WRA"), and the concrete lining subcontractor, for breach of contract, professional negligence and other torts. Of relevance to this Appellate Case Law Update, Plaintiff asserted a common law indemnity claim against the concrete lining subcontractor for additional expenses Plaintiff incurred when it had to install a different lining system to satisfy its contract with the project owner and engineer after the concrete lining subcontractor breached the subcontract. Several claims proceeded to a bench trial, including the common law indemnity claim.

Holding: The United States District Court for the Southern District of Iowa dismissed Plaintiff's common law indemnity claim.[8]

Analysis: Iowa law recognizes common law indemnity in four situations:

> (1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged. (2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sough to be charge. Restitution Restatement, Sec. 90. (3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged. (4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prove the misconduct of the one sought to charged.

John T. Jones Constr., 543 F. Supp. 2d at 1021 (quoting *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001)). The Court held that the first situation was not satisfied because Plaintiff's liability to WRA was not derivative or vicarious, but rather contractual. The second situation also was not applicable because Plaintiff did not incur liability at the direction of, in the interests of, or in reliance on the concrete lining subcontractor. The Court noted this species of indemnity rarely arises: "The rule has its most

[8] This holding is only one of several in the *John T. Jones Constr.* decision. In an extensive analysis, the Court also examined claims of professional negligence, intentional interference with contract, breach of contract, and promissory estoppel. The reader is advised to consult the *John T. Jones Constr.* decision for its discussion of those important issues.

frequent application where a person directs a servant or other agent to act on his account in the seizure of goods or the entry upon land, but applies also where a person directs an independent contractor to act on his account or where a judgment creditor directs a sheriff to take specific goods upon execution." *Id.* The Court also concluded the third and fourth situations of common law indemnity were not satisfied. The concrete lining subcontractor's duty to Plaintiff was only contractual and the concrete lining subcontractor engaged in no misconduct.

C. Indemnification for Past Losses

Employers Mut. Cas. Co. v. Estate of Lartius, 06-1725, 2007 WL 3087505 (Iowa Ct. App. Oct. 24, 2007).

<u>Facts:</u> Crane Rental Company leased a crane to Augustus Lartius on June 7, 2001 for work to be done on Lartius's property. An employee of Lartius was injured on that date when the crane came into contact with an electric power line. Crane Rental later rented a crane to Lartius on June 19, 2001. After the June 19, 2001 work was completed, Lartius initialed a "Work Order," which contained provisions for Lartius to indemnify Crane Rental. Crane Rental paid sums to Lartius's injured employee. Employers Mutual Casualty Company ("EMC"), as Crane Rental's liability insurance carrier, sought indemnification from Lartius for the sums paid to settle the claim with Lartius's employee. The district court granted summary judgment in favor of EMC ordering Lartius to indemnify Crane Rental.

<u>Holding:</u> The Iowa Court of Appeals reversed the district court's grant of summary judgment and remanded to the district court to dismiss the action with prejudice.

<u>Analysis:</u> At issue was whether the indemnification provision in the work order covered past losses, as Lartius's employee was injured June 7, 2001, but the work order was not executed until a later date. The Court first disposed of Lartius's argument that he did not know there was an indemnification provision; the Court agreed with Crane Rental's assertion that the fact that Lartius did not read the agreement does not preclude it from being enforced. The Court, however, noted that the contract must be construed most strictly against Crane Rental. The Court also noted that "usually a contract of indemnity covers only losses or liabilities that are incurred after the execution of the contract, and not a loss or liability that had been incurred prior to the execution of the contract, unless it plainly manifests an intention not to be limited to future losses or liabilities, but also to cover past transactions and existing losses or liabilities." *Employers Mutual Cas. Co.*, 2007 WL 3087505 at *3. The Court found there was no clear and plain manifestation of an intention for the indemnification provision to cover past losses. The Court concluded: "Considering all factors, most particularly the fact that the indemnification language relied upon did not clearly and specifically indicate an intention that the indemnification provisions were not to be limited to future losses or liabilities but would cover past losses and liabilities of Crane Rental, we believe the district court should have entered summary judgment for Lartius." *Id.* at 5.

D. Duty to Defend

IMT Ins. v. West Bend Mut. Ins. Co., 07-0161, 2007 WL 4191933 (Iowa Ct. App. Nov. 29, 2007).

Facts: Ron and Myong Smith owned a building in Fort Dodge, a portion of which was leased to the operators of Club Fitness. Pursuant to the lease, the Smiths leased to Club Fitness the building space "and all joint use of the parking facilities . . . and all rights, easements and appurtenances thereto belonging." Club Fitness was to pay the Smiths for a portion of the snow removal for the parking lot and adjoining sidewalk. Martha Doyle slipped and fell on an ice-covered sidewalk as she was entering Club Fitness. The sidewalk was located between the parking lot and the entrance to Club Fitness. The Smiths carried general commercial liability insurance coverage with IMT Insurance Company. Ron Smith was named as an additional insured under Club Fitness's liability policy with West Bend Mutual Insurance Company. Under that policy, Smith was insured "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to" Club Fitness. Doyle filed an action against Club Fitness and the Smiths, alleging the sidewalk was slippery due to an accumulation of ice. IMT requested West Bend defend and indemnify the Smiths. West Bend denied the tender of defense asserting Smith was only an additional insured with respect to liability arising out of . . . the premises leased to" Club Fitness, and the lease did not include the sidewalk as part of the leased premises. IMT and Smith filed a declaratory judgment action to determine the rights and responsibilities of the parties relating to insurance coverage and the duty to defense. IMT filed a motion for summary judgment and West Bend filed a cross-motion for summary judgment. The district court denied IMT's motion and granted West Bend's motion, finding West Bend had no obligation to indemnify and no duty to defend the Smiths. The Smiths and IMT appealed on the issue of West Bend's duty to defend.

Holding: The Iowa Court of Appeals reversed and remanded the district court's grant of summary judgment in favor of West Bend.

Analysis: "The propriety of granting summary judgment to West Bend . . . depends on whether Doyle's injury arose out of the 'ownership, maintenance or use' of those premises leased to the club." *IMT Ins.*, 2007 WL 4171933 at *2. The Court found that construing the policy liberally in favor of the Smiths, Doyle's injuries appeared to have arisen from the operation and use of the leased premises since her injuries would not have been sustained but for her plan to enter Club Fitness. Additionally, the lease provided that appurtenances are included and, although an open question, the sidewalk may be deemed an appurtenance triggering coverage under the lease. Thus, the Court held the district court erred in granting summary judgment to West Bend because Doyle's injury potentially arose of the premises leased to Club Fitness.

The district court also found West Bend had no duty to defend or indemnify the Smiths based on the allegations of the Petition. The Court disagreed. "To determine whether the insurer has a duty to defend, we look to the petition for the facts of the case." *Id.* at *4. After reviewing the allegations of the petition,

the Court concluded that West Bend failed to establish the absence of any possible basis on which it could be obligated to indemnify the Smiths against liability for Doyle's injuries. "Therefore, based upon the specifications of negligence in the Doyles' petition, the possibility of coverage for the Smiths as an additional insured exists under the policy, and West Bend has a duty to defend." *Id.* at *5.

Thus, the Court held that with regard to West Bend's duty to defend the Smiths only, the district court erred in denying IMT and the Smiths' motion for summary judgment and in granting summary judgment in favor of West Bend. The Court reversed the district court's ruling granting West Bend's motion and remanded to the district court for entry of summary judgment in favor of IMT and the Smiths on that issue.

VI. OTHER NOTABLE NEGLIGENCE CASES

A. Evidence of Prior Lawsuit; Evidence of Medicare and Medicaid Payments; Evidence of Patient's Noncompliance

Mohammed v. Otoadese, 738 N.W.2d 628 (Iowa 2007).

Facts: Defendant performed surgery on Jerry Whigham's enlarged thyroid, during which Whigham's vocal cords were damaged. A trachesotomy tube was installed to allow Whigham to breathe. Whigham suffered cardiac arrest and went into a coma when he removed the tube to clean it and was unable to replace the tube back into his throat. Plaintiffs, co-administrators of Whigham's estate, filed a medical malpractice against Defendant claiming the surgery damaged Whigham's recurrent laryngeal nerves. The jury returned a defense verdict. Plaintiffs filed a motion for new trial, which the district court denied. Plaintiffs appealed, raising several evidentiary issues. The Iowa Court of Appeals granted a new trial, finding the district court abused its discretion by admitting evidence of prior lawsuit filed by Whigham, but holding the district court did not err in allowing evidence of payments made on Whigham's behalf by Medicare and Medicaid. Both parties sought further review.

Holding: The Iowa Supreme Court vacated the decision of the Court of Appeals and affirmed the district court's denial of Plaintiffs' motion for a new trial.

Analysis: *Evidence of Prior Lawsuit.* Over Plaintiffs' objection, the district court allowed evidence regarding a lawsuit Whigham filed against Hy-Vee for a slip and fall that occurred in one of its grocery stores. Defendant argued evidence of the lawsuit was proper because the subject of Whigham's "affairs" was raised on direct examination. Whigham's sister testified about Whigham and how he suffered as a result of the surgery, but she never testified about his legal or financial affairs. The Court held that Whigham's lawsuit against Hy-Vee was not relevant to any issue in the case; thus, the district court abused its discretion in allowing defense counsel to cross-examine Whigham's sister about the Hy-Vee lawsuit. However, the Court concluded that "*under the unique facts of this case*," Plaintiffs suffered no prejudice as a result of the admission of this evidence. The Hy-Vee related testimony was brief, and much

of the seven-day trial focused on the standard of care and related expert testimony. The Court held that it could not conclude the result of the trial would have been different had the testimony regarding the Hy-Vee lawsuit been excluded. However, the Court also cautioned district courts to prevent the introduction of evidence regarding unrelated prior claims because such evidence "can be very distracting and improperly impugn the merits of the case being tried." *Mohammed*, 738 N.W.2d at 633. The Court continued:

> Our ruling in this case should be not read as tacit approval for introducing inadmissible evidence on a pinch-of-salt basis. Our standard for reversal may prove inadequate in the event the trial bar continues to be successful at introducing inadmissible evidence of prior unrelated claims. At this time, we rely upon trial judges to resist creative efforts to inject potentially prejudicial, irrelevant evidence into the record.

Id. at 633-34.

Evidence of Medicare and Medicaid Payments. Evidence that Whigham's medical bills were paid by Medicare and Medicaid was introduced at trial. Plaintiffs argued admission of such evidence is just as improper as admitting evidence of a defendant's liability insurance coverage. The Court disagreed, stating that the reasons for excluding evidence of the existence of liability insurance were not applicable to medical insurance coverage. The district court's ruling allowing such evidence did not prejudice Plaintiffs.

Evidence of Whigham's Noncompliance. Evidence that Whigham did not comply with doctor's orders prior to the surgery was also admitted. The Court concluded the evidence was relevant to Defendant's decision regarding the manner of removing Whigham's thyroid and was therefore admissible. The fact that Whigham was noncompliant supported Defendant's opinion that Whigham's thyroid was very large, causing Defendant to remove the thyroid through Whigham's chest rather than his neck, an issue of great contention at trial. The district court properly allowed evidence of Whigham's noncompliance.

B. IBME Investigative Information; Punitive Damages

Cawthorn v. Catholic Health Initiatives Iowa Corp., 743 N.W.2d 525 (Iowa 2007).

Facts: Plaintiff sustained a spine injury and underwent surgery performed by Defendant doctor. Plaintiff's pain continued and he underwent a second surgery. His pain persisted and he was again evaluated by Defendant doctor who, instead of performing tests for infection, relied on old tests showing no infection. Defendant doctor prescribed pain medication, but Plaintiff's pain persisted. Plaintiff sued Defendants for damages arising out of this treatment. The jury returned a substantial verdict for Plaintiff. Defendant hospital moved for a new trial, arguing the verdict was excessive. The district court ordered a new trial unless Plaintiff agreed to a remittitur. Plaintiff appealed on the conditional new trial issue and a punitive damages issue. Defendant hospital

cross-appealed an evidentiary issue. The Court of Appeals affirmed Plaintiff's appeal, but did not address the cross-appeal. Plaintiff sought further review.

Holding: The Iowa Supreme Court vacated the decision of the Court of Appeals, reversed on Defendant hospital's cross-appeal, and remanded for a new trial.

Analysis: *Evidence of IBME Investigation.* Defendant hospital cross-appealed the district court's admission of evidence of an investigation of Defendant doctor by the Iowa Board of Medical Examiners ("IBME"). Plaintiff produced evidence of the IBME investigation, in part, to argue Defendant hospital should have been aware Defendant doctor was not qualified to perform surgery on Plaintiff. The Court held this evidence was inadmissible in Plaintiff's action against Defendant hospital under Iowa Code section 272C.6(4) which expressly prohibits the admission of investigative information in any proceeding other than licensee discipline. The Court concluded that the impact of this evidence was so great as to require a new trial and the exclusion of all evidence of the IBME investigation. Having ordered a new trial, the Court did not consider Plaintiff's appeal on the conditional new trial issue.

Punitive Damages. Plaintiff's punitive damages claim rested on his assertion that Defendant hospital was aware Defendant doctor was likely to injure a patient through negligent treatment. This argument was based on legal malice, rather than actual malice. Believing the punitive damages issue may arise on re-trial, the Court addressed Plaintiff's argument that the district court erred in granting Defendant hospital's motion for directed verdict on Plaintiff's punitive damages claim. Actual malice may be shown by personal spite, hatred or ill will, while legal malice may be shown by wrongful conduct committed with a willful or reckless disregard for the rights of another. To receive punitive damages, Plaintiff must offer evidence of Defendant's persistent course of conduct to show that Defendant acted with no care and with disregard to the consequences of those acts; merely objectionable conduct is not sufficient. "Punitive damages serve as a form of punishment, and as such, mere negligent conduct is not sufficient to support such a claim." *Cawthorn*, 743 N.W.2d at 529.

The Court concluded Defendant hospital's conduct did not support a finding of willful and wanton conduct because the substance of the IBME investigation was not made known to Defendant hospital until after Defendant doctor treated Plaintiff, peer review of Defendant doctor prior to his treatment of Plaintiff was generally positive, and Defendant hospital took steps to monitor Defendant doctor's practice to ensure the safety of patients. The evidence did not support a claim that Defendant hospital "had intentionally done an act of such unreasonable character as to make it highly probable that harm would follow or that [Defendant hospital's] actions were accompanied by a conscious indifference to the consequences." *Id.* at 529-30.

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By

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Please note: This material references a video CD-Rom that is not included herein. We have provided an excerpted section from our book – the book includes a video CD-Rom that demonstrates breathing, voice projection, body language, and eye contact exercises.

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Chapter 12: Preparing Yourself And Your Witnesses For Depositions And Trial

The deposition you're taking

Many depositions are taken out of habit—without much thought about the goals for the deposition. Before you notice a deposition, determine your goals. Are you taking the deposition to contain a witness to his position? To preserve his testimony for trial? To strengthen your motion to dismiss? For discovery? Maybe you have multiple goals for the deposition? James McElhaney, in *Trial Notebook*, discusses some of these goals in detail. For our purposes, we're going to discuss the best ways to get important story information in a deposition.

Getting information that is useful for your story

This leads us back to our section on the power of storytelling (Part 2 of this book). You should already have an idea of the story you want to tell. To put the focus on the actions of the other party (see Chapter 7), you'll need more detailed information than you might ordinarily get in a deposition. Make sure to define your goals before you walk into the room. You are not just there to gather information, you are *looking* for specific information that can confirm and add credibility to the story you need to tell. Obviously, what you learn might change the story you decide to tell, but think in terms of getting thorough details, enough to build a story about the actions of the other party.

What information are you looking for in order to flesh out the story that you have decided to explore? What vignettes are undeveloped or need further clarification? (See Chapter 7.) Your story has sections, or chapters, that move the story forward. Each chapter has its own smaller arc—its own beginning, middle, and end. In each chapter, something happens that changes the story and causes it to move in a new direction. Someone says something, does something—or specifically *doesn't* say or do something. We call these chapters "vignettes" because we want you to think of them as visual scenes in which an action takes place. By the end of each arc, there is a new element or an emotional change that causes the story to progress. In planning to take a deposition, think about what these vignettes are and what information you'll need to make each one clear and engaging to your listeners.

How does the witness fit into the story or this particular vignette? What can you discover about your own client's perceived role in these vignettes?

Remember, you want to *show* the jurors what happened, instead of telling them what happened (Chapter 6). In order to do that, you'll need more details than just the words that were used. In addition to asking a witness *what* was said in a conversation, also ask her *how* it was said. You could tell the jury, "at that time, Nancy Jones threatened her employer, Mr. Miller."

But when you are telling the jury about a conversation, it is more persuasive and more credible to say, "Nancy Jones stormed into the room and said, 'you aren't going to get away with treating me this way." In a deposition, if a witness is telling

you about a conversation, ask her to "act out" the conversation for you—show you exactly what was said and how it was said.

If you're going to show the jury what happened, and lead them to a particular conclusion, a detailed story is the only way to do it. Details are essential to any compelling and credible story. For instance, in a car accident case, it's more effective to *show* the jury that the plaintiff was driving irresponsibly than to simply tell the jury "Ms. Williams was speeding." Further, you may suspect that the plaintiff was speeding, but not have evidence to back up that suspicion. Asking in deposition, "how fast were you going?" will most likely not result in the answer you're hoping for. Get the information you need more indirectly. While you're asking her about her work, also ask where her office is, and how far it is from her home, what time she starts work. Note: if you can make this whole line of questioning feel like you're just chatting—as you would at a dinner party—you'll stand more chance of getting accurate, unguarded responses. For instance, rather than looking at your pad, looking up, and asking, "what time are you expected to start work every day?" you might get more information if you ask, "what's your boss like? Can you get in whenever you want to in the morning, or is she pretty strict?" Later in the deposition, while discussing the day of the accident, ask what time she left for work. At another time during the deposition, find out how far the accident site is from her home. You may then be able to put together a story that persuades the jury that she was rushing, late for work, and probably wasn't paying enough attention to the road.

> "Ms. Williams left her home every morning at 8:30, to be at work at 9:00. Her office is at the corner of Main and Elm Street, about 23 miles from her home. That commute is mostly on the highway, so leaving thirty minutes before she has to be at work gets her to the office with enough time to park and walk into the building. This is important for her, because her boss is very strict about starting work on time. Her boss actually called Ms. Williams into her office the week before the accident, to tell her how important it was to be on time. On the morning of the accident, Ms. Williams received a call from her mother at 8:15. Her mother wanted to tell her some important news about Ms. Williams' sister, who was going through a divorce. By the time the call ended, it was 8:35. Ms. Williams bundled up, and went outside to start the car and scrape the ice from the windshield. She pulled out her driveway sometime between 8:40 and 8:45. At 9:05, the time of the accident, Ms. Williams was at the corner of James Street and Maple."

Now you won't have to tell them that Ms. Williams was in a hurry. They already have that picture.

How to get more detailed answers

Obviously, open-ended questions will elicit more detailed responses than yes/no questions. Remember, this is not cross-examination. That trial advocacy "rule" about never asking a

question to which you do not know the answer *cannot* apply to a deposition. You need to get the answers here. If you start from the beginning, encouraging the witness to give you long, detailed responses, you'll get longer answers when you get to the "meaty" questions as well. So, instead of asking "When did you move to Colorado?", ask "Tell me about what brought you to Colorado?" Get the witness into the habit of giving you long, detailed, complete narratives right from the start.

Remember, most people don't like silence and tend to try to fill it (see Chapter 10). If you don't fill the silence, the witness will, so you can use this tendency to encourage a more detailed response. If you do this effectively, the witness will begin to ramble, and many times that is when the gems appear. To do this effectively involves more than just not speaking. If the witness answers your question and you do not jump right into the next question, but you look down at your notes or otherwise break contact with him, you are taking the responsibility for the conversation onto yourself, and the witness will not feel obligated to fill the silence. If you continue to look at him, and continue to place the burden of the conversation upon *him*, he will feel the need to fill the silence you have created. This can be as simple as maintaining eye contact with him and looking to him for the rest of the answer that you know is there. If you do this effectively, he will reward you with more information than you could have hoped for, while his attorney beats her head against the proverbial wall. Remember to prepare *your* witnesses to expect this technique from opposing counsel as well (see "Preparing witnesses for deposition," page 165 below).

Important tips

1. **Active listening is essential.** Everyone knows that listening is important. If you aren't listening, you'll miss important follow-up opportunities. "Active listening" is a bit more specific. It means actively listening to every word that comes out of the witness' mouth, and analyzing what you hear. It means never thinking about your next question, or taking notes while the witness is speaking. This type of listening will elicit more detailed answers, and ensure that you don't miss a golden opportunity.

2. **Make sure you get the sound bites.** If you are looking for specific information, make sure you get it in a form that will sound good if played in court. If the answer is good for you, but it is unclear, imprecise, or ambiguous, then it won't make the impact you need in the courtroom. Narrow the witness down to the sound bite.

3. **Do your homework.** Prepare, prepare, prepare. An excellent attorney we work with schedules two full prep days for every scheduled day of deposition. If you've done your homework, you'll know which comments open doors to new information. You'll know where the lies are, where the truth is being manipulated, where the missteps are. If the witness—as well as opposing counsel—knows that you're prepared, you'll get more accurate information, and maybe improve your chances of settlement. But beware: showing off your knowledge is a poor goal in and of itself. Remove your ego from the process.

4. **Don't ask one question too many.** In the car accident example above, don't ask the follow-up question, "so you were in a hurry?" Don't give her the opportunity to say, "No. I decided it was more important to drive safely than to get to work on time. Ironic, don't you think?"

5. **Don't forget the "why" questions.** Many depositions have the "who," "what," and "where" questions, but are missing the "why" questions. Why did Ms. Smith leave late that morning? Why did she move from New Jersey to Illinois?

6. **Test various forms of questioning with key witnesses.** What makes the witness angry? What makes him sad? What makes him lose his temper? How strong is his resolve? What makes him stand firm?

7. **Create an outline to get the story:**

    a. You have to know what you *think* your story is going to be, and be flexible enough to change it if the information you're getting is leading in a different direction.

    b. Identify the possible vignettes, or chapters, of your story (see Chapter 7) and create an outline of the story, with each vignette listed. Use a best-case scenario: if you had vignettes to back up the best story you can think of, what would they be?

    c. Formulate questions designed to flesh out each of the vignettes. Remember that each vignette has a beginning, a middle, and an end.

d. Identify the information that is missing from each vignette, and add blank bullet points to that part of your outline. Now you know where the holes are.

The deposition you're defending

Video depositions

Recently, a client shared a video deposition horror story:

> "My partner defended a deposition for me once, and the deposition was taken on video. When he got back to the office, he told me the deposition had gone fairly well. I popped in the tape, and up popped my witness, with a very large Bird of Paradise growing out of the top of her head. My partner had sat next to her, and had not checked to see what she looked like through the camera lens. The deposition was taken in a conference room, and directly behind her was a Bird of Paradise plant. Since then, I always take a look through the lens, to make sure my witness looks good."

This story teaches a valuable lesson. We've seen video depositions in which the witness is framed, lit, or placed in the room in such a way that she looks shifty, silly, or dishonest. Sometimes it is purely a result of ignorance on everyone's part. But sometimes we feel it could have been intentional on the part of opposing counsel. Here are a few of the most common problems we see in video depositions:

1. The witness is placed in front of a window, so she ends up looking dark and gloomy.

2. The witness is seated in front of a plant. The plant is distracting and even comical.

3. The witness is placed in front of a busy hallway, so you see people walking by and staring into the camera. As incredible as this sounds, we've seen several depositions in which this happened. Usually, they involved a doctor or other professional at his or her office, and there was a window facing a hallway, behind the person's desk.

4. The witness is seated *facing* a busy hallway, so she keeps looking at the people walking by. On the tape she looks distracted, shifty, and not credible.

5. The witness is lit by one single light source from above, darkening her eyes and making her look tired or even sinister.

6. The videographer zooms in or out during the testimony, adding unintentional emphasis and meaning to the testimony.

7. The camera is placed too low or too high, making the witness look either big and burly or small and insignificant.

You must ensure that your witness is not caught on tape for all time looking sinister, unconfident, or dishonest. Take control of the room, ensuring that she is not being made to look less than credible. Some of the finest trial lawyers we've worked with have walked out on depositions rather than allow their witnesses to look bad on tape.

A good professional videographer will bring a neutral backdrop, additional lighting, and a good exterior microphone. He or she will have no problem letting you look at your witness through the camera to make sure she looks good. But many times, you'll show up for the deposition and find an amateur with a video camera. In those cases, stand your ground, and do what you must to ensure a good tape. Here are a few hints:

Seating arrangements

- Position your witness so that she is neither directly in front of nor looking at a busy hallway with people walking by. If she starts watching the people, even when she is not speaking, she will become distracted and may answer a question that she did not hear properly. She may also look distracted and dishonest on the tape; remember that the audience viewing the tape won't know what she was looking at.
- In a typical conference room, with windows into the hallway on one side and outside windows on the other, we'll try to put the witness at one end of the table, and the examiner and camera on the side of the table toward the outside windows. That way, the light from the outside windows adds light to the witness's face, since she is facing that way to listen to the question and address the camera or the examiner (see "Preparing witnesses for deposition," page 165 below). Also, if anyone is distracted by the inside hallway, it will be opposing counsel rather than your witness.

- If there is anything behind your witness (a painting, flowers, office equipment, telephone, or the like), ask to have it removed for the deposition.

Framing the witness

- The camera should be positioned behind the examiner, as close to an over-the-shoulder shot as you can get without getting the examiner in the picture. This way, if the witness is looking at the examiner (see below), he will be looking in an area close to the camera lens. A head-on shot is the most persuasive. However, since you can not control the movements of the examiner—he or she may lean forward, sit back, and so on—you are limited in how head-on you are able to place the camera. In any case, try to position the camera to make it as easy as you can for the witness to look at or near the camera lens. Don't let the camera be positioned to the side of the witness. It makes it very difficult for the witness to look into the camera lens, and it makes it hard for the viewers to gauge the witness' credibility, because they can only see half of her face.

- The camera should be placed slightly above the witness's eye level. If it is placed too low, the witness will look big, burly, generally unattractive, and possibly intimidating. If it is placed too high, the witness will look small, insignificant, unconfident, and possibly uncertain.

- The frame should be filled with the witness's head, shoulders, and arms (approximately table-level to just above her head).

- Once you have all agreed on the frame, make sure the videographer locks that position and will not zoom in or out. If he needs to adjust the frame, he should interrupt the testimony, not adjust it while the witness is speaking *or listening to the examiner.* Any camera movement sends a message to the viewer, and you do not want a purely unintentional camera move to affect how your witness's testimony is perceived by jurors.

Lighting

- Many conference rooms have only overhead lighting. This can cause shadows on the witness' face that can make her look tired, frustrated, or even sinister. To eliminate these shadows, you need what is known as a "fill light," a light source that fills in the shadows caused by the "key light," or main light source.

- In some rooms, outside windows can provide enough fill light to make the witness look good, provided that he is positioned facing the windows. Make sure that if the windows are on one side of his face, he does not have one side that is bright and one that is dark and shadowy.

- We have several clients who always go to depositions they're defending with a small gooseneck table lamp in

> the trunk of their car. That way, if they are faced with poor lighting, they can provide a quick and easy solution. Just aim the lamp at the witness to fill in any dark shadows.

Remember to look at your witness *through the camera lens* before the deposition begins. She may look great to you when you're sitting next to her, but look like she has a black eye when you look through the lens. Don't leave this responsibility to the videographer; take control of the way your witness is captured on tape. Don't be afraid to take control of the room and demand a better angle, better lighting, and a less distracting background. After all, once it's on tape, you're stuck with it.

Preparing witnesses for depositions

When preparing for deposition, every lawyer knows that preparation is key. Yet, our experience tells us that time and time again, lawyers put off the preparation till the very last minute, many times leaving only a couple of hours to prepare for one of the most important aspects of trial. Remember, it is much easier to prepare your witness for the deposition than it is to "fix" bad answers at trial. If you've prepared many witnesses for deposition over the course of your career, this information may not be new to you. However, we've tried to bring a non-lawyer's perspective to witness preparation and have found over the years that most witnesses need a more detailed lesson than even the most experienced lawyers give them.

A good witness preparation session teaches the witness how to deal with the entire deposition process. It leaves the witness

capable of handling any question, not just the ones you "practiced." It involves listening skills, *never* memorized answers. If the witness is thinking, "Wait, I know we covered this … what was that answer again?", while a question is being asked, then the prep session was not effective. He or she should never be thinking about what the "right" answer is. The witness should only be thinking about the question that was asked and the most honest answer to it.

Many times, when we are called in to help with the preparation of a "problem witness," the problem comes from some kind of miscommunication between the attorney and the witness. The witness is usually trying to avoid being "tricked" by the examiner, "win" the case during the deposition, or beat the examiner at his or her own game. A good witness preparation session cures more than just the symptoms of the witness's behavior; it also finds the underlying cause of the problem.

Before you begin to prepare your witness, you must first define your goals for the deposition. Are you hoping to encourage the other side to settle, or are you hoping to provide them with as little information as possible? Will the deposition be video taped or merely "on paper"? If the other side is deposing your expert, how much of your preparation is discoverable and, therefore, how much information do you want to disclose or keep from that expert? How does this witness's story fit in to the picture as a whole? Where does what he or she knows really count, and where does it not?

When you begin preparing the witness, remember that we learn and retain new information more effectively in an inter-

active session than in a lecture. If you begin with a long "lesson" about the do's and don'ts of depositions, you may have to repeat yourself quite a bit during the preparation session. Conversely, your witness retains more of the lesson if you ask questions and engage him or her in the lesson. For example, if the witness has testified before, you might ask, "What was the experience like for you? Were there any things that surprised you? Was there anything that happened that you want to avoid this time around?" If the witness has never testified, you might ask, "Is there anything about this deposition that makes you feel apprehensive?" A good question for any witness is "What information are you hoping the examiner won't ask you about? Is there anything that you did or didn't do that makes you feel embarrassed, or that you don't want to talk about?"

Good preparation is basically comprised of three essential elements for the witness:

- A thorough understanding of the case theory and overall themes;
- The ability to communicate the case theory and overall themes;
- Skills to avoid common traps and pitfalls.

Understanding the case theory and overall themes

Your witness must understand the theory of the case and its themes—in other words, what's the story, what really happened, why are we here? Many times, your client or your key witnesses have no clear understanding as to what you are

attempting to communicate at deposition. Your client has an emotional reason for being there, but that emotion must be harnessed and released at just the right moments. In addition, they rarely know what needs to be communicated from a legal standpoint, for that is usually none of their concern.

By taking time to communicate the case theory and themes, you achieve two important goals:

1. You develop the "buy-in" from witnesses that will be necessary at trial, which is especially important when preparing expert witnesses.

2. You provide your witnesses with a safety net. Once you have discussed your themes and theories, ask witnesses to restate in their own words what they think your key themes are. Let them know that those themes (in their words, not yours) are points that they can loop back to throughout the deposition, whenever it seems appropriate.

The ability to communicate the theory and themes

This part is where we are most often called in to help out an attorney, for this is where the communication style of your witness is quite important. By now, you have thoroughly discussed the theory and the theme. What language will you use to express it? Ultimately, you want your witness to use his or her own language, not the exact words that you would use, or something he or she has tried to memorize. If the deposition will be videotaped, review the "Preparing witnesses for video depositions" section below. If the deposition is not being videotaped,

focus on *listening skills* rather than "presentation skills." (See Chapter 10.)

Teach your witness how to listen to the question, and realize that he will improve with practice. Practice using direct and cross-examination questions, until you have achieved a level of consistency. Don't forget to teach your witness *how* to do what you're asking him to do. Many witnesses are told to answer only the question they are asked, but few are taught how to do it. This is a difficult concept for many witnesses to master. They are told to "be open and honest," to "tell their story," but then they are told to "keep their answers short." They are told to "listen to the question and correct any misconceptions in the question," but then they are told "not to argue with the examiner."

To make this concept easier for the witness to comprehend, tell them that you want them to tell the truth, the whole truth, and nothing but the truth. Telling the whole truth may mean correcting part of the question, or expanding on an answer, but if a further explanation is being offered only as an excuse for the answer, then it will sound defensive. In that case, the examiner will just ask the question again and again, and the witness will usually dig himself into a deeper and deeper hole. Explain the difference between giving a complete answer and making an excuse for an answer.

> **Q1.** Then you offered Mr. Green the "other job" as you call it, in a completely different department, right?
>
> **A1.** Yes.

Q2. And this was the same job that four other executives had already been shuffled into on their way out the front door, right?

A2. Four people had been offered the job but had not taken the position.

Q3. And you knew that Mr. Green wouldn't take the job either, because it was an empty position, just a stopping place for people on their way out of the company. You never really expected him to take the job, did you?

A3. The job was an excellent one, with equal pay and title to what Mr. Green had been receiving before, and offered a better opportunity for him to advance within the company. So, yes, I thought he would want the job.

Notice that question 1 only requires a "yes or no" response. If the witness had tried to "excuse" his answer by saying, "it was a good job," the examiner would simply get to reiterate her point: "It was in a completely different department than the one Mr. Green was hired for, right? It had completely different duties than the ones Mr. Green was trained to do and hired to do, right?" When the answer is simply "yes," train your witness to say it with confidence and clarity. With no trace of embarrassment, contrition, or uncertainty.

Question 2 held an incorrect implication, which the witness corrected calmly and politely. Question 3 was similar, but also required a "yes or no" answer. Without that final "yes," the

examiner would simply rephrase and ask the question again. Without the explanation prior to the "yes," the examiner would also get the opportunity to rephrase her question and ask it differently: "yes, you expected him to take a job that was outside his training and expertise, and that no one else wanted?" Note that the explanation comes first, not the "yes." There are few things worse than the "yes, but…" answer. Even if the examiner doesn't cut the witness off before the explanation is complete, the witness will certainly sound defensive and unconvincing.

Skills to avoid common traps and pitfalls

Most witnesses feel apprehensive about the deposition process. They worry that they will say something wrong or that "loses the case." They worry that the examiner will try to "trap" them or twist their words. The best way to reassure them is through practice. Make sure they know what to expect and that they have experienced—and found a way out of—the particular situation they fear the most.

For some witnesses, it begins with the way they sit. Actors know that if you sit in a way that looks confident, your confidence grows. If you sit in a way that looks defensive or evasive, you will feel defensive or evasive and your answers will reflect that feeling. If you have a witness who slouches back in his chair, seems defensive or abrasive, or has an "attitude problem," sometimes all it takes to fix the attitude is to change the way he or she is sitting. Tell the witness to sit forward with a straight back, and clasped hands resting on the table. This is a strong, available, and confident position. That confidence will come through in the witness's testimony. Remind the witness to

maintain this position no matter what the examiner does; this will help to eliminate the nonverbal cues or "tells" that signal when the examiner has "scored a hit" or otherwise made the witness feel uncomfortable.

Many witnesses go into a deposition thinking that they can "win" the deposition or that they can outsmart or outmaneuver the examiner. They see it as a battle, but they don't know what their ammunition really is. Remember the classic scene from *Raiders of the Lost Ark*, where the villain's henchman swings his sword around in an elaborate show of skill, only to have Indiana Jones look at him, unholster his pistol, and take him down in a single shot. Don't let your witnesses go into battle swinging madly with a sword only to get swiftly shot down. Arm them with the skills they'll need to come through unscathed.

1. **Tell the truth.** Everyone knows how important it is to tell the witness to tell the truth. But then the witness is told "Don't volunteer information, don't say that, don't imply this, don't, don't, don't … ." What does "tell the truth" mean? It means that you don't hedge, you don't fudge, you don't try to make the truth "sound better." It means that you don't try to justify, explain, or clarify the answer. You just answer, honestly and *briefly.*

2. **It's not your job to "win" the case with this deposition.** Many witnesses want to "win" the case in their deposition. They want to protect their company or themselves. No matter what they say to the contrary, most lay witnesses are either scared to death that they

will screw up and lose the case in their deposition or secretly hope that opposing counsel walks out of the deposition and says, "Oh, boy. We'd better settle this thing because we just don't have a chance!" Make sure you explain the process, your goals, and the realities of what can and cannot happen after the deposition. Make sure that witnesses know that they are not supposed to try to win the case in deposition and that their job is to listen to and answer honestly the questions they are asked.

3. **Answer only the question you are asked.** It seems simple enough, but this skill requires practice. It is not, after all, the way we interact in "real life." In real life, if someone asks you, "Do you know what time it is?", you typically say something like, "Oh, yes, it's 4:30." In a deposition, the response to that question should be "Yes." Explain the difference to the witness. Explain that it is not his or her responsibility to educate the examiner; if he or she wants to know what time it is, he or she will have to ask that question. During your prep session, look for situations in which the witness answers a question different from the one being asked. One common mistake goes something like this:

   Q: What did you do when you hung up the phone after that conversation?

   A: I thought maybe Mr. Smith had misunderstood me.

The question what not "What did you *think?";* rather, it was "What did you *do?"* They are two very different questions. Train your witness to listen for the active verb, and answer *that* question. In this example, the witness might have answered something like "I called my wife," or I went to lunch," to indicate what he *did.*

4. **Don't discuss things that are outside your immediate experience.** The witness needs to know that it is okay to say, "I don't know."

5. **Read every document before you answer questions about it.** Many witnesses will not want to take the time to read a document, especially when they think they know what it is and what it says. Remind them that they should never feel rushed, that it is not their problem if the examiner runs out of time, and that it is important to be sure they are answering questions about the correct document—and the correct version of it.

6. **Take your time.** In preparing for depositions, witnesses should get into the habit of taking a second or two before answering every question. During this moment, they should make sure that they understand the question. Doing so gives you, the attorney, the opportunity to object, and it helps witnesses avoid falling into a dangerous rhythm. Make witnesses aware of the rhythm that can be created with closed-ended questions. Train them to notice when a rhythm of "yes" or "no" answers has begun, and how to stop it. Tell them

to pause, take a breath, think about what the examiner has asked, and then answer appropriately.

You must prepare witnesses for the *silences* involved in questioning, just as you would prepare them for the questions. Practice this exercise:

- **Ask and listen.** During preparation, ask your witness a question, and wait while she responds.
- **Do not take responsibility for the silence.** When she has finished her answer, do not take responsibility for filling the silence. If the witness answers your question and you do not jump right into the next question, but you look down at your notes or otherwise break contact with her, *you are taking the responsibility for the conversation onto yourself.* If you continue to look at her, and continue to place the burden of the conversation upon *her,* she will feel the need to fill the silence you have created. This can be as simple as maintaining eye contact with her and looking to her for the "rest" of the answer.
- **Try and try again.** If she falls into your trap and embellishes, stop her, explain what you are trying to teach her, and keep throwing this exercise into your questioning until she can recognize it when it happens. She must be able to refuse responsibility for filling the silences.

7. **Don't try to second-guess the examiner.** Remind the witness that this is what opposing counsel does for a living, and that the system is set up to help him get the information he needs to put together his case. The witness will never beat him at his own game. Being cooperative will always gain the witness more ground than will trying to "win." Train the witness to stop trying to figure out "where he is going with that question"—and to just answer the question. Remind her: if she doesn't answer the question, the examiner will just keep asking it until she does.

8. **Listen, listen, listen.** Explain to the witness that this is her job during the deposition. Most bad answers happen because the witness wasn't truly listening. They either misunderstood the question, didn't listen to an objection, or started trying to figure out where the examiner was going with the questions and answered a question that had not been asked yet.

Preparing witnesses for video depositions

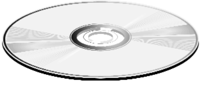
If the depositions are being videotaped, your witnesses need presentation skills in addition to the skills discussed above. We recommend using a video camera during prep. This allows witnesses to get used to having a camera in the room focused on them and gives you the opportunity to see what they look like through the lens. However, it's usually best NOT to put any tape in the camera; because there may be discoverability issues, particularly with an expert witness, having a tape could be risky.

If you need to use a tape as a teaching tool for your witness, consider erasing the tape afterwards.

Moreover, unless you have an extraordinary amount of time to work with your witnesses, showing them video tapes of themselves will only serve to make them more self-conscious than they already are. It takes people awhile to get used to watching themselves on video tape, and to view their performances objectively and constructively. We recommend instead that you ask your witnesses to trust you when you tell them that something looks good or bad. It means that you have to work a bit harder to find a way to explain what behaviors you find ineffective, rather than just playing the video tape and saying "See what you're doing here?" But this extra work is preferable to having a self-conscious witness.

Presentation skills for video deposition

To prepare witnesses for video depositions, we start by teaching them how to sit. They are going to need to sit calmly and confidently, and make sure they are not doing anything that distracts from their message. They will need to be able to maintain that position for an extended period of time. To accomplish this, we tell witnesses to sit forward, with their arms resting on the table, and their hands clasped together. Research confirms that jurors rate witnesses who sit in this position as more credible than witnesses who sit back in their chairs, even if they are sitting up straight. Sitting with hands clasped also helps to avoid making distracting gestures. On camera, with a tight frame, even small gestures look enormous.



Unfortunately, this forward and upright position can put strain on a person's back and make one tend to slouch or fidget. To make it easier to maintain this posture, tell witnesses to sit *far* forward on the front of their chairs. This will help to take the strain off the lower back, and enable them to maintain this position for a longer period of time. (For a demonstration on witness posture, see the enclosed CD-ROM).

> **NOTE:** It is not enough to tell your witnesses what *not* to do. You must also tell them what *to* do. Give them active skills to solve the problems you observe through the camera lens. For example, if a witness tends to swivel in her chair or fidget with her feet, have her anchor both feet flat on the floor, or bring her feet further under the chair. Find what works to help her lock her legs in place, and make the position more comfortable.

The most common question we get about preparing a witness for video depositions is, "should the witness look at the camera?" Our answer is, "it depends on the witness."

Making eye contact through a camera lens is extremely difficult for most people. Sometimes, you look into the lens and see a black hole. Sometimes, with a professional camera, you look into the lens and see yourself upside down, which can be very disconcerting. That said, witnesses—especially experts who are trying to "teach" the jury via video—are significantly more credible and effective if they can master this skill. When

a witness can successfully speak directly to the camera, the viewer becomes a more active participant in the process.

For this reason, we recommend that you try to teach your witness how to make eye contact with the camera, just as you would teach him how to make eye contact with the jury during his testimony at trial. For example, tell your witness to turn his chair to face the camera, so he has to turn his head to look at the examiner, but looking at the camera requires no extraneous movement. The very position of his chair will make it *easier* for him to look at the camera than at the examiner.

Sometimes a witness is able to learn the physical skill of looking at the lens, but appears like the proverbial deer in the headlights when he does so. He isn't able to *communicate* with the camera lens as he can communicate with a live person. In that case, you may want to ask him to use a different technique. You may want to ask him to share the information between the questioner and the lens. In other words, ask him to talk to the questioner *and* to the lens, as if it were another person in the room. He needs to practice until he is talking more conversationally with the camera, and including the camera as much as he includes the questioner.

If the witness still does not look comfortable including the camera, or if you do not have time for him to practice the skill of talking to the camera, then you'll have to advise him to look at the examiner. In that case, placement of the camera becomes even more important. If the camera is placed to the side of the witness, then the viewer can only see half of the witness's face during his testimony. (See "Framing the witness," above).

Preparing witnesses for trial

If you prepared any of your witnesses for "paper" depositions (as opposed to a video depositions), then the first thing you'll want to tell them when you begin preparing for trial is to forget what you told them to do in the deposition. Many attorneys seem stumped as to why their witnesses are so closed-off and "difficult" when they begin prepping for trial. "It's like pulling teeth to get her to tell her story!" they have complained to us. Often, that is because the witness remembers the attorney clearly saying "keep your answers as brief as possible, never volunteer any information, and pause before you answer each question." It seems obvious, but many attorneys forget to tell the witness that this process—the process of trial—is different from the deposition process.

Begin by teaching your witness how to sit—forward on the chair, if possible with her hands clasped on the rail in front of her. Tell her what the chair will be like in the box, what the microphone will be like. Teach her to walk to the chair, sit down, turn the chair to face the jury (or to split the difference between the lectern and the bench, in the case of a bench trial), turn the microphone so it is pointed toward her mouth, and "assume the position." It is very important that she remember to turn her chair to face the jury, because it will make it much more likely that she will talk to the jurors, instead of to you or opposing counsel. It should be easier for her to look at the jurors than at the questioner. She should need to turn her head to look at the questioner, but look straight ahead of her to connect with the jurors.

Eye contact in a jury trial

It is extremely important that your witnesses learn to connect with the jurors as they answer every question—on direct examination and on cross-examination. Some attorneys ask us, "Doesn't it look unnatural and contrived if a witness looks at the jurors every time he answers a question?" No—surprisingly, it doesn't. Jury researchers confirm that witnesses who look at the jury when answering are consistently rated as more credible than those who do not (Dr. Karen Lisko, Ph.D., doctoral thesis). The jurors very quickly accept the convention. Teach your witness to look at the questioner and listen very carefully to the question, then look at the jurors when answering.

It is important for witnesses to look at the jurors every time they answer. Even if the answer is just, "Yes." Obviously, it is easier to look at the jurors during longer answers than during shorter ones. Suggest to your witness that it will feel more comfortable answering "Yes, I did," or "Yes, that's correct," instead of just the one-word "Yes." There are a couple of benefits to doing this. First, it feels more comfortable. Second, it diminishes the tendency to fall into a "yes" rhythm on cross-examination.

To make looking at the jurors more comfortable for your witnesses, explain the following:

> Remember, I already know the answers to the questions I'm asking you on direct examination. Mr. Jones already knows the answers to the questions he's asking you on cross-examination. The

> only people who don't know the answers are the jurors. It's all about them. So tell them what you need them to know.

When we explain this to witnesses, they usually pick up the skill very quickly. So while you are preparing your witnesses, we suggest having at least two people in the room who can act as "jurors" to give the witnesses a setting in which to practice this skill.

You should also reiterate the importance of maintaining their demeanor as you prepare your witnesses for cross-examination. Think about your goals for this particular witness. If she is a corporate defendant, you may want her to look at the jury for every answer on cross to build rapport and credibility. If she is a plaintiff fighting the evil corporate lawyer, you may want her to look at opposing counsel on cross to make the jurors feel the need to "rescue" her from the attacking lawyer.

Once you have determined your goals, teach your witness in a way that takes into account her natural desire to "win." For instance:

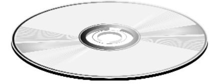
> Don't fall into the trap of looking at Mr. Jones (opposing counsel) on cross. That is what Mr. Jones wants. He wants you to change your demeanor. To become wary, cautious, finicky, even hostile. And he wants you to interact with *him,* not with the jurors. If he can achieve that change in your demeanor, he has succeeded in damaging your credibility. Don't let that happen. Don't let him get what he wants.

For witnesses who have a tendency to fall into a verbal "battle of wits" on cross, who clearly want to "win" this exchange, explain that the way to win on cross-examination is by maintaining their demeanor. Remind them again—they are talking to the *jurors,* not the cross-examiner, and they should feel no hostility toward *them.*

Eye contact in a bench trial

In the case of a bench trial, you probably don't want your witnesses looking at the judge for every answer. For one thing, the judge will take notes, or look over an exhibit, or otherwise be unavailable to make eye contact. It may be very disconcerting for witnesses if they keep trying to look at the judge and the judge isn't making eye contact in return.

In preparing for bench trials, we teach witnesses to *share the information with the judge,* answering both the questioner and the judge, and talking to both equally. In some courtrooms, the bench is so far back that it seems to be behind the witness stand. In that case, the witnesses will need to turn the witness chair to split the difference between the questioner and the bench. They should then look at the questioner during each question, listen very carefully to the question being asked, then include both the judge and the questioner in their answers. It is important to practice this skill.



Witness Preparation Worksheet

[**Note:** An electronic copy of this worksheet is included on the CD-ROM in the "Worksheets" folder.]

For Deposition:

1. Will the deposition be on video? ____________________

   Why: ____

2. What are your goals for this deposition?

   ____

   ____

3. What is your witness going to wear for the video deposition? Remember: avoid the color red, small or flashy prints, jewelry, watches, and so forth.

   ____

   ____

4. List the themes your witness can loop back to (using his or her own words):

   ____

   ____

5. Is your witness going to make eye contact with the camera, the examiner, or both?

   ____

   ____

6. Notes and observations:

____

____

For Trial:

1. What are your goals for this testimony?

____

____

2. What is your witness going to wear to court?

____

____

3. List the themes your witness can loop back to (using his or her own words):

____

____

4. What elements of the environment should the witness be made aware of (i.e., swivel chair, microphone, distance to the jury box, and so forth)?

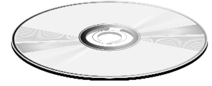
____

____

5. Notes and observations:

____

____



The Deposition You're Taking Worksheet

[**Note:** An electronic copy of this worksheet is included on the CD-ROM in the "Worksheets" folder.]

1. Will the deposition be on video? ____________________

   Why: ____

2. What are your goals for this deposition?

   ____

   ____

3. For a discovery deposition, outline your story, identifying each "chapter" or "vignette." Leave blank bullet points to represent the details you don't know, that will fill out the story.

   ____

   ____

4. What questions will you ask to find out the information you're missing to create a compelling and credible story?

   ____

   ____

5. When and how will you ask these questions (sometimes a linear line of questioning is not the most effective way to get information.)

   ____

   ____

6. What information do you need to walk out the door with, in order to support your motions?

____

____

7. Notes and observations:

____

____

Chapter 15:
Presentation Skills For Voir Dire

Ask yourself what you really want to achieve in voir dire. Is your goal to find out where the potential jurors live, what they do for a living, and how many kids they have, and to write all of that down on your legal pad? Or is your goal to find out about their *value system*, their core beliefs that may make them unable to treat your client fairly, or give her the money you think she deserves, or punish those who hurt her? Is your goal to teach them about the legal system? Or is it to establish yourself as someone they can trust, someone they can look to for answers when they don't understand what is happening in the courtroom?

To build a relationship with the jurors during voir dire, you must be willing to put aside your notes and have a human interaction. You must be willing to make honest eye contact. You must be able to express your vulnerability and your desire to know them as human beings, not just as potential jurors #1 – #25. This process involves more than knowing their names; it involves *listening*.

Many attorneys come into voir dire with the desire to make the jurors *like* them. We would like to amend that. We think your goals in voir dire should be much more specific:

1. Find out who is going to hurt you in the jury room.
2. *Listen* to the jurors.
3. Build relationships with the jurors.

There are two common communication mistakes we see attorneys making in voir dire: (1) being too ingratiating, and (2) not listening. Many times, these two mistakes are intertwined. Some lawyers are so afraid that the jurors won't like them that they don't ask any questions deeper than, for example, "Do you like being a dentist, Mr. Smith?" Then the lawyer smiles sweetly and makes a comment about how much they like their own dentist. This type of ingratiating behavior doesn't work, nor is it necessary. You do not need to be *liked* to win your case. You need to be respected and viewed as honest and credible. People are rarely impressed by someone trying to impress them. They are impressed by someone who truly listens to them, truly engages them in conversation, values their opinions, and is honestly interested in who they are as human beings. If they feel that you honestly care about what they have to say, you'll get more information and build a much deeper relationship.

Other attorneys are so afraid of voir dire that they rush through a list of questions, not really listening to the answers. They are terrified of having a conversation with potential jurors, so concerned they'll get a "bad answer" that they fail to get any useful information at all. They're so afraid of someone hurting their case during voir dire that they fail to discover who will hurt their case during deliberations.

Having a conversation with prospective jurors requires some faith on your part. There certainly will be jurors who say things that are in opposition to your case. Those are precisely the people you must try to identify and possibly have excused during voir dire. Of course, if one were to say something like,

"Yes, I've had a bad experience with a doctor. *Your client* operated on my mother and botched her surgery, too," that person would likely be excused for cause, but only after he had already hurt your case. Thus, a better approach is to ask prospective jurors whether they have had any experience with the parties involved in the case before you get into your open-ended, value-oriented questions.

Most answers given in voir dire—no matter how much an attorney may inwardly wince upon hearing them—are not really going to contaminate the jury. People have their own opinions coming into voir dire; and most prospective jurors are not going to disassociate themselves from their own strong opinions simply by hearing the strong differing opinions of a stranger sitting next to them. If you get a bad answer, thank the juror for being honest and silently congratulate yourself for finding this dangerous juror while you can still do something about it. But don't forget to find out who else feels the same way:

> "Mr. Jones, thank you so much for talking so honestly with me. You obviously have some very strong opinions on this subject. By a show of hands, how many feel the same way as Mr. Jones?"

If you believe it is necessary to counter the answer, never do it yourself. Ask if anyone has a different opinion and let them explain. But be careful, and make sure you absolutely must do it, because you are revealing to the other side the people who might be best for you in the jury room. So, for example, if you already know that the other side is going to strike Juror Number Four because of some answers she gave earlier, then

you might allow her to defend your position against the opinion expressed by Mr. Jones. Notice that the question above did not ask "Who feels the same way as Mr. Jones." By asking *how many,* you are telling them that it is okay, reasonable, and understandable for them to agree with the statement made by Mr. Jones.

Having a conversation with prospective jurors requires a leap of faith for another reason: When we get nervous, we find it hard to trust that we'll know what to say next; consequently, we tend to cling to our notes as if they will protect us. To have a conversation and build relationships with your jurors, you cannot just roll through your pre-planned questions. If you aren't listening to their answers, they might as well just fill out a questionnaire and be done with it. The jurors must feel that their answers affect you. If they perceive that your reaction won't change no matter what they say, then they are not going to relate to you on a fundamental human level. A conversation requires a give and take of information, not note-taking. So have someone else in the courtroom—a paralegal, secretary, co-counsel, or consultant—to take notes for you.

How prospective jurors see you listening to the other jurors can have great impact on how they relate to you when their turn comes along. If they perceive that you will listen to them and strive to understand, they will want to communicate with you. If they know that you will respect their answers, even if you disagree with them, they will be much more willing to be honest with you. If, on the other hand, they watch you ignoring or correcting other jurors' answers that you don't like, they

will edit their own answers accordingly. If they know that revealing their biases against plaintiffs who sue for "pain and suffering" will result in some form of correction from you, do you think they will be as open and honest with you about their values and beliefs as you need them to be? If they perceive that you are more interested in taking notes than in truly listening to their answers, how important do you think they'll perceive their answers to be? And if their answers are not important to you, why should they open up enough to give you anything more than the politically correct response? If you roll over an open honest answer like an automaton pushing through your list of questions without responding as a human being, do you think that juror, or any of the others who watch this exchange, will view you as someone they can relate to?

Active listening during voir dire will elicit more detailed, honest answers (see Chapter 10). How many times have you seen an attorney ask his next question just as the prospective juror was opening her mouth to add to her answer? If you wait and *listen* for just a few seconds after the juror has finished speaking, you not only convey respect for that person; you also create a momentary silence that must be filled. If you don't fill it, the juror will. Many times, you will get much more honest, revealing, and useful information from a juror's attempt to fill the silence than from his or her original answer.

We realize that your time in voir dire is limited, but you'll give and receive more information in less time if there is a natural exchange and true communication. In our focus group work, this has been one of the most surprising lessons that attor-

neys learn. After conducting ten minutes of voir dire with the focus of engaging the jurors in a conversation, they suddenly realize that it is possible to get to know these jurors and to let the jurors know them. Once again, it all comes down to listening.

Practice the following techniques to increase your effectiveness in voir dire:

1. **Put down your notes.** If you want to address jurors by name, ask their names. This is what would happen in conversation, isn't it? When you must look at your notes, or take a note, do so between questions. Stop questioning while you write. Do not take notes or look at your notes while the juror is speaking.

2. **Take the time to look.** Before you begin speaking, make eye contact with each juror and acknowledge that contact. Eye contact is the single most effective way to initiate that relationship. It tells jurors right from the beginning that what they have to say is important. (Review our discussion of eye contact and techniques to improve it in Chapter 5.)

3. **Pause for three seconds.** After each answer, make sure the juror is finished speaking and provide him or her with the opportunity to "fill the silence." Three seconds may feel long to you, but it will not look long to your listeners. It will look respectful.

4. **Listen to and acknowledge each answer.** Never move to another question without acknowledging the previous answer. You may intend to come back to that juror,

but not acknowledging answers gives the impression that you are not listening, disapproved of the answer, or just don't care about the answers that they give you.

5. **Ask simple questions.** Don't ask a long, complicated question, then ask the whole panel what they think about it. This process is hard enough—jurors shouldn't also have to try to figure out what you are asking them. Keep your questions short and clear.

6. **Never contradict, ignore, or discourage any answer.** Thank the juror for being so candid. You must encourage the other jurors to be as open and honest with you as possible, not simply to give you the answers you want to hear.

Case Law Update III

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

Iowa Defense Counsel Association
Annual Meeting & Seminar
September 19, 2008

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IOWA CASELAW UPDATE III

Civil Procedure; Court Jurisdiction & Trial; Evidence; Insurance, Judgment & Limitation of Action
2007-2008

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CIVIL PROCEDURE

1. RULES OF PROCEDURE

A. CIVIL PROCEDURE: OMISSION OR REDACTION OF PROTECTED INFORMATION

Iowa R. Civ. P. 1.422 (amended July 31, 2008; eff. Oct. 1, 2008)

Rule 1.422. Protected information. It is the responsibility of counsel and the parties to ensure that protected information is omitted or redacted from documents or exhibits filed with the court. The clerk of court will not review filings to determine whether the required omissions or redactions have been made.

1.422(1) *Omission or redaction required.* In all ~~civil~~ proceedings ~~and special actions~~ a party shall omit or redact protected information from documents and exhibits field with the court unless the information is material to the proceedings or disclosure is otherwise required by law.

a. “Protected information” includes the following:

(1) Social security numbers.
(2) Financial account numbers.
~~(3) Personal identification numbers.~~
(3) Dates of birth.
~~(4) Other unique identifiers.~~
(4) Names of minor children.
(5) Individual taxpayer identification numbers.
(6) Personal identification numbers.
(7) Other unique identifying numbers.

b. ~~If a social security number must be included in a document only the last four digits of that number should be used. If financial account numbers must be included only incomplete numbers should be recited in the document.~~ When protected information is required or is material to the case, only a portion of the protected information should be used. By way of example, and not limitation:

(1) If a Social Security number must be included in a document, only the last four digits of that number should be used.
(2) If financial account numbers are relevant, only incomplete number should be recited in the document.
(3) If an individual’s date of birth is necessary, only the year should be used.
(4) If a minor child must be mentioned, only that child’s initials should be used.

c. Parties are not required to omit or redact protected information from materials or cases deemed confidential by any statute or rule of the supreme court; however, omission or redaction is required for materials that are initially confidential but which later become public, such as records in dissolution proceedings.

1.422(2) *Omission or redaction allowed.* A party may omit or redact any of the following information from documents and exhibits filed with the court unless the information is material to the proceedings or disclosure is otherwise required by law:

a. ~~Other personal identifying numbers, such as driver's~~ <u>Driver's</u> license numbers.
b. Information concerning medical treatment or diagnosis.
c. Employment history.
d. Personal financial information.
e. Proprietary or trade secret information.
f. Information concerning a person's cooperation with the government.
g. Information concerning crime victims.
h. Sensitive security information.
i. Home addresses.
j. Dates of birth.
~~*k.* Names of minor children.~~

Comment: This was a new rule in 2006 and already has the above changes.

B. CIVIL PROCEDURE: TRIAL OF ISSUES; COURT REPORTER MEMORANDUM

Iowa R. Civ. P. 1.903 (amended July 31, 2008; eff. Oct. 1, 2008) and Rule 1.1901 Form 12

<u>Rule 1.903. Trial of issues; reporting.</u>

1.903(1) *Trial of issues.* All issues shall be tried to the court except those for which a jury is demanded. Issues for which a jury id demanded shall be tried to a jury unless the court finds that there is no right thereto or all parties appearing at the trial waive a jury in writing or orally in open court.

1.903(2) *Reporting.* Unless waived by the parties, all trial proceedings shall be reported including:

a. All oral comments or statements of the court during the progress of the trial, any objections, and the court's rulings.

b. The proceedings impaneling the jury, any objections, and the court's rulings.

c. Opening statements, any objections, and the court's rulings.

d. The oral testimony, offers of proof, any objections, and the court's rulings.

e. The fact that the testimony was closed to the public.

f. The identification of exhibits, by letter or number or other appropriate mark, all written or other evidence offered, any objections, and the court's rulings.

g. All motions or other pleas made during the trial, any objections, and the court's rulings.

h. Closing arguments, any objections, and the court's ruling.

i. The return of the verdict.

j. Any other proceeding before the court or jury which might be preserved and made of record by a bill of exceptions.

<u>1.903(3) *Court reporter memorandum.* Promptly after reporting a proceeding a court reporter shall file a memorandum that includes all of the following:</u>

<u>*a.* The type of proceeding that was reported.</u>

<u>*b.* The date(s) on which the proceeding occurred.</u>

<u>*c.* The name of the court reporter who reported the proceeding.</u>

<u>*d.* The name of the judge who presided over the proceeding.</u>

<u>*e.* The reporting fee for the proceeding.</u>

<u>The court reporter shall use the court reporter memorandum form found in rule 1.1901, form 12. The form shall be signed by the court reporter. The court reporter is not required to</u>

serve the memorandum on the parties. The district court clerk shall enter the memorandum on the docket.

~~1.903(3)~~ 1.903(4) *Transcripts-rates for transcribing a court reporter's official notes.* Pursuant to Iowa Code Section 602.3203, the maximum compensation of shorthand reporters for transcribing their official notes shall be as provided in Iowa Ct. R. 22.28.

Comment: This rule was amended to add the reporting element in 2006. Now it has been amended to add the requirement that promptly after recording a court proceeding the court reporter must file a memorandum with the above required information. Form 12 is the Court Reporter Memorandum Form provided by the Court.

C. CIVIL PROCEDURE: CIVIL TRIAL-SETTING CONFERENCE

Iowa R. Civ. P. 1.906 (amended June 27, 2008; eff. Sept. 1, 2008)

Rule 1.906. Civil Trial-Setting Conference. No later than 90 days after the action is commenced, the clerk shall send a notice of civil trial-setting conference to all parties n in default. The clerk shall use Iowa Court Rule 23.5-Form 1, the Notice of Civil Trial-Setting Conference, to send the notice. The notice shall schedule a trial-setting conference no later than 150 days after commencement of the action. The parties are responsible for obtaining a trial-setting conference within 150 days after commencement of the action regardless of whether a party receives notice of the trial-setting conference. Failure to receive notice shall not be grounds to avoid dismissal under rule 1.944. A party may move for an earlier trial-setting conference upon giving notice to all parties. The court shall use Iowa Court Rule 23.5-Form 2, the Trial Scheduling Order, to set the trial date. If a trial is continued, the court shall set the trial to a date certain. Unless otherwise ordered, the deadlines established in the trial scheduling order shall continue to apply to the case.

Comment: This amended rule replaces the old rule 1.906 in its entirety.

D. CIVIL PROCEDURE: AMENDMENTS OF RULE 1.1901 FORMS 8 AND 9

Iowa R. Civ. P. 1.1901 (amended June 26, 2008; eff. Sept. 1, 2008)

Rule 1.1901-Form 8: Application for Appointment of Counsel and Financial Statement

Comment: The former forms were first repealed by Justice Ternus on April 11, 2008, and became effectively repealed on July 1, 2008 and adoption of the new forms took effect on July 1, 2008. Then the new forms which will become effective on September 1, 2008, eliminates having to disclose the applicant's social security number.

E. CIVIL PROCEDURE: Chapter 1- SCOPE OF DISCOVERY

Iowa R. Civ. P. 1.503 et al. (amended Feb. 14, 2008; eff. May 1, 2008)

Rule 1.503. Scope of discovery. Unless otherwise limited by order of the court in accordance with the rules in this chapter, the scope of discovery ~~is as follows:~~ shall be as provided in this division.

1.503(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other 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. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Unless otherwise provided in a request for discovery, a request for the production of a "document" or "documents" shall encompass electronically stored information. Any reference in the rules in this division to a "document" or "documents" shall encompass electronically stored information.

1.503(2) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this rule, an application for insurance shall not be treated as part of an insurance agreement.

1.503(3) *Trial-preparation materials.* Subject to the provisions of rule 1.508, a party may obtain discovery of documents and tangible things otherwise discoverable under rule 1.503(1) and prepared in anticipation of litigation or for trial by and for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a persona not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 1.517(1)(d) apply to the award of expenses incurred in relation to the motion. For purposes of this rule, a statement previously made is any of the following:

a. A written statement signed or otherwise adopted or approved by the persona making it.

b. A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

1.503(4) *Supplementation of responses.* A party who has responded to a request for discovery is under a duty to supplement or amend the response to include information thereafter acquired as follows:

a. A party is under a duty seasonably to supplement the response with respect to any question directly addressed to any of the following:

(1) The identity and location of persons having knowledge of discoverable matters.

(2) The identity of each person expected to be called as a witness at trial.

(3) Any matter that bears materially upon a claim or defense asserted by any party to the action.

b. A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(1) The party knows that the response was incorrect when made.

(2) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance of knowing concealment.

c. As provided in rule 1.508(3), a party shall supplement discovery as to experts and the substance of their testimony.

d. An additional duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

1.503(5) *Claims of privilege or protection of trial-preparation materials.*

a. Information withheld. 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.

b. Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received that information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Rule 1.504 Protective Orders.

1.504(1) Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken:

a. May make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had.

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place.

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.

(5) That discovery be conducted with no one present except persons designated by the court.

(6) That a deposition after being sealed be opened only by order of the court.

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

b. Shall limit the frequency of use of the methods described in rule 1.501(1) if it determines that any of the following applies:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

(2) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(3) The ~~discovery is unduly burdensome or expensive~~, burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, ~~limitations on~~ the parties' resources, and the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

~~1.504(2) If the motion for a protective order is denied in whole or in party, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.517(1)(d) apply to the award of expenses incurred in relation to the motion.~~

1.504(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of rule 1.504(1)(b). The court may specify conditions for the discovery.

1.504(3) If the motion for a protective order is denied in whole or in party, the court may, on such terms and conditions as are just, order that any party or person provide pr permit discovery. The provisions of rule 1.517(1)(d) apply to the award of expenses incurred in relation to the motion.

Rule 1.507 Discovery conference.

1.507(1) At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

a. A statement of the issues as they then appear.

b. A proposed plan and schedule of discovery.

c. Any limitations proposed to be placed on discovery.

~~*d.* Any other proposed orders with respect to discovery.~~

~~*e.* A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion~~.

d. Any issues relating to the discovery and preservation of electronically stored information, including the form in which it should be produced.

e. Any issues relating to claims of privilege or protection as trial-preparation material, including (if the parties agree on a procedure to assert such claims after production) whether to ask the court to include their agreement in an order.

f. Any other proposed orders with respect to discovery.

g. A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

1.507(2) East party and that party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by that attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.

1.507(3) Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

1.507(4) Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 1.602.

Rule 1.509 Interrogatories to parties.

1.509(1) *Availability procedures for use.* Except in small claims, any party may serve written interrogatories to be answered by another party or, if the other party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be directed to the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party.

Each interrogatory shall be followed by a reasonable space for insertion of the answer unless the interrogatories are provided in an electronic format in which an answer can be inserted. An interrogatory which does not comply with this requirement shall be subject to objection.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.

A party answering interrogatories must set out each interrogatory immediately preceding the answer to it. A failure to comply with this rule shall be deemed a failure to answer and shall be subject to sanctions as provided in rule 1.517. Answers are to be signed by the person making them. Answers shall not be filed; however, they shall be served upon all adverse parties within 30 days after the interrogatories are served. Objections, if any, shall be served within 30 days after the interrogatories are served. Defendants, however, may serve their objections or answer within 60 days after they have been served original notice. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under rule 1.517(1) with respect to any objection to or other failure to answer an interrogatory.

A party shall not serve more than 30 interrogatories on any other party except upon agreement of the parties or leave of court granted upon a showing of good cause. A motion for leave of court to serve more than 30 interrogatories must be in writing and shall set forth the proposed interrogatories and the reasons establishing good cause for their use.

1.509(2) *Scope; use at trial.* Interrogatories may relate to any matters which can be inquired into under rule 1.503, including a statement of the specific dollar amount of money damages claims, the amounts claimed for separate items of damage, and the names and addresses of witnesses the party expects to call to testify at the trial. Interrogatory answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

1.509(3) *Option to produce business records.* Where the answer to an interrogatory may be drive d or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been serve or from an examination, audit or inspection of such business records, or from a compilation, abstract or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to

permit the party serving the interrogatory to locate and identify as readily as can the party served, the records from which the answer may be ascertained.

~~Rule 1.512 Production of documents and things and entry upon land for inspection and other purposes. Any party may serve on any other party a request:~~

~~1.512(1) To produce and permit the party making the request, or someone acting on that party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 1.503 and which are in the possession, custody or control of the party upon whom the request is served.~~

~~1.512(2) Except as otherwise provided by statute, to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 1.503.~~

Rule 1.512 Production of documents, electronically stored information, and things; entry upon land for inspection and other purposes.

1.512(1) *Requests.* Any party may serve on any other party a request:

a. To produce and permit the party making the request, or someone acting on that party's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information-including writing, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained-translated, if necessary, by the respondent into a reasonably usable form

b. To inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of rule 1.503 and which are in the possession, custody or control of the party upon whom the request is served.

c. To permit, except as otherwise provided by statute, entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 1.503.

1.512(2) *Procedure.*

a. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.

b. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 60 days after service of the original notice upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is object to, including an objection to the requested form for producing electronically stored information, stating the reasons for the objection. If objection is made to part or an item or category, the part shall be specified. If objection is made to the requested form for producing electronically stored information-or if no form was specified in the request-the responding party must state the form it intends to use.

c. The party submitting the request may move for an order under rule 1.517 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

d. Unless the parties otherwise agree, or the court otherwise orders:

(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(2) If a request does not specify the form for producing electronically stored information, the responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable.

(3) A party need not produce the same electronically stored information in more than one form.

~~Rule 1.513 Procedure under rule 1.512. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.~~

~~The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 60 days after service of the original notice upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.~~

~~The party submitting the request may move for an order under rule 1.517 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.~~

Rule 1.513 Reserved.

Rule 1.513 Action for production or entry against persons not parties. ~~Rules~~ Rule 1.512 ~~and 1.513~~ do does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Rule 1.517 Consequences of failure to make discovery.

1.517(1) *Motion for Order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may move for an order compelling discovery as follows:

a. Appropriate court. A motion for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. A motion for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

b. Motion. If a deponent fails to answer a question propounded or submitted under rule 1.701 or 1.710, or a corporation or other entity fails to make a designation under rule 1.707(5), or a party fails to answer an interrogatory submitted under rule 1.509, or if a party, in response to a request for inspection submitted under rule 1.512, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the party seeking discovery may move for an order compelling an answer, a designation,, or an inspection in accordance

with the request. When taking a deposition non oral examination, the proponent of the question may complete or adjourn the examination before moving for an order.

Any order granting a motion made under this rule shall include a statement that a failure to comply with the order may result in the imposition of sanctions pursuant to rule 1.517.

In ruling on such motion, the court may make such protective order as it would have been empowered to make on a motion pursuant to rule 1.504(1).

c. Evasive or incomplete answer. For purposes of this rule as evasive or incomplete answer is to be treated as a failure to answer.

d. Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

e. Notice to litigants. If the motion is granted, the court shall direct the clerk to mail a copy of the order to counsel and to the party or parties whose conduct, individually or by counsel, necessitated the motion.

1.517(2) *Failure to comply with order.*

a. Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 1.707(5) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under rule 1.515 or rule 1.517(12), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following.

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(5) In lieu of any of the forgoing orders or in addition thereto, the court shall require the disobedient party or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

1.517(3) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.510, and if the party requesting

the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the reasonable expenses incurred in the making that proof, including reasonable attorney's fees. The court shall make the order unless it finds any of the following:

a. The request was held objectionable pursuant to rule 1.510.

b. The admission sought was of no substantial importance.

c. The party failing to admit had reasonable grounds to believe that the party might prevail on the matter.

d. There was other good reason for the failure to admit.

1.514(4) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under rule 1.707(5) to testify on behalf of a party fails:

a. To appear before the officer who is to take the person's deposition, after being served with a proper notice; or

b. To serve answers or objections to interrogatories submitted under rule 1.509, after proper service of the interrogatories; or

c. To serve a written response to a request for inspection submitted under rule 1.512, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under rule 1.517(2)(*b)*(1), (2),(3), and (5).

The failure to act described in this subrule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 1.504.

1.517(5) *Motions relating to discovery.* No motion relating to Depositions or discovery shall be filed with the clerk or considered by the court unless the motion alleges that counsel for the moving party has made a good faith but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court.

1.517(6) *Electronically stored information.* Absent exceptional Circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Rule 1.602 Pretrial conferences; scheduling; management.

1.602(1) *Pretrial conferences; objectives.* In any action, the court may In its discretion direct the attorneys for the parties and any Unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

a. Expediting the disposition of the action.

b. Establishing early and continuing control so that the case will not be protracted because of lack of management.

c. Discouraging wasteful pretrial activities.

d. Improving the quality of the trial through more thorough preparation.

e. Facilitating the settlement of the case.

1.602(2) *Scheduling and planning.*

a. Upon application of any party or on the court's own motion, except in categories of cases exempted by supreme court rule as inappropriate,

the court or its designee shall enter a scheduling order setting time limits
for all of the following:

(1) Joining other parties.

(2) Designating experts.

(3) Completing discovery.

(4) Amending the pleadings.

(5) Filing and hearing motions.

b. After consulting with the attorneys for the parties and any unrepresented parties, the court may also order any of the following:

(1) Special procedures, including assignment to a single judge, for Managing potentially difficult or protracted actions that may involve Complex issues, multiple parties, difficult legal questions, or unusual Proof problems.

~~(2) The date or dates for conferences before trial, a final pretrial conference and trial.~~

~~(3) Any other matters appropriate in the circumstances of the case including extension of those deadlines which are then justified.~~

(2) Provisions for discovery of electronically stored information.

(3) Any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation materials after production.

(4) The date or dates for conferences before trial, a final pretrial conference and trial.

(5) Any other matters appropriate in the circumstances of the case including extension of those deadlines which are then justified.

c. A schedule shall not be modified except by leave of the court upon a showing of good cause.

1.602(3) Subjects *to be discussed at pretrial conferences.* The court at any conference under this rule may consider and take action with respect to the following:

a. The formulation and simplification of the issues, including the elimination of frivolous claims or defenses.

b. The necessity or desirability of amendments to the pleadings.

c. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence.

d. The avoidance of unnecessary proof including limitation of the number of expert witnesses and of cumulative evidence.

e. The identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial.

f. The advisability of referring matters to a master.

g. The possibility of settlement and imposition of a settlement deadline or the use of extrajudicial procedures to resolve the dispute.

h. The substance of the pretrial order.

i. The disposition of pending motions.

j. Settling any facts of which the court is to be asked to take judicial notice.

k. Specifying all damage claims in detail as of the date of conference.

l. All proposed exhibits and mortality tables and proof thereof.

m. Consolidation, separation for trial, and determination of points of law.

n. Questions relating to voir dire examination of jurors.

o. Filing of advance briefs when required.

p. Such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

1.602(4) *Final pretrial conference.* A final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

1.602(5) *Sanctions*. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the court, upon motion or the court's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in rule 1.517(2)(*b*)(2) – (4). In lieu of or in addition to any other sanction, the court shall require the party or the attorney representing that party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 1.707 Notice for oral deposition.

1.707(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

1.707(2) If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in The subpoena shall be attached to or included in the notice.

1.707(3) The notice to a party deponent may be accompanied by a request made in compliance with ~~rules~~ rule 1.512 ~~and 1.513~~ for the production of documents and tangible things at the taking of the deposition. The procedure of rule ~~1.513~~ <u>1.512(2)</u> shall apply to the request.

1.707(4) No subpoena is necessary to require the appearance of a party for a deposition. Service on the party or the party's attorney of record of notice of the taking of the deposition of the party or of an officer, partner or managing agent of any party who is not a natural person, as provided in rule 1.707(1), is sufficient to require the appearance of a deponent for the deposition.

1.707(5) 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.

Rule 1.1701 Specific provisions.

1.1701(1) *Forms; issuance.* Every subpoena shall comply with the following requirements:

a. State the name of the court from which it is issued and the title of the action, including its docket number.

b. Command each person to whom it is directed to attend and give testimony or to produce and permit inspection, ~~and~~ copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in possession, custody or control of that person, or to permit inspection of premises, at the time and place therein specified. A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial, hearing or deposition, or may be issued separately. A subpoena may specify the form in which electronically stored information is to be produced.

c. Be issued by the clerk of court as provided by these ~~Rules of Civil Procedure~~ rules or by statute.

d. Set forth the text of rules 1.1701(2), 1.1701(3), and 1.1701(4).

1.1701(2) *Protection of persons subject to subpoenas.*

a. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earning and reasonable attorney's fees.

b. Presence; objections.

(1) A person commanded to produce and permit inspection, ~~and~~ copying, testing, sampling, of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial

(2) Subject to rule 1.171(3)~~(b)~~(e), a person commanded to produce and permit inspection, ~~and~~ copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance, if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to ~~inspection or copying of~~ producing any or all of the designated materials or inspection of the premises – or to producing electronically stored information in the form requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, ~~and~~ copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying testing, or sampling. Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, ~~and~~ copying, testing, or sampling commanded.

c. Motion to quash.

(1) Only timely motion, the court which issued the subpoena shall quash or modify it if the subpoena does any of the following:

1. Fails to allow reasonable time for compliance.

2. Requires a person who is not a party or an officer of a party to travel To a place outside of the country in which that person resides, is employed Or regularly transacts business in person, except that, such a person May be ordered to attend trial anywhere within the state in which the person is served with a subpoena.

3. Requires disclosure of privileged or other protected matter and no exception or waiver applies.

4. Subjects a person to undue burden.

(2) To protect a person subject to or affected by the subpoena, the court may quash or modify it if the subpoena does any of the following:

1. Requires disclosure of a trade secret or other confidential research, development, or commercial information.

2. Requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

1.1701(3) *Duties in responding to subpoena.*

a. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

~~b. When the information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communication, or things not produced that is sufficient to enable the demanding party to contest the claim.~~

b. If a subpoena does not specify the form for producing electronically stored information, the person responding to a subpoena must produce the information in a form in which the person ordinarily maintains it or in a form that is reasonably usable.

c. A person responding to a subpoena need not produce the same electronically stored information in more than one form.

d. A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery
is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of rule 1.504(1)(b). The Court may specify conditions for the discovery.

e.

(1) When the information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(2) If the information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received that information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

1.1701(4) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issues. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by rule 1.1701(2)(c)(1)~~(2)~~"2".

1.1701(5) *Service.* Subpoenas shall be served as prescribed in these rules or by statute.

1.1701(6) *Notice.* Prior notice of any commanded production of documents and things or inspection of premises shall be served on each party in the manner prescribed by rule

1.442(2) and in a manner reasonably calculated to give all parties an opportunity to object before the commanded production or inspection is to occur.

1.1701(7) *Limits.* An attorney may cause a subpoena to be issued only in a pending proceeding governed by the rules of civil procedure and in which the attorney has appeared.

2. CIVIL PROCEDURE CASELAW

A. IOWA SUPREME COURT STATE'S DEMAND FOR JURY TRIAL AND HOW IT AFFECTS EQUAL PROTECTION AND DUE PROCESS RIGHTS OF DEFENDANT

In Re Detention of Hennings, 744 N.W.2d 333 (Iowa 2008) (Filed Feb. 1, 2008).

Facts: The state filed a petition seeking to declare Hennings a Sexually Violent Predator (SVP). The state demanded a jury trial. Hennings filed a motion to strike on the ground that section 229A.7(4) violates the Equal Protection and Due Process Clauses of the United States and Iowa Constitutions. Hennings asserts it deprives him of his fundamental right to fair trial by granting the state the right to demand and obtain a jury trial over his objection. The district court denied the motion and a jury declared him a SVP. Hennings appealed asserting the district court erred in overruling his motion to strike the State's jury demand.

Holding: The State's demand for a jury trial does not violate Henning's Equal Protection and Due Process Rights.

Analysis: The right to a fair trial does not guarantee a trial before the decision-maker of the defendant's choosing, just before an impartial decision-maker. The institution provides ways to make sure jury trials are fair by way of voir dire, allowing and banning evidence, venue changes and post-trial remedies. The Court's confidence in the jury system concludes the Due Process Clauses do not entitle Hennings to a bench trial in this case.
Hennings further claims under the Equal Protection analysis he should be considered similarly situated as defendants in a criminal case. He is not because respondents in SVP proceedings are different because they have been convicted or charged with committing a sexual offense in the past. Further, most have a mental abnormality making it likely he or she will commit sexually violent acts if not confined. This is a different standard than a criminal defendant.

In re Detention of Lehman, 2008 WL 271817 (Iowa 2008) (filed Feb. 1, 2008).

See Henning brief above.

B. RULE 1.421- FAILURE TO STATE A CLAIM UPON WHICH ANY RELIEF MAY BE GRANTED AND EXTENSION OF 90-DAY PERIOD FOR SERVICE OF LAWSUIT

Antolik v. McMahon, 744 N.W.2d 82 (Iowa 2007) (filed Dec. 28, 2007).

Facts: Antolik sued McMahon for damages sustained in a motor vehicle accident. Antolik waited 153 days after filing suit to serve McMahon. The Iowa Rules of Civil Procedure require a 90-day period unless the court extends the service for good cause. Plaintiff obtained an ex parte order extending the time because the parties were involved in ongoing settlement. The district court dismissed the case

because the basis for the extension was insufficient. Plaintiff argues on appeal the Defendant waived the sufficiency of service by failing to raise the issue in the pre-answer motion to dismiss under IRCP 1.421(1) and the time limit was validly extended by the ex parte order.

Issue: Whether these six challenges, specifically insufficiency of service, are waived if raised in a defendant's answer rather than by pre-answer motion. Antolik contends subsections 1.421(3) and (4) mandate that the six challenges enumerated in subsection 1.421(1), including insufficiency of service of notice, be raised in pre-answer motion or be deemed waived.

Holding: The Defendant properly raised the service-of-notice issue in her amended answer and settlement negotiations are not good cause for delay in service. The ex parte order extending the time for notice is void.

Analysis: Defendant did not waive her challenge for insufficiency of process by putting it in her answer and not a pre-answer motion. Rule 1.421(3) allows for challenging the sufficiency of process by placing it in the pre-answer motion but does not mandate it. Plaintiff relied on subsections 1.421(3) and (4) but these merely show that if there is a pre-answer motion, then all challenges enumerated in 1.421(1)(b)-(f) must be raised. However, it does not require there be a pre-answer motion and allows the defendant to raise it in a pre-answer motion or an answer.

The ex parte order allowing for an extension is void for two reasons. Defendant had no knowledge of the extension and case law states the existence of ongoing settlement negotiation is not a sufficient reason for delaying service.

C. REAL PARTIES IN INTEREST: INDIVIDUAL CLAIM VERSUS THE BANKRUPTCY ESTATE- WHEN HAS THE CLAIM ACCRUED?

Lobberecht v. Chendrasekhar, 744 N.W.2d 104 (Iowa 2008) (filed Feb. 1, 2008).

Facts: Casandra Lobberecht had gastric bypass surgery on December 18, 2002, by Dr. Chendrasekhar, a doctor employed by the Iowa Clinic, P.C. Lobberecht began experiencing abdominal pain, and on February 18, 2003, sought further treatment from Dr. Chendrasekhar, who suspected she suffered from inflammation of the gallbladder. Shortly thereafter, he performed surgery to remove Lobberecht's gallbladder. Her abdominal pain continued, however, and on March 29, 2003, she went to the Iowa Methodist Medical Center emergency room with severe pain. She was admitted to Iowa Methodist for pain control and additional tests to determine the source of her pain. Lobberecht underwent a test that revealed a fistula or an opening along the staple lines of her stomach pouch. Lobberecht was discharged from the hospital on April 2, 2003, and was told to return to Dr. Chendrasekhar for a follow-up after two to three weeks. On April 22, 2003, Lobberecht returned to the Iowa Clinic complaining of continued abdominal pain and a possible hernia. Dr. Chendrasekhar again noted the presence of the fistula and told Lobberecht that he would probably do repair work on the fistula during her hernia surgery. On April 26, 2003, just before the date of her scheduled surgery, Lobberecht was admitted to the Iowa Methodist Medical Center with severe abdominal pain due to either the hernia or problems from the

fistula. Surgery was performed on April 27, 2003, to repair the hernia and the fistula. However, the fistula was not addressed at that time due to excessive scar tissue.

On May 28, 2003, the Lobberechts filed for chapter 7 bankruptcy. They did not list on their bankruptcy forms any potential medical-malpractice claim against the defendants.

At Lobberecht's June 5, 2003 follow-up visit, Dr. Chendrasekhar noted that Lobberecht was doing well after the hernia surgery, although she began regaining some of her weight.

The Lobberechts received their discharge in bankruptcy on August 26, 2003.

On January 9, 2004, Lobberecht went to Mahaska Hospital with abdominal pain. Over the next seven months, Dr. Timothy Breon of the Mahaska Hospital performed several procedures intended to address the problems occurring as a result of the fistula.

On December 14, 2004, the Lobberechts filed suit against Dr. Chendrasekhar and the Iowa Clinic, claiming negligent performance of the gastric bypass surgery. The Polk Co. District Court entered summary judgment in favor of defendants on the ground the Lobberechts were not the real parties in interest, and debtor appealed. The Court of Appeals affirmed. The debtor applied for further review.

Issue: Whether Plaintiffs' medical malpractice cause of action against the defendants belongs to them, as individuals, or to the bankruptcy estate. If the cause of action belongs to the bankruptcy trustee, the plaintiffs are not the real parties in interest.

Holding: The debtor was not real party in interest and the cause of action was the property of the bankruptcy estate, however the proper remedy was not to dismiss, but to allow a reasonable time, as determined by the district court, for substitution of the real party in interest. *See* Iowa R. Civ. P. 1.201.

Analysis: In Iowa, a person has a legal interest in a cause of action when it accrues, and that occurs when an aggrieved party has a right to institute and maintain a lawsuit. The plaintiffs, relying on the statute-of-limitations provisions of Iowa Code section 614.1(9), contended that their cause of action for medical malpractice did not accrue until they knew, or should have known, they were injured. Section 614.1(9) provides that medical-malpractice cases must be brought within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, ... of the existence of [ ] the injury or death for which damages are sought in the action, whichever of the dates occurs first....

The plaintiffs argued that their medical-malpractice claim could not have accrued as of the date they filed for bankruptcy because, as of that date, they did not know, and could not reasonably have known, of their injury. The Court noted that this was not a statute of limitations issue.

The statute of limitations under section 614.1(9) determines when a cause of action is *lost* by passage of time. However, for bankruptcy purposes, the question is not when the cause of action was lost, but when it was *acquired.* Thus, accrual for statute-of-limitations purposes is irrelevant to determining whether a cause of action has accrued for bankruptcy purposes. The relevant question in this case was *could* the plaintiffs have sued prior to May 28, 2003, the date they filed their bankruptcy petition? If so, the cause of action belonged to the trustee in bankruptcy and not the plaintiffs.

In Iowa, a medical-malpractice cause of action accrues when "all the necessary elements have occurred." To establish a prima facie case of medical malpractice, the plaintiff must submit evidence that shows the applicable standard of care, the violation of the standard of care, and a causal relationship between the violation and the harm allegedly experienced by the plaintiff.

All of the acts that the Plaintiffs alleged were negligent occurred on December 18, 2002, the date of the surgery. As of that date, the plaintiffs' medical-malpractice cause of action had accrued for bankruptcy purposes, and the plaintiffs' right to sue was complete. The cause of action therefore became the property of the bankruptcy estate.

D. THE STATE'S APPEAL RIGHTS IN SEXUALLY VIOLENT PREDATOR CASES: IOWA CODE § 229A.7(5) PERMITS THE STATE TO APPEAL ADVERSE SVP DECISIONS EVEN THOUGH THE STATUTE DOES NOT EXPRESSLY GIVE THEM THAT POWER- BUT IOWA RULE OF APPELLATE PROCEDURE 6.1, PERMITS APPEALS OF FINAL JUDGMENTS.

In re the Detention of Pierce, 748 N.W.2d 509 (Iowa 2008) (filed May 9, 2008).

Facts: The State of Iowa had filed a petition to designate Bryan Pierce a "Sexually Violent Predator" (SVP) in an attempt to keep him in prison past the expiration of his criminal sentence. In a trial in Warren County, the Judge determined that Pierce should be released because the State was not able to put any current temporal connection to his likelihood to re-offend- the State only proved that Pierce was a high risk to re-offend at some future point (from 6 to 15 years after release). The State appealed the decision.

Holding: (1) That state has a right to appeal a determination that an individual is not a SVP; and 2) statute governing commitment of sexually violent predators does not require the state to prove that the respondent is more likely than not to reoffend within a particular time frame.

Analysis: The Court found that the language of Iowa Code § 229A.7(5) permits the State to appeal adverse SVP decisions even though the statute does not expressly give them that power. The Court justified the decision through the language of Iowa Rule of Appellate Procedure 6.1, which permits appeals of final judgments. The Court felt the language of the procedural rules trumped the fact that the statute was not specific on the State's appeal rights.

The Court then went on to the merits of the appeal and also found in favor of the State of Iowa. The Court felt the trial judge erred when he interpreted the third element that the State was required to prove to hold the defendant in custody. The judge had ruled that while there may a risk in the future, the risk at the time of the commitment hearing was not such that Pierce should be held. The Iowa Supreme Court concluded that the statute only "requires the State to establish the respondent is presently suffering from a mental abnormality that makes him more likely than not to engage in sexually predatory acts in the future" and that there is "no burden to prove that alleged sexual predators are expected to re-offend within a specific time period". The fact that the defendant was currently not a risk to commit a new offense made no difference. If he was a more likely than not to re-offend at some point in the future, he had to be held in custody as a sexually violent predator.

3. OTHER RECENT AMENDMENTS AND NEW RULES

A. GENERAL COURT RULES: Chapter 23- TIME STANDARDS FOR CASE PROCESSING, NOTICE OF CIVIL TRIAL-SETTING CONFERENCE AND TRIAL SCHEDULING ORDER

Iowa Ct. R. 23 (amended June 27, 2008; eff. Sept. 1, 2008)

Comment: This amendment replaces 23.1-23.5 in their entirety.

B. GENERAL COURT RULES: Chapters 24, 31, 35, 41, 43, 46 and 47- RULES RELATED TO THE OFFICE OF PROFESSIONAL REGULATION (amended June 5, 2008; eff. July 1, 2008).

C. GENERAL COURT RULES: Amendments to 34.7, 35.13, 39.8, 39.14, 41.4, 41.5, 41.10 and 45.3 effective April 25, 2008, except for amendments to subrules 39.8(1) and 41.4(4) which become eff. Jan. 1, 2009)

D. GENERAL COURT RULES: REPORT OF PROBATE REFEREE

Iowa Ct. R. 7.11 (amended April 14, 2008; eff. July 1, 2008)

7.11-Form 1: Report of Probate Referee

E. GENERAL COURT RULES: APPEALS FROM GRIEVANCE COMMISSION REPORTS

Iowa Ct. R. 35.11 (amended eff. Feb. 27, 2008)

Rule 35.11 Appeal.

F. GENERAL COURT RULES: SENIOR JUDGES

Iowa Ct. R. 22.12 (amended eff. Feb. 27, 2008)

Rule 22.12 Senior Judges.

G. GENERAL COURT RULES: ALLOCATION OF PROCEEDINGS/CASE STATEMENT FORM

Iowa Ct. R. 21.21 and 21.41 (amended eff. Feb. 27, 2008)

Rule 21.21 Allocation of proceedings (cases)

Comment: Rule 21.21 was amended and case statement form 21.41 was rescinded.

H. GENERAL COURT RULES: Chapters 31 and 37, 14 and 15, 47 and 48-RULES RELATED TO THE OFFICE OF PROFESSIONAL REGULATION (amended February 14, 2008; eff. April 1, 2008)

I. GENERAL COURT RULES: Chapters 35-44, 49- OFFICE OF PROFESSIONAL REGULATION (amended eff. Dec. 5, 2007)

Comment: Amendments to Chapters 35-44 and adoption of chapter 49.

J. GENERAL COURT RULES: JUDICIAL ADMINISTRATION-JUROR COMPENSATION

Iowa Ct. R. 22.31(1) (amended eff. Oct. 22, 2007)

Rule 22.31 Juror Compensation.

4. IOWA RULES OF PROFESSIONAL CONDUCT

A. RULE 32:7.4 FIELDS OF PRACTICE (amended eff. Nov. 19, 2007)

Rule 32:7.4 Fields of Practice.

B. RULE 32:7.2 ADVERTISING (amended eff. Nov. 19, 2007)

Rule 32:7.2 Advertising.

Comment: Adds mention of limited representation as authorized by Rule 32:1.2(c).

COURT JURISDICTION & TRIAL

5. JURY INSTRUCTIONS:

State v. Smith, 739 N.W.2d 289 (Iowa 2007) (filed Sept. 7, 2007).

Facts: Smith, along with two friends, traveled to Chicago in a stolen Lincoln Navigator and the car was eventually pulled over for speeding. The driver, Dineen, was the only one with knowledge the vehicle was stolen.

When the Police Officer returned to the car after realizing the vehicle was stolen, Dineen shot the officer four times. The three fled from the scene. The Court instructed the jury it could find Smith guilty of each charge either as a principal, an aider and abettor or under the theory of joint criminal conduct. The jury found Smith guilty on four counts.

Smith appealed alleging the district court erred in denying his motion for judgment of acquittal and in overruling his objection to the joint criminal conduct jury instruction. The court of appeals affirmed on all issues except Smith's willful injury conviction, which was reversed because the jury instruction did not mention the concept of specific intent. The district court did not require anymore than a general verdict.

Holding: Because there is insufficient evidence for a joint criminal conduct charge and the jury only returned a general verdict, the case is remanded for new trial.

Analysis: A verdict based on facts only legally supporting one theory will not negate the possibility that the defendant was convicted under a theory containing legal error. Even if there is sufficient evidence to charge under aiding and abetting, the case still must be remanded because the general verdict did not reveal the basis for its guilty verdict.

Schroeder v. Albaghdadi, 744 N.W.2d 651 (Iowa 2008) (filed Feb. 15, 2008).

Facts: Homer (Plaintiff's husband) came to the emergency room complaining of shortness of breath, nausea and anxiety two weeks after open-heart surgery. Dr. Hinrichs took a variety of tests and expressed to Homer's family he felt Homer should be admitted to the hospital. Dr. Hinrichs did not have admitting privileges so he phoned Dr. Albaghdadi, the on-call cardiologist.

There was a factual dispute regarding the telephone call. If the jury believed Hinrichs' version than Albaghdadi's actions may have fallen below the standard of care five different ways. If the jury believed Albaghdadi's version than he may have met an applicable standard of care. The court used two-verdict form. The jury returned a verdict in favor of Albaghdadi's version, finding he performed to the proper level of care. The court of appeals reversed the judgment and remanded for a new trial.

Holding: The court properly used a two-verdict jury format when instructing the jury on the issue of medical negligence and did not impermissibly comment on the evidence.

Analysis: To prevent Plaintiff's counsel from arguing things not supported by expert testimony the court chose a two-verdict format. Plaintiff suggests this format impermissibly comments on the evidence. Instructions designed to determine a physician's duty of care do not constitute an impermissible comment on the evidence.

The verdict forms were given to the jury as potential factual scenarios in which a standard of care may or may not have been adhered to Albaghdadi. It provided the jury with a road map to determine the care owed Homer consistent with the jury's fact-finding.

6. JURISDICTION ISSUES

Schott v. Schott, 744 N.W.2d 85 (Iowa 2008) (filed Jan. 18, 2008).

Facts: Jamie and Heather were in a committed, same-sex couple for several years and adopted two children. Jamie is the natural parent and consented to both adoptions. In determining custody of the children the district court ruled it had no subject matter jurisdiction because the adoptions were invalid. On appeal, both parties contend the adoptions were valid and ask the Court to find the district court had subject matter jurisdiction.

Holding: It was an error to collaterally attack the adoption; Heather and Jamie are the children's legal parents. The district courts had subject matter jurisdiction to determine the rights and responsibilities with respect to child custody, physical care, and support.

Analysis: The district court has inherent power and jurisdiction in all proceedings involving the custody and care of minor children. A final judgment is conclusive on collateral attack, even if the judgment was erroneous, unless the court that entered the judgment lacked jurisdiction over the person or the subject matter. The court had jurisdiction so the district court considering Heather's petition erred by invalidating the adoptions and thus had subject matter jurisdiction over Heather's claims.

City of Okoboji v. Iowa Dist. Court for Dickinson County, 744 N.W.2d 327 (Iowa 2008) (filed Jan. 25, 2008).

Facts: A district court judge entered a ruling in 2004 that denied a request by City for declaratory and injunctive relief against Okoboji Barz, Inc. On appeal the Court determined the proposed use of the property would change the nature and character of the nonconforming use and would be an unlawful expansion. The appellate court remanded the case to the district court to issue a permanent injunction. The district court judge issued an injunction only enjoining the bar owner from using the marina to operate a bar "for sale of alcoholic beverages with on-premises consumption." The injunction did not prohibit the owner from using his property to provide live music, karaoke, hog roasts and full-moon parties to patrons or selling packaged alcohol and allowing patrons to open it and consume it on the premises.

Holding: The district court must obey the appellate court's ruling by determining what the precise action to be done is and must read the mandate by considering the full opinion of the appellate court and the circumstances the opinion embraces.

Analysis: On remand, the jurisdiction of the case is returned to the district court in order to do the act authorized or directed by the appellate court in its opinion and nothing else. If the district court proceeds contrary to the mandate, its decision is void. The district court here looked at the opinion "in a vacuum" and did not look at the rationale of the appellate court to discover the intent. By ignoring the holding and rationale the district court fell short of the letter and spirit of the opinion. The trial court failed to carry out its responsibility to implement the mandate pursuant to the appellate court's wishes.

In re N.V., 744 N.W.2d 634 (Iowa 2008) (filed Feb. 15, 2008).

Facts: The State filed a child in need of assistance (CINA) petition in September 2005. The mother was a member of the Sac and Fox Tribe. Under the Iowa Indian Child Welfare Act (Iowa ICWA) the Tribe was entitled to notification of the proceedings. The Tribe did not wish to seek jurisdiction over this action.
At the hearing for the termination of parental rights the parents requested the court to transfer jurisdiction to the tribal court. The district court granted the request. The State raised three issues on appeal. (1) whether the district court could deny an "eleventh-hour" request to transfer the custody proceedings to a tribal court (2) whether the parties or witnesses would suffer undue hardship by such a transfer and (3) whether the doctrine of estoppel prevents the parents from requesting a transfer to a tribal court.

Holding: Jurisdiction may be transferred to tribal court because the state failed to provide a legal basis for the district court to deny the transfer.

Analysis: Courts can deny transfer to tribal courts for good cause. Good cause can be when the tribal court declines the transfer, the tribal court does not have subject matter jurisdiction, the tribal court is unable to mitigate an undue hardship or either of the child's parent object. The section makes no limitation on the time in which a request to transfer must be filed.

Neither party would suffer undue hardship if the case were transferred. Prior court files, transcripts, and exhibits can be made available to the tribal court and the children are able to make their concerns known in any forum. The doctrine of estoppel cannot be used to trump the statutory right under the Iowa ICWA.

7. LEGAL STANDING

Godfrey v. State, 752 N.W.2d 413 (Iowa 2008) (filed June 20, 2008).

Facts: On October 4, 2003, Godfrey filed a petition for declaratory judgment and injunctive relief against the state. Godfrey alleging an enactment violated the single-subject rule of our state constitution and asked the law to be declared unenforceable. The district court held she had no standing to bring the claim and

did not rule on the merits. On appeal, Godfrey asserts she has standing to bring the action based on her status as a citizen, taxpayer and potential workers' compensation claimant.

Holding: In order to have standing one must have an actual and imminent personal or legal interest in the claim. In order to bring a claim due to the greater public interest the importance must be substantial.

Analysis: A plaintiff must have (1) a specific personal or legal interest in litigation and (2) be injuriously affected. Cases involving actions by private persons to enforce private rights may be brought under the personal-interest alternative requirement in the first element but the litigant must suffer a specific invasion of a right. The Plaintiff must establish a "casual connection between the injury and the conduct complained of" and that the injury is 'likely' as opposed to merely 'speculative.' Godfrey's likelihood of injury is hypothetical. There is nothing to show that the possibility of injury in the future is not merely theoretical. Godfrey's status as a taxpayer is also insufficient. A general interest shared by all citizens in making sure government acts legally is insufficient to support standing. Godfrey further argues she is the only litigant in Iowa who is able to challenge the statute because the window of opportunity for other litigants has passed. However, establishing third-party standing still requires the litigant to establish a personal injury or stake in the application of the challenged statute.

Godfrey asserts if all else fails, there should be an exception to the standing doctrine that waives the requirement in exceptional circumstances involving issues of great public importance. Standing should only be waived when the issue is of utmost importance and the constitutional protections are most needed. Plaintiff claims the legislature violated the single-subject requirement by claiming the individual provisions of House File 2581 do not relate to the same subject. Because there is no evidence of fraud by the legislature to engage in logrolling the need is minimized. In the broad scheme of constitutional violations, this issue is not one of great public importance to support the waiver of the current standing rule.

8. BIFURCATION IN A CRIMINAL CASE

State v. Helmers, 2008 WL 2854501 (Iowa 2008) (filed July 25, 2008).

Facts: Helmers moved to bifurcate his trial so evidence of a no-contact order would not be presented to the jury unless it first found him guilty of stalking. The district court granted the motion and the State sought interlocutory appeal.

Holding: Bifurcating a trial is not appropriate when it would be splitting elements of a single offense. The probative value of this evidence does not outweigh the danger of unfair prejudice.

Analysis: The state contends it is not appropriate to bifurcate elements of a single offense and the court concluded a no contact order is an element of the crime for which Helmers is charged. The Court found the balancing test used by the district court

was incorrect. The no-contact order is likely the best evidence to prove one of the elements and is highly probative in the trial at hand.

9. OTHER NOTABLE OPINIONS

State v. Smith, 2008 WL 2854495 (Iowa 2008) (filed July 25, 2008).

Facts: As a result of Smith's guilty plea he was subject to mandatory lifetime supervision but was not fully informed when he agreed to the plea. Originally Smith requested immediate sentencing, which waived his right to file a motion in arrest of judgment. The Court then sentenced Smith to the recommended sentence without the mandatory lifetime supervision.

In October, the first judicial district entered an order finding Smith's sentence was illegal. Five days before the resentencing, Smith filed a motion in arrest of judgment and an application to withdraw his guilty plea. The district court ordered a new trial stating the plea was unknowing and the improper plea invalidated the whole agreement.

Holding: Because Smith waived his right to file a motion in arrest of judgment, the district court improperly considered his motion when it entered an order granting him a new trial.

Analysis: Smith claims his motion in arrest of judgment was timely because he filed it no later than five days before the resentencing. The court disagreed. The time limits must be set for sentencing in conjunction with the time limits set for filing a motion in arrest of judgment. If the court sets the date of sentencing less than fifty days after the plea, the maximum time a defendant has to file a motion is no later than five days before the sentencing.

The not-later-than-five-days time limitation has no application to a resentencing and Smith's voluntary waiver of his right to file a motion in arrest of judgment continues to apply at the time of the resentencing.

When a defendant claims a plea was not made knowingly and voluntarily because the court failed to disclose the maximum penalty, but the defendant failed to file a motion in arrest of judgment, we have decided the proper remedy is for the defendant to raise this issue on post-conviction relief.

EVIDENCE

10. EVIDENCE: ADMISSION OF EVIDENCE

Cawthorn v. Catholic Health Initiatives Iowa Corp., 743 N.W.2d 525 (Iowa 2007)(filed Nov. 30, 2007).

Facts: Thirty percent of liability was attributed to Mercy after Cawthorn sued for medical malpractice. The district court ordered a new trial unless Cawthorn agreed to a remittitur reducing the verdict of $10,2590,000 to $1,190,000. Cawthorn

appealed, contending the trial court abused its discretion in ordering the conditional new trial and in refusing to submit his claim for punitive damages.

Mercy cross-appealed, claiming error in the admission of an independent review of Dr. Miulli's qualifications by the Iowa Board of Medical Examiners (IBME). The court of appeals affirmed on Cawthorn's appeal but did not address Mercy's cross-appeal.

Holding: The admission of the investigation report and transcript of the IBME hearing was improper. The impact was so great as to require a new trial and the exclusion of all evidence of the IBME investigation. Punitive damages are not appropriate because Mercy did not act with malice.

Analysis: Section 272C.6(4) bars the admission of investigative materials and information in any proceeding other than licensee discipline. The provision is intended to assure a free flow of information and suggests that confidentiality should protect the source of information as well as the person being investigated.

Punitive damages are only recoverable when the defendant acted with actual or legal malice. Though evidence existed that Mercy was aware Dr. Miulli was likely to injure a patient through negligence, there is nothing to show the hospital was aware the doctor's competency was at issue. There is not a finding of willful and wanton conduct as required by statute.

State v. Wells, 738 N.W.2d 214 (Iowa 2007) (filed Sept. 7, 2007).

Facts: Lorant Wells was convicted of sexual abuse in the third degree after having sex with a minor. He claimed the district court erred in admitting evidence statements made by the victim to a sexual assault nurse examiner because it did not give him a right to confront his accuser.

Holding: The admission was incorrect but the error was harmless and does not allow for a new trial

Analysis: The guilty verdict was largely dependent on DNA evidence and the testimony of the sexual abuse counselor was likely secondary. The error was harmless because the trial would have come out the same way if the objection had been sustained.

State v. Bentley, 739 N.W.2d 296 (Iowa 2007) (filed Sept. 28, 2007).

Facts: Bentley was charged with sexual abuse in the 2nd degree. The victim was videotaped describing the sexual abuse and accused Bentley. The child was killed before trial. Bentley won a pre-trial motion ruling the admission of the ten-year-old's videotaped statement would violate the defendant's right to confront a witness against him under the 6th amendment.

Holding: The tape is testimonial and does not allow Bentley his 6th amendment right to cross-exam his accuser. The tape is inadmissible.

Analysis: Because of the police involvement in the interview process the tape is deemed testimonial. This is the very type of thing the Confrontation Clause was directed. Because there is no opportunity to cross-examine the child, the admission of her testimonial statements would violate Bentley's right to confront witnesses against him.

State v. Harris, 741 N.W.2d 1 (Iowa 2007) (filed Aug. 24, 2007).

Facts: In January 2003 an automobile was set on fire and a body was found inside with three bullet wounds to the head. Harris eventually admitted to witnessing the murder, pouring gasoline over the car and body and igniting it.
After the confession, Harris was charged with arson in the second degree and obstruction of justice. Harris filed a motion to suppress confession arguing the detective violated his *Miranda* rights and his statutory right to speak with a family member. His request for an attorney was repeatedly ignored and he was not allowed to call his brother. The district court denied the motion and Harris was found guilty on both accounts. Harris appealed arguing the failure to suppress his confession required a new trial and the court of appeals affirmed.

Holding: Harris's Fifth Amendment right to have an attorney present during interrogation and his statutory right to contact a family member were violated. Harris's motion to suppress should have been granted. Remanded for a new trial.

Analysis: The Supreme Court found Harris properly invoked his right to counsel when he stated "I don't want to talk about it. We're going to do it with a lawyer. That's the way I got to go." Further, he answered affirmatively when the detective asked him "you want to do it with a lawyer, is that what you're saying?" The Court decided the detective violated Harris' rights by cajoling him and using techniques "likely to elicit an incriminating response."

The Court stresses one shall not be subjected to further interrogation unless *he* initiates further communication. Because Harris did not initiate the following exchanges, he did not waive his rights. Further, it was a violation to use a deal to lure Harris into confessing without his attorney present. There was no valid waiver. Harris also expressly requested to talk to his brother in accordance with. On appeal, the State concedes the detective violated Harris' statutory right to contact a family member. The district court ignored a newly decided Supreme Court decision that would have deemed the appropriate remedy to be suppression of the confession.

The district court was wrong to ignore *Moorehead* because Supreme Court decisions are binding the moment they are filed. A decision which is to be included or designated for inclusion in the National Reported System is not an 'unpublished opinion.' If it were, it is not controlling legal authority under Iowa Appellate Rules. Courts are not to ignore opinions pending Northwest Reporter Citation.

11. EVIDENCE: MEDICAL MALPRACTICE AND IOWA R. EVID. 5.401 (DEFINING RELEVANT EVIDENCE): AND IOWA R. EVID 5.403 (ALLOWING RELEVANT EVIDENCE TO BE EXCLUDED "IF ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, CONFUSION OF THE ISSUES, OR MISLEADING THE JURY)

Mohammed v. Otoadese, 738 N.W.2d 628 (Iowa 2007) (filed Sept. 14, 2007).

Facts: Jerry Whigham was referred to Dr. E. Anthony Otoadese for an enlarged thyroid. Dr. Otoadese was a cardiothoracic and vascular surgeon in Waterloo. Whigham's thyroid had enlarged to the extent it was pressing on his trachea, right lung, and superior vena cava, a large vein. In February 2001, Dr. Otoadese performed surgery by opening Whigham's chest and removing the enlarged thyroid. During this process, Whigham's recurrent laryngeal nerves were injured.

After the surgery Whigham was unable to breathe normally. He was diagnosed with bilateral paralysis of his vocal cords. A tracheostomy tube was installed which allowed Whigham to breathe through the tube. In December 2002, Whigham removed the tube to clean it, and was unable to replace it. His sister attempted to help him, but she was also unable to get the tube back into his throat. Whigham suffered cardiac arrest and went into a coma.

In February 2003, Sharon Mohammed, who was Whigham's niece and conservator, filed a medical malpractice action against Dr. Otoadese, claiming during the surgery in 2001 Dr. Otoadese negligently damaged Whigham's recurrent laryngeal nerves. Whigham died while the suit was pending. Mohammed and Whigham's sister, Doris Whigham Curry, as co-administrators of Whigham's estate, were substituted as the plaintiffs in the action.

Evidence was admitted during the course of the trial regarding a prior lawsuit that Whigham had filed against Hyvee and regarding the fact that Whigham's medical bills were paid by Medicare and Medicaid.

Holding: Although testimony concerning a prior lawsuit against Hy-Vee for a slip and fall injury should not have been admitted, the evidence was not prejudicial to the estate nor was the evidence of payments by Medicare and Medicaid nor was evidence regarding Whigham's failure to follow his doctors' recommendations.

Analysis: Before trial, the estate had filed a motion in limine requesting an order prohibiting the defense from presenting any evidence regarding a lawsuit Whigham filed against Hy-Vee for a slip-and-fall injury that occurred at one of its grocery stores in 2000. In resisting the motion, defense counsel argued the Hy-Vee lawsuit was relevant to rebut the estate's contention Whigham intended to file the present case against Dr. Otoadese but was not able to do so before slipping into a coma. This was because Whigham consulted a lawyer after the Defendant removed his thyroid and got another lawsuit on file, namely against Hy-Vee, and not against the Defendant. That is what the Defense wanted to offer this for.

Obviously counsel for the estate responded that this was just an attempt to try to make it look like Mr. Whigham was a litigious person and that this evidence was more prejudicial than probative.

The court of appeals had granted a new trial based on testimony concerning Whigham's prior lawsuit against Hy-Vee for a slip-and-fall injury.

While the Supreme Court ruled Whigham's lawsuit against Hy-Vee was not relevant and should not have been admitted because it did not "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the [present] action more probable or less probable, they found that it was not prejudicial to the estate.

12. JURY INSTRUCTIONS & EXCLUSION OF EVIDENCE: THERE MUST BE SUBSTANTIAL EVIDENCE IN THE RECORD IN ORDER TO SUPPORT A JURY INSTRUCTION

Welcher v. Spees, 2008 WL 3367165 (Iowa App. 2008) (filed Aug. 13, 2008). (final publication pending)

Facts: Spees regularly cared for dogs in the neighborhood, feeding and watering dogs she believed were in need. One such was Butchie, whose owner gave Spees permission to tend to him. On one occasion, she found Butchie tangled in his line. Attempting to untangle him, Spees let Butchie off the line. Butchie immediately took off. Welcher, a postal carrier, heard Butchie breaking off the chain, and himself ran to his truck. He jumped into the truck, injuring his back in the process. Welcher brought suit against Spees and against Aebersold, Butchie's owner, who was later dismissed. The jury returned a verdict for Spees, finding that Butchie did try to bite Welcher, but that this was not the proximate cause of his injuries. Welcher appealed on two issues. First, that the Court erred in failing to instruct the jury on Waterloo's leash laws and Iowa dog owner statutes. Second, that the Court erred in refusing to admit evidence of a sign on Aebersold's property stating that Butchie was not always friendly.

Holding: The district court did not err in refusing to instruct the jury on the Waterloo leash law or Iowa's dog owner liability statute, and evidence excluded by the district court was cumulative. Affirmed for the Defendant.

Analysis: There must be substantial evidence in the record in order to support a jury instruction, and that it is error to submit instructions that have no support. The Court of Appeals found that there was not sufficient evidence submitted to support the instruction on leash laws, as the leash law itself was not entered into evidence, and there was no support for the contention that Spees admitted violation of the law. Regarding ownership statutes, there was not sufficient evidence that Spees owned Butchie and it was undisputed that she had ever cared for Butchie on her own property.

Regarding the excluded sign, the Court of Appeals reviewed for abuse of discretion. The Court states that while the sign may have been relevant, it was cumulative, as there was already evidence that Welcher informed Spees that Butchie was not friendly towards him. Therefore, the Court found that the exclusion of the cumulative evidence was not an abuse of discretion.

13. IOWA RULE OF EVIDENCE 5.606(*b*); JURY INSTRUCTIONS

The *Miller v. Shellberg,* 2008 WL 3367602 (Iowa App. 2008) (filed Aug. 13, 2008) (final publication pending)

Facts: Raymond Miller and Rebecca Miller, husband and wife, were stopped at a red light near Harrah's Council Bluffs Casino, when their vehicle was struck in the rear by a vehicle driven by Ronald Shellberg, an employee of Harrah's Casino, during the course of his employment. The Millers filed suit against Shellberg and Harrah's Casino, alleging they were injured during the accident. Defendants admitted negligence, but disputed that their negligence was the proximate cause of the Millers' damages.

During closing arguments, defendants objected several times to arguments raised by plaintiffs that they claimed were outside the evidence presented at the trial. The district court admonished plaintiffs' counsel to stick to the evidence. After closing arguments, the court instructed counsel for both parties to review the exhibits to be given to the jury. Counsel reviewed a loose stack of exhibits and informed the court attendant the exhibits were ready to be taken to the jury. Plaintiffs' counsel then handed the court attendant a black binder of exhibits that had a label stating "RAYMOND MILLER REBECCA MILLER EXHIBITS MASTER COPY." The court attendant took the black binder to the jury room and told the jury, "Here are the exhibits."

After the jury reached a verdict for the Millers, the parties became aware that eleven exhibits had gone to the jury room that had not been admitted into evidence. Defendants filed a motion for new trial, claiming the Millers' counsel had engaged in misconduct by raising matters outside the evidence during argument, and that there had been jury misconduct due to the fact the jury was exposed to extraneous prejudicial information. The Millers presented affidavits from six of the eight jurors. Five of the affidavits stated, "At no time did I, or any member of the jury, view, rely upon, or even discuss the following documents." Several affidavits also stated the jurors had considered only the evidence presented in the courtroom, their notes, and medical records, and further stated, "Any item in the binder that did not show the medical history was not taken into account in the decision making." The district court denied the request for a new trial based on attorney misconduct, but granted the request for new trial based on jury misconduct. The Millers appeal and claim the district court erred by determining the juror affidavits were inadmissible. Defendants cross-appealed on the basis that the district court abused its discretion by not granting their motion for new trial based on misconduct by the Millers' counsel and also assert the district court should have granted a new trial based on improper jury instructions.

Holding: The district court properly determined juror affidavits about whether they had considered the eleven exhibits were not admissible under Iowa Rule of Evidence 5.606(*b*). The court engaged in an objective consideration of the eleven exhibits, and found they were prejudicial. The court did not abuse its discretion in granting a new trial. The issue of jury instructions may arise during retrial. The court did not err in giving the jury instructions defining fault and negligence. Although

defendants had admitted negligence, the jury needed to know what this concept embodied.

Analysis: Iowa Rule of Evidence 5.606(B) precludes consideration of juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room. The affidavits in this case attempted to present evidence on the issue of whether the jury had been influenced by extraneous prejudicial information. Under rule 5.606(b), juror affidavits concerning the jury's deliberations or the influence of any matter on the deliberations is inadmissible . Because the affidavits presented by the Plaintiffs concerned matters arising during the course of the jurors' deliberations they could not be considered.

INSURANCE

14. "FAIRLY DEBATABLE" STANDARD SHOULD BE USED IN THE TORT OF BAD FAITH OF INSURANCE CLAIMS IN REFERENCE TO SECTION 86.13 PENALTY BENEFITS

City of Madrid v. Blasnitz¸ 742 N.W.2d 77 (Iowa 2007) (filed Oct. 5, 2007).

Facts: Insurer denied coverage for a worker's compensation claim. A deputy workers' compensation commissioner issued an arbitration decision awarding disability, medical and penalty benefits. An appeal to the district court determined the penalty award was not supported by substantial evidence and it should be remanded. The court of appeals affirmed the district court decision. Blasnitz claims insurer did not have a reasonable basis to contest her entitlement to benefits and is therefore entitled to coverage and penalty provisions.

Holding: The commissioner erroneously weighed the evidence in deciding whether the claimant's claim was fairly debatable and penalty provisions are not appropriate.

Analysis: "Fairly debatable" standard should be used in the tort of bad faith of insurance claims in reference to section 86.13 penalty benefits. A claim is fairly debatable when it is open to dispute on any logical basis. It does not matter if the insurer is eventually found incorrect, the insurer cannot be held liable for penalty benefits as a matter of law. Looking at the evidence in its entirety it is clear there is a reasonable basis to contend the claimant did not sustain a rotator cuff tear. The court determined that even though all evidence shown was not available to the insurer at the time, a statement from a witness and inconsistent medical records were sufficient for reasonable doubt. Further, an insurance company is not required to accept the evidence most favorable to the claimant and ignore the contradictory evidence. Remanded for entry of an order denying penalty provisions.

15. THE "ARISING OUT OF" REQUIREMENT IS NOT SATISFIED BY AN INJURY OCCURRING WHILE THE EMPLOYEE IS ENGAGED IN SOME ACTIVITY OR DUTY WHICH THE EMPLOYEE IS AUTHORIZED TO UNDERTAKE AND WHICH IS CALCULATED TO FURTHER THE EMPLOYER'S BUSINESS, DISAPPROVING *MEADE V. RIES*, 642 N.W.2D 237

Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa 2007) (filed Nov. 9, 2007).

Facts: While working as a cocktail server at Lakeside Casino, Dana Blue became light-headed and nauseated while on duty and was directed by her supervisor to go to the employee's lounge until she felt better. After spending approximately forty-five minutes in the lounge, Blue's symptoms disappeared, and she felt well enough to return to work. Blue left the lounge with several of her coworkers, walked forty feet to a set of stairs, and descended the stairs with no problem. Still conversing with her coworkers, she turned a corner and began walking down a second set of stairs. As she descended the steps, Blue stumbled and grabbed onto a coworker so as not to fall down the stairs. Although she immediately felt a pain in her ankle, Blue continued to the bottom of the staircase without incident. She later denied any light-headedness or nausea at the time of this incident.

Within the next couple of days, Blue's ankle became painful and swollen, and she could not walk without limping. Despite treatment, Blue continues to have pain in her ankle. She has been diagnosed with possible early complex regional pain syndrome, and her physicians have related this condition to the staircase incident.

Blue sought workers' compensation benefits from her employer and its insurer, appellee Zurich-American Insurance Group. The Workers' Compensation Commissioner awarded benefits to Blue for her injury, concluding her work subjected her to the inherently dangerous activity of traversing stairs. On judicial review, the district court rejected the Commissioner's conclusion that stairs are inherently dangerous and reversed the award of benefits, stating Blue's injury coincidentally occurred at work and was not compensable. Blue has appealed this decision.

Holding: Petitioner was entitled to workers' compensation benefits under the actual-risk rule.

Analysis: In order for an injury to be compensable in Iowa, there must be a connection between the injury and the work. That connection is established by showing the injury arose out of and in the course of the worker's employment. Iowa Code § 85.31(1) The "arising out of" requirement in statute making injury compensable if it arises out of and in course of employment is not satisfied by an injury occurring while the employee is engaged in some activity or duty which the employee is authorized to undertake and which is calculated to further, indirectly or directly, the employer's business; such a statement of the "arising out of" element is indistinguishable from the test for the "in the course of" element; disapproving *Meade v. Ries*, 642 N.W.2d 237. I.C.A. § 85.31(1).

The "arising out of" element in statute making injury compensable if it arises out of and in course of employment requires proof that a causal connection exists

between the conditions of employment and the injury; the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of employment. I.C.A. § 85.31(1).

Positional risk to claimant when descending employer's stairs where she injured foot did not establish causal connection between injury and employment; the connection was not established by the employment bringing claimant to the position where she was injured. I.C.A. § 85.31(1). However, the Foot injury from stumbling while descending employer's stairs arose out of employment, although claimant was inattentive and did not stumble due to any particular defect in or condition of the stairs and they were no more dangerous than a typical set of steps; the stairs posed an actual risk of stumbling or falling when traversing them, and the misstep was causally related to the fact that claimant was walking on stairs. I.C.A. § 85.31(1).

16. ERISA PREEMPTION AND COORDINATION OF BENEFITS PURSUANT TO IOWA CODE 513C.

Magellan Health Serv., Inc. v. Highmark Life Ins. Co., 749 N.W.2d 705 (Iowa 2008) (filed May 30, 2008).

(Note: This opinion has been pulled from the bound volume of the Northwest Second because a petition for rehearing is pending.)

Facts: John Doe was diagnosed with leukemia in the 1990's. His medical bills were initially paid through group health insurance coverage provided by his mother Jane Doe's employer, Principal Financial Group. At the same time, John was also covered as a dependent under his father's group insurance plan—the Magellan "90/60 Preferred Provider Option." The Magellan policy was administered by CareFirst of Maryland, Inc. d/b/a CareFirst BlueCross BlueShield (CareFirst). The Magellan policy was issued under a self-funded plan governed by ERISA.

In 1997, Jane left Principal for other employment. She exercised her COBRA rights, and John's medical bills continued to be paid by Principal for eighteen months. After COBRA benefits were exhausted, John continued to be covered as a dependent under his father's insurance plan. Although John was covered by the Magellan policy, Jane was concerned that group plan administrators might deny her son specialized treatment because such care was not "medically necessary." In order to guarantee that benefits would be available for desired care, Jane obtained an individual insurance policy for John from Wellmark. The Wellmark Policy was issued pursuant to Iowa Code chapter 513C, which requires health insurers operating in Iowa to provide a basic or standard level of health insurance coverage to an Iowa resident regardless of the person's health status. The Wellmark Policy became effective on May 1, 1999.

In July 1999, The Iowa Insurance Commissioner promulgated regulations mandating that policies issued pursuant to Iowa Code § 513C.9 shall not

duplicate benefits paid under any other health insurance coverage. It was determined the Wellmark plan was "always secondary" to the Magellan plan. In late 2001, Magellan purchased a stop-loss reinsurance policy with Highmark to cover health care claims for John's leukemia.

A coordination of benefits dispute took place when Magellan's stop loss carrier, Highmark, refused to reimburse Magellan after Magellan submitted a clam to recover the substantial costs it incurred on John's behalf, stating that plan was secondary to the Wellmark policy. On October 3, 2003, Magellan filed a suit against Highmark and Wellmark alleging a breach of its stop-loss policy. Highmark countered that ERISA preempted application of the "always secondary" state regulation and that the Coordination of Benefits language of the Magellan policy rendered the Wellmark policy primarily liable for the claims submitted by John. All parties filed for summary judgment. The district court granted Magellan's motion for summary judgment and denied Highmark's. Defendant appeals district court grant of summary judgment to the plaintiff, which determined that defendant was the primary insurer and thus liable for coverage

Holding: Policies issued pursuant to Iowa Code section 513.9 do not fall within ERISA's preemption provisions. The "always secondary" regulation is not preempted by ERISA and Magellan is the primary insurer. Highmark is required to fulfill the stop-loss policy.

Analysis: In this case, the Court was called upon to determine the legal ramifications of conflicting coordination of benefits provisions in a self-funded welfare benefit plan governed by the Employee Retirement Income Security Act of 1975 (ERISA) and an individual health insurance policy issued pursuant to Iowa Code chapter 513C.

Analysis of the ERISA preemption requires three steps. (1) whether the state statute in question "relates to" an ERISA plan and is therefore within the scope of the preemption clause (2) whether the state statute is nonetheless saved through application of the savings clause (3) where a state statute falls within the scope of the preemption clause but is also within the scope of the savings clause. The Court found Iowa Code chapter 513C and the "always secondary" regulation make no reference to ERISA plans and are not targeted directly and exclusively toward ERISA plans. There is no reason to believe chapter 513C and Iowa Administrative Code rule 191-75.7(4) so clearly touch on the objectives of ERISA that Congress must have understood that this is the type of law that would not survive ERISA.

Although this opinion mentions the possibility of preemption and the possible application of the "savings clause" and "deemer clause," the Court simply holds that Iowa state law "is not within the scope of ERISA's preemption clause" and accordingly the "savings clause and deemer clauses have no application." (quoted language taken from footnote 2.)

NOTE: The U.S. Supreme Court has stated in *FMC v. Holliday*, 498 U.S. 52, 111 S.Ct. 403 (1990), that while state law is not applicable to a self-funded plan itself, it is applicable to an insurer of an ERISA plan concerning the issue of reimbursement

(subrogation on personal injury claims). However, this particular case has extensive negative treatment though it has not been overruled.

17. WORKER'S COMPENSATION BENEFITS AND COBRA

Midwest Ambulance Serv. v. Ruud, 2007 WL 4553349 (Iowa 2008) (filed August 15, 2008).

Facts: After a work-related injury, Ruud continued to have problems with her shoulder. After approximately two years, Rudd was sent to Dr. Geary who refused to provide treatment stating that Ruud's employer was denying worker's compensation liability. Ruud was unable to return to work and exercised her COBRA benefits in order to continue her health coverage under Midwest's group medical plan. During the period of COBRA coverage, Ruud paid the required premiums personally. Ruud filed a workers' compensation claim on September 10, 2003 against Midwest and Midwest's workers' compensation insurer, Combined.

A workers' compensation commissioner held that because Ruud herself paid the premiums for COBRA benefits, her employer is not entitled to credit. Further, he concluded that amounts paid by Ruud's private insurance were attributable to her. Midwest and Combined appealed and the district court affirmed the determination that the employer was not entitled to credit for COBRA benefits paid by Rudd's group health insurer.

Holding: Under Iowa Code section 85.38(2), the employer must contribute in whole or in part to a group insurance plan for the benefit of the claimant in order to be entitled to statutory credit. The commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of the employer.

Analysis: Midwest and Combined argue that under Iowa Code Section 85.38(2), as long as Midwest contributed to "any group plan" it is entitled to credit. It would be irrelevant that Ruud paid the premiums for the continuation of her group health insurance coverage as long as the employer was contributing in some way to the underlying group plan. The Court agreed with Ruud's counter. Midwest's interpretation is contrary to legislative intent because the legislature did not intend an employer to receive credit under Iowa code section 85.38(2) when the employer is not contributing to the premiums of the claimant. Because Midwest and Combined have not proven they have contributed to Ruud's COBRA payments, they cannot prevail.

Section 85.27(1) provides that the employer shall furnish reasonable medical services and supplies for injuries compensable under workers' compensation. Midwest argues Ruud must prove she paid the medical expenses herself in order to receive reimbursement. Ruud state she essentially paid for the medical bills by purchasing private insurance coverage. Because an employer who wholly or partially provides insurance under a group plan is entitled to a credit not simply of the premiums paid, but of the full amount of benefits paid by the group plan for injuries covered by workers' compensation, the reverse should also be true. An employee who pays group health insurance premiums has, in effect, paid for

medical expenses by the group plan and should be paid for past medical expenses independent of employer contribution.

18. WORKERS COMPENSATION BENEFITS AND REDUCING COMMISSIONERS AWARD TO JUDGMENT:

Ayers v. D & N Fence, Inc., 2008 WL 3366322 (Iowa App. 2008) (filed August 13, 2008).

Facts: Clifford Ayers injured his knee while working for D & N Fence Co., Inc. He petitioned for workers' compensation benefits. In pertinent part, the workers' compensation commissioner ordered "that defendants pay all of claimant's expenses under section 85.27 associated with a knee injury and knee replacement surgery." United Fire and Casualty Company rather was the workers' compensation carrier. On judicial review, the district court and the Iowa Supreme Court affirmed the agency decision. *See Ayers v. D & N Fence Co., Inc.,* 731 N.W.2d 11 (Iowa 2007). The Iowa Supreme Court concluded "Ayers was entitled to reimbursement for his medical expenses." Ayers then filed a District Court motion to have the award reduced to judgment. The district court granted the motion, ordering judgment "on behalf of the petitioner, personally and against Defendant, D & N Fence Company, Inc. for $27,129.74 in actual medical expenses and $100 in costs." The court denied a request to reconsider its ruling. United Fire and Casualty appealed the decision as beyond the scope of the District Court's authority under Iowa Code § 86.42.

Holding: A workers' compensation claimant is not entitled to be paid sums for medical and hospital expenses unless there is a specific showing that the claimant himself paid for medical expenses. Because the Petitioner did not directly and personally pay $27,129.74, he was not entitled to judgment in that amount. Reversed and remanded to conform with the commissioner's award.

Analysis: Following the recent precedent of *Rethamel v. Havey*, 679 N.W.2d 626, 629 (Iowa 2004) and *Rethamel v. Havey*, 715 N.W.2d 263, 266 (Iowa 2006) (*Rethamel II*), the Court of Appeals concluded that it was error for the District Court to award judgment personally to Ayers. In this case the commissioner ordered D & N to pay Ayers's medical expenses, but did not specify who was to be paid. In *Rethamel II,* the Iowa Supreme Court addressed this scenario finding that it is only appropriate for the claimant to receive payment for medical expenses if there is a showing that claimant paid for medical expenses. Absent this showing, the District Court erred in awarding the judgment.

-JUDGMENT AND LIMITATION OF ACTION-

19. IOWA CODE SECTION 614.8-THE TOLLING OF THE STATUTE OF LIMITATIONS FOR MINORS IN SOME ACTIONS

Rucker v. Humboldt Cmty. Sch. Dist., 737 N.W.2d 292 (Iowa 2007) (filed Aug. 17, 2007).

Facts: Rucker fell during a band performance and sued the director, the school district and the high school band for negligence. Defendants argued Rucker's claim was

untimely because she was required to file her claim within two years of her injury. Rucker countered Iowa Code Section 614.8 (2005) extended the time to file her claim to one year after her 18th birthday. The district court ruled in favor of the defendants, holding section 614.8 does not apply to claims against municipalities under chapter 670.

Issue: Whether Iowa Code section 614.8, which tolls the statute of limitations for minors in some actions, applies in the present case.

Holding: Iowa Code Chapter 670 governs Tort claims against municipalities and is the exclusive remedy for torts against municipalities and their employees. The applicable statute of limitations is two years. Tolling provision does not apply.

Analysis: Iowa Code Chapter 670 is the sole remedy for torts against municipalities and their employees. 670.5 requires notice be given to the municipality. If the plaintiff does not give timely notice of his claim, then the applicable statute of limitations is found in chapter 614. This requires plaintiff to sue within two years of the date of injury. Ruckers did not give notice and her claim is barred. Further, a tolling provision was not intended for 670.5 by case law.

The legislature has since changed this statute by removing the notice requirement and allowing the tolling provision to apply to tort claims against municipalities occurring after July 1, 2007.

20. WHAT IS REQUIRED IN ORDER TO RECEIVE CONTESTED CASE REVIEW HEARING

Swanson v. Civil Commitment Unit for Sex Offenders, 737 N.W.2d 300 (Iowa 2007) (filed Aug. 17, 2007).

Facts: Swanson was a patient in the Civil Commitment Unit for Sexual Offenders (CCUSO) and was subject of four behavioral reports for rule violations. He appealed three behavioral reports to DHS, claiming his due process rights were violated and requesting the department provide him with a contested case hearing. The administrative law judge issued three dismissals of Swanson's requests and found he was not an aggrieved person under Iowa Administrative Code chapter 441 and did not have authority to determine whether Swanson is being denied due process. The district court affirmed and ruled his due process rights were not violated.

Holding: Swanson is not an aggrieved person for purposes of a contested case review and his procedural due process rights were not violated.

Analysis: The failure of a person to progress in the CCUSO program because of the issuance of a major behavioral report is not an adverse action, but an integral part of the treatment. Swanson argued he was denied access to the courts because he has been denied proper procedure. The court must consider (1) the private interest, (2) the risk of an erroneous deprivation of such interest and the probative value of additional or substituted safeguards and (3) the government's interest.

The court found Swanson does not identify a liberty interest because the handbook does not determine a minimum time the program has to be completed; the length is wholly dependent on the patient's progress. Swanson was allowed numerous ways to access grievance procedures if he is dissatisfied and could take his grievance to the court. The government's interest is high because allowing appeals on every disciplinary report would be too costly for DHS. No additional process is necessary to satisfy Swanson's procedural due process rights under federal and state constitutions.

21. DEFERRED JUDGMENTS V. DEFERRED SENTENCES

State v. Kamber, 737 N.W.2d 297 (Iowa 2007) (filed Aug. 17, 2007).

Facts: Kamber was sentenced to five years imprisonment, suspended, with two years probation after pleading guilty to theft in the second degree. Kamber requested a deferred judgment. The district court determined she was ineligible for this sentencing option because she had been given deferred sentences on two prior theft convictions. Court of Appeals affirmed.

Holding: Section 907.3(1)(c) prohibits a defendant who has previously received two or more deferred judgments from obtaining another, but it does not prohibit a defendant who has only received two or more deferred *sentences* for prior offenses from receiving a deferred judgment.

Analysis: Deferred judgments and sentences are two different things. When the Court considered the statute as a whole, it is apparent that when the legislature intended to include both deferred judgments and deferred sentences, it expressly referred to both. "Similar relief" language does not include deferred sentences unless expressly stated

22. RES JUDICATA AND JUDICIAL ESTOPPEL

Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192 (Iowa 2007) (filed Oct. 12, 2007).

Facts: In a worker's compensation claim, employers admitted liability in an alternate medical care hearing in order to have an independent medical examination. After a second petition, employer amended its answer and disputed liability. The deputy commissioner determined employer was precluded under res judicata from contesting liability. The district court agreed. The court of appeals held the doctrine of issue preclusion did not apply because the issue was not actually raised and litigated in the first proceeding. However, it concluded Tyson was judicially estopped.

Holding: Because the liability issue was admitted in the first proceeding, the issue was not actually raised and litigated. Further, judicial estoppel does not apply as judicial estoppel applies only when the position asserted by a party was material to the holding in the prior litigation.

Analysis: Judicial Estoppel prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding. The issue must have been judicially accepted. Judicial

acceptance is when the previous, inconsistent assertion was material to the holding in the first proceeding. Because the first proceeding dealt with who was administering the examination and not liability, employer's admission was not judicially accepted.

23. RES JUDICATA DOES NOT BAR RELITIGATION OF CLAIMS WHERE THE ISSUE IS IN A DIFFERENT CONTEXT IN PREVIOUS LITIGATION

Hunter v. City of Des Moines Mun. Hous. Auth., 742 N.W.2d 578 (Iowa 2007) (filed Nov. 9, 2007).

Facts: Hunter leased a house from the Des Moines Municipal Housing Agency (DMMHA). The lease allowed DMMHA to terminate the lease if the tenant committed a serious or repeated violation of material terms of the lease. After 12 years it was discovered Clark, an unauthorized individual, had been living there for numerous years. Additionally, Hunter had won failed to report earnings to DMMHA.

Based on this information DMMHA served Hunter a 34 day notice of lease termination. Hunter contested the termination by requesting a grievance hearing. The hearing found Clark was living in the dwelling in violation of the lease and both Clark and Hunter failed to report income to DMMHA. Hunter refused to vacate.

DMMHA initiated a forcible entry and detainer action in state small claims court and won. Hunter appealed the small claims decision to the district court. The Court reversed and dismissed the forcible entry and detainer action because it held DMMHA was required to provide Hunter with notice-to-cure. DMMHA again served Hunter with a notice to terminate within the following 43 days; this also did not have a notice-to-cure option.

Hunter then filed an action against DMMHA for breach of contract and abuse of process; DMMHA filed a counterclaim. Both parties moved for summary judgment. Hunter claimed the district court rulings established her claim that notice-to-cure was required as a matter of law and the parties were precluded from re-litigating the notice-to-cure issue under res judicata.

Holding: Res Judicata does not bar relitigation of claims where the issue is in a different context in previous litigation. Iowa's Landlord and Tenant Act does not require notice-to-cure for month-to-month leases. Administrative hearings are fair opportunities to litigate and may be utilized for res judicata.

Analysis: The breach-of-contract claim by Hunter is premised on the argument that DMMHA was required to provide notice-to-cure. Hunter states the issue is precluded and DMMHA would not be able to deny being required to provide notice. Res Judicata does not apply when the law is being applied in unrelated claims.

When a court has declared a rule of law in deciding a case between two parties, the same parties are not estopped from insisting the law is otherwise in a subsequent action between them. There is a two-step process to determine

when an exception applies. First, a court must determine if an “issue of fact” or an “issue of law” is sought to be re-litigated. Second, whether the “issue of law” is presented “in a successive case that is so unrelated to the prior case that relitigation of the issue is warranted.” The Supreme Court had not previously considered the application of this exception.

In this case, the same legal issue is presented as in the prior case between the parties but in an entirely different context and is not barred by Res Judicata. Iowa’s Uniform Residential Landlord and Tenant Act does not require the landlord to give notice-to-cure for a month-to-month lease. The specific lease terms also do not require a notice-to-cure. Hunters claim for breach of contract must fail.

DMMHA sought summary judgment based on factual findings made in the grievance proceedings by two administrative hearing officers and claims these findings are barred by res judicata and affirmatively establish that Hunter violated the lease. The grievance process complies with due process and affords a tenant a full and fair opportunity to litigate the factual issues and will allow for res judicata. DMMHA is entitled to summary judgment.

24. MOTION TO DISMISS NOT PROPER DUE TO INSUFFICIENT INFORMATION

Turner v. Iowa State Bank & Trust Co. of Fairfield, 743 N.W.2d 1 (Iowa 2007) (filed Dec. 14, 2007).

Facts: Turner brought three claims against the co-trustees. Co-trustees moved for motion to dismiss claiming Turner’s actions were barred because of the statute of limitations and issue preclusion. The court of appeals reversed the district court’s ruling sustaining the motion to dismiss. The co-trustees petitioned for further review.

Holding: Motion to dismiss based on issue preclusion is not appropriate because the facts in the pleadings are not sufficient. Motion to dismiss based on statute of limitations is not proper because the petition does not include enough information to determine the time period began.

Analysis: In determining whether to grant the motion to dismiss, a court views the well-pled facts of the petition in the light most favorable to the plaintiff, resolving any doubts in the plaintiff’s favor. Turner’s petition contained none of the necessary allegations or documents to support the co-trustees position that Turner’s claims are barred by the theory of issue preclusion or claim preclusion.

A defendant may raise the statute of limitations by a motion to dismiss if it is obvious from the uncontroverted facts contained in the petition that an applicable statute of limitations bars the plaintiff’s claim for relief. The petition is not sufficient to show a claim of one for breach of trust and the Court cannot determine the proper statute of limitations on it alone.

25. MEDICAL MALPRACTICE AND DETERMINING THE STATUTE OF LIMITATIONS AND APPROPRIATENESS OF SUMMARY JUDGMENT

Murtha v. Cahalan, 745 N.W.2d 711 (Iowa 2008) (filed Feb. 22, 2008).

Facts: Beginning in the summer of 1997, Murtha discovered a lump on her breast. A mammogram showed no evidence of breast malignancy and a biopsy diagnosed it as non-cancerous. Murtha consulted numerous doctors about it over the years. In June 2002 a biopsy showed breast cancer. Mutha filed suit on September 5, 2003 alleging negligent treatment and care for misdiagnosis of the lump in her breast beginning in 1997.

Issue: Whether the Plaintiff had knowledge, or imputed knowledge, of an injury, i.e., physical or mental harm.

Holding: The triggering event for the statue of limitations could reasonably be within two years and is a fact question for the jury. Summary judgment is not appropriate.

Analysis: The statute of limitations for medical malpractice cases is triggered upon actual or imputed knowledge of both the injury and its cause-in-fact. Knowledge of the wrongfulness of the defendant's conduct, however, is not required to commence the time period.

In medical malpractice cases based on an injury that is not immediately apparent, it is not clear at what stage the ultimate injury actually occurred, nor is the cause of injury always clear. An injury in a negligent misdiagnosis case requires more than a continuing undiagnosed condition. The cause of action is based on not the original detrimental condition but the injury, which later occurs because of the misdiagnosis and failure to treat. The question of when she sustained her injury is still a fact question and summary judgment is not appropriate under these facts.

Determining when the statute of limitations is triggered in a medical malpractice case requires two distinct steps. First, the Plaintiff must have knowledge, or imputed knowledge, of an injury, i.e., physical or mental harm. Second, the Plaintiff must have knowledge, or imputed knowledge, of the cause in fact of the injury.

Rathje v. Mercy Hosp., 745 N.W.2d 443 (Iowa 2008) (filed Feb. 22, 2008).

Facts: On March 19, 1999 Georgia Rathje was prescribed Antabuse by staff at Mercy Hospital. After a week Georgia became sick. The nurse suggested she eat before taking the pill in the future. On April 5, Georgia was admitted with more serious symptoms. Dr. Janda examined Georgia and ordered an upper gastrointestinal test and prescribed medication. Georgia was hospitalized on April 27 and a gastroenterologist believed her condition might be a "drug-induced hepatitis secondary to Antabuse." Georgia was transferred to the University of Iowa Hospitals and received a liver transplant as a result of end-stage liver disease secondary to Antabuse.

April 26, 2001 Georgia and her parents filed a petition against numerous health care providers. Mercy Hospital and Dr. Schroeder claimed a statute-of-limitations defense and moved for summary judgment.

The district court granted summary judgment for the defendants. It found the injury had physically manifested itself prior to April 26, 1999, more than two years before the Rathje's filed suit.

Holding: Although the district court relied on the Supreme Court's line of prior cases in reaching its initial decision, the court concluded that now the statute of limitations does not run until discovery of *both* the injury and its factual cause. Summary judgment is not appropriate because this action is not necessarily barred by the statute of limitations.

Analysis: As originally enacted, the statute of limitations for medical malpractice provided for a two-year period to file a claim but does not designate when it is triggered. The concept of inquiry notice allowed the clock to run only when the plaintiff had the amount of information that would allow a reasonably prudent person to discover the fraud or wrong by making inquiries.

The legislative intent behind the medical malpractice statute of limitations shows it should commence upon action or imputed knowledge of both the injury and its cause-in-fact and it must be enough to put a reasonably diligent person on notice. The district court erred in granting summary judgment for the defendants for the statute of limitations did not run until at the earliest April 27, 1999, the date the gastroenterologist made a diagnosis of the drug-induced hepatitis. A reasonable jury could find Rathje's properly filed within the two-year time period.

26. PRODUCT LIABILITY AND DETERMINING THE STATUTE OF LIMITATIONS

Buechel v. Five Star Quality Care, Inc., 745 N.W.2d 732 (Iowa 2008) (filed March 7, 2008).

Facts: Buechel was found lodged in the wide space between the mattress and the bed rails at Prairie Ridge Care & Rehabilitation. On January 15, 2003 the plaintiffs filed an action against the nursing home alleging negligence and a products liability claim against the unnamed manufacturer of the bed. On September 15, 2003 Sunrise Medical was named as the manufacturer. Plaintiffs did not amend their petition until October 28, 2003, more than a month after the entities were identified.

Sunrise concedes the statute of limitations tolls until the defendant is ascertained but asserts Plaintiff was put on inquiry notice on January 21, 2001. Further, the tolling period ended on September 15, 2003 and Plaintiff had five days to amend. The district court granted Sunrise's summary judgment.

Holding: The claim is barred by the statute-of-limitations because at the time of death Plaintiff was put on inquiry notice to look into all possible elements of the claim.

Analysis: The two-year statute of limitations is tolled in product liability cases against a manufacturer if the manufacturer is unknown. The time period was tolled temporarily by the filing of the petition on January 15, 2003 and began again on September 15, 2003 when the manufacturer was discovered.

A party is placed on inquiry notice when a person gains sufficient knowledge of facts that would put that person on notice of the existence of a problem or potential problems. Plaintiff was put on inquiry notice when it was determined the bed had played a causative role in her death. Plaintiff had until September 21, 2003 to amend complaint.

27. STATUTE OF LIMITATIONS OR STATUTE OF REPOSE EFFECT ON CONTRIBUTION CLAIMS

Estate of Robert Ryan v. Heritage Trails Associates, Inc., 745 N.W.2d 724 (Iowa 2008). (filed March 7, 2008).

Facts: A twenty-seven-year-old nurse tank holding anhydrous ammonia ruptured and seriously injured two workers who were filling the tank. One of the workers eventually died due to his injuries. The injured worker and the estate of the other brought claims against the manufacturer of the anhydrous ammonia, the distributors of the anhydrous, and the company hired by their employer to provide safety training. The manufacturer and distributors of the anhydrous, together with the safety training company, filed contribution claims against the manufacturer of the tank. The manufacturer and distributors of the anhydrous settled their claims with the workers by entering into a stipulated judgment. The trial proceeded on the injured workers' claims against the safety training company and the contribution claims against the tank manufacturer.

The jury returned a verdict in favor of the workers and against the safety training company. It also returned a verdict against the tank manufacturer on the contribution claims. The tank manufacturer appealed contending Iowa Code section 614.1(2A) (2003), Iowa's statute of repose for products liability cases, and section 668.5, Iowa's contribution statute, precluded the court from submitting the contribution claim to the jury.

Holding: 1) statute of repose did not bar contribution claim; statute of repose barred any claim against tank manufacturer by the workers, such that there was no common liability as required for contribution claim; and 3) contribution exception of products liability statute of repose did not eliminate the common liability requirement for a contribution claim. Reversed the district court's judgment against the tank manufacturer, but affirmed the workers' judgment against the safety training company.

Analysis: Because the statute of repose prevents common liability between the manufacturer of the anhydrous, the distributors of the anhydrous, the safety training company, and the tank manufacturer, the contribution claims against the tank manufacturer are precluded as a matter of law.

The first step in applying a statute of limitations to a contribution claim is to determine when the claim accrued; a cause of action for contribution ordinarily

accrues when one tortfeasor has discharged more than that tortfeasor's proportionate share of a common obligation. In determining whether a statute of limitations bars a contribution claim, courts count the time from when the claim accrued to the time the action for contribution was commenced; any action filed past the limitations period is barred.

The repose period for a products liability action not only extinguishes claims that accrued more than 15 years prior to the start of the repose period, but also prevents claims from accruing during the repose period; thus, if a right to contribution would ordinarily accrue during the repose period, the statute of repose prevents it from doing so. I.C.A. § 614.1(2A)(a).

Statute of repose for products liability claims barred workers' action against manufacturer of anhydrous ammonia tank for injuries occurring when the tank ruptured more than 15 years after it was manufactured, and thus anhydrous ammonia manufacturer and distributors did not have a contribution claim against the tank manufacturer, given that tank manufacturer did not have common liability with the anhydrous ammonia manufacturer and distributors. I.C.A. §§ 614.1(2A)(a), 668.5(1).

28. SUMMARY JUDGMENT AND CONTRACTS

Cemen Tech, Inc. v. Three D Industr. L.L.C., 2008 WL 2098038 (Iowa 2008) (filed May 2, 2008).

Facts: Cemen Tech, Inc. (CTI) sued defendants alleging breach of contract, appropriation of trade secrets, unfair competition and breach of fiduciary duty after they exhibited a prototype cement mixer closely resembling CTI's mixer. The district court granted defendant's motion for summary judgment on virtually all of the plaintiff's claims and the Court refused to allow reverse palming off as a basis for its unfair-competition claim because CTI did not specifically mention it in its pleading. Plaintiff appealed.

Holding: Contractual nondisclosure agreement was superseded by a subsequent agreement therefore summary judgment was proper. Individuals cannot be held liable for breach of contract when signing as the representative of a company. A fiduciary relationship cannot be established between a potential buyer and a company or a customer and a company. It is a fact question whether there is a fiduciary relationship between company and its employees.

Analysis: Count I alleged Dean Longnecker and David Enos breached a contractual nondisclosure agreement dated October 25, 1999. The district court concluded a January 6, 2000 confidentiality agreement superseded the previous. The Supreme Court agreed. Signing a contract as a representative does not in effect hold the individual liable for any breach committed by a company. Further, CTI brought the claim against Three D *Industries* and the letter was signed by Three D *Company*. Because these are two distinct entities, corporations cannot be held liable on a contract to which they were not parties.

CTI contends that Three D, Longnecker, Enos, five former employees and Jamie Yelton (a former CTI customer) wrongfully obtained CTI's trade secrets and used them to form a competing business. The evidence was sufficient to generate a fact question on whether the economic value of the information is trade-secret protected. Confidentiality agreements, such as those signed by defendants, may be sign of steps to insure secrecy of information. Further, obtaining information by lawful means does not necessarily dispose of the trade-secret issue. The court found there was sufficient evidence to generate a fact question on the trade-secret issue with respect to the employee-defendants and to Enos and Longnecker, who obtained possible trade-secret information during a potential sale with CTI, but not in relation to Yelton. It was error to enter summary judgment on CTI's trade-secret claim, except as to Yelton.

The district court erred in refusing to allow argument of reverse-palming because all Iowa requires is "notice pleading". A plaintiff is not required to set forth specific legal theories for recovery, only give notice of the incident giving rise to the claim and the general nature of the claim.

The Court affirmed the ruling that Three D Industries, Longnecker and Enos were not in a fiduciary relationship with CTI because their relationship was based on a potential purchase and acting solely for their benefit. Further, Yelton was just a customer and owed no fiduciary duty to CTI. However, the claim against the employee-defendants cannot be disposed of by summary judgment because a reasonable jury could find the relationship is based on trust or confidence reposed by one person in the integrity and fidelity of another.

Pillsbury Co., Inc. v. Wells Dairy, Inc., 752 N.W.2d 430 (Iowa 2008) (filed July 11, 2008).

Facts: Pillsbury and Wells entered a contract and two months later there was an explosion at a Wells plant. In August, Pillsbury joined a venture with Nestle-USA Food Group called Ice Cream Partners, USA (ICP). Pillsbury sent Wells a notice of assignment asserting Pillsbury still wanted remedies from the explosion. In December 2001, Nestle acquired Pillsbury's fifty percent interest in ICP and renamed the former joint venture NICC. Nestle then agreed with Dreyer that it would acquire the assets relinquished by Pillsbury under the 1999 contribution agreement that formed ICP.

In August of 2002, Pillsbury filed its two-count petition against Wells in state court alleging its breach of contract and negligence claims. Wells answered Pillsbury's petition and raised the "force-majeure" clause of the production contract as an affirmative defense. Wells filed two summary judgment motions: one alleging the force-majeure relieved Wells of liability and one alleging Pillsbury was not the real party in interest to pursue the action against Wells. The district court sustained both motions but allowed Pillsbury two weeks to join or substitute the real party in interest of the court would dismiss the lawsuit. Pillsbury attempted to substitute its insurer but Wells resisted and the court entered judgment in favor of Wells.

Holding: Summary judgment is not appropriate on the force-majeure clause because reading the contract in whole and a lack of discussion changing the meaning of

the clause renders it unreasonable that negligence would be covered. Additionally there is an issue of fact on whether Pillsbury assigned its interest to ICP.

Analysis: The determination of who is the real party in interest in this action turns on the interpretation of the contracts assigning Pillsbury's interest to ICP. Because of extrinsic evidence and course of dealings, there is a genuine fact question on whether ICP truly was assigned Pillsbury's interest and it is left as a jury question.

When the clause is read in the context of the entire agreement it is not ambiguous. In its regular definition force-majeure is an event that can be neither anticipated nor controlled, therefore this clause is not intended to shield a party from the normal risks associated with an agreement. Had the parties meant to change the common meaning of the force-majeure clause, the parties should have had a discussion regarding the definition of a force-majeure event. Wells' claimed interpretation that an explosion would be included is not reasonable in light of the common understanding of the clause or the purpose of the contract.

29. STATUTE OF LIMITATIONS ON IMPLIED WARRANTY CLAIMS

Speight v. Walters Development Co, Ltd., 744 N.W.2d 108 (Iowa 2008) (filed Feb. 1, 2008).

Facts: The Speights are the present owners of a home in Clive, Iowa, which was custom-built in 1995 by the defendant, Walters Development Company, Ltd. It was built for use by the original buyers, named Roche. The Roches sold the home to people named Rogers, who in turn sold it to the Speights on August 1, 2000. Sometime after purchasing the home, the Speights noticed water damage and mold. A building inspector determined that the damage was the result of a defectively constructed roof and defective rain gutters. Nothing in the record indicates that any of the owners between the original builder and the Speights had actual or imputed knowledge of these defects.

The Speights filed suit against Walters on May 23, 2005, alleging a breach of implied warranty of workmanlike construction and general negligence in construction of the home. Both the Speights and Walters moved for summary judgment, raising the issue of whether the Speights, as remote purchasers, could pursue a claim for breach of an implied warranty of workmanlike construction. Walters also raised the issue of whether the plaintiffs' claim for breach of implied warranty was barred by Iowa Code section 614.1(4) (2005), the applicable statute of limitations. The district court concluded that, under the present state of the law, the Speights could not maintain an implied-warranty claim, and in any event, such claim would be barred by the statute of limitations. The district court also concluded that the Speights could not bring a general negligence claim because they did not assert an accompanying claim for personal injury-a ruling the plaintiffs do not challenge on appeal.

Holding: 1) subsequent purchasers could bring action to recover against builder under claim of implied warranty of workmanlike construction; 2) five-year limitations period began to run when subsequent purchasers discovered that water damage and mold was result of defectively constructed roof and defective rain gutters;

and 3) five-year limitations period governing claim of breach of implied warranty applicable to sale of goods did not govern purchasers' action. Essentially, a builder's liability for its work will continue past the first buyer and extend to a subsequent purchaser so long as the claim is filed within the applicable statute of limitations.

Analysis: Many jurisdictions do not permit subsequent purchasers to recover for a breach of the implied warranty of workmanlike construction. This holding stems from the lack of a contractual relationship between the subsequent purchaser and the builder-vendor.

However, some jurisdictions do permit subsequent purchasers to recover for a breach of the implied warranty of workmanlike construction. The purpose of the implied warranty of workmanlike construction is to ensure that innocent home buyers are protected from latent defects. This principle is equally applicable to subsequent purchasers who are in no better position to discover those defects than the original purchaser. The lack of privity between the subsequent purchaser and the builder-vendor is not an impediment, in these jurisdictions, to allowing a subsequent purchaser to recover on an implied-warranty claim. Though the implied warranty of workmanlike construction " 'has roots in the execution of the contract for sale,' " it exists independently of the contract by its very nature.

The Court reasoned that latent defects are, by definition, undiscoverable by reasonable inspection. Thus, the subsequent purchaser is in no better position to discover those defects than the original purchaser. It is inequitable to allow an original purchaser to recover while, simultaneously, prohibiting a subsequent purchaser from recovering for latent defects in homes that are the same age.

Furthermore, the statute of limitations did not apply because it was based on discovery of damage and not the sale of goods. Because the plaintiffs could not have gained actual or imputed knowledge of the defect in their home more than five years prior to commencing this action, their suit was not time barred under Iowa Code.

30. APPROPRIATENESS OF SUMMARY JUDGMENT IN AGE DISCRIMINATION CASE AND RETIREMENT PLANS WITH MINIMUM AGE REQUIREMENTS

Weddum v. Davenport Cmty. School Dist., 750 N.W.2d 114 (Iowa 2008) (filed June 6, 2008).

Facts: The Davenport School District denied Weddum early retirement incentives because she did not meet the plan's minimum age requirement. She sued alleging the school district's decision violated the Iowa Civil Rights Act's prohibition on age discrimination. Both parties brought motions for summary judgment and the district court denied both. The Court granted the school district's request for an interlocutory order.

Holding: The school district is entitled to summary judgment as a matter of law because retirement plans with minimum age requirements are allowed.

Analysis: The Court turned to the federal Age Discrimination in Employment Act to help interpret the ICRA. The United State Supreme Court held the ADEA does not prohibit "reverse age discrimination." The ICRA plainly allows early retirement plans with minimum age requirements. The exception does not apply here because the school district did not act with age-related animus toward Weddum. Iowa law clearly gives school districts the discretion for the age upon which employees are eligible for early retirement benefits.

31. CLAIM PRECLUSION AND DECREE OF DISSOLUTION

In re Marriage of Ginsberg, 750 N.W.2d 520 (Iowa 2008) (filed May 16, 2008).

Facts: In divorce proceedings John was ordered to pay the debt the parties owed to Tanya's father and hold her free from liability. The actual amount was not determined and was left "disputed." Tonya eventually repaid the loan herself and sought indemnification from John. The court of appeals held claim preclusion barred Tanya's action and remanded the case to district court to dismiss.

Holding: Claim preclusion does not prevent the enforcement of the decree as it was written.

Analysis: Tanya was not attempting to relitigate who should repay her father for the loan, that issue had been decided. She was asking the district court to enforce the "hold harmless" provision of the decree.

32. ISSUE PRECLUSION

City of Coralville v. Iowa Util. Bd., 750 N.W.2d 523 (Iowa 2008) (filed May 30, 2008).

Facts: The City, relying on a previous decision, directed MidAmerican to place its power lines at a location underground at its own expense. MidAmerican complied but informed City it reserved the right to recover from its customers the costs of relocating the wires.

The City filed a petition in the district court to enjoin MidAmerican from assessing the tariff against the residents. While the action was pending, MidAmerican sought a declaration that IUB had exclusive jurisdiction over the rate and tariffs and requesting that the City could not, through its ordinance, prevent the company from charging its customers for the costs of relocating its equipment. The City intervened in the IUB proceeding on issue preclusion and jurisdiction.

Holding: The city does not have issue preclusion because the issue litigated was different than the one before the board. IUB has jurisdiction over the validity of the tariff, general utility tariffs, cost recovery and cost allocation.

Analysis: The court in *Coralville I* was not asked to decide whether MidAmerican could pass the costs of undergrounding through to its Coralville customers and therefore that issue is not precluded from litigation.

There is no conflict between the tariff and the city's ordinance and therefore IUB has jurisdiction to regulate the rates and services of public utilities.

City of Coralville v. MidAmerican Energy Co., 2008 WL 2222234 (Iowa 2008) (filed May 30, 2008).

See City of Coralville v. IUD brief above.

33. OTHER NOTABLE OPINIONS

Baker v. City of Iowa City, 750 N.W.2d 93 (Iowa 2008) (filed May 30, 2008).

Facts: Baker owns a home in Iowa City and employs a resident manager for the property. In 2003 Baker rejected a female applicant. The applicant filed a complaint with the Iowa City Human Rights Commission, claiming discrimination in employment and housing on the basis of marital status, race and sex. The Commission found probable cause that discrimination had occurred, violating the city ordinance. Prior to the hearing on the discrimination complaint, Baker filed action against the City and the Commission on four counts. Baker filed a motion for partial summary judgment on count I, claiming the city ordinances were facially unconstitutional because they conflicted with state law.

Baker settled with the complaint in the underlying administrative hearing. The district court then ruled all issues raised by the plaintiff were moot by settlement. Baker appealed the district court's dismissal of unconstitutional ordinance claim, the § 1983 claim and the claim defendants exceed their proper authority and acted illegally in conducting the investigation and administrative proceedings. The court of appeals held that with the dismissal of the discrimination complaint, the controversy that precipitated the plaintiff's lawsuit was eliminated.

Holding: Counts I and II are not moot because the underlying claim does not affect the rights of Plaintiff. On count I, the Iowa City ordinance subjecting small employers to its prohibition of unfair employment practices conflicts with state law and exceeds the City's home rule authority. However, adding "marital status" to the list of prohibited practices is not prohibited.

Analysis: A claim will become moot when facts or governing laws change after an action is commenced. The Court ruled count III, in which Baker sought a writ of certiorari, is moot because the relief would have been annulling the proceedings.
The § 1983 claim is not moot because the underlying settlement does not encompass the violation of Baker's civil rights. Count I also remained viable after settlement. Notwithstanding the dismissal, as an Iowa City housing owner and employer, Baker remains constrained by restrictions imposed by the city ordinances.

Baker contends the inclusion of small employers and the prohibition of discrimination based on marital status is inconsistent with chapter 216. City law is not inconsistent unless it is irreconcilable with the state law. The Court determined the legislative intent would be ignored if it were to allow local communities to bar employment discrimination by employers employing four or

less. However, the City is entitled to add “marital status” to the list of discriminatory practices not allowed because it is not inconsistent with state law.

Medicare and Future Medical Expenses in Personal Injury Litigation

Iowa Defense Counsel Association
Annual Meeting
September 19, 2008

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MEDICARE & FUTURE MEDICAL EXPENSES IN PERSONAL INJURY LITIGATION

1) **OVERVIEW OF THE MSP**

   a) In 1981 Congress passed the Medicare Secondary Payer Statute 42 U.S.C. § 1395y(b) ("MSP").

   b) Under the MSP, if a plaintiff/claimant's medical bills have been paid, or "can reasonably be expected" to be paid by worker's compensation insurance, or by automobile or liability insurance, then Medicare becomes the "secondary plan" and the insurer becomes the "primary plan" for the payment of the plaintiff/claimant's medical bills. 42 U.S.C. § 1395y(b)(2)(A)(ii).

   c) "In a nutshell, the MSP declares that, under certain conditions, Medicare will be the secondary rather than primary payer for its insureds. Consequently, Medicare is empowered to recoup from the rightful primary payer (or from the recipient of such payment) if Medicare pays for a service that was, **or should have been**, covered by the primary insurer. *U.S. v. Baxter Intern., Inc.* 345 F.3d 866, 875 (C.A.11 (Ala.) 2003) (emphasis added).

2) **REIMBURSEMENT TO MEDICARE**

   a) **Medicare's authority to make conditional payment**

      i) If an insurer has not paid, or cannot "reasonably be expected" to pay a plaintiff's medical bills, the MSP authorizes Medicare to make the payments and seek reimbursement from the insurer. 42 U.S.C. § 1395y(b)(2)(B)(i).

   b) **Subrogation:** Medicare is "subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan." 42 U.S.C. § 1395y(b)(2)(B)(vi).

   c) **Insurance Company's obligation to Reimburse**

      i) If Medicare pays a plaintiff/claimant's medical bills, it may seek reimbursement from an insurer for such payment by establishing the insurer had a responsibility to pay the medical bills. The insurer's responsibility for payment may be established through a "judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means." 42 U.S.C. § 1395y(b)(2)(B)(ii).

   d) **Action by the United States**

i) In order to recover Medicare payments, the "United States may bring an action against any or all entities that are or were required or responsible…to make payment…under a primary plan." 42 U.S.C. § 1395y(b)(2)(B)(iii).

(1) This recovery includes the right to collect "double damages" against the primary plan. 42 U.S.C. § 1395y(b)(2)(B)(iii).

ii) **Attorney Liability:** The Center for Medicare and Medicaid Services ("CMS") "has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, **attorney**, State agency or private insurer that has received a primary payment." 42 C.F.R. § 411.24(g).

3) **PROTECTING YOU AND THE INSURANCE COMPANY WHEN SETTLING CASES**

a) Because the MSP and the reimbursement requirements apply to future medical bills of a plaintiff/claimant, Medicare must be protected when settling claims. 42 U.S.C. § 1395y(b)(2)(A)(ii).

b) **WORKER'S COMPENSATION SETTLEMENTS AND FUTURE MEDICAL BILLS**

i) While the MSP seems broad enough to already do so, Federal Regulations specifically make Medicare a secondary payer for accident related future medical bills where there has been a commutation of benefits or a compromise settlement. 42 C.F.R. § 411.46(d).

ii) In more recent years, the CMS has issued memoranda as guidelines for determining when worker's compensation settlements need to take Medicare into consideration.

(1) Step No. 1 – Determine whether Medicare must be accounted for with respect to future medical bills.

(a) If the claimant is currently receiving Medicare Benefits, then Medicare must be accounted for.

(b) If the claimant is <u>not</u> currently receiving Medicare Benefits, then Medicare must be accounted for when both of the following conditions are met:

(i) If at the time of settlement, the claimant "has a 'reasonable expectation' of Medicare enrollment within 30 months of the settlement date, **and** the anticipated **total** settlement amount for future medical expenses **and** disability/lost wages over the life or

duration of the settlement agreement is expected to be greater than $250,000." *July 23, 2001 CMS Memorandum.*[1]

(2) Step No. 2 – If Medicare must be accounted for, protect Medicare's past benefit payments through notification and reimbursement, and protect Medicare's future payments through a set-aside and settlement approval.

iii) For detailed discussion of Worker's Compensation and protecting Medicare with set asides, *See,* James M. Voelker, *Medicare Secondary Payer Statute,* Peoria County Bar Association 2006 continuing Legal Education Series – January 21, 2006: http://www.medicareapproval.com/PCBA%201-13-06%20Medicare%20Update.pdf

4) **AUTOMOBILE OR LIABILITY INSURANCE AND FUTURE MEDICAL BILLS**

a) **Primary Payer Under the MSP**

i) As written, the MSP is so broad that a liability insurer seems to become a "primary payer" under the MSP when: (1) the insurer accepts responsibility for payment of a plaintiff's medical bills (including payment of med-pay coverage); (2) the insurer settles the case with the plaintiff and the settlement includes a release of past and future medical bills; and/or (3) if the insurer pays a judgment that includes past or future medical bills of a plaintiff. *See,* 42 U.S.C. § 1395y(b)(2)(B)(i).

b) **Satisfying Medicare's Interest**

i) Unlike worker's compensation, in the tort liability realm, there are no regulations or specific policy memoranda from the CMS to explain how to protect Medicare.[2]

ii) **Suggested Procedures Until CMS Issues Further Guidance**

(1) Step No. 1 – Determine whether Medicare must be accounted for with respect to future medical bills.

(a) If the plaintiff is currently receiving Medicare Benefits, then Medicare must be accounted for with respect to past medical benefits paid.

(2) Step No. 2 - Future medical bills

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[1] *See-* www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/72301Memo.pdf

[2] For a discussion of whether the MSP can be enforced against a liability insurer in the absence of such regulations or memoranda, *See,* Schmidt, *The King Kong Contingent: Should the Medicare Secondary Payer Statute Reach to Future Medical Expenses in Personal Injury Settlements?,* Pitt. L. Rev. 469 (2006) - http://lawreview.law.pitt.edu/issues/68/68.2/Schmidt.pdf

(a) Require plaintiff's counsel to obtain letters from doctors stating there will be no future medical care related to the accident; or

(b) In cases where future medical care is certain to occur, require plaintiff's counsel to obtain information from doctors as to the scope and cost of the future medical care, agree to place enough funds in trust to cover these expenses, and insert the following language in the Release:

Plaintiff's Counsel will not release the foregoing funds from their trust account until (1) Medicare provides instructions on how it wants its future interests under the MSP protected; (2) all parties to this case and their attorneys agree in writing as to what procedures are required to protect Medicare's future interests pursuant to Medicare's issued instructions; and (3) plaintiff and his/her attorneys implement whatever procedures are agreed to for the protection of Medicare's future interests.

5) **RECENT CHANGES IN THE MSP**

a) **Section 111 of S.2499, now Public Law No. 110-173 -** The bill, which President Bush signed on December 29, 2007, amends numerous provisions of the Social Security Act, including portions of the MSP.

b) **Reporting Requirement**

i) Beginning July 1, 2009, Worker's Compensation and Liability Insurers are required to "determine whether a claimant (including an individual whose claim is unresolved) is entitled to" Medicare benefits." 42 U.S.C. § 1395y(b)(8)(A)(i).

ii) If the "claimant is determined to be so entitled" then the insurer must submit the identity of the claimant, and "other information as the Secretary shall specify in order to enable the Secretary to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim." 42 U.S.C. § 1395y(b)(8)(A)(ii).

(1) "This will require that each claimant be required to sign a Social Security form SSA-3288 (Consent to Release Information). This form can be submitted to the Social Security office closest to the claimant's residence with a request for complete benefit eligibility information. Ideally, this should be done at the time the claim is opened and *again* at the time the claim is resolved through judgment, settlement or award. The reason for repeating this procedure is that a claimant who is not eligible for Medicare at the time the claim is opened may become eligible by the time the claim is resolved; and the burden for determining the claimant's Medicare eligibility is on the plan." John J. Campbell, *New Medicare Secondary Payer Reporting Requirements* – The Medicare Set Aside Bulletin.

(2) "Plans will also need to collect identifying information on all claimants when their claims are opened. This would include, at a minimum, the claimant's full name, date of birth, Social Security number, and Medicare HIC number, if applicable." John J. Campbell, *New Medicare Secondary Payer Reporting Requirements* – The Medicare Set Aside Bulletin.

iii) **Time for Reporting:** The specified time for reporting this information has not yet been set, but is to be specified by the Secretary. 42 U.S.C. § 1395y(b)(8)(C).

c) **Enforcement**

i) Any insurer that fails to timely comply with the reporting requirements "shall be subject to a civil money penalty of $1,000 for each day of noncompliance with respect to each claimant." 42 U.S.C. § 1395y(b)(8)(E)(i).

d) Currently, this change in the law does not seem to resolve the lack of guidance for protecting Medicare regarding future medical expenses related to tort liability accidents.

6) **RESOURCES**

The Medicare Secondary Payer Manual:

www.cms.hhs.gov/manuals/downloads/msp105c02.pdf

The Medicare Set Aside Bulletin:

www.jjcelderlaw.com/MMSEAMSABull.htm

CMS Update Link:

https://www.cms.hhs.gov/MandatoryInsRep/

Practical Tips for Using Mock Jury Trials

Iowa Defense Counsel Association
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PRACTICAL TIPS FOR USING JURY RESEARCH: SURVEYS, FOCUS GROUPS, MOCK JURY TRIALS

September 18, 2008

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PRACTICAL TIPS FOR USING JURY RESEARCH: SURVEYS, FOCUS GROUPS, MOCK JURY TRIALS

I. *Overview of Techniques for Jury Research*: Jury research can be described as an umbrella term for various methods of social science research associated with juries. Academic jury research derives from many disciplines including psychology, sociology, communications, and criminal justice. Trial consultation comprises only a small portion of all jury research. Trial consultants offer a broad range of services such as witness evaluation and preparation, change of venue surveys, development of trial exhibits, jury profiles and selection, trial strategy, and post-trial polling of the jury. Our presentation will focus on three techniques: surveys, focus groups, and mock trials. These three techniques are used to address three overriding questions: (1) how will the jury be inclined to view main issues; (2) who has liability; and (3) the scale of the defendant's exposure.

A. *Surveys*: Attitude surveys are a quick and easy way to obtain feedback about a case, and they can be performed at any stage of the litigation process. Surveys typically involve two steps. First, counsel and the consultant prepare a written fact scenario objectively summarizing both sides of the case. Second, the consultant follows up with a phone interview asking each participant his or her opinion about the case based on a prepared list of questions.

B. *Focus Groups*: Focus groups originated in the world of marketing. Like surveys, they can be performed at any stage of the litigation process. In a traditional focus group, a pre-screened group of respondents gathers in the same room. A moderator guides the group through a discussion of issues identified as central to the case. The moderator does so by presenting case summaries and key pieces of evidence and then asks a few pre-prepared questions to initiate an open-ended discussion. Additional techniques include fixed or free association, story-telling, and role-playing. A typical session may involve roughly 10 participants and last 1 to 2 hours.

C. *Mock Trials*: The first researcher-conducted mock trials appeared in the 1970's. A mock trial consists of a one or multiple day session in which participants hear comprehensive and adversarial case presentations. The possibilities are endless, and the presentations might include exhibits, videotaped testimonial excerpts, and even live witnesses. Participants' reaction to the testimony can be either continuously monitored by hand held devices or measured incrementally at each stage of the presentation by responses to a series of written questions. At the conclusion of the presentation, participants are divided into a jury panel or panels and asked to deliberate to a verdict. The participants are then debriefed post-verdict about why they felt the way they did. The entire session is conducted in either rooms with two way mirrors or via closed circuit television so attorneys can

observe the process undetected.[1] Mock trials are typically complete at the completion of discovery within 90 days from the trial date, but they can also be completed earlier in the litigation process such as prior to a mediation.

II. The Dos and Don'ts of Jury Focus Groups or Mock Trials

DO

1. Conceal partisanship.
2. Present balanced case or make the opposition's case stronger than opposition you will face at trial to gain a truer test of your case.
3. Conduct mock trial sufficiently in advance of trial to allow you to adjust tactics based on findings.
4. Make jury composition demographically similar to what your jury will be.
5. Prepare neutral statement of case to extent possible but explain important factual disputes.
6. Include material jury instructions jury will see at trial.
7. Present evidence as you intend to present it at trial, live vs. video witness, etc.
8. Use verdict questions that force discussion of issues you want addressed.
9. Leave deliberating juror's alone, just listen.

DO NOT

1. Rely on single focus group. One is often not enough and may be misleading.
2. Test juror reactions from one venue by using mock juror's from another venue.
3. Let jury know which side has sponsored mock trial.
4. Suggest decisions made are pretend decisions – the impression of reality insures realistic results.

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[1] www.jurysolutions.com/pages/JuryResearch.asp
Http://en.wikipedia.org/wiki/Jury_research
Http://en.wikipedia.org/wiki/Focus_group
Allan J Campo, Applications of Jury Research in Mediation of Personal Injury Litigation

5. Cross exam your own client even as an exercise at risk of damaging or confusing your relationship.

6. Provide focus group new fact after deliberations as they do not incorporate such facts in same way as if heard in the flow of evidence so conclusion may be misleading.[2]

III. Case Studies

A. The Survey Approach
B. Mock Trial on a Beer Budget
C. Mock Trial on a Champaign Budget

IV. Open Forum

V. Appendix of Sample Materials

A. Survey, Case Study #1
B. Mock Trial, Case Study #2
C. Focus Group/Mock Trial, Case Study #3
D. Articles & References

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[2] David Ball, Ph.D., How to Do Your Own Focus Groups, A Guide for Trial Attorneys (NITA 2001)

APPENDIX

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Survey, Case Study #1

Sioux City

TOTAL SURVEYED: 62 (Female 38 / Male 24)

A COMMON WARNING THAT APPEARS ON CHILDRENS' CLOTHING IS: "NOT INTENDED FOR SLEEPWEAR." IN THAT CONTEXT, WHAT DOES THE PHRASE "NOT INTENDED FOR SLEEPWEAR" MEAN TO YOU?

- Might be flammable.
- Isn't fire retardant.
- Shouldn't be slept in / could catch fire.
- Something wrong with it / not flame retardant.
- Not fire proof.
- Not fire proof.
- Doesn't know. If not flame resistant.
- That it's flammable.
- Not flame retardant.
- Not fire proof.
- Not be fire proof.
- Not to sleep in it. Could burn quicker.
- Probably not flame retardant.
- Don't light a match near it, based on questions.
- Probably more flammable.

[9 out of the 15 responses associating the warning with "fire" were provided pursuant to the initial survey form that posed this question following other questions about flammability. When this question was asked first, the number of people answering correctly was greatly reduced.]

- Not to wear to bed.
- Shouldn't wear to bed.
- Doesn't know.
- Can't wear to bed.
- Shouldn't be used for sleepwear.
- Shouldn't be worn to bed.
- Not intended for sleep.
- Not to be worn to bed.
- Child wouldn't wear it to bed.
- Should wear to bed.
- Don't put on for bed.
- Dangerous for sleepwear.
- Should be worn during the day / could get tangled.

- Shouldn't be slept in.
- Shouldn't wear it to sleep in.
- Shouldn't be worn.
- Kids can't sleep in it / there's something wrong.
- Child shouldn't sleep in it.
- Shouldn't be put to bed in it.
- Don't wear at all – children sleep at various times.
- Should not sleep in it.
- Don't send them to bed in it.
- You're not supposed to sleep in it.
- Not pajamas.
- Not to wear at night or naptime.
- Shouldn't be slept in.
- Depends on what it is. Could get tangled up in it.
- Not enough protection. Could choke from rolling around.
- It could be dangerous in some way, i.e., if they roll around.
- Shouldn't wear it to bed for some reason – choke or some hazard.
- Button can come off. Strap – choking.
- Not to use it.
- Shouldn't sleep in it for some reason.
- Wouldn't know.
- Should not be worn to bed.
- PJs like tops and bottoms.
- Shouldn't be slept in.
- Something wrong with it. Doesn't say why.
- Not for PJs.
- Could choke them.
- Not for wearing to bed.
- Shouldn't be slept in.
- Shouldn't be worn / don't know when children are going to sleep.
- Shouldn't be worn to bed.
- Not to sleep in.
- Warning not good / doesn't read labels.

THE FOLLOWING QUESTIONS APPLY TO A CHILD BETWEEN 4 AND 5 YEARS OLD:

ARE CHILDREN LEFT ALONE WITH CANDLES?

Yes 4 (3 / 1)
No 36 (24 / 12)
Comments: "Had a friend whose house burned down because of an unattended candle."

IF A PARENT LEAVES A CHILD ALONE IN A ROOM WITH A CANDLE FOR A FEW SECONDS, DOES THAT MAKE THE PARENT A "BAD" PARENT IN YOUR OPINION?

Yes 7 (4 / 3)
No 33 (23 / 10)
Comments: "Negligent."
"Poor discretion."
"Parent is "bad" if candle is within reach."
"Not bad, but stupid."
"Could happen inadvertently"
"Not necessarily bad but improper parenting skills."
"Forgivable."
"Not taking proper care of the child / something could happen."
"Just absent-minded / not careful."

WOULD YOU LEAVE YOUR CHILD ALONE WITH A LIGHTED CANDLE?

Yes 16 (9 / 7)
No 46 (29 / 17)
Comments: "Not for a long period of time."
"For a few seconds." x 2
"If the candle was out of reach." x 3 x 1

[This was the only question asked all three nights in Sioux City. The prior two questions were not asked in the first night. The wording of the questions changed over time to improve the quality of responses.]

DOES CHILDREN'S CLOTHING PROTECT A CHILD FROM INJURY BY FIRE?

Yes 5 (2 / 3)
No 43 (26 / 17)
Some 4
Doesn't Know 1
Other: "Not unless it's flame retardant."
"It should."
Comments: "It can, if flame retardant."
"Some clothes are more flammable than others."

IS CHILDREN'S CLOTHING FLAME RESISTANT?
Yes 5 (4 / 1)
No 26 (13 / 13)
Some 14 (12 / 2)
Doesn't Know 5 (4 / 1)
Other: "Read label." x 2
Comments: "Other than sleepwear, no."

IF A CHILD WAS WEARING A 100% COTTON DRESS AND THAT DRESS WAS IGNITED BY A CANDLE, HOW LONG WOULD IT TAKE FOR HALF OF THAT DRESS TO BURN ONCE IGNITED?

15 Seconds 29 (18 / 11)
"Cotton goes up really fast" x 2 x 1

30 Seconds 19 (10 / 9)

45 Seconds 5 (3 / 2)

One minute 1

More than one minute 1

Between one and two minutes 1 "Cotton isn't very fast burning"

More than two minutes 1

Doesn't Know 5 (3 / 2)

WOULD YOU EXPECT THE CHILD WEARING THAT DRESS TO EXPERIENCE (circle all that apply):

minor burns 3 (1 / 2) significant scarring 1

major burns 21 (11 / 10) death 1

third degree burns 7 (3 / 4) singed hair

All / Most 25 (20 / 5)

Doesn't Know 3 (1 / 2)

ARE YOU A PARENT?

Yes 51 (31 / 20)
No 9 (5 / 4)
No Response 2

Aggregate

TOTAL SURVEYED: 120
Sioux City 62 / Other 58
Female 85 / Male 35

A COMMON WARNING THAT APPEARS ON CHILDRENS' CLOTHING IS: "NOT INTENDED FOR SLEEPWEAR." IN THAT CONTEXT, WHAT DOES THE PHRASE "NOT INTENDED FOR SLEEPWEAR" MEAN TO YOU?

- 48 (40%) respondents essentially repeated the warning, i.e., "shouldn't sleep in it", "not for bed", "not for pajamas", etc.
- 38 (32%) respondents associated "Not intended for sleepwear" with some kind of flammability risk.
- 15 (13%) respondents incorrectly identified or could not identify the risk, e.g., choking, strangle, chemicals, generally harmful.
- 7 (6%) respondents said the clothing should not be purchases at all because kids can fall asleep at any time.
- 7 (6%) respondents did not know.
- 3 (3%) respondents gave other responses that did not make sense.

[^23 out of the 38 (60%) respondents who associated "Not intended for sleepwear" with "fire" were from the rural areas. The higher awareness of the meaning of the warning in rural areas weighs against the selection of rural jurors. 9 of the 38 were also asked leading questions that probably educated them on the meaning of the warning.]

[^Regardless of rural or Sioux City, leading or non-leading questions, 82 of the 120 (68%) respondents were completely without relevant knowledge of the meaning of "Not intended for sleepwear." This huge variance appears to validate our belief that there is, at the very least, significant confusion regarding the meaning of the phrase "Not intended for sleepwear" and it appears as though this meaning does not convey any helpful information to the majority of consumers.]

THE FOLLOWING QUESTIONS APPLY TO A CHILD BETWEEN 4 AND 5 YEARS OLD:

ARE CHILDREN LEFT ALONE WITH CANDLES?

Yes 15 (15%) (14 / 1)
No 83 (85%) (60 / 23)

[^This question was not asked the first night so the total is less than 120. Hard to draw a firm conclusion from this information. Possible conclusion: People generally believe that children should not and are not left alone with candles. Not a big surprise.]

IF A PARENT LEAVES A CHILD ALONE IN A ROOM WITH A CANDLE FOR A FEW SECONDS, DOES THAT MAKE THE PARENT A "BAD" PARENT IN YOUR OPINION?

Yes 11 (19%) (7 / 4)
No 47 (81%) (35 / 12)

[^Again, this question was not asked every night. Nonetheless, the wide margin evidenced by the responses indicates that although people do not think children should be left alone with candles, they are not likely to harshly judge a parent who does leave a child alone with the candle. Tends to support the idea that the child being left alone with the candle will not bar recovery but may reduce the verdict amount.]

WOULD YOU LEAVE YOUR CHILD ALONE WITH A LIGHTED CANDLE?

Yes 18 (15%) (11 / 7)
No 102 (85%) (74 / 28)

[^Again, this question was not asked every night. The questioners reported that many people hesitated when answering this question, which caused revisions to the survey that would enable respondents to acknowledge that children are left alone with candles without indicting themselves. Nonetheless, 15 percent of the respondents said they do / have left their children alone with candles. This is a significant percentage, especially in light of the overwhelming attitude that such behavior is generally not acceptable.]

[^The most important information obtained from this question is that out of the 18 "yes" respondents, only 2 were from rural areas. It was suspected that rural jurors would be more accepting of risk, but these results do not support that belief. Moreover, the questioners noted that their belief that most of the rural respondents were elderly, and it is common knowledge that people become more risk adverse as they age. Although the sample size is too small to draw any firm conclusions, the response to this question and to the warning question seem to weigh against our selection of rural jurors.]

DOES CHILDREN'S CLOTHING PROTECT A CHILD FROM INJURY BY FIRE?

Yes 7 (6%) (4 / 3)
No 92 (82%) (64 / 28)
Some 9 (8%)
Doesn't Know 3 (3%)

[^On one hand, these responses seem to support defedant's position that "all clothing burns" and thus no clothing "protects" a child from fire. On the other hand, these responses could evidence the general confusion regarding flammability standards for children's clothing. See below.]

IS CHILDREN'S CLOTHING FLAME RESISTANT?

Yes 8 (7%) (7 / 1)
No 60 (56%) (41 / 19)
Some 31 (29%) (24 / 7)
Doesn't Know 8 (7%) (7 / 1)

[^The "best" answer to this question is "some." The higher response rate for "no" is probably the result of people's inclination to be "safe rather than sorry." All of the non-candle related questions tend to indicate a great deal of confusion regarding the flammability standards applicable to children's clothing.]

IF A CHILD WAS WEARING A 100% COTTON DRESS AND THAT DRESS WAS IGNITED BY A CANDLE, HOW LONG WOULD IT TAKE FOR HALF OF THAT DRESS TO BURN ONCE IGNITED?

15 Seconds 57 (48%) (43 / 14)

30 Seconds 37 (31%) (20 / 17)

45 Seconds 13 (11%) (11 / 2)

One minute 4 (2%)

More than one minute 1 (1%)

Between one and two minutes 1 (1%)

More than two minutes 1 (1%)

Doesn't Know 5 (3%) (3 / 2)

[^Contrary to our initial beliefs, the survey seems to indicate that people generally expect that cotton will burn very fast. 94 (78%) respondents thought that half of the dress would burn in 30 seconds or less.]

WOULD YOU EXPECT THE CHILD WEARING THAT DRESS TO EXPERIENCE (circle all that apply):

minor burns 4 (3%) (2 / 2) significant scarring 5 (4%)

major burns 48 (40%) (31 / 17) death 5 (4%) (4 / 1)

third degree burns 12 (10%) (7 / 5) singed hair 1 (1%)

All / Most 41 (34%) (33 / 8)

Doesn't Know 3 (2%) (1 / 2)

[^The survey indicates that most people would expect very serious injuries from a cotton dress starting on fire. 106 (88%) of the respondents stated that the child would experience major burns, third degree burns, death, or all of the above. Note also that 4 of the 5 "death" responses were from rural areas, again indicating the more risk-adverse nature of that population.]

ARE YOU A PARENT?

Yes 101 (84%) (73 / 28)
No 17 (14%) (10 / 7)
No Response 2 (2%)

[^No surprise here. Our jury will be comprised almost entirely of parents.]

Phone Number Called: _____________ City / Town: ______________

Hi – my name is _________________ I'm a student at the University of Minnesota School of Law. Would you be willing to answer a few questions about product safety for children?

Subject is: Female Male

DO YOU HAVE ANY CHILDREN OR GRANDCHILDREN?

Yes No

HOW MANY CHILDREN / GRANDCHILDREN? _________

WHAT ARE THEIR AGES (AGE RANGE)? _____________

The following question concerns a "child" between that age of 4 and 5 years old.

DO YOU THINK IT WOULD BE UNREASONABLY DANGEROUS FOR A PARENT TO REMAIN IN THE HOME BUT TO LEAVE A CHILD ALONE IN A ROOM WITH:

An ignited stove? Yes No
An unignited stove? Yes No
An ignited fireplace? Yes No
An unignited fireplace? Yes No
An ignited candle? Yes No
An unignited candle? Yes No
An ignited space heater? Yes No
An unignited space heater? Yes No

DOES CHILDREN'S CLOTHING PROTECT A CHILD FROM INJURY BY FIRE? Yes No
Other ____

IS CHILDREN'S CLOTHING FLAME RESISTANT? Yes No
Other ____

A COMMON WARNING THAT APPEARS ON CHILDRENS' CLOTHING IS: "NOT INTENDED FOR SLEEPWEAR." IN THAT CONTEXT, WHAT DOES THE PHRASE "NOT INTENDED FOR SLEEPWARE" MEAN TO YOU?

____

____

____

IF A CHILD WAS WEARING A 100% COTTON DRESS AND THAT DRESS WAS IGNITED BY A CANDLE, HOW LONG WOULD IT TAKE FOR HALF OF THAT DRESS TO BURN ONCE IGNITED?

15 Seconds

30 Seconds

45 Seconds

More than one minute

Between one and two mintues

More than two minutes

WOULD YOU EXPECT THE CHILD WEARING THAT DRESS TO EXPERIENCE (circle all that apply):

minor burns

major burns

third degree burns

significant scarring

death

Mock Trial, Case Study #2

VERNON
RESEARCH GROUP

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Qualitative Project Cost Estimate

Date: August 24, 2007
To: Jim Craig
Company: LWC Lawyers
Phone: 319-365-1184
Fax:
E-mail: jcraig@lwclawyers.com

Project topic	Mock Trial	**Methodology**	Mock Trial
Sample Source	VRG	**Start Date**	TBD
Session Location	VRG Facility	***Session Dates on Hold**	TBD
Session Times	5:30-9:30	**Session Length**	4 Hrs
Specifications	Requires Project Confirmation one week prior to Start Date.		
	Recruit 8 participants from Linn County for Mock Trial.		
	Mix gender and age (18-75).		

		Cost Per	Total
****Recruiting**	Recruit 9 for 8 to show	$125/ea	$1,125
Incentives	8 Participants	$125-$150/ea	$1,000-$1,200
*****Facility**	viewing capacity up to 10 observers	$1,500/per Day	$1,500

***Hold:** As a courtesy, we will "hold" a space for your project for a maximum of 3 alternative dates.
If a different client makes a firm commitment for the space, we will contact you.
If we have not heard from you within 24 hours we will release your "hold".
****Recruiting ,** unless otherwise indicated, is based on an average screener length of
5 minutes or 10 questions. Services include confirmation calls, letters, and / or e-mails
*****Facility** includes QA to check in respondents, audio taping, parking,
TV-VCR-DVD in conference room, and beverages for clients and respondents.

Additional Services		
Videorecording Options	½" VHS Stationary - Ceiling Mounted	$60/group
	½" VHS with Operator	$125/hr (min 4 hours)
	DVD Stationary - Ceiling Mounted	**$150/day**
Respondent Meals	Sandwich tray for lunch or early evening	**$15 per respondent; min $90**
Client Meals	Carryout and delivery selections for lunch or dinner	$15 - $40/each
Copies		$.15/each
Faxing		$.50/per pg
Bid Upon Request	Webstreaming available upon request	
Other Requests		

Once we receive the final screener and specs, the estimate may require revision. All costs are +/-10%.
Please notify us when you are ready to book the project and we will send you a formal contract.
We look forward to working with you in the near future. Thanks!

YourJury™ Staging

The VRG facility will be used for this mock jury.

VRG will provide the following:

- ✓ Separate registration for clients and respondents
- ✓ Food and beverage service for clients and respondents
- ✓ Complete audio and video recording, as well as live viewing
- ✓ A pre and post-jury survey instrument
- ✓ One facilitator for fact introduction and jury deliberations
- ✓ The distribution of incentives to respondents and pay-and-sends and the maintenance of cash handling procedures
- ✓ Distribution of all recordings and appropriate reports to LWC

Our anticipation of a sequence of events follows one mock jury, to be held for four hours between 5 and 9pm on October 2nd:

1. 30-minutes prior to first mock jury-Clients check-in
2. 30 minutes prior to mock jury-respondents check-in and are provided food and drink
3. Begin mock jury
4. 20 minutes-Respondents are seated, welcomed and provided with a pre-jury survey
    a. Pay-and-sends are taken care of
    b. Administration and collection of the survey
5. 10 minutes-Hear introduction of case facts
6. 40 minutes-Presentation of plaintiffs exhibits and arguments
7. 40 minutes-Presentation of defendants arguments
8. 10 minutes-Break
9. 100 minutes-Deliberations with facilitator present
10. 15 minutes-Post-jury analysis
11. 5 minutes-Parking lot issues and dismissal

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YourJury™ Recruiting

VRG will design a screener to be used in the recruitment of the 10 respondents. The proposed screener immediately follows this page.

The recruitment of this project will begin as early as September 24 in order to finish in time for the October 2nd mock jury. Each potential respondent will be offered an incentive of $125 to secure their participation in a three hour event.

We will strive to be as representative as possible of the population in Linn County.

The recruitment will begin by utilizing the screener with an internet interface using the contacts we have accumulated through Iowa's Opinion Panel™.

Once it is found that a respondent qualifies, they will be given questions of a psychographic nature to create a better profile for the client to use. VRG will send out a confirmation email to each individual, as well as the placing of a confirmation phone call.

Grids will be produced for the client with pertinent demographic, geographic and psychographic information.

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VERNON

Are you a citizen of the United States?

____Yes
____No [TERMINATE]

Are you a registered voter in the state of Iowa or have a valid state of Iowa driver's license or state-issued ID?

____Yes
____No [TERMINATE]

What County do you reside in?

____ Benton

____ Buchanan

____ Delaware
____ Iowa
____ Jones

____ Johnson

____ Linn

____Other [TERMINATE]

Have you lived in this county for at least one year?

____ Yes
____ No

What is your age?

____Under 18 [TERMINATE]
____18-24
____25-34
____35-44
____45-54
____55-64
____65-71
____72 or older

Are you currently a full-time student?

____Yes
____No

Have you ever attended law school?

____Yes
____No

Have you ever been convicted of a felony?

____Yes [TERMINATE]
____No

Have you been called for jury duty recently and are waiting to serve within the next three months?

____Yes [TERMINATE]
____No

Are you or someone close to you currently involved in a lawsuit or legal matter?

____Yes [TERMINATE]
____No

Have you ever been party to a lawsuit or criminal proceedings, or have you ever sat on a jury?

____ Yes
____ No

Does your personal/religious belief prohibit you from serving on a jury?

____Yes [TERMINATE]
____No

Have you participated in a market research study in the last year or *ever* in a legal research study?

____Yes [TERMINATE]
____No

Do you feel comfortable reading, writing, and understanding English?

____Yes
____No [TERMINATE]

Do you have any physical difficulties that would make it difficult for you to watch video, to read, write or sit in a research session for 2 hours at a time?

____Yes [TERMINATE]
____No

Do you, your close friends, or your family members have any relationship to the following industries?

Media (e.g., journalism, newspaper, television, radio)

____Yes [TERMINATE]

____No

Legal (e.g., law enforcement, lawyers, judges, politicians, legal administrators, court clerks, court reporters)
____Yes [TERMINATE]
____No

Market or Market Research companies
____Yes [TERMINATE]
____No

Have you, your family, or your close friends ever worked for an insurance company?

(If yes) Which one?

Who is your current employer, if any?

What is your spouse's current occupation, if any?

Who is your spouse's current employer, if any?

What was your former occupation, if any?

Who was your former employer, if any?

What was your spouse's former occupation, if any?

Who was your spouse's former employer, if any?

If you are retired or are a homemaker or student, what was your former occupation, if any?

If you are retired or are a homemaker or student, who was your former employer, if any?

For each of the following questions, please indicate your level of agreement or disagreement with each statement. Please respond on a 1 to 10 scale, where 1 is "strongly disagree" and 10 is "strongly agree."

1 Strongly disagree
2 2
3 3
4 4
5 5
6 6
7 7
8 8
9 9
10 Strongly agree

A I prefer working in a team, as opposed to working alone, to accomplish a task
B Life is not fair
C Most of the teenagers I know are responsible and dependable
D People who know me describe me as quiet or shy
E Most big companies try to take advantage of regular people when possible
F I tend to avoid conflict
G It takes me longer than most people to make up my mind about an issue
H These days, it seems like the "deck is stacked" against ordinary men and women

RECORD GENDER:

_____Male
_____Female

What is your marital status?

_____Never married
_____Married
_____Separated
_____Divorced
_____Widowed
_____Other

What is the highest level of education you've completed?

_____Less than high school
_____GED
_____High school
_____Trade school/technical school
_____2-year college degree
_____Bachelor's degree
_____Some graduate study
_____Master's or Doctoral degree

What is your employment status?

_____Full time
_____Part time
_____Retired
_____Unemployed
_____Homemaker
_____Disabled

What is your combined annual household income?

_____Under $15,000
_____$15,000 - $24,999
_____$25,000 - $34,999
_____$35,000 - $49,999
_____$50,000 - $74,999
_____$75,000 - $99,999
_____$100,000 or more

What is your race?

____White/Caucasian (Non-Hispanic)
____Hispanic/Latino or Hispanic Descent
____Black/African American
____Asian/Pacific Islander
____Native American
____Other

I would like to invite you to be part of a 4 hour research study at Vernon Research Group on Thursday, September 27th beginning at 5pm. You would be paid $125 for your time and opinions.

Would you be interested in participating?

____Yes
____No [TERMINATE]

Name:

Phone:

Alternate Phone:

Email:

Address:

City:

County:

ZIP:

The research study on September 27th will take place at Vernon Research Group beginning at 5pm.

Please arrive 15-30 minutes before your scheduled session to register.

Thanks for your time and we'll see you on September 27th.

MODERATOR QUESTIONS

Thanks for the feedback, and we'll make sure the changes are consistent with your requirements.

I'd also like for you to start thinking about the facilitators guide for the jury deliberations. In addition to these questions to consider for the moderator, we need to know what key words and phrases we need to be listening for, so we4 can have the facilitator ask the jurors to expand.

1. Briefly, what was your feeling after the presentation of the facts?

2. How did you feel after the plaintiff/defendant presented their case?

3. Do you recall anything in anyone's testimony that stands, and if so, how?

4. What was the best/worst argument you heard in favor of the plaintiff/defendant and why?

5. Do you recall a specific exhibit that influenced your thinking?

6. If you were to cast a ballot in a jury room at this point, what ballot would you cast and why?

7. How do you feel about teenaged drivers, in general?

8. (If they have the chance to meet her) How do you feel about the defendant after having seen her and hearing her testimony?

Some questions to think about…Remember, you'll have just over an hour-and-a-half to get all these questions answered. If you have others that you'd like to ask, let me now and we can include them in the guide. Also, you can send notes into the facilitator with specific questions to ask the entire jury, or specifically to one juror.

CASE SPECIFIC ISSUES TO EXPLORE

1. Is Defendant at fault, why?

   A. How important is the fatigue factor?

   B. How important is swerve?

   C. How important is speed?

2. If Defendant at fault, you feel excused by sudden emergency instruction?

3. Does fact three 18 year old girls were allowed to drive to California alone on spring break affect your findings of fault?

4. Do you accord Plaintiff comparative fault for either:

   A. Being an unrestrained passenger in the front seat?

   B. Being part of a joint enterprise to travel all night from California to Cedar Rapids?

5. Agree "Don't Veer for Deer"?

   A. What would you do?

Focus Group/Mock Trial, Case Study #3

DRAFT AGENDA
3 DAY MOCK TRIAL

DAY 1

7:00 - 9:15	Jurors arrive, sign in, re-screening, background questionnaires; training in use of audience response device
9:15 - 9:45	Plaintiff Opening Statement
9:45 - 10:15	Defendant Opening Statement
10:15 - 10:30	Brief measures
10:30 - 10:45	15 minute Break
10:45 - 11:15	Defendant/Counterclaim Plaintiff Opening Statement
11:15 - 11:45	Plaintiff/Counterclaim Defendant Opening Statement
11:45 - 12:15	Third Party Defendant Opening Statement
12:15 - 12:45	Measures
12:45 - 1:45	Lunch
1:45 - 5:00	Plaintiff Evidence (Combined - 3 hours) plus 15 minute break at mid-point
5:00 - 5:15	Post Plaintiff Measures; Confidentiality Admonition and Dismiss Panelists

DAY 2

8:00 - 8:30	Jurors arrive, sign in, etc.
8:30 - 11:45	Defendant Evidence (Combined - 3 hours) plus 15 minute break at mid-point
12:00 - 1:00	Lunch
1:00 - 2:00	Complete Defendant Evidence (1 hour)
2:00 - 2:15	Post Defendant Measures
2:15 - 3:00	Third Party Defendant Evidence (45 min)
3:00 - 3:30	Post Third Party Defendant Measures plus 15 minute break
3:30 - 4:30	Plaintiff Rebuttal Evidence (1 hour)
4:30 - 4:45	Final Plaintiff Measures, Confidentiality Admonition and Dismiss Jurors

DAY 3

7:00 - 8:30	Jurors arrive, sign in, etc.
8:30 - 9:00	Plaintiff Closing
9:00 - 9:30	Defendant Closing
9:30 - 9:45	Brief measures
9:45 - 10:00	15 minute Break
10:00 - 10:30	Defendant/Counterclaim Plaintiff Closing
10:30 - 11:00	Plaintiff/Counterclaim Defendant Closing
11:00 - 11:30	Third Party Defendant Closing
11:30 - 11:45	Plaintiff Rebuttal
11:45 - 12:30	Post-presentation measures, personal verdicts
12:30 - 1:30	Lunch
1:30 - 2:00	Instructions, assignments to juries, move to deliberation rooms
2:00 - 4:00	Deliberations
4:00 - 4:15	Break
4:15 - 5:30	Debrief juries, Confidentiality Admonition and Dismiss jurors for the day

RESPONSES TO OPEN ENDED QUESTIONS:

What is the strongest evidence in favor of Defendant's case?

What question would you want to ask the lawyer for Defendants?

What is the strongest evidence in favor of Third Party Defendant's case?

What question would you want to ask the lawyer for Third Party Defendants?

What is the strongest evidence in favor of Plaintiff's case?

What question would you want to ask the lawyer for Plaintiff?

What do you think about Plaintiff bringing Third Party Defendant into this lawsuit?

What is the strongest evidence in favor of Plaintiff's case?

What question would you want to ask the lawyer for Plaintiff?

What is the strongest evidence in favor of Defendant's case?

What question would you want to ask the lawyer for Defendant's?

What is the strongest evidence in favor of Third Party Defendant's case?

What question would you want to ask the lawyer for Third Party Defendant?

Describe briefly your thoughts on the testimony of the independent witnesses.

Describe briefly your thoughts on the burn tests conducted by Defendants.

Describe your thoughts on the testing conducted by Plaintiff/Defendant.

How would you summarize this case?

Articles & References

DECISION•POINTS

LITIGATION LIBRARY

FAQ: Frequently Asked Questions About Jury Research

"WHEREAS LAWYERS ARE TRAINED TO THINK LEGALLY – JURORS TEND TO USE THEIR EXPERIENCES TO UNDERSTAND CASES."

Following are some of the most frequently asked questions about jury research:

WHAT IS JURY RESEARCH?

Jury research is the study of the behavior of jurors. The study of jury attitudes and decision making in the world of litigation (versus the academic study of jurors) involves studying the responses of people in a particular venue or geographic location who represent potential actual jurors. These individuals, known as mock jurors or surrogate jurors, will either be surveyed by telephone (large samples for quantitative research) or actually hear summary versions of a case and render verdicts (small samples for qualitative research). The idea is to be able to analyze the jurors' predispositions toward the case, as well as to understand their reactions to the actual evidence and themes of the case.

WHAT DO ALL THESE DIFFERENT NAMES MEAN – MOCK TRIAL, FOCUS GROUP, ETC.?

The term "focus group" comes from the world of marketing where focus groups have been used to test markets for various products for years. A focus group involves testing opening presentations in front of mock jurors who deliberate to a verdict and/or participate in a facilitated discussion. The term "mock trial" is often used interchangeably with "focus groups," but a mock trial may alternatively be short hand for a summary trial or trial simulation, (in which openings, closings, and witnesses are tested in front of mock jurors). As noted above, caution is required because these terms are used differently by different companies or consultants. We have chosen to define our research projects by what we want to accomplish, such as Solution Generating Research, Strategy Development Research, and Trial Simulation, which then defines the rationale, the stimuli that will be used, the methods of measurement, and the length and complexity of the exercise.

WHY DO I NEED A JURY CONSULTANT TO DO RESEARCH – CAN'T I SET IT UP MYSELF?

There are four main reasons you should always hire an experienced jury consultant when you consider this research. 1) Jury research is more than just logistics. For example, market research firms are not geared for the specific needs of litigation research (issues of venue sampling, confidentiality, etc.), and thus the wrong people could end up in your "juries." 2) As trial consultants, we know how to analyze the results. We have observed and studied thousands of mock jurors in hundreds of venues around the country. We can use our knowledge about how jurors respond to intellectual property, commercial, product liability, personal injury, antitrust, and employment cases in analyzing your case. 3) Because we have studied research methodology we are able to understand the threats to the validity of the research and various limitations of the findings. 4) We bring something different to your analysis. Lawyers are trained to think legally—jurors tend to use their experiences to understand cases. You need someone who can think like a juror and analyze jurors' responses. We are psychologists, business professionals and communication specialists who will analyze your case and provide a much needed objective perspective, one based on the thousands of jurors we have watched deliberate.

WHERE DO YOU GET THE "JURORS"?

The jurors are recruited, based on our specifications, through sub-contracted market research companies, where we will often hold our research as well. They will assemble mock jurors by cold calling and relying on their database of potential market research participants. Though many jury consulting companies use newspaper ads to recruit, we find this method lacks the guarantee of an appropriate matching sample and the confidence that you will be able to maintain confidentiality. We make sure to screen carefully to make sure that no juror will know about your client or the research case.

BUT MOCK JURORS ARE THE SAME AS REAL JURORS, RIGHT?

They absolutely are! We can tell you that the most common feedback that we receive from attorneys who have tried cases and talked to their jurors afterwards, and from our own extensive post-trial interviews, is that the jurors said the same things regarding the actual case as the mock jurors did.

The mock jurors we recruit will react to the case in the ways "typical jurors" will with only two exceptions. Mock jurors are often privy to less information because they have received only a summary of the case and thus may have limited feedback for the attorneys. And, of course, they are individuals, and no one can predict the exact individuals who will be chosen as jurors, or predict how the group dynamic that will ensue in the jury room will affect the outcome of the case.

WHAT IF GETTING A READ ON MY WITNESSES IS IMPORTANT TO ME?

In this case, a research project that includes the evaluation of witnesses could be designed. For example, a Trial Simulation could provide jurors with openings, video clips of witnesses (or live witnesses) and closing statements to get the real feel of the trial. Or, a research project designed to evaluate only witnesses could be set up.

WHAT TECHNOLOGY IS AVAILABLE TO HELP ME UNDERSTAND THE JURY DECISION-MAKING PROCESS?

Our research methodology, Moment-to-Moment™ is an unique computer-based measurement device that allows you to watch on screen as jurors rate opening statements or witnesses with hand held scoring devices that look like simple calculators. Instantaneous measurement of reactions as well on-site data collection and generation is possible using this technology. While this is, in some ways, different from the actual trial, we find that it is the one important option available in a research setting to really get into the heads of the jurors as they are processing the information presented to them.

WHAT PERCENTAGE OF THE TIME DOES YOUR MOCK TRIAL PREDICT THE ACTUAL TRIAL OUTCOME?

It is not possible to correlate the mock jurors' assessments and the trial outcome for two basic reasons:

1. If jurors have disliked the case as presented we make recommendations for improving the strengths and eliminating the weak points of the case. As such, a "negative" outcome in a mock trial often results in a positive outcome at trial.
2. Many cases do not go to trial. If a negative outcome occurs at the mock trial, lawyers will sometimes re-evaluate the settlement value of a case. The research can enable the attorney to be more confident about the possibility of winning a case (and thus approaching settlement with different expectations) or more soberly realistic about the chance of losing (and thus decide to change a settlement demand or increase an offer).

Thus, despite the obvious research value, there is no ability to correlate research outcome with trial outcome. However, we can say with confidence that our research is predictive of typical juror responses. As mentioned above, we verify this through post-trial interviews with actual trial jurors, and through anecdotal evidence from clients.

BUT I NEED A STATISTICAL ANALYSIS OF THE VENUE—WHAT IS THE RIGHT RESEARCH FOR ME?

The more you need a scientific statistical analysis, the more people you need to survey. Multiple group research or a telephone Community Attitude Survey may be more appropriate for this need. Damage estimates, assessment of the venue regarding a prediction of various verdict outcomes or correlation between demographics and potential verdict response are all more appropriately determined by telephone sample of 200 to 400 people or more. We have skill and experience in conducting these surveys. We use a national survey house with all of the appropriate technology to pinpoint the appropriate sample we have designed for you. The surveys generally last ten to twenty minutes – and yes, people like jurors do answer the phone and complete the surveys. The questions can include general questions about relevant attitudes, demographics, and even case specific questions.

MY CLIENTS SAY A RESEARCH EXERCISE IS NOT WORTH THE EXPENSE—HOW CAN I PERSUADE THEM THAT IT'S WORTH DOING?

"Once you've done jury research on a case you'll never want to go to trial again without doing research," says one of our repeat attorney clients. The value of the research often cannot be appreciated unless you've seen how powerful it is in helping to shape the case based on potential juror views. We have saved millions of dollars in costs since cases frequently settle more quickly or for a different amount of money than before the research. But in fact, the value of utilizing juror consultants or jury research is often best recognized when a consultant was not called and the venue was incorrectly assessed or good themes were not communicated at the right level for the jury. While cost is always a litigation concern, what is the cost to your client of not knowing how a future jury will perceive your case?

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Q: What is the primary value of mock jury research?

Pre-trial jury research or mock trial research has become a frequent pre-litigation tool during the last 20 years. Surrogate jurors from the venue or a matching surrogate venue are brought together to hear summary presentations from both positions (usually what we call an opening, but with argument). The mock jurors see portions of expert reports, hear and/or see deposition testimony, and view demonstratives that highlight counsel's opposing arguments of what the facts actually show. Jurors are then typically broken out into multiple "deliberation groups" to debate the merits of the case as separate juries.

What do you see as the primary value to be drawn from conducting mock jury research (where anywhere from 2-4 groups of jurors deliberate over the adversarial summary presentations made by trial counsel)? Would you say the primary value is in:

A. Gauging the likelihood of prevailing on liability – i.e. do we win or do we lose?

B. Testing of possible themes or storylines – i.e. identifying what jurors accept and don't accept as themes for the case.

C. Gauging the likely range of any damages a jury in this venue might award – i.e. how much is the case worth?

D. Establishing a profile of your worst juror for the case – i.e. what juror characteristics are associated with those who just can't be fair to your client and your case themes/story?

Commentary:

Most of those responding chose the correct answer (B, thematic testing and development), although we've seen many lawyers fall into the other answer categories when present at surrogate jury research efforts. That is, it is human nature to take what you hear and see at jury deliberation research sessions and try to gauge the chances of winning, the likely damage award, and the type of juror to strike.

But small group jury exercises should truly be considered qualitative research – research that explores various thematic possibilities to gauge the reaction of jury eligible people.

Although the power of experimental research does increase with more respondents, the relatively low numbers used in jury deliberation exercises make each of the other choices above a suspect goal (even with 4 panels of 12 mock jurors):

> Choice A: Did we win? If jurors deliberate on their own (without a moderator), one or two strong jurors can easily push the "verdict" in the direction they want. Winning or losing is not a true measure of the merits of the case, and small group research should not in and of itself be considered predictive of the likely outcome at trial. You actually learn more when testing your worst case scenario, and jurors help you identify the weakest points in your case.
>
> Choice B: What is the case worth in the venue? On damages, surrogate jurors tend to gravitate towards the "anchor points" they hear in the presentation(s). We find that the pattern of individual reactions to the damages claimed is probably more valuable to examine than the actual group votes. Again, the opinions expressed by a few vocal jurors can easily drive the "group" number in one direction or another. Measures gauging anger towards the parties and jurors' level of commitment to their positions are just as likely to predict the potential for damages as the actual number selected by each of the mock jury groups.
>
> Choice D: Who should I be looking to strike? The fact that 2 of 3 older men in a sample of 24 jurors reacted strongly against your client is not a reliable reason to strike all older men at

trial. Although there are times when an overwhelming response by a particular subtype of juror can be considered a good indicator for jury selection (e.g., 10 of 12 women vote the same way), even then, the limited statistical power of small group research dictates that the pattern observed could be an artifact, not a fact.

So if the sample is too small to rely on for extrapolating the chances of winning, the likely award, or the type of juror to strike, why should you rely on the way the surrogate jurors react to your themes?

The answer lies in the interpretation of the juror reactions to your thematic presentations. The feedback provided by research jurors – even in small samples – provides clues into how ordinary people will react to your "story." It is not so much the quantity of those jurors who agree or disagree with you that is important, but instead, the types of arguments they use to find holes in your case and to explain, in their eyes, "what really happened."

The manner in which surrogate jurors discuss the case can provide invaluable insight into alternative ways to package your message. Experienced lawyers (and consultants) can often take an idea expressed by a single juror and expand it into the cornerstone of a compelling argument for use at trial.

The ability to parse out what is working and not working in a case makes small group jury exercises as much about the skill and experience of those conducting the research as it is about the raw "data" collected (e.g., the votes).

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Zagnoli McEvoy Foley LLC
Experts in Litigation Communication

Jury Research and Selection

When you enter the courtroom, do you know what your jury is thinking or what they want to hear? A whole host of subjects critical to the success of your case can be influenced by the unexpressed and underlying opinions, perceptions and biases of your jury. At ZMF, we use a variety of mock jury exercises in jury research, including focus groups and mock trials. In every project, ZMF adheres to the highest standards of social science research, and to the standards and guidelines set forth by the American Society of Trial Consultants.

Do you know what your jury is thinking or what they want to hear?

Discovery Focus Group
These small, simple, low-key exercises provide feedback at any stage of litigation. Often they are used before cases are even filed or are still in their infancy to help determine what direction a case should go while venue and discovery can still be influenced. Clients also find them useful when they want reactions to a single witness or an isolated question. These focus groups require no formal presentation and little fanfare. They are therefore a good choice in sparsely populated venues, and are a significant but modest tool that most budgets can afford.

Issues Focus Group
There are many reasons not to include lawyer presentations in mock jury exercises and this is the tool that provides that methodology. Multi-defendant cases, large trial teams, the need to reduce issues at trial are three instances when the information we want to test is more important than the messenger. We combine our experience and creativity with your knowledge of the facts to write scripts that are read to mock jury participants. Discussion is encouraged along the way to deliberate the evidence, arguments and demonstratives giving us insight into their doubts, interests and questions about the specific issues in the case.

Trial Preparation Focus Group Mock Trial
Often called a mock trial, this exercise allows you to conduct an adversarial attorney presentation of each side of the case to specifically test the themes, evidence and arguments of both sides. Add visuals and witness video to increase credibility or to add weight to an attack. ZMF prides itself in delivering the best solutions of any consultants in the industry to guide you in your development of trial strategy, witness preparation, jury selection, case story and themes.

Research Enhancement Tools
ZMF Webcast offers a convenient, real-time, low-cost solution for participating and viewing jury research projects without

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leaving your desk. With this service, your focus group, mock trial or mock arbitration can be viewed using online streaming video feeds delivered straight to your computer, dramatically reducing travel-related costs and providing the opportunity for more key individuals involved with your project to observe the exercise. Featuring secure access to simultaneous live video and an easy-to-use chat room interface, all parties can interact with the proceedings as they progress — all without having to book a hotel or sit on a plane.

Moment-to-Moment Audience Response
What moves your jury? Do they respond better to the photographic evidence or an eyewitness account? The argument about intention or the one about inattention and neglect? With ZMF's Moment-to-Moment Audience Response, mock jury participants use hand-held dials to express immediate reactions to your most important material, such as opening statements, closing arguments and expert testimony. Responses are instantly presented for real-time viewing and are saved for follow-up analysis.

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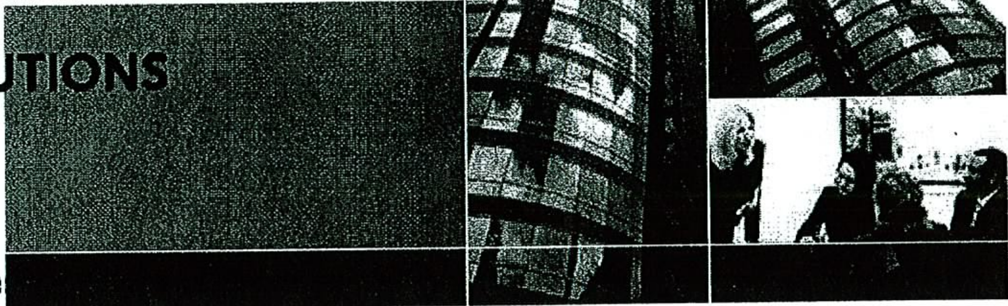

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Dear Carolyn, just a brief note to express our sincere appreciation for helping us achieve the nearly $11 million verdict in Nick's case. You were the first person we wanted to tell about the verdict because we felt you played such a great part in our success. Your expert guidance while selecting the jury, your perceptive recommendations during our pre-trial preparation and your all-around "good counsel" were invaluable. Pat and I made a decision a long time ago never to go to trial without you by our side! Thanks again for everything!

Susan B. Fellman Esq. and Patricia Breuninger, Esq., Breuninger & Fellman, Scotch Plains, NJ

KNOW WHAT MATTERS BEFORE TRIAL, NOT AFTER

*We conduct **mock trials, focus groups** and **attitude surveys** for lawyers. All of these services are described below.*

At Jury Solutions, LLC, we help lawyers when they call on the eve of trial, helping them accurately and scientifically assess their true chances of winning or losing. But you don't have to wait until the eve of trial. We've been helping lawyers earlier and earlier in the litigation process because jury research is far more effective and cost-efficient when done early on. Lay-person assessments can provide valuable feedback before the first deposition is taken. In fact, the best way to use jury research is as a tool to plan out complaints, counter-claims and answers; determining the subject matter of *in limine* motions; identifying the most important witnesses to depose; and planning out your overall litigation strategy.

ATTITUDE SURVEYS:

[Top]
An Attitude Survey is an easy way to get quick and reliable feedback about a case. It is a tool that can be used at any point during the litigation life cycle, such as before taking on a new client, before mediation and before a mock trial and/or a real trial.

There are two steps to a survey. We devise a simple written fact scenario that summarizes both sides of a lawsuit. The summary outlines each side's legal claim with sufficient detail so that jurors can form an opinion. We design summaries that have sufficient detail but can be read by a mock juror in about 20 minutes. Then we follow up with an in-depth phone interview, asking each juror-participant his or her opinion about the case.

Click here to read what other attorneys say about attitude surveys

How are survey results used?
Here's an example: Say a plaintiff's lawyer has taken on a case and has not yet invested too much time or money litigating the case. An opportunity arises for mediation and settlement. This

is the plaintiff's first chance to convince the other side of case value and jury appeal. But more and more, mediators and lawyers aren't interested in what their opponent thinks: They want to see concrete and objective data. An Attitude Survey allows a litigant to do just that by demonstrating, in an organized and empirical way, what real lay persons think about the case.

Compare to the alternative:
Traditionally, lawyers have turned to jury verdict research to learn what certain claims are supposedly worth in certain geographical areas. There is a major drawback to such an approach: Jury verdict research is simply too blunt of an instrument. Knowing a verdict amount for a type of injury or claim reveals nothing about the underlying reasons that explain why and how a jury arrived at a particular number.

Verdict amounts are never driven by mere injury alone. For example, in a personal injury case, a claim derives value, not only from the plaintiff's injury (or defendant's culpability) but from the plaintiff's income, vocation, culpability, and post-injury behavior. These are details that can't be tested from a generic data base of verdict results but they can be tested in an Attitude Survey.

Advantages: Attitude Surveys are extremely quick and cost-effective, taking very little attorney time and money, and giving litigants a quick reality check about the "jury appeal" of their case. It also gives litigants deeper insight early on to flag potential problems before they mushroom into fatal flaws during discovery. Finally, if litigants belatedly realize they need objective feedback and they are on the eve of trial, surveys can give them quick insight into their strengths and weaknesses so settlement opportunities can be more realistically assessed.

FOCUS GROUPS

Focus groups function more like brainstorming sessions and jurors tell us what they think, and what information is most important to them and why. These sessions are much more informal than mock trials and take much less time to prepare and facilitate. Jurors still hear case summaries, view critical pieces of evidence and respond to individual questionnaires and group discussions.

Focus groups can be easily done at any stage of the litigation process but to reap the greatest benefits, they should be done early on, before the first deposition is taken.

Advantages: The greatest advantage to an early focus group is that it will unearth problems that are lurking in your case - problems that will inevitably rear their ugly heads when it might

be too late to fix them. Lawyers sometimes think that jurors' reactions come out of left field but they don't. Focus groups will tell you exactly where jurors' reactions are coming from, right from the getgo. Knowing this information early on will place you and your client on the same page, allowing you to maximize your goals during the Discovery process and helping you to forge realistic goals and strategies - not just on the eve of trial, but at every stage of the litigation process.

Using focus groups to prepare a written voir dire questionnaire: In every high profile case, written questionnaires are suggested to the court. (See Jury Selection: Using Written Questionnaires). However, questions and answers are of no use if you don't understand the significance of jurors' answers. We always conduct mock trials in a way so that we are prepared for jury selection. However, some clients don't have the time or desire to conduct a mock trial. In that case, a pre-trial focus group can be a quick and economical way to gain critical knowledge before jury selection.

For example, in a product liability suit, a written questionnaire (with no back-up research) might reveal a juror's belief that the product in question is dangerous. Plaintiff's attorneys might see that as a plus. But a focus group might reveal that jurors who believe the product is dangerous also believe that the user was at fault, for not recognizing obvious dangers. The point is, there is no strategic advantage to knowing a juror's opinion if you don't know whether that opinion will help or hurt your cause.

MOCK TRIALS:
A mock trial is the most efficient and reliable way to synthesize a complex fact pattern so that it can be easily understood by lay persons. It reveals transcendent strengths and weaknesses that unify a diverse group of jurors, no matter what their differences in background. This is of paramount importance because, as experienced trial attorneys know, when case outcome depends on the "ideal jury," chances are, that case is destined to lose.

More specifically, mock trials reveal:

- Which pieces of evidence are critical to jurors and why;
- The interplay of different legal issues and alternative legal theories, as well as the dominance of one issue over others;
- A realistic sense of case value and exposure;
- Jurors' reactions to key witnesses; and
- The likelihood of your client being able to win or lose after an actual trial.

For all of these reasons, mock trial results can also bring about the best possible settlement. If the case cannot be settled, mock trial results can be used to prepare for jury selection. All of our

projects are designed so we can discern connections between a mock juror's verdict and his or her particular background (demographics, attitudes and experiences). Lawyers gain a distinct advantage during voir dire If we learn during the mock trial that the best or worst jurors shared certain characteristics in common. This information can later be used during the actual jury selection, to shape voir dire questions and to also determine whether a prospective juror is apt to favor one side over the other.

Lawyers who succeed after a mock trial often report that they never felt so confident entering the courtroom because they truly knew what they were up against.

Good candidates for mock trials have some of the following features:

High-stakes: If the client and representing lawyer feel that they can easily move on after a negative outcome, then the stakes probably aren't that high.

High-cost: In no other profession do people spend so much time and money on a single venture without first researching the likely pay-off. When it comes to complex litigation, this happens all the time. For these high-cost cases, financial risks can be reduced when a mock trial is included in the litigation budget. At Jury Solutions, research projects typically cost 1-2% of what a litigant stands to gain or lose.

Complex: When a case is a quagmire, lawyers often think a mock trial can't do it justice. The fact is, these cases benefit the most. The mock trial format requires lawyers to tell their story concisely. Because research shows that jurors inevitably simplify complicated stories, it pays to know the simple answer well in advance of trial.

Difficult or unrealistic client: This is a litigant who resists his lawyer's recommendations, cannot see how his behavior relates to his legal troubles, distrusts anyone who disagrees with him and is insulted by the prospect of settling, etc. Sometimes these clients are hopeless but sometimes, a mock trial can open their eyes.

HOW THE MOCK TRIAL PROCESS WORKS

A mock trial is typically a one-day research session in which mock jurors hear comprehensive, adversarial case presentations. The presentations include exhibits and videotaped testimonial excerpts when possible. We work with our clients to develop case presentations that are equally strong and balanced. At each critical juncture (after each side of the case, jury instructions and before deliberating) jurors respond to a series of comprehensive written questionnaires which reveal

every juror's opinion about each key fact and issue presented to them. Ultimately, the questionnaire responses provide a blueprint of case strengths and weaknesses. After the questionnaires are completed, jurors are divided into panels and deliberate to a verdict. The entire research session is held in rooms with two-way mirrors or with closed-circuit monitoring so attorneys can observe the jury's deliberations undetected. After a verdict is reached, jurors are debriefed about why they felt the way that they did.

For even the most experienced trial lawyers, this is a fascinating experience. Not only is it instructional, but it can be downright inspirational to see mock jurors collectively use their personal experience to simplify complex issues. Seeing jurors in action helps attorneys overcome limiting stereotypes. For example, in a gender discrimination mock trial, the plaintiff's attorney swore he would never seat an accountant on his jury. His eyes were opened when a male CPA was the plaintiff's strongest advocate.

The added benefit of Personality Type analysis

Personality Type is a psychological model that originated from the work of psychologist Carl Jung, as well as Isabel Briggs Meyers and Katherine Briggs. Understanding personality type is the key to knowing what kind of information people focus on (facts or possibilities), and how they make decisions (personally or objectively).

All jury research we facilitate involves personality type analysis. In addition to screening mock jurors for demographic and other personal variables, we determine each person's type, which is then factored into our overall analysis of how the jurors reacted to the case. A juror's type is one of the most important psychological filters through which he or she views the evidence and testimony in a lawsuit. Therefore, using this model in our research provides the attorney with the means to craft specific themes and arguments that will ultimately appeal to the particular jurors sitting on the actual case. Click here to see how Personality Type analysis can give lawyers an edge during voir dire.

The final report

The final report analyzes all the research data and provides comprehensive recommendations for its presentation at trial.

MOCK TRIAL OPTIONS
[Top]

Single-jury: Ten to 12 participants deliberate to a verdict. *Advantages:* Identification of key issues and juror reaction to case and parties.

Double-jury: Approximately 16 to 20 participants are divided into two juries and reach independent verdicts.
Advantages: Additional participants increase the reliability of results. Two discrete verdicts help reveal the depth of case strengths and/or weaknesses. Separate verdicts also illustrate how differing personalities affect overall group dynamics and decision-making.

Multi-jury: Three, four or more panels of eight jurors reach independent verdicts.
Advantages: The greater the number of participants, the more reliable the results with respect to jurors' individual reactions, as well as the discrete verdicts.

Increasing the number of participants improves the reliability of juror profiles, revealing any connections between jurors' initial attitudes and ultimate decisions. This information is extremely useful during the actual jury selection.

FEES FOR JURY RESEARCH

Most projects are billed on a "per project basis" and costs depend on the size and scope of the project (i.e., number of jurors and panels, location of project).

We will gladly provide interested parties with a cost assessment. However, one size does not fit all so before we can give you a valid quote, we will ask to have a fairly substantive conversation about your case (after a conflicts check and an assurance of confidentiality). We will ask you to describe case particulars, what's at stake for your client beyond a mere win or loss, trial dates, summary judgment status, what you hope to accomplish, the unique problems you face with this litigation and how much time you can reasonably expect to invest in the project.

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Applications of Jury Research in Mediation of Personal Injury Litigation

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Allan J Campo is a principal in the consulting firm American Jury Centers and directs the Sandestin, Florida office. He concentrates his trial consulting practice on the study and teaching of effective advocacy practices, witness training, and ADR. He is a member of the American Society of Trial Consultants, of which he was President in 1995. He is also an Associate Member of the ABA.

3. Introduction

Jury research studies and jury research data have been used in a wide range of applications since the first researcher-conducted mock trials appeared in the 1970's. One still under-utilized application is that of mediation. There is much fertile ground for the creative use of jury research in this arena. Those trial attorneys who experiment with the use of research in the mediation setting usually find value and continue relying upon these tools.

4. Applications of Jury Research in Mediation of Personal Injury Litigation

A. Thinking about Jury Research

We'll do a mock trial as part of our trial preparation, but that will be after the mediation- when we get into full trial mode. That statement or a version of it has landed in this writer's e-mail a hundred times or more. Without commenting on the embedded pre-supposition that the mediation won't result in a settlement, let's talk about why waiting until after the mediation to do the jury research might not always be the best idea. We'll end up discussing self-fulfilling prophecies, too, since they are an inherent problem in mediation, but other ground needs to be covered first.

Mock trials (we mean here all the forms of jury research with all their interesting names, i.e. mock trials, test trials, summary trials, trial simulations, focus groups, discussion groups, interview studies, inquiry research, audience surveys, etc.) are usually thought of as a tool for trial preparation. Mock trials can tell you what the jury will be most interested in, how they will be inclined to regard main issues,

who has liability, and the scale of the defendant's exposure. Such intelligence is usually deemed useful by clients, and the preparation for these exercises has become a familiar part of trial prep for many defense lawyers. Evidence and argument presentations are usually delivered in some neutral setting to surrogate jurors whose reactions guide the development of testimony, exhibits, and argument for trial. These "jurors" return verdicts and typically also answer questions about the case that helps to inform trial preparation. Until recently, research of this type has typically been performed after discovery is concluded and within ninety days or so of the trial date.

B. Hard Data Helps

The results of jury research designed and performed in this way also often help a client decide whether or not to settle prior to commencing trial. While the research is not always crafted solely for the purpose, it gives a snapshot of the case and its attendant risks and benefits which helps clients and trial attorneys contemplate their day of reckoning in the clear light of an empirical analysis of the case. The utility of jury research tools for this purpose is well proven. *What will a jury do with this case?* is the toughest question of all. Research rarely purports to answer the outcome question directly, but strong probabilistic statements can indeed be made with good data. These hard numbers can provide some comfort for client, case manager, and attorney alike.

C. The Problem of Mediation: No Fact Finder

Mediators like data, too. That is an inescapable reality of working with them. They will ask you for the hard background that supports your evaluation of the case. In fact, all the parties are working from some sort of data as their reference system. We all do the same thing in every area of our lives, estimating probabilities from phenomena that we have observed and recorded. No one simply guesses about the future, humans try to calculate what it will be.

The parties will engage in dozens of communications in the context of mediation that illustrate the reliance of everyone present upon empirical foundations for their viewpoints. Suppose you are Defense Counsel and the Plaintiff Attorney trots out past verdicts in cases "just like this one". She may write huge numbers on the flip chart in her initial presentation of the case at the opening session of the mediation. You reply in your presentation with case law and may discuss case citations "exactly on point" that are intended to assure her- and the mediator- that her claims are in serious jeopardy because of their obvious flaws. You also point out the serious factual issues that you believe will weaken her case. *Nobody, however, knows what the fact finder in the jury will actually do with this exact fact picture; this plaintiff, this defendant, and a case tried in this venue.*

Nonetheless, sooner or later, there you are- taking your turn and writing much smaller numbers on the flip chart and setting the counterpoint. The debates in

break out rooms often go on and on as discussion rages around the comparability of other cases and other scenarios. Finally, maybe, you horse-trade your way to a settlement-- or, you leave. A lot of the time you leave.

D. Bringing the Fact Finder Into the Mediation

By performing jury research that is case specific, you are able to bring the realities of the case into focus. Importantly, this will inform you and your client and you both may very well go to mediation with higher confidence in your evaluation for settlement than perhaps ever before. Should you provide the mediator with the results of your research? You certainly should consider it. Should you provide the results (or some of them) to the opposing attorney? Consider that, too.

The important thing to remember is that you often can produce empirical answers to assertions that a jury will or will not do certain things, and you and your client can decide how to use those answers to persuade others to your point of view. Questionnaire results from a well-conducted jury research project can be very persuasive. The power lies in the fact that real people, adults who could serve as jurors, have reacted to the case. These real people's responses can frequently be more convincing than anything else.

E. How to Present Research Data at Mediation

Never fail to make a robust and interesting presentation of your case at mediation, even with a mediator who may discourage it. In fact, you probably should not even agree to have as a mediator someone who prohibits presentations by the sides at the initial meeting of the parties. The reasons to allow such presentations are many, but not the least of them is that few things will sober up a too-confident Plaintiff client or a too-defiant Defendant client more than a powerful and skillfully delivered presentation at the mediation. Each has to look the adversary in the eye and hear the case, perhaps for the first time, colored as it might be at trial. Further, for many injured Plaintiffs still carrying the double burden of rage and resentment, the mediation can serve as a "day in court" and allow them to move to the next stage: resolution of the case. The presentation is important indeed.

Research data can be presented at mediation in the same way it would be presented at a conference or board meeting. It should be converted to slides or to enlargement boards so that the data is big and bright and impossible to ignore. Handouts of the key elements of data given as take-aways to the mediator and the opposing parties can continue to argue your viewpoint even when you are not present, so do not fail to create them. The goal is to let the data speak for the

surrogate jurors who heard the case in the research setting. In this sense, it is not you telling the other side what the issues are worth- it is those neutral "jurors". They don't have a stake in the outcome. They don't care who "wins". They are merely saying what they think through their questionnaire responses. Lawyer anecdotal information tells us that client parties are often uncertain about relying upon their own lawyer's evaluation of the value of a case and that sometimes the jury research numbers are the first evaluations trusted *at all* by such clients.

F. Bring Videotape

Videotape of surrogate juror discussions of a case are often among the most powerful tools for getting a message across to an opposing party or to a mediator who seems unwilling or unable to accept written data. It is a chance for you to let others see and hear for themselves what is likely to be the real reaction of jurors at trial. Most Americans are highly conditioned to be responsive to "television" style images, and we tend to trust our reactions about things we see on screen. That makes the use of screen-presented video the desirable mode for showing important material at mediation.

Videotape of key witness depositions are highly useful for the same reasons as mentioned above. Such tape should be carefully edited so that it is interesting to look at. Do not try using a raw video and "fast forwarding" to excerpts you wish to show. You wouldn't do that in a courtroom, you should not do it in the mediation room- the courtroom of early resolution.

G. Consider Bringing the Consultant

Attorneys active in ADR report to us that they see a rise in the incidence of jury consultants presenting abbreviated reports of findings at mediation. Once an extremely rare circumstance occurring more often in commercial disputes than in personal injury litigation, the practice seems to be earning adherents. This increased warmth makes some sense. Often, the only pushback available to a party on the wrong side of the research findings is to question the validity of the research or the competence of the researcher. Who best to soothe doubts about the methodology than the person who performed the work? Most jury consultants have some experience creating truncated reports of findings for use at mediation and will also be comfortable presenting the findings "live".

H. Conclusion

For many cases, the mediation is the only place where the sides ever confront one another and the realities of their dispute. Most cases settle, whether in mediation or at some other time, and the experience in the mediation is typically contributory to this outcome even if the case does not actually settle in the presence of the mediator. For that reason and others obvious to most, it makes

sense to try very hard at mediation to bring a fair resolution to your case. There seems to be little to gain from holding back or from limiting the amount of effort expended in preparation. Above all, having a well-thought and supportable evaluation of the case is the most useful tool of all. The tools of jury research can lend themselves in many cases to the development of a reality-based and data-supported evaluation which will be persuasive to mediator and opponent alike. While not applicable- or even practical- in all circumstances, some thought probably should always be given to the scheduling of a focus group, mock trial or similar exercise in advance of mediation of a high stakes case.

THE CASE FOR TRIAL CONSULTANTS

A master's program trains students in the art and science of winning in the courtroom

Trial consulting is a young field. Many practitioners trace its beginning to the Harrisburg Seven trial in the early 1970s, when seven Catholic priests and nuns in Pennsylvania were tried for anti-war protests that included pouring blood on draft records.

Jay Schulman, a social psychologist sympathetic to their position, surveyed attitudes in the jurisdiction to help defense attorneys choose the ideal jury to win acquittal. His research indicated that a blue-collar jury would be most sympathetic to the clergy. His findings stunned the lawyers, who had presumed that a college-educated panel would be more liberal and more likely to side with the defense. But the defense took Schulman's advice and steered jury selections toward blue-collar individuals. The jurors were hung, and the clergy were free.

In the past decade, the demand for trial consultants has multiplied, although much of the work now involves large corporations or wealthy individuals defending against product liability, personal injury and medical malpractice suits.

The American Society of Trial Consultants, founded in 1990, now has about 275 members, most of whom have full-time practices, according to Tom Beisecker, a KU associate professor of communication studies who also researches litigation sciences and who two years ago served as ASTC president.

"It's hard to say how many academics do this on a part-time basis," Beisecker says. But he's helping meet the marketplace's needs: With psychology professor Larry Wrightsman, former law professor Stanley Davis and political science professor Pete Rowland, Beisecker began an interdisciplinary, special-studies master's program in litigation sciences that graduated its first student last June. They expect to admit five to 10 students annually.

"Identifying the issues in the case from the perspective of jurors is increasingly recognized as useful, and there is a place for well-trained professionals," Wrightsman says. "Attorneys may see the facts from a legal perspective, but there may be another perspective that the jurors use. Trial consultants can help by pointing out the issues attorneys should be emphasizing to win the jury to their points of view."

Rowland, who takes on between seven and 10 cases annually (mostly during the summers and semester breaks), says the cases enrich his teaching and research. He thrives on opportunities to use his extensive background in statistical and field research and forensic psychology to give lawyers an edge in trials.

Often, as for the Byron De La Beckwith trial (see story), he researches and prepares a list of specific questions to help attorneys choose jurors likely to vote in their favor. Trial consultants also coach lawyers on trial presentation strategies and negotiation skills. They sometimes even conduct mock trials to test how jurors may respond in a courtroom.

"There's nothing so unpredictable as a jury," Rowland says. "And of course that unpredictability drives social scientists nuts and makes juries inherently interesting research targets....As those methods have become available to litigators, they've come to see the value, for example, of doing a mock trial—a truncated version of your trial in advance. It's like having a dress rehearsal but getting the critics' comments in confidence, so you can anticipate problems on opening night."

Wrightsman knows some people view jury research as unfair tinkering with trials. "It smacks of orchestrating things. There have been op-ed pieces written about how horrendous this is," he says.

But he points out that lawyers already wield considerable power in choosing juries during the selection process, when they have the right to challenge, or dismiss, a certain number of jurors without stating any reason. "The system is there anyway," Wrightsman says, "so let's try to make it work better." *—BW*

DAMAGE TO A CONTRACTOR'S OWN WORK:

DETERMINING INSURANCE COVERAGE OF DEFECTIVE WORKMANSHIP CLAIMS

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DAMAGE TO A CONTRACTOR'S OWN WORK: DETERMINING INSURANCE COVERAGE OF DEFECTIVE WORKMANSHIP CLAIMS

I. Introduction

A university hired a contractor to build a new roof for its football stadium. After the contractor finished the project, the roof began to leak and caused damage to the roof, the track, the football field, and the seats. The university sued the contractor because of its faulty work, and the contractor looked to its insurance company to provide a defense to the lawsuit and insurance coverage in the event it had to pay damages to the university. The insurance company denied the contractor's claim on the grounds that the insurance policy did not cover defective workmanship, and brought a declaratory judgment action in court.

This fact scenario, taken from a 2002 case out of the Northern District of Iowa,[1] is representative of the issues that may arise when a contractor looks to its commercial general liability insurance policy for coverage of a defective workmanship claim. This Article examines what must be present in the insuring agreement of a contractor's commercial general liability policy in order for there to be defective workmanship coverage and, if the insuring agreement includes the requisite elements, what triggers the policy's coverage.

II. Defective Workmanship Insurance Coverage

The type of insurance policy generally implicated in defective workmanship claims is the commercial general liability ("CGL") policy.[2] A CGL policy provides payment for damages that the insured, generally a contractor, is responsible for as a result of bodily injury or property damage to which the policy applies.[3] The insuring clause then usually limits the coverage under the policy to bodily injury and property damage caused by an "occurrence" that takes place during the policy period.[4] CGL policies typically define the meaning of the important words used

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[1] General Casualty Ins. Co. v. Exterior Sheet Metal, Inc., 2002 WL 32172280 (N.D. Iowa Dec. 24, 2002).
[2] Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims under Commercial General Liability Policies*, 30 TORT & INS. L.J. 785, 786 (1995).
[3] WILLIAM SCHWARTZKOPF, PRACTICE GUIDE CONSTRUCTION CONTRACT SURETY CLAIMS § 22.03 (2007).
[4] *Id.*

in the insuring clause, such as “property damage” and “occurrence.”[5] Following the insuring clause, the CGL policy sets out a specific list of exclusions for which the policy does not provide coverage.[6]

Thus, to determine whether a CGL policy covers damages in a defective workmanship claim, the insuring clause, policy definitions, and policy exclusions must be examined. Insurance coverage for defective workmanship may differ depending on the policy’s language and courts’ interpretation of the language. Coverage for defective workmanship claims under a CGL policy typically turns on two issues: (1) whether defective workmanship constitutes an "occurrence" under the policy; and (2) whether the bodily injury or property damage caused by the defective workmanship is subject to the exclusions set forth in the policy.

A. Defective Workmanship as an “Occurrence”

The first issue when determining whether a CGL policy provides coverage for a defective workmanship claim is whether the bodily injury or property damage resulted from an “occurrence.” The contractor is only covered by the policy if there has been bodily injury or property damage caused by an “occurrence.”[7] The standard CGL policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”[8] It does not, however, define the term “accident,” and courts have adopted a wide array of definitions.[9] Courts typically arrive at their definition of “accident” by looking at the plain meaning of the word and at other jurisdictions’ definitions.[10] Most courts also consider the nature of the injury in determining whether a particular act is an “accident.”[11] Some of these courts apply a subjective test and find that there is no “accident” if the injury is foreseeable or

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] SCHWARTZKOPF, *supra* note 3. An individual policy may contain a different definition than the standardized form, so it is important to check the definition in each policy. *Id.*
[9] *Id.*
[10] *See id.* (describing how courts determine whether there has been an “occurrence”).
[11] *Id.*

expected.[12] Others apply an objective test and hold that there is no "accident" when there is a substantial probability that the injury will likely occur.[13] A few courts mandate that the event be "sudden" in order to be an "accident."[14]

While the issue has been addressed by courts in many jurisdictions, courts have not been consistent in determining whether there is an "occurrence" under a CGL policy in defective workmanship claims. Some states, such as Iowa, hold that defective workmanship is not an "occurrence." In *Pursell Const., Inc. v. Hawkeye-Security Ins. Company*, the Iowa Supreme Court held that a contractor's defective workmanship, standing alone, is not an "occurrence" under a CGL policy.[15] In *Pursell*, a contractor constructed the basement levels of two houses at an elevation that violated a city ordinance, causing it to be illegal for the houses to be occupied, rented, or sold.[16] The court held that the contractor's faulty construction was not an occurrence because all of the damage was to the property on which the contractor performed work.[17] Indiana, like Iowa, also holds that defective workmanship is not an "occurrence." In *Amerisure, Inc. v. Wurster Const. Co.*, exterior sheathing and insulation systems installed by a contractor failed to work properly and needed to be repaired and replaced.[18] The Indiana Court of Appeals held that the failure of the systems to perform as required under the contract was the "natural and ordinary consequence" of defective workmanship and therefore was not an "occurrence."[19]

Some states take the middle ground and find that defective workmanship is not an "occurrence" when the property damage is to the contractor's work itself, but is an "occurrence" when the damage is to property other than the contractor's work. For example, in *Auto-Owners Insurance Co. v. Home Pride Co.*, the Nebraska Supreme Court held that defective

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[12] *Id.* (*citing* Sheets v. Breathren Mut. Ins. Co., 679 A.2d 540 (Md. 1996).
[13] Schwartzkopf, *supra* note 3 (*citing* City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052 (8th Cir. 1979) and R.N. Thompson & Assocs., Inc. v. Monroe Guar. Ins. Co., 686 N.E.2d 160 (Ind. App. 1997)).
[14] *Id.* (*citing* Indiana Ins. Co. v. Hydra Corp., 625 N.E.2d 70 (Ill. App. 1993)).
[15] Pursell Const., Inc. v. Hawkeye Sec. Ins. Co., 596 N.W.2d 67, 71 (Iowa 1999).
[16] *Id.* at 68.
[17] *Id.* at 71–72.
[18] Amerisure, Inc. v. Wurster Const. Co., 818 N.E.2d 998, 1001 (Ind. App. 2004).
[19] *Id.* at 1005; *see also* Selective Ins. Co. of the Southeast v. Cagnoni Development, LLC, 2008 WL 126950, at *12 (holding that damages caused by the allegedly faulty design and installation of a roof on a commercial warehouse was not an occurrence).

workmanship was an “occurrence” only if the resulting injury was bodily injury or injury to property other than the contractor’s work.[20] In that case, a subcontractor’s failure to install shingles on a number of apartment buildings in a workmanlike manner resulted in damage to the roof structures and to the apartment buildings themselves.[21] The court held that the damage was an “unintended and unexpected consequence of the contractors’ faulty workmanship” that went beyond the damage to the contractors’ own work product and therefore was an “occurrence” under the GCL policy.[22]

Other states have found that defective workmanship is an “occurrence” regardless of the character of the property damaged by the defective workmanship. In *Lee Builders, Inc. v. Farm Bur. Mut. Ins. Co*., the Kansas Supreme Court held that property damage occurring as a result of faulty or negligent workmanship constitutes an “occurrence” as long as the insured did not intend for the damage to occur.[23] In that case, a subcontractor’s faulty materials and workmanship on the construction of a home resulted in continuous exposure of the home to moisture.[24] Since this continuous exposure was “both unforeseen and unintended,” the court held that it was therefore an “occurrence” under the policy.[25]

Minnesota courts have similarly held that defective workmanship can constitute an “occurrence” under a CGL policy. Applying Minnesota law, the Eighth Circuit held in *Aten v. Scottsdale Ins. Co.* that an improperly poured and graded basement floor leading to water damage to the home was an accident and thus an “occurrence” under the CGL policy.[26] In reaching its conclusion, the court relied upon *O’Shaughnessy v. Smuckler Corp.*, a Minnesota Supreme Court case stating that property damage resulting from defective workmanship could

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[20] Auto-Owners Ins. Co. v. Home Pride Co., 684 N.W.2d 571, 578 (Neb. 2004).
[21] *Id.* at 574.
[22] *Id.* at 578.
[23] Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486, 495 (Kan. 2006).
[24] *Id.*
[25] *Id.* at 495.
[26] Aten v. Scottsdale Ins. Co., 511 F.3d 818, 821 (8th Cir. 2008).

be "real and substantial" as well as "accidental."[27] The Supreme Courts of Florida, Texas, and Tennessee have also held in the last few years that defective workmanship can be an accident and therefore an "occurrence" under a CGL policy, indicating that there may be a developing trend among states in favor of this approach.[28]

Not all states are clear on whether defective workmanship constitutes an "occurrence." In *State Farm Fire & Cas. Co. v. Tillerson*, the Illinois Court of Appeals 5th District held that the uneven settling of soil under a newly constructed room was not an "occurrence" because the settling was the "natural and ordinary consequence" of defective workmanship.[29] However, in *Country Mut. Ins. Co. v. Carr*, the Illinois Court of Appeals 4th District distinguished *Tillerson* and held that the sudden movement of basement walls as a result of defective workmanship adjacent to the walls was an "occurrence" because it was neither expected nor intended.[30]

Wisconsin courts have also reached different conclusions about whether defective workmanship is an "occurrence" under a CGL policy. In *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, the Wisconsin Supreme Court held that damage to a building caused by soil settling that was the result of a subcontractor's inaccurate soils report, was the result of an "occurrence" because the cause and the harm were not intended, anticipated, or expected.[31] However, in *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*, the Wisconsin Court of Appeals, while holding that a contractor's improper installation of rubber mats was an "occurrence" that resulted in the mats being unexpectedly and unintentionally damaged by a scraper, concluded that faulty workmanship in itself is not an "occurrence" because every failure to perform a job is

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[27] *Id.* (quoting O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 105 (Minn. Ct. App. 1996)).
[28] PHILIP L. BRUNER AND PATRICK J. O'CONNOR, JR., 4 BRUNER & O'CONNOR CONSTRUCTION LAW § 11:28:06 [hereinafter BOCL]; *see* U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871, 883 (Fla. 2007) (holding that subcontractors' defective soil preparation was an "occurrence"); Lamar Homes v. Mid-Continent Casualty, 242 S.W.3d 1, 8 (Tex. 2007) (holding that a general contractor's defective workmanship in building house foundation was an "occurrence"); Travelers Indemnity Co. of America v. Moore Assoc., Inc., 216 S.W.3d 302, 308 (Tenn. 2007) (holding that alleged water penetration from a faulty window installation by a subcontractor was an "accident" and thus an "occurrence").
[29] State Farm Fire & Cas. Co. v. Tillerson, 777 N.E.2d 986, 991 (Ill. App. 2002).
[30] Country Mut. Ins. V. Carr, 867 N.E.2d 1157, 1162 (Ill. App. 2007).
[31] Am. Family Mut. Ins. Co. v. Am. Girl, 673 N.W.2d 65, 71 (Wis. 2004).

not an accident.[32] These cases demonstrate that whether defective workmanship is an "occurrence" depends on the jurisdiction and on the unique facts of a case.

B. Exclusions Barring Defective Workmanship Claims

Once it has been determined that there was bodily injury or property damage caused by an "occurrence" under the CGL policy, the next issue is whether there are any policy exclusions that apply to preclude coverage. Generally, the insurer has the burden of proving the application of a policy exclusion, and exclusions are strictly interpreted against the insurer.[33] The most common policy exclusions applied in defective workmanship claims are the "your work" exclusion, the "faulty workmanship" exclusion, the "impaired property" exclusion, and the "your products" exclusion. These exclusions are collectively referred to as the "business risks" exclusions, and are intended to preclude coverage for risks that could most easily be avoided by the contractor itself.[34]

1. The Exclusion for Damages to "Your Work"

Exclusion (*l*),[35] the "your work" exclusion, states that coverage does not apply to "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'"[36] This exclusion only applies to work within the products-completed operations hazard—it has no bearing on operations in progress.[37] It is often raised by insurers in claims against contractors because it reduces coverage for losses arising from a contractor's defective workmanship after a project is completed.[38]

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[32] Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer, 721 N.W.2d 704, 714 (Wis. Ct. App. 2006).
[33] Kalell v. Mut. Fire and Auto Ins. Co., 471 N.W.2d 865, 867 (Iowa 1991); Stan Kock & Sons Trucking, Inc. v. Great West Cas. Co., 517 F.3d 1032, 1040 (8th Cir. 2008); Safeco Ins. Co. of America, Inc. v. Wood, 948 S.W.2d 182, 183 (Mo. App. E.D. 1997).
[34] BOCL § 11:37.
[35] The policy exclusions in this Article are taken from the standard form CGL policy. Even though CGL coverage is one of the most standardized types of insurance coverage, it is not uncommon for insurers to draft their own CGL policy forms. BOCL § 11:6. Therefore, policy exclusions in a particular CGL policy may use different names and terms than the standard form policy exclusions used in this Article.
[36] BOCL § 11:46.
[37] *Id.*
[38] *Id.*

For example, *in Balzer Bros. v. United Fire & Cas. Co.*, a subcontractor's insurance company invoked the exclusionary "your work" provision when a contractor, who had been assigned the subcontractor's rights, filed suit against the insurer, seeking coverage for damage to industrial coolers caused by the subcontractor's forklift operator[39] The contractor argued that the moving of the coolers was activity outside of the exclusion because the stripping and cleaning of the coolers, not their handling, was the only work contemplated. The Iowa Court of Appeals applied Exclusion (*l*) to deny coverage, stating that the contractor "made no showing that this moving was not a necessary part of the contracted-for work."[40]

Exclusion (*l*) is more frequently used by general contractors to preserve coverage when the property damage was caused by one or more of their subcontractors. Depending on the CGL policy form, the "your work" exclusion usually contains a subcontractor exception.[41] The subcontractor exception states that the exclusion does not apply "if the damaged work or work out of which the damage arises was performed on your behalf by a subcontractor."[42] The burden of proof shifts to the insured to show that the exception to the exclusion applies.[43] This exception is significant to general contractors when there are subcontractors involved because is provides coverage that would otherwise be excluded.[44]

U.S. Fire Ins. Co. v. J.S.U.B. serves as an example of a court upholding coverage under the subcontractor exception. [45] In that case, the subcontractors' use of poor soil and improper soil compaction and testing caused damage to the foundations, drywall, and other interior portions of newly-constructed homes.[46] The homeowners sued the general contractor, and the general contractor brought a declaratory judgment action against its insurer, seeking coverage

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[39] Balzer Bros. v. United Fire & Cas. Co., 2000 WL 1027258, at *1 (Iowa App. July 26, 2000).
[40] *Id.* at *2–3.
[41] BOCL § 11:48.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871, 887 (Fla. 2007).
[46] *Id.* at 875.

for the damages.[47] After finding that the unintended and unexpected property damage resulting from the subcontractors' defective work was an "occurrence," the Texas Supreme Court held that the subcontractor exception applied and the contractor had coverage under the CGL policy.[48] In applying the subcontractor exception, the court stated "[w]e simply cannot ignore the exception that has now been incorporated into Exclusion (*l*), an exception that clearly applies to damages to the insured's own work arising out of the work of a subcontractor."[49]

However, even if the CGL policy contains a subcontractor exception, a court may still exclude coverage where the defective work is that of a subcontractor. For instance, the Minnesota Supreme Court refused to recognize the broader coverage supplied by a subcontractor exception in *Knutson Const. Co. v. St. Paul Fire and Marine Ins. Co*.[50] The court held that where a general contractor has exclusive control and responsibility over all project work and materials and turns over to the owner the completed project, all of the work performed and materials furnished by subcontractors merges into the general contractor's product.[51] Since the general contractor agreed to complete the product in a good workmanlike manner, it incurred the business risk of liability arising from its failure to fulfill that contractual duty, and thus whether the work was done "on behalf" of the general contractor by the subcontractor was irrelevant.[52] Therefore, as *U.S. Fire* and *Knutson* illustrate, it is important to look to both the insuring agreement and to the jurisdiction to determine whether a policy exclusion applies.

2. The Faulty Workmanship Exclusion

Exclusion (j) states that coverage does not apply to property damage that occurs to six different types of property, two of which are important in the defective workmanship context.[53] These two exclusions, exclusions (j)(5) and (j)(6), are the primary means of barring coverage for

[47] *Id.*
[48] *Id.* at 887.
[49] *Id.*
[50] Knutson Const. Co. v. St. Paul Fire and Marine Ins. Co., 396 N.W.2d 229, 237 (Minn. 1986).
[51] *Id.* at 236.
[52] *Id.* at 236-37.
[53] BOCL § 11:38.

the contractor's business risks.[54] Exclusion (j)(5) bars coverage for damage to the work being done by the insured at the time of the property damage.[55] The exclusion provides that "property damage" to "that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations" is not covered under the CGL policy.[56] Exclusion (j)(5) only applies to the specific work on which the insured is working on the time of the occurrence—damage to property outside the "particular part" is not excluded under Exclusion (j)(5).[57]

Since damage to property outside the "particular part" is not excluded from coverage, the meaning of "particular part" becomes an important issue in defective workmanship claims. A contractor wishing to avoid this exclusion will try to construe "particular part" to apply to as small a part of the project as possible.[58] For example, in *Minergy Neenah, LLC v. Rotary Dryer Parts, Inc.,* a subcontractor was replacing the steam tubes within a rotary dryer when a fire broke out and caused substantial damage to the entire dryer.[59] The court held that the "particular part" excluded from coverage was only the area on which the subcontractor was contracted to work, and on which he in fact worked, and not the entire dryer.[60]

Exclusion (j)(6), otherwise known as the "faulty workmanship" exclusion, precludes coverage for "property damage" to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."[61] The purpose of the faulty workmanship exclusion is to discourage careless work by making contractors liable for losses that their own defective work cause.[62] Exclusion (j)(6) does not apply to property damage

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[54] *Id.*
[55] BOCL § 11:43.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Minery Neenah, LLC v. Rotary Dryer Parts, Inc., 2008 WL 1869040, at *2 (E.D. Wis. 2008).
[60] *Id.*
[61] BOCL § 11:44.
[62] *Id.*

that occurs after the insured's work is complete, but only applies to preclude coverage for the costs to repair or replace the particular part of property damage discovered while the insured is still performing its work.[63]

General Casualty Ins. Cos. v. Exterior Sheet Metal, Inc.[64] illustrates the operation of the faulty workmanship exclusion. In that case, a contractor constructed a faulty roof that leaked and caused damage to the roof and the interior of the football stadium.[65] The Northern District Court of Iowa applied Exclusion (j)(6) to deny coverage for the cost to repair or replace the roof because the roof was the property on which the contractor's work was faulty.[66] However, the court did not relieve the insurer of covering the damage to property other than the roof itself, noting that the policy explicitly stated that only the damage to the property on which faulty work was performed *on it* was excluded from coverage.[67]

3. The "Impaired Property" Exclusion

Exclusion (m), or the "impaired property" exclusion, precludes coverage for claims where, instead of physical injury to property, there is defective operation of property.[68] The impaired property exclusion states that there is no coverage for "property damage" to "'impaired property' or property that has not been physically injured, arising out of: (1) a defect, deficiency, inadequacy, or dangerous condition in 'your product' or 'your work'; or (2) a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms."[69] "Impaired property" means property that cannot be used or is less useful, but can be restored to use.[70] Therefore, if the property cannot be restored to use by repair or replacement of insured's work or product, the impaired property exclusion does not apply.[71]

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[63] *Id.*
[64] General Casualty Ins. Co. v. Exterior Sheet Metal, Inc., 2002 WL 32172280 (N.D. Iowa Dec. 24, 2002).
[65] *Id.* at *2–3.
[66] *Id.* at *8.
[67] *Id.* at *9.
[68] BOCL § 11:49.
[69] *Id.*
[70] *Id.*
[71] *Id.*

Exclusion (m) is typically applied in situations where the incorporation of an insured's defective workmanship or faulty materials into a larger product causes economic losses.[72] For example, in *Am. Mercury Ins. Group v. Urban*, a contractor negligently designed and constructed a concrete pad upon which a wet bin for a grain dryer sat.[73] The court applied Exclusion (m), stating that the underlying claim was "loss of use" to the entire grain-handling facility. The damage to the impaired facility was purely economic in nature, rather than physical, and arose out of the physical damage to the concrete pad and wet bin caused by the contractor's negligence.[74] Since the facility could be restored to use by repair or replacement of insured's work without causing physical injury to the entire facility, Exclusion (m) precluded coverage.[75]

4. The "Your Products" Exclusion

The Damage to Your Products Exclusion, or Exclusion (k), excludes coverage for "'property damage' to 'your product' arising out of it or any part of it."[76] "Your product" means "any goods or products, other than real property, manufactured, sold, handled, distributed, or disposed of by: (1) you; (2) others trading under your name; or (3) a person or organization whose business or assets you have acquired; and containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products."[77] This exclusion prevents coverage for property damage to the insured's products and to work performed by the insured, because of their own defects or deficiencies, or any damages for "loss of use" of the products.[78]

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[72] *Id.*
[73] Am. Mercury Ins. Group v. Urban, 2001 WL 1723734, at *2 (D. Kan. May 31, 2001).
[74] *Id.* at *11.
[75] *Id.* at *12.
[76] BOCL § 11:45.
[77] *Id.*
[78] Modern Equipment Co. v. Continental Western Ins. Co., Inc., 355 F.3d 1125, 1129 (8th Cir. 2004) (applying Iowa law).

The Eastern District of Tennessee recently addressed the applicability of Exclusion (k) in *Cincinnati Ins. Companies v. Tennessee Log Homes, Inc.*[79] In that case, a contractor built a log home for the Owner using plans provided by the owner and adapted by TLH, the supplier. The arbitrator concluded that the design for the construction of a log home did not meet local building codes because of the absence of two necessary support columns. As a result of the faulty design, there were many surface irregularities on the roof and the exterior walls were thrust outwards, causing almost $100,000 in property damage.[80] The court held that Exclusion (k) applied because TLH's design plan was a "good or product" and the property damage arose out of the improper construction of a home due to the defective plan.[81] Therefore, TLH had no insurance coverage under its policy.[82]

III. Triggering Coverage under a Commercial General Liability Policy

Once it has been determined that a CGL policy offers coverage for a defective workmanship claim, the insurer's duty to indemnify or defend the insured is "triggered" by the existence of bodily injury or property damage during the policy period.[83] The bodily injury or property damage must take place during the policy period in order for coverage to exist: it is the timing of the injury or property damage, rather than the "occurrence," that determines whether there is coverage.[84] Courts may use one of four trigger theories in determining when injury or property damage occurs for purposes of CGL coverage: (1) the "manifestation trigger" theory; (2) the "injury-in-fact trigger" theory; (3) the "exposure trigger" theory; or (4) the "continuous trigger" theory.[85] The application of these trigger theories depends on the nature of the CGL policy at issue: some courts apply different trigger theories depending on whether the policy is first-party coverage or third-party coverage, while others apply different theories depending on

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[79] Cincinnati Ins. Companies v. Tennessee Log Homes, Inc., 2008 WL 2944914 (E.D. Tenn. July 25, 2008).
[80] *Id.* at *3.
[81] *Id.* at *8–9.
[82] *Id.* at *9.
[83] BOCL § 11:72.
[84] *Id.* A common misconception is that the "occurrence" triggers the policy. *Id.*
[85] *Id.*

how "property damage" is defined in the CGL policy.[86] The type of coverage trigger employed can have considerable ramifications on the duties of insurers as well as the coverage of the insured, as the different theories and cases below illustrate.[87]

A. The "Manifestation Trigger" Theory

Under the "manifestation trigger" theory, coverage under a CGL policy is triggered when the property damage becomes manifest to the owner.[88] The theory does not take into consideration when the property damage actually occurred, but the point in time that a reasonable property owner would be on notice of a potentially insured loss.[89] The application of the manifestation trigger can result in considerably less coverage for the insured, especially if the property damage manifests itself during a time when the insured has inadequate or nonexistent coverage.[90]

Audubon Trace Condominiums Ass'n, Inc. v. Brignac-Derbes, Inc. serves as an example of the application of the manifestation trigger to a defective workmanship claim.[91] In *Audubon*, a developer that had been sued by a condominium association for damages resulting from alleged defective construction of the condominiums brought a third-party action against its insurers.[92] The insurers filed motions to dismiss on the grounds that no manifestation of damages occurred during their policy periods, and the court, after reviewing the allegations of when the damage was discovered by the condominium association, held that the damages did not manifest until after the policy periods had expired.[93] Therefore, the developer had no coverage under its CGL policy.[94]

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[86] *Id.*
[87] *Id.*
[88] BOCL § 11:73.
[89] *Id.*
[90] BOCL § 11:72.
[91] Audubon Trace Condominium Ass'n, Inc. v. Brignac-Derbes, Inc., 924 So.2d 1131 (5th Cir. 2006).
[92] *Id.* at 1132.
[93] *Id.* at 1134.
[94] *Id.*

B. The “Injury-in-Fact Trigger” Theory

The “injury-in-fact trigger” theory starts coverage at the point in time when the property damage can be shown to have been first suffered.[95] To trigger coverage, the insured must establish that some damage occurred during the policy period.[96]

In *Western Nat. Mut. Ins. Co. v. Barbes*, the Minnesota Court of Appeals applied the injury-in-fact coverage trigger to determine whether there was insurance coverage for property damage that occurred as a result of a contractor’s defective construction of a timber-framed home.[97] The court found that the homeowners had suffered actual injury at the time they began experiencing problems in their home from the defective workmanship, not at the point the defective workmanship occurred.[98] The insurer that issued the CGL policy in effect at the time the homeowners began experiencing problems was responsible for providing coverage, not the insurer of the policy that was in effect when the home was constructed.[99]

C. The “Exposure Trigger” Theory

CGL policy coverage is triggered under the “exposure trigger” theory in defective workmanship cases when the faulty work was performed or the defective product was installed—in other words, when the first injury-causing conditions occurred.[100] This theory, while not usually applied in defective workmanship cases, may be applied when the property damage is caused not by a single act of defective workmanship but a series of acts or omissions.[101] In *Harleysville Mut. Ins. Co. v. Berkley Ins. Co. of Carolinas*, the court applied the exposure theory to a claim that defective installation of a synthetic stucco system in a home and elevated moisture levels caused damage to the home.[102] The builder performed repairs, but this resulted

[95] BOCL§ 11:75.
[96] In re Silicone Implant Litig., 667 N.W.2d 405, 415 (Minn. 2003) (quoting Northern States Power Co. v. Fidelity and Cas. Co. of New York, 523 N.W.2d 657. 663 (Minn. 1994)).
[97] Western Nat. Mut. Ins. Co. v. Barbes, 2006 WL 1704201, at *3 (Minn. App. June 20, 2006).
[98] *Id.* at *4.
[99] *Id.*
[100] BOCL § 11:74.
[101] *Id.*
[102] Harleysville Mut. Ins. Co. v. Berkley Ins. Co. of Carolinas, 610 S.E.2d 215, 216 (N.C. App. 2005).

in even more problems with the stucco system.[103] The court, applying the exposure theory, held that coverage was triggered on the date that the defective stucco system was originally installed and the insurer whose policy was in effect at that point in time was responsible for providing the coverage.[104]

D. The "Continuous Trigger" Theory

Under a "continuous trigger" theory, bodily injury and property damage that are continuous or progressive throughout successive policy periods are covered by all polices in effect during those periods.[105] The "occurrence" of the bodily injury or property damage, rather than the timing, event, or conditions of the causal event, triggers the CGL policy under this theory.[106] The adoption of the continuous trigger can broaden coverage for an insured because it triggers all policies in existence over the duration of the injury.[107] For instance, in *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.* the Wisconsin Supreme Court applied the continuous trigger theory to damage to a warehouse from soil settlement over the terms of three CGL policies.[108] The court held that since the property damage occurred continuously over all three policies periods, all of the polices covered the loss.[109] Thus, the contractor was covered from the time the injury actually occurred through the discovery of the damage.[110]

IV. Conclusion

Contractors who seek protection against defective workmanship claims from their commercial general liability policies will generally find it difficult to convince their insurers to cover property damage caused to their own work. Whether defective workmanship is an "occurrence" under a commercial general liability policy depends on the jurisdiction. However, even if the defective workmanship is an "occurrence" under the contractor's policy, several

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[103] *Id.*
[104] *Id.* at 219.
[105] BOCL 11:76.
[106] *Id.*
[107] BOCL 11:72.
[108] Am. Family Mut. Ins. Co. v. Am. Girl, 673 N.W.2d 65, 85 (Wis. 2004).
[109] *Id.*
[110] *Id.*

exclusions may preclude coverage. Furthermore, not only must there be an “occurrence” and no exclusion barring coverage, the CGL policy must have been in effect at the time that the bodily injury or property damage triggered the policy. All of these factors considered, it may be difficult for contractors to find coverage for defective workmanship claims under their commercial general liability policies.

IOWA DEFENSE COUNSEL ASSOCIATION
ANNUAL MEETING & SEMINAR

WEST DES MOINES MARRIOTT
DES MOINES, IOWA

SEPTEMBER 19, 2008
4:00 – 5:00 P.M.

EXPLORING SOURCES OF ETHICS AND PROFESSIONALISM ISSUES

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APPENDIX i

EXPLORING SOURCES OF ETHICS AND PROFESSIONALISM ISSUES[1]

I. Introduction

> One thing we learned from the recent wave of corporate scandals is that lawyers behaved badly.[2]

The stories of organizational corruption following the Enron collapse are legion and, from all accounts, more of them will occur because the indications are that, even with the prosecutions emanating from the corporate corruption scandals, "corporate fraud is alive and well in the U. S."[3] Aside from following the accounts of the trials, it is essential for lawyers to listen to the "explanations" of why some of the principal actors followed their corrupt paths because there are lessons to be learned from their rationalization and self-destruction.

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[1] This material has evolved from an article written by this author and published in the AMERICAN JOURNAL OF TRIAL ADVOCACY: Orrin K. Ames III, *Concerns About the Lack of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed*, 28 AM. J. TRIAL ADVOC. 532 (2005). Similar discussions of these topics have been presented to other lawyers' organizations. The discussions always produce wide ranges of agreement or disagreement with the themes discussed. The content of the material has been significantly expanded from the original article, to include a significant expansion of the discussions of client pressure to add a consideration of, and a focus on, clients' workplace environments, a very recent ethics survey, as well as expanded focus on psychological considerations and supporting citations.

[2] Sung Hui Kim, *The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper,* 74 FORDHAM L. REV. 983, 984 (2005).

[3] John W. Schoen, *Corporate fraud alive and well in U.S.*, MSNBC, www.msnbc.msn.com/id/12762573/print/1/ display mode/1098/ (May 25, 2006).

In connection with the Enron prosecution of Lay and Skilling, explaining his motives to defraud Enron, Fastow said: "I believe I was extremely greedy and that *I lost my moral compass* . . . ."[4] His "explanation" is not atypical.

In connection with the prosecution and sentencing of Jack Abramoff, a description of Abramoff by a friend is singularly enlightening. That friend said: "Jack is a good person, who in his quest to become successful *lost sight of the rules*."[5]

Even more revealing is the description that Adam Kidar, Abramoff's former business partner, who was also sentenced, gave of himself. He wrote the judge a letter in which he said that "he *knew* the Sun Cruze deal was *wrong*" but that "'he was very caught up in the fast paced world of [his] partner and the high profile that came along with it.'"[6] Then, in spite of his awareness of the wrongfulness of his conduct, he said of himself: "'I am not the horrible person that the media has written about.'"[7] He still refused to acknowledge his responsibility and shortcomings!

Most recently, we saw the disgrace of Richard "Dickie" Scruggs, a very well-known plaintiffs' lawyer in Pascagoula, Mississippi, who made millions of dollars, and a national

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[4] Associated Press, *Highlights of testimony in the Enron trial*, MSNBC, www.msnbc.msn.com/id/12786817/page2/print/1/ display mode/1098/ (May 25, 2006) (emphasis added).

[5] Associated Press, *Abramoff gets 5 years, 10 months in fraud case*, www.msnbc.msn.com/id/12066674/print/1/display mode/1098/ (March 29, 2006) (emphasis added).

[6] *Id.* at 2 (emphasis added).

[7] *Id.* *See* the discussions of cognitive dissonance and other psychological influences, *infra* beginning at 28.

reputation,[8] in the tobacco litigation which resulted in a "multi-billion dollar settlement"[9] and, most recently, in the post-hurricane Katrina litigation against State Farm and other insurance companies. He was recently convicted of attempting to bribe a judge in a matter involving attorneys' fees. Taken down with him was a law partner and, tragically, his son who is also a lawyer and who failed to report the bribery scheme when he knew about it. Scruggs will serve his five year sentence.

Like Abramoft and others, however, he professes to have not yet found an answer for his conduct. At his sentencing hearing he said:

> I could not be more ashamed of where I am today, mixed up in a judicial bribery scheme that I participated in. I realized that I was getting mixed up in it. And I will go to my grave wondering why.[10]

We see similar examples of lawyers losing sight of the rules when we hear stories of, and read judicial opinions addressing, combative depositions,[11] lawyers hiding documents and

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[8] *USA Briefs, Scruggs gets five-year sentence in bribary case,* LAWYERS USA at 2 (July 14, 2008) ("Scruggs appeared to nearly faint as the federal judge scolded him for his conduct . . . Scruggs started to sway side-to-side . . . ."); Holbrook Mohr, *Ex-Lawyer Scruggs to Begin Five-Year Sentence Monday,* MOBILE REGISTER at 5B, (August 3, 2008), (Scruggs was portrayed in the 1999 film "The Insider" starring Al Pacino and Russell Crowe). *See also* Sung Hui Kim, *supra* note 2 at 988-1001 (comparing venality and banality models of fraud).

[9] Mohr, *supra* note 8.

[10] *Id.*

[11] *See* Jean M. Cary, *Rambo Depositions: Controlling An Ethical Cancer in Civil Litigation*, 46 DEF. L. J. 649 (1997); Eleanor W. Myers, *"Simple Truths" About Moral Education,* 45 AM. U. L. REV. 823, 828 (1996) ("Clients also seem to want lawyers who take the 'Rambo' approach and lawyers give into this pressure."); Steve Weinberg, *Hardball Discovery*, A.B.A.J. (Nov. 1995); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 Val. U. L. Rev. 513, 513 (addressing the transition of the profession from one of professional congeniality to one of confrontations.). *Cf.* Comment, *A Critique of the Civility Movement*, 88 MARQ. L. REV. 751 (1994); Leonard Jay Schrager, *Civility Yields Success*, 13 C.B.A. RECORD 8 (1999). As an anecdotal comment, this author spoke with a

committing other *serious* discovery abuses for clients,[12] disrespect toward the courts by lawyers who were, purportedly, zealously advocating the positions of their clients.[13]

II. Goals of This Material and Presentation

The goal of this discussion is, therefore, to try to suggest and discuss some basic conditions that might be contributing to the incidents of lawyers "crossing the line," to include the basic nature of what we do as lawyers and the potentially distorting effects on who we are as people and who some become as lawyers. The focus will be on a concept which engenders some controversy: recognition that there is a moral tension that is inherent in what we do as lawyers. It is hoped that this material and the accompanying discussion will stimulate consideration of our own individual moral accountability when we operate within the adversary system. Such a consideration often requires an uncomfortable exploration of how morally responsible, if at all, lawyers are in assisting clients to accomplish their goals. We will consider whether lawyers

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court reporter about the topic. That court reporter related that she had seen many things take place in depositions to include lawyers grabbing each other's ties across the deposition table. In all probability court reporters could write volumes about lawyers' unprofessional conduct.

[12] *See* GMAC Bank v. HTFC Corp., 248 F.R.D. 182 (E.D. Pa. 2008) (egregious conduct of client in a deposition resulted in sanctions, but the lawyer for the deponent also sanctioned for not interceding and controlling the client); General Refractories Company v. Fireman's Fund Insurance Company, 337 F.3d 297 (3d Cir. 2003) (abuses were so serious that they gave rise to a separate cause of action for abuse of process). *See also* W. Bradley Wendel, *Rediscovery of Discovery Ethics*, 79 MARQ. L. REV. 895 (1996). The author differentiates between the lawyer's roles at various stages of litigation and posits that, while lawyers have a duty to be advocates for their clients, that adversarial duty does not apply with full force to discovery where the lawyer is in the role of assisting the court in adjudicating the dispute on the merits by disclosing the facts necessary for the court to make an informed decision. *Id.* at 895.

[13] For an excellent article dealing with the problem, *see* Allen K. Harris, *The Professionalism Crises: The "Z' "Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 12 THE PROF. LAW. 1 (2001) (noting that one of the causes of the loss of professionalism is the misconception that the concept of zealous representation, formerly in Cannon 7, is still in the A.B.A. Model Rules). *See also* Paul Lowell Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L. J. 445, 445 (1990). ("The law often permits what honor forbids," Bernard Joseph Saurin, Spartacus, 1760).

disengage from the goals that they are accomplishing for their clients by simply saying that they are doing their professional job or do they morally link with the goals that their clients seek;[14] how closely they become identified by others with their clients' goals;[15] how closely *they allow*

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[14] Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 542, 543 ("A fundamental question for lawyers . . . is the extent to which lawyers are personally accountable for results they help their clients get.") (hereafter Schwartz-Zeal). *See also* Nancy B. Rapoport, *Enron, Titantic, and the Perfect Storm,* 71 Fordham L. Rev. 1373, 1385 (2003) ("For the longest time, lawyers, have done everything they could do to distinguish the client's ends from the means that the lawyers used to achieve those ends. This "moral independence" theory has been used to justify everything from lawyers who take unpopular causes to lawyers who facilitate shady deals, even though the original theory was never intended to justify shady deals.").

[15] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2001) (hereafter MODEL RULES ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the clients' political, economic, social or moral views or activities."); MODEL RULE 6.2(c) (allowing a lawyer to not accept appointed representation if "the client or cause is so repugnant . . . as to be likely to impair the client-lawyer relationship on the lawyer's ability to represent the client."). *See also* Madeline C. Petrara, *Dangerous Identification: Confusing Lawyers With Their Clients*, 19 J. LEGAL PROF. 179 (1995).

With respect to the identification of lawyers with the morality or immorality of their clients' goals by others and by the lawyers themselves, the following thought-provoking questions have been asked:

> [I]s there something special about legal agents that exempts them from these precepts? Can lawyers say: "You are mistaken. I am a lawyer. Your judgments do not apply to me. To all the others, perhaps but not to me."? Can they, as Murray Schwartz has put it, "file a demurrer, rather than an answer, to the charge of immorality"?
>
> Those who answer "yes" may rely on attributes of the legal system within which lawyers work, especially its adversary dimension. That system, they might contend, is so special that as long as a lawyer acts within it, he or she must be insulated from moral accountability or the system won't work as intended. Those who answer "no" or remain skeptical may question whether the legal system can offer an excuse in all cases. If a client cannot cite the lawfulness of his goals or tactics whenever the morality of either is challenged, why should the lawyer, who helps the client achieve the goals or invoke the tactics, fare better?

Stephen Gillers, *Legal Ethics: Can A Good Lawyer be a Bad Person?* 2 J. INST. STU. LEGAL ETHICS 131, 131-32 (1999) citing Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 674 (1978). *Cf.* MODEL RULE 1.2(b); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 5, 7, 14 (1999):

> Lawyers and academics who call for returning values to legal ethics ought to be expected to specify whose values they seek to infuse into the practice of lawyering, how those values are to be ascertained and applied, and what to do in cases in which those values conflict; "[P]ersonal moral beliefs have limited application to the professional setting in a world of marked religious and moral diversity and disagreement"; "[I]t is fatuous to assert that a moral analysis of the lawyer's behavior must stop with the conclusion that no legal rule was violated. An

themselves to be personally linked to those particular goals; and the psychological and moral consequences on lawyers as they advocate certain positions for their clients that are in conflict with their personal values.[16] It is submitted that this tension, and the accompanying process of moral disengagement, create perilous risks for "crossing the line." It is believed by this author that addressing these types of issues, discussing them openly within the profession, and thereafter, considering them as we practice our profession, create the potential for fewer incidents of risky behavior.

III. The Reality of Client Pressure

A. Client pressure:

While in the past, I have treated this topic within the body of topics that create high risks for lawyers, I want to address it on the front end. This is because I believe that it is an element that is a pervasive reality that puts other explanations in context.

The tendency of lawyers, through a desire to win and gain economic success, can propel a

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> inquiry into the ethical status of lawyers' behavior must take into account more than simply whether or not rules are followed.

See also Roger C. Cramton, *Counseling Organizational Clients "Within the Bounds of the Law,"* 34 HOFSTRA L. REV. 1043 92006) (gatekeeping concepts addressed); Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go In Assisting a Client In Legally Wrongful Conduct?,* 35 U. MIAMI L. REV. 669 (1981).

[16] *See* Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 640 (1997) (excellent article that deals with the 1996 Formal Ethics Opinion 96-F-140 from the Tennessee Supreme Court's Board of Professional Responsibility which deals with lawyers' ethical obligations when lawyers are appointed as counsel for minors who seek judicial waiver of Tennessee's parental consent requirement to obtain abortions "when such representation violates the lawyer's deeply held beliefs about the sanctity of life.").

lawyer toward the goal of "winning" for the client even at costs to other institutions as well as to the lawyer, personally. This can result in the potential for the disengagement of the lawyer from the other valuable interests to which lawyers' duties are also owed. This approach can occur when the lawyer is too closely linked to the client, or too economically dependent on the client. In such environments of dependency, the lawyer, it is submitted, may be more prone to cross the line for the client.[17] Lawyers must guard against this type of dependency or else be held captive by it.

B. The relevance of a client's workplace pressure:

In this context, it is helpful to examine some suggested paradigms regarding organizational clients. In order to do that, there must be an informed understanding among lawyers of what is occurring in the corporate world today and into what type of world defense lawyers insert themselves during the course of representing their organizational clients and what type of world plaintiffs' counsel encounter.

An understanding by lawyers of the pressure within organizations is essential.[18] That

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[17] Client pressure can arise from simply being economically dependent on a client, like insurance carriers, for sources of revenue. An insurance company's book of business can result in a tremendous influence over a lawyer's conduct. *See* State Farm Mut. Auto Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998) (Gonzalez, J., concurring and dissenting) (discussion of the ethical issues in insurance defense practice). *Cf.* Burnele V. Powell, *What Clients Want and Why They Can't Have It*, 52 EMORY L. J. 1135 (2003).

[18] *See* Jeffrey S. Kinsler, *Arthur Anderson and the Temple of Doom,* 37 SW. U. L. REV. 97 (2008) (excellent article regarding Arthur Anderson's demise and the effects of organizational cultures on lawyers). *See also* Sung Hui Kim, *supra* note 2 at 997 ("[M]y banality hypothesis . . . suggests that the behavioral origins of lawyer acquiescence in corporate fraud are found in commonplace interactions in organizational settings. In other words, what we perceive as 'extraordinary behavior' on the part of inside counsel is better explained by analyzing what is 'ordinary behavior'

pressure either taps a deviant nature in some people within an organization or propels them in directions which they would not normally go. Some revealing surveys have been done regarding workplace pressure in corporate America today.

In 1997, there was a landmark study sponsored by the American Society of Chartered Life Underwriters & Chartered Financial Consultants and the Ethics Officer Association with underwriting support from the Guardian Life Insurance Company of America and State Farm Insurance Companies.[19] It revealed the existence of workplace pressures and the *responses* of the employees to those pressures by crossing the line and participating in improper or illegal conduct.

In 2002, there was a survey conducted by the Southern Institute for Business and Professional Ethics which revealed that,

> [m]any businesses, especially small businesses, do little or nothing to promote an ethical culture. It seems that small businesses feel they do not need an ethical code for their employees because they

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in the corporate workplace."). The effects as evidenced by Enron and other incidents are certainly not confined to in-house counsel. Regarding the savings and loan crisis and the Kaye Scholar case, see Lincoln Savings and Loan Association v. Wall, 743 F. Supp. 901, 920 D.D. (1990) (Regarding Keating's claim to have surrounded himself with accountants and lawyers, the Court said: "Where were these professionals . . .when these clearly improper transactions were being consummated."); Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel In Regulatory Proceedings After the Kaye Scholar Settlement,* 25 ARIZ. ST. L. J. 487, 489 (1993) ('[T]he lessons of the Kaye Scholar settlement is how litigators at a prominent powerhouse law firm used hardball tactics and creative ignorance to receive $13 million in fees while helping the government lose $2.6 billion."); Donald C. Langevoort, *What Was Kaye Scholar Thinking?,* 23 LAW & SOC. INQUIRY 297 (1998) (hereafter Langevoort-*Kaye Scholar*). The negative effects of conformity and obedience can also be present in large law firms. *See* Andrew M. Perlman, *Unethical Obediance By Subordinate Attorneys: Lessons From Social Psychology,* 36 HOFFTRA L. REV. 451 (2007). *See also* Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism,* 35 U. MEM. L. REV. 631 (2005).

[19] *See also* 4 E.O.A. NEWS 4 (Spring, 1997) ("This study is believed to be the first quantitive study to pinpoint the sources of pressure in the American workplace. It examines how workers respond to the pressure they experience and whether there is a link between workplace pressure and unethical/illegal behavior.").

> have few employees, and because of their sense that within small scale companies the ethical behavior of employees naturally exists.[20]

John Knapp, President of the Southern Institute, observed that there are things that corporations can do to "indirectly encourage unethical behavior, such as setting aggressive financial goals or project deadlines."[21] Along those lines, Mr. Knapp made the following observation:

> One of the things that people misunderstand about ethics is that it's about people choosing to do wrong for their own gain. The much larger problem is people doing things that they think are good for the business. It's actually an easier problem to root out the bad applies . . . who, when faced with a decision between right and wrong, choose wrong because it personally profits them. That's a fairly minor problem compared to the larger issue of people who cut corners and make compromises because they believe it's in the best interest of the company or that the company would condone or even encourage that activity.[22]

Most recently, the Ethics Resource Center published the results of its *National Business Ethics Survey: An Inside View of Private Sector Ethics.*[23] The survey is part of National Workplace Ethics Study which is "an ongoing research initiative of the Ethics Resource Center."[24]

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[20] Leah Wilson, *Changing Corporate Ethics Codes After Enron and How to Know If the Changes Prove Useful*, 28 J. LEGAL PROF. 259, 264 (2003-2004).

[21] *Id.*

[22] *Id.*

[23] Found at: www.ethics.org (hereafter *"Business Ethics Survey.").* *See also* Jim Nortz, *Ethics Resource Center Sounds Alarm With Its 2007 National Business Ethics Survey,* 26 A.C.C. DKT. (#2) 74 (March 2008).

[24] *Business Ethics Survey, supra* note 23 at ii.

While finding some good news, the *Business Ethics Survey* found the following very sobering realities:

> Ethical misconduct in general is very high and back at pre-Enron levels – during the past year, more than half of employees saw ethical misconduct of some kind.
>
> Many employees do not report what they observe – they are fearful about retaliation and skeptical that their reporting will make a difference. In fact, one in eight employees experiences some form of retaliation for reporting misconduct.
>
> The number of companies that are successful in incorporating a strong enterprise-wide ethical culture into their business has declined since 2005. Only nine percent of companies have strong ethical cultures.[25]

These survey results are very disheartening because they reveal on-going negative ethical conduct even after the Enron, WorldCom, and Arthur Anderson[26] prosecutions, the civil actions by shareholders, and efforts by the S.E.C. to emphasize the roles of gatekeepers and to change organizational cultures.[27] Furthermore, there has literally been a cottage industry developed by

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[25] *Id.* at v.

[26] Arthur Anderson LLP v. United States, 544 U.S. 696 (2005) (Arthur Anderson's conviction reversed due to bad instruction on *mens rea*). See Kinsler, *supra* note 18 at 98 ("Anderson collapsed not because of greedy partners or unethical lawyers – though both groups undoubtedly contributed to such failure – but because Anderson had an environment in which in-house attorneys were either unable or unwilling to render the type of professional, independent legal advice required of attorneys."); Albert D. Spalding, Jr. and Mary Ashby Morrison, *Criminal Liability For Document Shredding After Arthur Anderson LLP,* 43 AM. BUS. L. J. 647 (2006).

[27] *See* Renee M. Jones, *Sarbanes-Oxley's Insight: The Role of Distrust,* 3 J. BUS. & TECH. L. 437 (2008); Terry Morehead Dworkin, *SOX and Whistleblowing,* 105 MICH. L. REV. 1757, 1757 (2007) ("The language of the Sarbanes-Oxley Act ("Sox") leaves no doubt that Congress intended whistleblowing to be an integral part of its enforcement mechanism."); Peter C. Kostant, *From Lapdog to Watchdog: Sarbanes-Oxley Section 307 and a New Role For Corporate Lawyers,* 52 N.Y.L. SCH. L. REV. 535 (2007-2008); Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers,* 2006 B.Y.U.L. REV. 1107 (2006); Richard E. Moberly,

consultants on business ethics.[28]

It is this workplace pressure and the results of it that lawyers encounter. Lawyers must understand that it is this workplace pressure that may very well have precipitated the case in which they are involved. The corollary is that lawyers must also be cognizant of the participants in such conduct because those participants may very well still be part of the organizational culture[29] and if so, they could very well be in a mode of protecting themselves.

C. The relationship of competition to organizational culture:

A very enlightening article has been written about organizational cultures and competition by Donald C. Langevoort titled *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility in the Lessons of Enron*.[30] In his article Mr. Langevoort addresses what he describes as a new economy and the types of managers and environments that exist in corporate America with the new economy when there are what he describes as "[h]yper-

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Unfulfilled Expectations: An Empiracal Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 WM. & MARY L. REV. 65, 67 (2007); David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines,* 105 MICH. L. REV. 1781 (2007); Jaclyn Taylor, *Fluke or Failure? Assessing Sarbanes-Oxley After United States Scrushy,* 74 UMCK L. REV. 411 (2005); Bryon F. Egan, *The Sarbanes-Oxley Act and Its Expanding Reach,* 40 TEX. J. BUS. LAW 305 (2005); Gregory R. Watchman, *Sarbanes-Oxley Whistle-Blowers: Avoiding the Nightmare Scenario,* 24 A.C.C. DKT. 38 (2006); Thomas O. Gorman and Heather J. Stewart, *Is There a New Sheriff In Corporateville? The Obligations of Directors, Officers, Accountants and Lawyers After Sarbanes-Oxley of 2002,* 56 ADMIN. L. REV. 135 (2004).

[28] HARV. BUS. REV. 38 (January 1, 1994) (Westlaw cite: 1994 WLNR 177267).

[29] Kinsler, *supra* note 18 at 98 (discussing Anderson's "use or misuse of in-house attorneys.").

[30] 70 GEO. WASH. L. REV. 968 (2002).

[c]ompetitive[s] firms."[31] He addresses the common characteristics of those who are involved in such organizations and traces how those characteristics can lead to the types of problems that we see today with respect to organizational corruption. The important phenomenon that he describes is what types of people these organizations produce, or the types of people who are drawn to those organizations, which are, predictably, people with high self-images. He describes this phenomenon as follows:

> Self-esteem grows with the predictable increase and resistance to information that is inconsistent with inflated self-image. At the very top of the organization, we see a rarified group of survivors very adept at producing, but with diminished capacity to see things as they really are. Indeed, the noted organizational psychologist Michael Macoby has claimed that the ultimate tournament survivors in high-growth "intangible"-based firms is often the hard core narcissist—a personality trait (disorder in severe instances) that often produces highly charismatic leadership coupled with a strong disinclination to accept or admit the truth.[32]

D. The paradox of the charismatic CEO:

It is this type of environment with these types of people with which a lawyer might find

[31] *Id.* at 968.

[32] *Id.* at 971 citing Michael Macoby, *Narcissistic Leaders: The Incredible Pros, The Inevitable Cons*, HARV. BUS. REV., Jan.-Feb. 2000, at 69-70. For an interesting article dealing with a social-psychological perspective on corrupt corporate leadership, *see* Michael A. Hogg, *Social Identity and Misuse of Power*, *Corporate Misbehavior by Elite Decision-Makers Symposium: Perspectives From Law and Psychology*, 70 BROOK. L. REV. 1239 (2005). *See also* Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance,* 92 IOWA L. REV. 105 (2006). *Cf.* Rebecca Walker, *Mitigating the Fear of Retaliation: Helping Employees Feel Comfortable Reporting Suspected Misconduct,* PLI CORPORATE LAW AND PRACTICE HANDBOOK SERIES, 1661 PLI/CORP. 81 (March-June 2008).

himself or herself dealing.[33] Indeed, one of the most potentially dangerous elements within an organization is the very charismatic leader.[34] I have spoken to business groups and I describe this phenomenon as the *paradox of charisma*. While charismatic CEOs are sought after by boards of directors, they can often be the downfall of their organizations. What must be understood is that lawyers thrust into this environment and who work for people like this, either as in-house or outside counsel, are as vulnerable as anyone to the charismatic CEO.[35]

E. Entrenched corporate cultures:

The recent stories of organizational corruption are legion. From all accounts, we will have more such incidents because the indications are that, even with prosecutions emanating from the corporate corruption scandals, "corporate fraud is alive and well in the U. S."[36]

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[33] Along these lines, counsel should also determine if an organization has a code of ethics and a functioning compliance program whether it appears to be a viable part of the corporate culture. *See* Philip A. Wellner, *Effective Compliance Program and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497 (2005). *See also* Darian M. Ibraham, *Individual or Collective Liability For Corporate Directors,* 93 IOWA L. REV. 929 (2008).

[34] *See* Rakesh Khurana, *The Curse of the Superstar CEO*, HARV. BUS. REV. 6 (September 1, 2002); Kate Lorenz, *Examining the Alpha Male At Work,* ww.careerbuilder.com/custom/MSN/CareerAdvice/viewarticle.aspx?articleid=100 (examines types and the character traits of each to include charisma and "bending the facts to get their ideas accepted."). *But cf.* Alan Murray, *After the Revolt, Creating a New CEO,* THE WALL STREET JOURNAL, May 5-6 et al. (addresses the difference in new CEOs at Boeing, Hewlett-Packard, and AIG); Linda Klebe Trevino, *Out of Touch: The CEO's Role in Corporate Misbehavior,* 70 BROOK. L. REV. 1195 (2005).

[35] *See* Mark A. Sargent, *The Moral World of Corporate Lawyers,* 19 GEO. J. LEGAL ETHICS 289, 289 n. 4 (2006) ("It is crucial to understand that lawyers and law firms who do the bidding of the corporate managers, who hire them may have failed to meet their fiduciary obligations to their real client, the corporate entity."); Roger C. Crampton, George M. Cohen and Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 736-742 (2004). *See also* Rapoport, *supra* note 14 at 1388 n. 73 (posting that one's moral development alone does not explain actions, that there must be a consideration of the particular situation and that to try to predict a person's actions based on moral development alone is a "'fundamental attribution error.'").

[36] John W. Schoen, *Corporate Fraud Alive and Well in U. S.* MSNBC, www.msnbc.msn.com/id/12762573/print/1/displaymode/1098/ (May 25, 2006). For an interesting article dealing with a social-psychological perspective on corrupt corporate leadership, *see* Hogg, *supra* note 32.

The issues discussed in this section certainly may be causal elements of the Enron-type stories[37] and they, therefore, must be viewed as relevant to professionalism and ethical issues.[38] With that paradigm, the remainder of this material will address the central underlying issues of concern.

To help counter the corrosive effects of these pressures, I have developed a program for businesses titled: *Best Business Practices and Organizational Ethics From a Litigator's Vantage Point*. It is designed to inform businesses, their management, and their employees of a litigator's perspective on business conduct and to provide insights into good business practices and bad business practices that expose organizations and their personnel to potential civil and criminal liability. Copies of my advertising flyer and an outline of the program are attached at the Appendix.

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[37] *See* Robert Prentice, *Enron: A Brief Behavioral Autopsy,* 40 AM. BUS. L. J. 417 (2003) (excellent article addressing aspects of behavioral decision theory in relation to the Enron story). *Cf.* Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations,* 152 U. PA. L. REV. 1517 (2004) (excellent survey and critique of other authors' explanations of the causes of the Enron situation).

[38] Regarding internal investigations, s*ee generally* Catherine M. Foti, *Ethical Issues Raised in Connection With Internal Investigatory Interviews*, Practicing Law Institute, *Ethics After Enron: Protecting Your Firm or Corporate Law Department*: A Satellite Program, Westlaw cite: 126 PLI/NY 231; Jeffrey Thomas and Susan T. Stead, *Attorney-Client Privilege and Confidentiality Issues in Internal and External Investigations*, 35 THE BRIEF 13 (2006).

IV. The Law School Experience: A Relevant Reflection

One cannot begin to explore these issues without a *critical* reflection on the law school process and its linkage to present day problems. The law school classroom experience can be one of the most intellectually and personally fulfilling experiences that a person can have. It is stimulating, it is intellectually challenging, it is skill-producing, and it is transferable to many other professional career paths. However, it has its inherent dangers.[39]

The law school classroom experience takes people who bring their own communities of memory, value systems, ideals, and expectations, into the classroom, and creates the potential danger of value neutralization and moral ambiguity.[40] This is, arguably, aided by the way that classes are taught and the use of the Socratic method.

To illustrate this point, and admittedly at the risk of over-simplifying the classroom process, a faculty member may ask a student to analyze a case. The student will have to draw on the analytical left side of his brain and articulate a rational argument for the plaintiff. The faculty member may then ask another student to make an argument for the defendant, from the same fact pattern and the same legal context. That student will, likewise, draw on the left side of her brain

[39] Having taught law school for five years, I can unequivocally state that it was one of the most personally rewarding times in my life. However, on reflection, and after considering the types of issues that are addressed in this material, I believe that the law school process has the inherent dangers built into it that I have tried to address in this material.

[40] *See* Ames, *supra* note 1; Orrin K. Ames, III, *Moral Neutralization*, 6 ADDENDUM 8 (2001). *Cf.* Paul G. Haskell, *Teaching Moral Analysis in Law School*, 66 NOTRE DAME L. REV. 1025 (1991) (advocates teaching moral analysis); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457(1897) (endorsed the separation of the study of law from considerations of morality). *See generally,* the discussion of cognitive dissonance and other psychological influences, *infra* beginning at 28.

and articulate a diametrically opposed, equally rational, analytically tight argument. This, of course, is done to "prepare" law students to handle any side of a dispute and to "think like a lawyer."

However, before they begin their immersion into the Socratic Method, students have some concept of what is right and what is wrong. All too soon, however, in a law school classroom, students find that a given set of facts can produce two advocates' arguments each with, arguably, equal intellectual merit. This can then cause the student to ask, "which argument is morally right?"

That core question is not customarily addressed in the law school classroom. Some would say that such a question is better left to a discussion among the students after the class or in a jurisprudence course. However, such a position might not be accurate. This is because the process of pitting one person's left-brain, analytical capacity against another's to structure arguments that are often devoid of moral weighting, tends to numb the law students' communities of memory and create cynicism, value neutrality, and moral ambiguity. When those communities of memory are sufficiently numbed, the law student is graduated, having successfully completed this process. She then enters the practice of law well equipped for a system that is "simply a device for accomplishing specific political, economic, and social objectives based on an instrumental theory designed to accomplish what is expedient," which offers the corresponding financial incentives and rewards.

One consequence of this moral neutralization, it is submitted, is the creation of vulnerability to the pressures of law practice that law graduates will experience. Some of these pressures are explored in this material.

V. The Rules of Professional Conduct: Perpetuation of Moral Ambiguity

Once having graduated from law school, and now thoroughly exposed to the pragmatic merits and financial incentives of moral ambiguity, the student enters a profession with rules of professional conduct that, arguably, lack concern for moral consequences. A view comporting with that observation advances the thesis that the rules are non-consequentialist in nature and that they are the result of a balancing process that has already been done by the drafters of those rules.[41] With that view, an individual lawyer's discretion to consider his or her own moral code when being asked to abide by those rules, may no longer have a role in the way that a lawyer practices his or her profession.[42]

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[41] *See* Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct,* 55 DRAKE L. REV. 347 (2007) (focus on confidentiality and attorney-client privilege).

[42] *See* Mario J. Madden, *The Indiscrete Role of Lawyer Discretion In Confidentiality Rules*, 14 GEO. J. LEGAL ETHICS 603 (2001):

> Legal ethics are often perceived as merely an extension of personal morality. Such a view leads many in the legal profession to approach crises and legal ethics as they would crises in their personal lives and treat legal ethical rules like personal moral values - i.e., as mere guides for behavior that individual lawyers can modify as necessary. The belief that individual lawyers can determine, based on their own personal moral beliefs, appropriate ethical behavior in a given professional situation is problematic, however, because it has led to a prominent role for lawyer discretion in the rules governing confidentiality. . [D]iscretion should not play such a role.

Id. at 603-04. *See also* Wendel, *supra* note 15 at 6 ("[P]ersonal moral beliefs have limited application to the professional setting in a world of marked religious and moral diversity and disagreement."); Myers, *supra* note 11 at 830-31:

That approach, of course, requires one to accept the premise that the "legal ethical rules are distinct from the rules of personal morality."[43] That view also holds that, "[t]he tendency to apply personal moral judgments to professional actions, although easily understandable, is ultimately detrimental to the legal profession."[44] In keeping with the advancement of this thesis one would also believe that "the rules of professional responsibility determine the appropriate conduct of a lawyer without regard to particular consequences, and consequences do not excuse a lawyer from following the rules."[45]

Juxtaposed with this paradigm is the view that such a value neutral and non-consequentialist framework for guidance can result in a lawyer committing amoral or immoral acts[46] while hiding behind rules of professional conduct and not taking responsibility for his or her acts that relate to the representation of clients within the boundaries of the ruling. According to this view, lawyers are autonomous, moral beings with value systems who should act in accordance with their own personal moral codes in the context of their professional activities.[47]

> Even the finest moral education - one that teaches the rules of the profession, attempts to cultivate the capacity for reflective moral judgment, and activity engages students in values clarification and moral choice – is likely to be undermined if the workplace is where our students practice systematically undercut expressions of personal values or constrain the exercise of judgment.

[43] Madden, *supra* note 42 at 604.

[44] *Id.* at 605.

[45] *Id.* at 606.

[46] *See generally,* Thomas Shaffer, *The Profession As a Moral Teacher,* 18 ST. MARY'S L. J. 195, 197 (1986) ("My argument in this articles turns on . . . two propositions: (1) Sound ethical codes in the profession are those which depend on character; and (2) Ethics codes in which that dependence is not understood are corrupt and corrupting.").

[47] *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1 (1975).

This clash of perspectives is ultimately related to how a lawyer will practice his or her profession. Furthermore, it can come to a head when a lawyer is faced with a path, while representing a client, that creates serious moral issues for him or her.[48] The choice of what a lawyer will do under those circumstances, and how the lawyer will act, are issues that need to be openly debated and not just in academic law review articles. They should first be addressed in law schools, but they need to be constantly discussed by practitioners in CLE programs that will do more then address symptoms of the lack of professionalism and of ethical transgressions.[49]

VI. The Role of Individualism

A. Individualism in the culture in general:

When Tocqueville came to America, what he observed and described as the strength of American culture was the same quality that he cautioned might ultimately be its weakness. Having come from a culture that had been acclimated to living under the control of a monarchy, he was acutely aware of how individualistic Americans were. He saw this as a quality that made them self-reliant and that provided unbounded capacities to succeed.

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[48] *See* Dr. Edmond D. Pellegrino, Director, Kennedy Institute of Ethics and John Carroll Professor of Medicine and Medical Humanities, Georgetown University, Washington, D.C.; *Character, Virtue and Self Interest in the Ethics of the Professions*, Brenda F. Brown, Lecture, the Catholic University of America, the Columbus School of Law, February 20, 1989 (edited version, Center for International Leadership, Washington, D.C. at 6; hereafter "Pellegrino"). This can become an acute dilemma in situations where there are lawyers who are working in corporations, in government, and in private firms and who observe their institutions doing something morally or legally wrong. These lawyers are placed in classic potential whistle-blower positions. The profession, however, offers very little, if any, protection to lawyers in such situations. *See* Brenda Marshall *In Search of Clarity: When Should In-House Counsel Have The Right to Sue for Retaliatory Discharge?* 14 GEO. J. LEGAL ETHICS 871 (2001). *But cf.* MODEL RULE 8.3 which requires lawyers to report if they know of violations of the Rules. *See also In re* Lackey, 37 P.2d 172 (Ore. 2002) (former Oregon National Guard Judge Advocate officer revealed alleged improprieties and other matters).

[49] *See* Ames, *supra* note 1.

On the other hand, he also realized that these same qualities of individualism and self-reliance contained the latent capacity for the disengagement by the person possessing it from the values in that person's culture to a point where that person, even at the cost of the communities around him or her, would maximize the fulfillment of that person's individual self-interest. This self-maximization trait was recognized by Robert Bellah and a number of other scholars who authored a study of American culture in the 1980s. That study offered the concept of *utilitarian individualism* to describe the linkage of the quality of individualism with utilitarian self-maximization. The effect of individualism on the culture was described by the authors as resulting in a citizen isolating himself from his fellow citizens and withdrawing into smaller communities made up solely of his family and friends and, therefore, leaving the greater society to take care of itself.[50]

B. <u>Utilitarian individualism's migration into the legal profession</u>:

It seems that the concept of utilitarian individualism may now have worked its way into the legal profession. Evidence of this is that many observers are lamenting that the legal pro-

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[50] ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWINDLER, AND STEVEN M. TIPTON, HABITS OF THE HEART, INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 37 (1985) (hereinafter "Bellah") (quoting from TOCQUEVILLE, *DEMOCRACY IN AMERICA*, ed. Mayer at 506):

> Individualism is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself.

See also RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 268-275 (1991) (excellent discussion of Hobbes and his perspectives on individualism, self-interest, and "material aggrandizement for the individual"); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION at 225-264 (1993) (discussion of the impacts of the Law and Economics and Creative Legal Studies movements in law schools).

fession has become a business; that it has lost many of its attributes of a profession; and that its practitioners are more goal oriented in terms of money and commercial success than professional service. In short, there has been a metamorphosis of the legal profession from the type of lawyering symbolized by Atticus Finch[51] to the Rambo, confrontational, win at all costs, style of lawyering that we see practiced today. To be sure, not all lawyers are participating in this transition, but enough are that the problems are now systemic and not isolated or simplistically explainable as resulting from dysfunctional personalities.

One of the manifestations of this self-interest has been articulately described as follows: “When pure self-interest is a lawyer’s compass, whatever argument will achieve a certain result--and fee--is made, and sometimes wins.”[52] The self-maximizing orientation manifested by the desire to win and make money, even at costs to others, it is submitted, results in a very high risk of lawyers’ isolation from relationships to others, to the culture, and to the law as a values-based institution.

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[51] *See* Monroe H. Freeman, *Atticus Finch - Right and Wrong*, 45 ALA. L. REV. 473 (1994); Thomas L. Shaffer, *Growing Up in Maycomb*, 45 ALA. L. REV. (1994).

[52] Michael D. Brennan and Alexander Dushku, *Each Lawyer’s Crisis*, 81 MARQ. L. REV. 831, 835 (1998) [hereinafter "Brennan"]. Drawing again on Tocqueville, this self-maximizing perspective of the legal profession has been described as follows:

> For [Toquoville], the professions were never intended to be a path to wealth. As lawyers sought to rise above the upper middle class (where their profession had placed them) by using their privileged position to charge ever more for their services, they progressively lost the capacity to view their profession as something other than the pursuit of economic interests. Cartel power was used for financial ends. The capacity to resist unjust client demands was necessarily weakened. Lawyers began to become hired guns.

Id. at 837-838.

For lawyers, this means the risk of disengagement from duties that have always made up the range of duties that are part of a lawyer's profession: duties to the courts, to society, to the culture, and to the truth. Without the shared connection to the courts, the society, the culture, and truth, which all combine to form lawyers' communities of memories,[53] lawyers risk becoming disengaged.[54] Dean Anthony Kronman, of the Yale Law School, has found this type of situation

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[53] *See* the concept of "communities of memory" described in Bellah, *supra* note 50, at 152-157. Bellah describes a community of memory as one that, in order not to forget its past, it "is involved in retelling its story, its constructive narrative . . . [offering] examples of the men and women who have embodied and exemplified the meaning of the community." *Id*. Bellah observes that "[t]he stories that make up a tradition contain conceptions of character, of what a good person is like, and of the virtues that define such character." *Id.* A closer examination of the legal profession today will yield the conclusion that it may be losing its community of memory and that the role modeling is disengaging from conceptions of character. Identities are formed in communities and such disengagement creates a high risk of loss of identity.

[54] This disconnect can diminish the character of the profession as well as the lawyer. Speaking as a physician, but articulating professionalism concepts that apply equally to lawyers' approaches to their profession and to their clients, Dr. Edmond D. Pellegrino has described the relationship of character to the role of the professional:

> Character shapes the way we define a moral problem, selects what we think is a ethical issue, and decides which principles, values and technical details are determinative.

Pellegrino, *supra* note 48. Dr. Pellegrino does not say it, but lawyers' codes of professional responsibility must be understood to be very narrow in their moral dimensions. They, traditionally, are not aspirational; they do not tell lawyers how to be good lawyers. They should simply be understood to express a minimum level of conduct to avoid the more typical problems.

Reinforcing the relationship between character and professionalism, Leslie E. Gerber, in his article on theological ethics and their relationship to the legal profession, has observed:

> [W]hat constitutes a dilemma is often character-dependent. . . . Therefore, to construe ethics as the solution of dilemmas is to ignore the radical variability in human moral capacity. . . . For example, the Aquandary@ about whether to divorce may equally beset two persons, but they may bring to the problem such diverse patterns of reflection and emotion that, for all practical purposes, they are effectively two different problems.
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> . . .
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> Good persons are good because they possess the right virtues. Virtues are habits, inclinations, dispositions, skills, and modes of seeing and describing the moral world they must be practiced to be possessed; they are exercised not only in moments of great anxiety and crisis but in the small, ordinary context of life.

Leslie E. Gerber, *Can Lawyers be Saved? The Theological Legal Ethics of Thomas Shaffer*, 10 J. LAW & RELIGION 347 (1995). *See also* the discussions of cognitive dissonance, *infra* beginning at 28. In the context of Enron, *See*

to be a moral crisis within the profession.[55] Unless somehow restrained or channeled, utilitarian individualism will continue to manifest itself in the legal profession, in the adversary system, and in lawyers' relationships with clients and the courts.[56]

VII. An Instrumentalist Theory of Law

Thrown into this mix is the fact that the legal system has metamorphosized from a theologically-based system to a secular system where the goals of the law are thought of in terms of material and personal ends with lawyers serving as instruments to accomplish those ends.[57] It

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Rapoport, *supra* note 14 at 1378 ("If we are to believe that there is a single root cause of the Enron mess (an arguable point at best in such a complicated situation), failure of character gets my nomination.").

[55] *See* Kronman, *supra* note 50 at 1-2:

> [There is] a crisis in the American legal profession. [The] profession now stands in danger of losing its soul.
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> . . .
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> This crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfillment to the person who takes it up. Disguised by the material well-being of lawyers, it is a spiritual crisis that strikes at the heart of their professional pride.

[56] Some sense of balance needs to be maintained between the duties to the client and other duties that lawyers have to the courts, to the legal system, to the culture, to society, and to themselves as persons, and the pressures that can arise out of the attorney-client relationship that can cause tensions with those other duties. *See*, Ames, *supra* note 1. *See also* 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.") (hereafter "Lawry-Cross").

[57] *See* HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 335 (1993) [hereinafter "Berman"]:

> Only in the past two generations . . . has the public philosophy of America shifted rapidly from a religious to a secular theory of law, from a moral to a political instrumental theory, and from a historical to a pragmatic theory. Law is now generally considered to simply be a device for accomplishing specific political, economic, and social objectives. The tasks of law are thought to be finite, material, and personal -- to get things done, to make people act in certain ways. Rarely does one hear it said that the law is a reflection of an

is from this instrumentalist theory of law paradigm that many clients see their lawyers and from which they will want their lawyers to pursue their matters. In litigation, or even during settlement negotiations, clients will not talk about what is right or wrong. One rarely, if ever, hears discussions of what is morally right. Clients simply want to prevail and accomplish their goals. They then view their lawyers as instruments by which to accomplish that goal.[58]

> objective justice or of the ultimate meaning or purpose of life. Usually it is thought to reflect at best the community sense of what is expedient; and more commonly it is thought to express the more or less arbitrary will of the law-maker.
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> . . .

See Michael P. Schutt, *Oliver Wendall Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity,* 30 RUTGERS L. J. 143, 154 (1998) (comparing Toqueville and Oliver Wendall Holmes and the author's observation that "[t]he role of Holmes' enduring breach with classical legal thought was an 'instrumentalist' approach to law.").

[58] *See* Kronman *supra* note 50 at 127:

> The narrow view insists that a lawyer is merely a specialized tool for effecting his clients' desires. It assumes that the client comes to the lawyer with a fixed objective in mind. The lawyer then has two, and only two, responsibilities: first, to supply his client with information concerning the legal consequences of his actions, and second, to implement whatever decision his client makes, so long as it is lawful.

See also Roger C. Cramton, *On Giving Meaning to "Professionalism*," SYMPOSIUM PROCEEDINGS: TEACHING AND LEARNING PROFESSIONALISM 7, 11, (A.B.A. October 2-4, 1996, Oak Brook, Illinois, published 1997).:

> Once upon a time American lawyers viewed law and justice as objective, rational, and universal. Today, when pragmatic instrumentalism, legal realism, and critical theory are the orthodoxies of the day, law is viewed as contingent, contemporary, and arbitrary. A social order based on justice gives way to one that is viewed, alternatively, as subjective (leading to fragmentation of community), as coercive power, or in positivist terms of whatever officials do.

VIII. The Relevance of the Nature of the Adversary System

Combining the driving motive of utilitarian individualism, an instrumentalist theory of law, and the basic nature of the adversary system, can exacerbate the effects of utilitarian individualism standing alone. For a perspective on this, compare the perspective of the adversary system by Lloyd Weinreb, a former Dean of the Harvard Law School with Lord Brougham's statement as counsel to Queen Caroline in her 1820 trial before the House of Lords.

Dean Weinreb said:

> All the arts and, be it said, tricks of persuasion, all the available dust that can be thrown in the fact-finders' eyes, all the obfuscation that may tilt the result in one direction or the other are the zealous advocate's stock in trade. That is what adversariness, as we now think of it means. Only those who accept adversariness as an article of faith would suppose that such tactics in and of themselves further the search for truth.[59]

In stark contrast Lord Brougham said:

> An advocate, by the sacred duty which he owes his client, knows in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay,

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[59] Lloyd L. Weinreb, *Legal Ethics: The Adversary Process Is Not An End In Itself*, 2 J. INST. LEGAL ETHICS 59, 61 (1999).

> separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his clients' protection.[60]

With such divergent perspectives of the adversary system,[61] the risk is acute that layering on the motive of utilitarian individualism will simply create a heightened risk of disengagement from those anchors that at one time provided stability that contributed to professionalism. It is submitted that such a situation is already upon us. Adding further to the tensions that arise out of that combination are the following matters which must be considered when attempting to identify root causes of the lack of professionalism: the non-consequentialist nature of the various rules of professional responsibility;[62] the issue of the moral responsibilities of lawyers for clients' goals; and a consideration of moral consequences from utilizing permissible rules and tactics.

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[60] *See* Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDU. 29 (1991). Professor Geoffrey Hazard has observed that Lord Broughan's statement is a "classic vindication of the lawyer's partisan role" that has permeated the practice of law despite changes in our society and the practice of law. He also observed, however, that "[i]n recent years . . . scholars of the legal profession genuinely have criticized [Lord] Brougham's stance and have taken a less single-minded view of an advocate's responsibility." Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O. J. Simpson Team*, 29 MCGEORGE L. REV. 291, 292 (1998).

[61] *Cf.* Robert P. Lawry, *The Central Moral Tradition of Lawyering*. 19 HOFSTRA L. REV. 311, 338-340 (1990) (hereafter "Lawry-Central"):

> [The] adversarial role depends on a clear understanding of the system itself. In its classic formulation, the adversary system is a philosophy of adjudication which requires partisan advocates, an impartial decision-maker, and a structured forensic procedure. What makes the system work, of course, is not merely the presence of an impartial judge and partisan advocates, but the agreement by all that the proceedings will be governed by rules fairly applied by the judge and meticulously respected by the lawyers.

[62] For an excellent article on this perspective, *see* Madden, *supra* note 42.

IX. Moral Tension and Its Consequences: The Heart of the Issue

A. General observations:

The representation of clients often calls upon lawyers to advocate positions for some clients that they might not otherwise take for themselves and with which they might morally disagree.[63] This, to some degree, causes lawyers to live in two different worlds: one for the client and the other for "self."[64]

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[63] Howard Lesnick, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference: General Responses to the Conference: The Religious Lawyer In a Pluralist Society,* 66 FORDHAM L. REV. 1469 (1998) (excellent article addressing the opinion from the Tennessee Supreme Court's Board of Professional Responsibility dealing with a Catholic lawyer's dilemma with respect to an appointment to represent a juvenile who wanted the court to waive the statutory prohibition regarding parents' consent so that she could have an abortion); Collett, *supra* note 12 (deals with the same opinion). *Cf.* Deborah L. Rhode, *Moral Counseling,* 75 FORDHAM L. REV. 1317 (2006) (arguing for support and incentives for lawyers' moral counseling).

[64] *See* Wasserstrom *supra* note 47 at 5-6, 8 (emphasis supplied):

> For where the attorney-client relationship exists it is often appropriate and many times even obligatory for the attorney to do things that all other things being equal, an ordinary person need not, and should not do. *What is characteristic of the role of the lawyer is the lawyer's required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance*. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.
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> . . .
>
> In this way, the lawyer as professional comes to inhabit a simplified universe which is strikingly amoral which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive in their everyday lives.

David A. Kessler, *Professional Asphyxiation: Why the Profession is Falling Apart*, 10 GEO. J. LEGAL ETHICS 455, 483 n.183 (1997) ("Although morality is divisible into both professional spheres, it is rare to find a lawyer who is able to totally differentiate between the two. In fact, it is the inherent conflict between these senses of morality that is responsible for much of the stress and misjudgment plaguing the profession . . . ."); Susan Bandes, *Repression and*

This can produce a type of institutionalized amorality with which lawyers are confronted every day of their professional lives. How lawyers handle the resulting internal tension is a *central question* that must be addressed by all lawyers when searching for the root causes of lawyers "crossing the line." In order for one to make the right choices, one has to have a sense of the world in which he or she is immersed as a lawyer, the potential amorality of the demands made on him or her as a lawyer, and the resulting confrontations with one's "character."[65]

B. <u>Divergent Paradigms For Assessing These Concerns: The Law and Economics Approach Compared to a Behavioral Approach</u>:

It is suggested that the law and economics movement over the last few years offers little if any meaningful paradigms by which to make assessments of the issues involving lawyers' behavior addressed by this material and that a much more informed perspective that is transferable into the lives of lawyers comes from the psychological literature.[66] Therefore, the following aspects of behavioral psychology are very helpful in understanding what lawyers experience and the resulting moral and psychological tensions.[67] The areas discussed hereafter

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Denial in Criminal Lawyering, 9 BUFF. CRIM. L. REV. 339 (2006). *See also* Michael M. Simon, *Navigating Troubled Waters: Dealing With Personal Values When Representing Others,* 43 BRANDEIS L. REV. 415, 419 (2006) (excellent treatment of two paradigms on these moral dilemmas evidenced by the "client-centered approach" and the "contextual or moral activism approach").

[65] *See* Pellegrino, *supra* note 48 where Dr. Pellegrino sees character as the thing which shapes the way we define a moral problem; Lesnick, *supra* note 59.

[66] *See generally,* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility For Clients' Fraud,* 46 VAND. L. REV. 75 (1993) (hereafter Langevoort-*Lawyers*); Sung Hui Kim, *supra* note 2 (banality theory).

[67] *Cf.* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law,* 50 STAN. L. REV. 1551 (1991) (rational actor); Christine Jolls, Cass R. Sunstein, and Richard Thaler, *Theories and Tropes: A Reply to Posner and Kelman,* 50 STAN. L. REV. 1593, 1599 (1998) (critical of the rational actor model); Russell B. Koroblain, Thomas S.

are by no means a complete treatment of the issues. They do, however, serve as good catalysts for thinking about these issues. Most importantly, however, they demonstrate areas of *high risk* even for lawyers who have excellent reputations and who are respected for their perceived ethics and integrity.[68]

C. Role differentiation:

The opponents of the non-consequentialist paradigm of the rules of professional conduct and the ramifications of that perspective, and those who are aware of the tensions that are engendered by the very nature of the things that lawyers do, are concerned that the result of simply obeying the rules might be role-differentiated behavior.[69] As an example of this, Professor Wasserstrom, in his article on lawyers as professionals, relates the following story that comes out of the Nixon Watergate situation and the testimony of John Dean before the Select Senate Committee when Mr. Dean reviewed a list of names of those involved in the cover-up and had placed asterisks by some names:

Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics,* 88 CAL. L. REV. 1051, 1053 (2000) (law and economics theory's, "continued validity is threatened by its unrealistic core behavioral assumption: that people subject to the law act rationally."); Robert Prentice, Johnathan J. Koehler, *A Normality Bias In Legal Decision Making,* 88 CORNELL L. REV. 583, 585 (2008) ("Law-and-economics scholars are now in at least partial retreat, as a veritable mountain of scientific evidence now exists showing that decision makers violate economic dicta across numerous contexts and that judges and jurors ignore efficiency criteria when making decisions that establish the common law."). The article also has excellent cited resources regarding juror decision making. *Id.* at 585 and note 5. *See also* Robert A. Prentice and Jonathan J. Koehler, *A Normality Bias in Legal Decision Making,* 88 CORNELL L. REV. 583, 585 (2003) ("This article contributes to the growing literature on behavioral influences in the law by offering a psychological account of legal decision making.").

[68] *See* Sung Hui Kim, *supra* note 2 at 988-992 (example of Mark A. Belnick, General Counsel of Tyco).

[69] *See* Wasserstrom *supra* note 47. *See also* James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 872 (1983) ("[T]he lawyer always speaks in service of someone else whose interests he represents and he accordingly says not what he believes to be true or right about an issue he addresses, but whatever will persuade his audience to act in furtherance of those interests.").

> One day when he had been looking at the list of participants, he had been struck by the fact that so many of them were lawyers. So, he marked the name of each lawyer with an asterisk to see just how many there were. He had wondered, he told the Committee, when he saw that so many were attorneys, whether that had anything to do with it; whether there was some reason why lawyers might have been more inclined than other persons to have been so willing to do the things that were done in respect to Watergate and the cover-up. But he had not pursued the matter; he had merely mused about it one afternoon.[70]

Professor Wasserstrom then observes:

> It is, I think, at least a plausible hypothesis that the predominance of lawyers was not accidental - that the fact that they were lawyers made it easier rather than harder for them both to look at things the way they did and to do the things that were done.[71]

Role differentiation occurs when, due to a lawyer's professional role, a lawyer assumes a different moral posture on a particular matter than he or she would do under normal circumstances in his or her personal life.[72] The danger of this role differentiation is that it can, over a period of time, perpetuate the desensitization that began in law school and that continues

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[70] *Id.*

[71] *Id.*

[72] *See* Wasserstrom, *supra* note 47 at 3; James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court*," 48 BUFFALO L. REV. 349, 355 (2000) ("This so-called 'role differentiation thesis' posits a separation between personal morality and the conduct required of the lawyer thus permitting that erroneous claim that lawyers are not merely accountable to their client's goals."). *But cf.* Sarena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L. J. 551, 554 (1991) (excellent article which "contests the role-differentiation approach to legal ethics."). *See also* Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal For Change*, 72 FORDHAM L. REV. 261, 276 (2003) (brain imaging studies show that role-differentiated thinking "is far more difficult than anyone before realized.").

throughout the practice of law when one has to assume roles representing clients that are different from the roles that one would take in their personal lives.

This role differentiation, therefore, creates an inherent tension between the lawyer as a person and the lawyer as an advocate. It is this tension, and the resolution of it, or, perhaps, more accurately stated, the accommodation of it within one's personal life that is at the very heart of professionalism.

D. <u>Compartmentalization</u>:

A corollary to the above discussed role-differentiation is what lawyers do, psychologically, when called upon because of the demands of the profession to divorce their personal values and convictions from their acts of representation.[73] They compartmentalize and practice "moral disengagement."[74] There are, however, consequences to this. It "creates an ethical pressure cooker from which there is no release"[75] and creates a desensitization to the fact that a

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[73] *See* Collett, *supra* note 16 which addresses the tension where a lawyer is assigned to represent a client whose goals conflict directly with the lawyer's deeply held religious and moral beliefs. That article addresses Tennessee Formal Opinion 96-F-140 which "implies that a lawyer shirks her professional responsibility when refusing court appointments to represent minors seeking abortions, even when such representation violates the lawyer's deeply held beliefs about the sanctity of human life." *Id.* at 640. The author of that article observed about that decision that it "is premised on a corrupt, and corrupting, understanding of the lawyer's professional obligation." *Id.* at 644. In the opinion, the Board said: "[C]ounsel's moral belief, and usually acceptable ethical standard and duties must yield to the moral beliefs and legal rights of the defendant." *Id.* citing *Tenn. Bd. of Professional Responsibility Formal Op.* 96-F-140 (1996). *Cf.* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000). *See also* Edward B. Foley, *Jurisprudence and Theology*, 66 FORDHAM L. REV. 1195 (1998).

[74] Marianne M. Jennings, *Moral Disengagement and Lawyers: Codes, Ethics, Conscience, and Some Great Movies*, 37 DUQ. L. REV. 573, 574 (1999). *See also* Susan Bander, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339 (2006).

[75] Jennings, *supra* note 74 at 575-76. *See* Pellegrino, *supra* note 48 regarding his definition of character and where

lawyer may be doing something wrong and contribute to the lawyer's failure to see the moral issues that are confronting him or her.[76]

Compartmentalization breeds rationalization. Such rationalization in ethical matters "is the beginning of ongoing moral lapses and ethical breaches."[77]

E. Cognitive Dissonance:

When role differentiation and compartmentalization are combined with the psychological phenomenon of cognitive dissonance, the risks of drifting into improper conduct escalate. The potential for the overriding or sublimation of otherwise restraining personal values becomes acute.

Cognitive dissonance is a theory that holds that "people adjust conflicts to achieve internal comfort."[78] The theory posits that, "when a person's actions and attitudes are discrepant . . ." [psychological discomfort results] "which in turn motivates the person to restore harmony between him or her attitudes and behavior by altering the attitudes to fit the behavior."[79]

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he sees character as a determinant of the way that we define a problem; Gerber, *supra* note 46 and his perspective on the relationship between dilemmas and character.

[76] *See* Thomas Huff, *The Temptation of Creon: Philosophical Reflections on the Ethics of the Lawyer's Professional Role*, 46 MONT. L. REV. 47, 50-51 (1985).

[77] Jennings, *supra* note 74.

[78] Reed Elizabeth Loder, *Integrity and Epistemic Passion,* 77 NOTRE DAME L. REV. 841, 862, n. 68 citing Erwin Chemerinsky, *Protecting Lawyers From Their Profession: Redefining the Lawyer's Role,* 5 J. LEGAL PROF. 31, 32-34 (1980).

The theory, therefore, suggests that once lawyers commit to the process of representing a client, they "will increasingly pay attention to facts and circumstances that justify their representation and deflect information that suggests that the client is corrupt."[80] The theory "teaches that when our actions conflict with our self-concepts, our beliefs and attitudes change until the conflict is removed."[81] This resulting process of disengagement from restraining values and information can alter how ones see a problem[82] and contribute to lawyers taking positions "at odds with [their] personal values [and] those values chang[ing] over time."[83]

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[79] Matthew D. Lieberman, *Do Amnesiacs Exhibit Cognitive Dissonance Reductions? The Role of Explicit Memory and Attention in Attitude Change,* 12 PSYCH. SCI. 135, 135 (2000) as quoted in Julie A. Seaman, *Cognitive Dissonance in the Classroom: Rationale and Rationalization in the Law of Evidence,* 50 ST. LOUIS U.L.J. 1097, 1097 n. 1 (2006).

[80] Langevoort-*Kaye Scholar supra* note 18 at 301. *See also* Langevoort-*Lawyers supra* note 66 at 102-103 (cognitive dissonance can make it difficult for lawyers to process negative information about clients).

[81] Rapoport, *supra* note 14 at 1389.

[82] *See* Pelligrino, *supra* note 48 and Gerber, *supra* note 54, and accompanying texts.

[83] Joseph Allegretti, *Clients, Courts, and Calling: Rethinking the Practice of Law,* 32 PEPP. L. REV. 395, 401 (2005). *See also* Rapoport, *supra* note 10 where she addresses David Luban's treatment of the case of Berkley Photo, Inc. v. Eastman Kodak Co., 603 F. 2d 263 (2d Cir. 1979) *cert. denied* 444 U.S. 1093 (1980) as described in W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement,* 52 S.C.L. REV. 557, 606-07 (2001); Blake D. Morant, *Lessons From Thames Moore's Dilemna of Conscience: Reconciling the Clash Between a Lawyer's Beliefs and Professional Expectations,* 78 ST. JOHN'S L. REV. 965 (2004). *See also* Jones, *supra* note 32 at 139-145 (similar exploration of cognitive dissonance regarding board members); Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight Into Securities Fraud Litigation,* 95 NW. U. L. REV. 133 (2000) (similar exploration of cognitive dissonance and other behavioral characteristics with respect to auditors).

X. The Moral Tolls On The Lawyers Who Use Permissible Rules and Tactics

There are strategies and requirements that have, on balance, been legitimized, but that, in more subtle ways, raise troubling moral questions for lawyers and that demonstrate the issues discussed above. Two that demonstrate this are the use of statutes of limitation and the invocation of the attorney-client privilege.

A. Statutes of limitation:

If the adversary system is theoretically oriented toward finding the truth of a dispute, there are vehicles for exculpation that have nothing to do with the truth and the proper allocation of moral responsibility. One example is a statute of the limitation. Whether lawyers think about it or not, a statute of limitation is a vehicle that lawyers interpose on behalf of clients to immunize otherwise culpable conduct only because of a lapse of time.

Different jurisdictions have different rules for the triggering of the statute of limitation in tort cases. Some have the rule that the statute does not begin to run until an injured party discovers the damage; others have the rule that, absent fraud that would toll the statute of limitation, the statute begins to run at the time of the accrual of the cause of action, which is usually at the time of the injury, and not when the injured party discovers it. Perhaps, one of the most egregious cases that exemplifies this is the Alabama Supreme Court’s decision in *Garrett v. Raytheon*

Company, Inc.[84] In that case, the plaintiff had been exposed to excessive radiation. He did not become aware of the damage from that radiation until years later when his condition was diagnosed and he discovered the damage to his body. The damage had not manifested itself at the time of the radiation.

The Alabama Supreme Court, applying Alabama's tort statute of limitation, held that, no matter how much damage had been inflicted on the body of the plaintiff, no matter how badly he had been injured, no matter to what degree his life had been diminished in quality and length at the time of the harmful dose of radiation, he was not entitled to recover because the statute began to run at the time of the accrual of the cause of action which was when the plaintiff was injured, not when he learned about it. The result of that ruling was clearly the immunization of morally culpable conduct.

The lawyer who represented Raytheon most certainly received many accolades from his client and law partners for having won. However, stepping back and looking at the result from a moral paradigm rather than an advocate's paradigm, probing the implications of it, and reflecting on the question of whether the morally right thing was done, the result becomes very problematic. Even though a defendant had been morally culpable and had ruined a person's life, it escaped accountability. Nevertheless, the lawyer who won that case did exactly what he was expected to do and, if he would not have done it, he could probably have been sued for

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[84] Garrett v. Raytheon Co., Inc., 368 So. 2d 516 (Ala. 1979). *See also* Moore v. Glover, 501 So. 2d 1187 (Ala. 1986); Mathis v. General Electric Corp., 372 So. 2d 864 (Ala. 1979). *But cf.* Baron v. C.N.A. Ins. Co., 678 So. 2d 735 (Ala. 1996) (rule different in asbestos cases). *Cf.* C.J.C. v. Corporation of the Catholic Bishop of Yakima, et al., 943 P.2d 1150 (Wash. App. 1997) (application of the common law discovery rule in a child sexual abuse case).

malpractice. That does not, however, allow that lawyer to find comfort in the rules when it comes to moral accountability. This is the classic tension resulting from the role differentiation issue addressed earlier in this article. [85]

B. The Attorney-Client Privilege:

Likewise, the invocation of the attorney-client privilege interposes a barrier to the truth because of the values already placed upon the attorney-client privilege by society and by lawyers. Because the attorney-client privilege is an accepted impediment to truth, it is traditionally construed narrowly. When the privilege is properly invoked and honored, however, the truth will not come out.

In that situation, can lawyers stand behind the privilege and expect moral immunization when the truth is hidden?[86] Lawyers rarely, if ever, think about, discuss, or are really willing to consider, this type of question nor do they recognize or discuss the moral tolls that are experienced by them over the years of practice when legally permissible vehicles are used to accomplish morally questionable ends. There are some lawyers who have not found a way to effectuate a workable perspective on this issue. They have not found the comfortable balance that allows them to deal with the dilemmas posed by role differentiation. Some end up leaving the practice

[85] *See* Zabella v. Pakel, 242 F. 2d 452 (7th Cir. 1957) (recognizing that a post Bankruptcy statement that a debt would be paid would be enforceable because of "[t]he moral obligation which [the] defendant had to pay his debts . . . *id* at 454, but that the statute of limitation would bar the enforcement of the debt even when the jury "was justified in thinking that defendant . . . should feel obligated to pay an honest debt. . . ." *Id.* at 455).

[86] *Cf.* Steven H. Hobbs, *The Lawyer's Duties of Confidentiality and Avoidance of Harm to Others: Lessons From Sunday School,* 66 FORDHAM L. REV. 1431 (1998).

of law because of that. It is submitted, however, that leaving the practice of law is not necessary to save your soul.

XI. Personal Suggestions to Help Reduce the Risk of "Crossing the Line"

I want to take the liberty to offer some personal approaches to the practice of law, as they relate to litigation, that, hopefully, will help guard against uncomfortable accommodations and that will not require the sacrifice of one's "self" in order to practice law.[87] They, of course, will not solve the issues that have been discussed. It is suggested, however, that they can be of great comfort in dealing with the moral tensions and that they can certainly help in the process of defining one's practice of law. They are:

1. Lawyers (litigation) are historians and we should approach our practices that way. A lawyer's role is to reconstruct clients' histories, not to change them for any client.[88]

2. Lawyers should stay away from the most dangerous word in a lawyer's vocabulary: the word "we."[89]

[87] *See* John L. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L. Q. 423.

[88] *See* Ames, *supra* note 1; Orrin K. Ames, III, *Lawyers as Historians*, 6 ADDENDUM 7 (2001).

[89] *See* Ames, *supra* note 1.

A. Lawyers as historians:

Litigators must understand that, in the end, they are historians. They do not know what their clients have done because they were not there when the events were taking place. They are simply given a history of decisions, actions, and omissions with which to work. Most often the history that is given by the client is permeated with the client's gloss on the events and it is crucial to never lose that perspective when dealing with clients.

As historians, litigators reconstruct clients' histories as well as they can, within the parameters of the rules of the profession, the rules of evidence, *etc.*, and present those histories to juries for their reconciliation of them with what could be other versions of those histories. Lawyers are not to manipulate the histories or to try to change them. They must, on the other hand, scrutinize the histories from totally detached and unbiased perspectives and then identify the strong points and present them with honesty and clarity.[90]

The tendency to place one's credibility at risk by saying too much about a client's history and making unequivocal statements about it when the lawyer, in fact, is not conversant with the reality of that history, carries with it ominous risks.[91] Lawyers were not part of those histories and they should not adopt them or link themselves with them in the minds of jurors or the public.

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[90] *But cf.* Richard Zitrin, *Truth Justice and the Criminal Defense Lawyer*, 9 THE PROF. LAWYER 10 (1998) for a thought-provoking article about criminal defense attorneys' different roles which that author asserts are not about truth-seeking.

[91] Observers draw conclusions about a speaker's *subjective* beliefs even in lawyering, advocacy situations. "Our tendency to infer attitudes from advocacy-behavior apparently leads us to disconnect almost entirely information about external constraints on what others are advocating." David Luban, *Integrity: Its Causes and Cures,* 72 FORDHAM L. REV. 279, 282 (2003).

The tendency to do so, however, is exemplified by what is the most dangerous word in the lawyer's vocabulary: "We."

B. "We" – the most dangerous word in a lawyer's vocabulary:

The suggestion that follows should not create the impression that, in following it, one will adopt a less energetic or less loyal posture for a client. On the contrary, it is submitted that it will make one a more effective and beneficial counselor and advocate for a client.

Some lawyers who are retained to litigate a case after the operative events have occurred, refer to their clients as "we." However, it is submitted that the use of the word "we" links the lawyer too closely with the client's history. Furthermore, in the mind of the client, as well as the lawyer, it links the lawyer too closely to that client. The lawyer was never a part of the client's history and should not adopt it.[92] The lawyer did not make the decisions that the client made. The lawyer did not participate in the client's conduct.

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[92]This observation, of course, may not necessarily be applicable to the lawyer client situation which is ongoing or in which the lawyers have been immersed in the client's day to day business and legal activities. *See* Carrick Mollenkamp and Nathan Koppel, *Investor Sues Refco Law Firm,* THE WALL STREET JOURNAL, July 27, 2007 at C7 (allegations that the firm knew, or should have known of alleged sham loan transactions and failure to advise a party acquiring a controlling stake in Refco); *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); 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,

In spite of this, lawyers do this all of the time. How often do lawyers, when talking in terms of historical events in a case, use the term "we?" At a conference of defense lawyers where a well-respected litigator was talking about a product liability case that he had handled and that had involved some type of glue, when referring to his client and the glue that had been manufactured by his client, used words such as "we" and "our glue." However, it never was the lawyer's glue; he had no role in selecting and designing its chemical composition; he had no role in its marketing. He, therefore, did not have any business adopting responsibility for it. By adopting responsibility for a client's actions, omissions, and decisions through the use of such linking language, a lawyer will be viewed, in the minds of the jurors, as the client. This is not the same as showing passion for a client's cause or demonstrating faith in your client's position. In the end, if the jury is sensing that it is not accepting the client's positions, and if the lawyer is "adopting" the client's history, the lawyer will be viewed by the jury as a less neutral assessor of that history and that risks the diminution of the lawyer's effectiveness to the jury.

Use of the word "we," and language such as "our glue," especially in conversations with the client, also diminishes the distance that the lawyer has to maintain from the client if he or she is going to properly advise and represent that client. The lawyer must always maintain a

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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). 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

sufficient distance from his or her client in order to be able to give that client proper, dispassionate advice and to be able to properly assess the facts of the clients' history and of the case. Often, the advice that the lawyer has to give the client is the antithesis of what the client wants to hear. If the lawyer, throughout the course of handling the case, has constantly used the term "we" or similar language, the lawyer may, psychologically, make it much more difficult to give that client, with which he or she has inextricably linked himself or herself, the kind of "unwanted" advice that the client needs with respect to the handling of any particular case.

Furthermore, lawyers who identify too closely with their clients and who use the words "we" and "our," run the risk of adopting the mindset associated with those words, and may, when approaching the line between proper and improper conduct, cross the line because of the inextricable linkage that the lawyer has made to the client. It can also produce the type of lawyer we see today who conducts Rambo-style depositions, who hides documents, and who becomes verbally abusive and physically aggressive in depositions just to win for the client. It can tip the scales toward utilitarian individualism and winning at all costs and reinforce a myopic concept that there is to be a total commitment to a client to the exclusion of important countervailing interests of the courts, the pubic, the culture, and the lawyer's "self."

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corporate defendants.").

XII. A Final Observation

The issues discussed above are not accepted by many lawyers as realities of their professional lives. Some reject them; others discount their importance. The propensity to ignore the reality of them, however, increases the risk of crossing the line. There is, therefore, a need to discuss them. It is suggested that the discourse should begin in the law schools and that it should continue throughout lawyers' professional lives because it is with informed discussions of these issues that the risks of lawyers crossing the line are hopefully diminished.

APPENDIX

ADVERTISEMENT

BEST BUSINESS PRACTICES
AND ORGANIZATIONAL ETHICS FROM
A LITIGATOR'S VANTAGE POINT

Orrin K. "Skip" Ames III, a litigation attorney with the law firm of Hand Arendall in Mobile, Alabama, offers a unique and in-depth program to businesses on the best business and ethical practices. He has been a litigator for 31 years and, as a litigator, he has handled many cases of business fraud, improper business practices, tortious interference with business relationships, patent infringement, insurance coverage, and insurance bad faith.

His litigation experience has been enriched by the years that he taught law school. As a Full Professor, he taught Criminal Law, Criminal Procedure, Constitutional Law, and White Collar Crimes. As a result of his experience, he has developed a litigator's perspective on business conduct and insights into what are good business practices and what are bad ones that expose organizations and their personnel to potential civil and criminal exposure.

Skip has lectured extensively over the last ten years to lawyers on ethics and professionalism issues, but most importantly, he has also lectured to business groups on business practices and business ethics issues. He has now taken his accumulated knowledge and experience, as a litigator, a law teacher, and a lecturer, and developed a full program for businesses on best business and ethical practices. His program is designed for businesses, their management, their employees, trade or business organizations, as well as government organizations.

His years of diverse experience enable him to offer a unique perspective to businesses on the risks that businesses face in a competitive environment and the best business practices to use in a multitude of settings to help to avoid both criminal and civil issues. Because of his years as a litigator, he also provides a unique insight into the dynamics of litigation and the relationship between businesses and lawyers, to include the extremely complex, but increasingly important, areas of attorney-client privilege, work product, and exceptions to those important doctrines that arise out of attempts by businesses to selectively waive the privileges to cooperate with government and administrative agencies, waiver of the privilege when clients use lawyers' information to commit crimes or fraud, and other waiver issues. He also provides insight into best business practices relating to electronic and other discovery so that businesses will understand the nature of litigation and the complex and volatile area of discovery.

His program can be adapted to business or government groups of any size. It can be a day-long program; a half-day program; or a shorter program. It is adaptable to business retreats

and small group settings or to much larger audiences. In addition to the lecture format, the program can include small group problem-solving exercises. The program includes an extensive book of materials that will be of use to participants long after the program has been completed.

The need for such a program is evidenced by the cases of business corruption that have made such dramatic headlines over the last few years and the realization that many, if not all, of those large organizations had ethics officers, ethics hotlines, ombudsmen, and other mechanisms that were in place, but that failed. The reasons for their failure will be explored with an emphasis on the burgeoning role of the board of directors and other corporate personnel as gatekeepers to prevent business corruption.

An outline of the topics that can be covered in the program is attached. Depending on the needs of the attendees, the topics can be modified.

Skip maintains his full-time practice with his firm. He is offering this program as a component of his practice. Businesses, business groups, and government groups interested in having such a program for their organizations can contact him at his firm:

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NOTE: The following language is required by Rule 7.2 of the Alabama State Bar Rules of Professional Conduct:

> "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."

Best Business Practices
and Organizational Ethics

I. Introduction:

A. Organizational Corruption: The Modern Scandals.

II. Organizational Personalties:

A. The Distorting Effects of Workplace Pressure on the Character of the Organization and Its Personnel.

B. Movement Toward Gatekeeper Roles.

C. The Paradox of the Charismatic CEO.

D. Guidance Provided by Psychological Research.

III. The Relationship With Legal Counsel:

A. The Concept of Secrets:

1. The Need For an Understanding of the Dynamics of the Relationship By Business People.

2. Privileges and Protections Based on the Attorney-Client Relationship and the Waiver of Those Protections.

a. The Attorney-Client Privilege.

b. The Work Product Doctrine.

3. The More Comprehensive Concept of Confidentiality.

B. Understanding the Proper Role of One's Legal Counsel.

IV. The Emerging Gatekeeper Roles: Not Just For Large Organizations:

A. The Comprehensive Umbrella of *Sarbanes-Oxley*.

1. General.

2. Non-Profit Corporation Issues in Light of *Sarbanes-Oxley*.

3. The Central Element of Ethics Codes.

B. Management.

C. Organizational Gatekeepers.

1. Boards of Directors: The Lessons From *Caremark.*

2. Compliance Officers.

3. Ethics Officers/Ombudsmen.

4. Audit Committee.

D. Emerging Independent Gatekeeper Roles.

1. Accountants.

2. Lawyers.

V. <u>Areas of High Exposure</u>:

A. Criminal Vulnerability

1. Organizational Prosecutions.

a. Underlying theories of "corporate" criminal liability.

b. Exposure of individuals within organizations.

2. Department of Justice Positions.

a. Deferred Prosecution Agreements.

b. Waiver of privileges.

c. The effects in the civil arena: selective waiver.

3. Individual Prosecutions.

B. Selected Areas of Civil Vulnerability.

1. Federal Corrupt Practices Act.

2. Antitrust.

3. Fraud.

4. Tortious Interference with Business or Contractual Relationships.

5. Trade Disparagement: A Form of Commercial Defamation.

6. Theories of Tort Liability That Potentially Touch All Businesses.

a. Intellectual Property Torts:

(1.) Patent Infringement.

(2.) Trade Secrets.

(3.) Trademark Infringement.

(4.) Lanham Act.

b. Unfair Competition Claims.

VI. <u>Litigation Issues</u>:

A. Discovery.

1. A Danger Unappreciated By Businesses.

2. Duties Relating to Discovery.

(a) Parties to litigation.

(b). Counsel.

3. Electronic Discovery.

4. Spoliation: The Death Blow to a Case.

B. Prudent Conduct Even Before Litigation Is Expected.

VII. <u>An Essential Discussion of Insurance "Protection"</u>:

A. Primary Business Coverages.

1. Commercial General Liability "Bodily Injury" and "Property Damage."

2. Commercial General Liability "Personal Injury."

3. Commercial General Liability "Advertising Injury."

B. The "Extras."

1. Employment.

2. Patent.

3. Pollution.

VIII. Wrap Up Perspectives.

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Iowa Defense Counsel Association

1965 through 2007 Annual Meetings

This Index is supplied as a service to the members of the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
C/O Ms. Lynn Harkin, Associate Director
East Grand Office Park
100 E. Grand Avenue, Suite 300
Des Moines, IA 50309
515/244-2847

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