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Annual Meeting Program Chair: James Pugh

2009 IDCA Officers and Directors

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BOARD OF DIRECTORS

District I – 2011
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AT-LARGE

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DRI STATE REPRESENTATIVE
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mwt@nyemaster.com

PAST PRESIDENT
Martha L. Shaff
111 East Third Street, Suite 600
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mls@bettylawfirm.com

PAST PRESIDENTS

*Edward F. Seitzinger, 1964 – 1965
*Frank W. Davis, 1965 – 1966
*D.J. Goode, 1966 – 1967
*Harry Druker, 1967 – 1968
*Philip H. Cless, 1968 – 1969
Philip J. Willson, 1969 – 1970
*Dudley J. Weible, 1970 – 1971
Kenneth L. Keith, 1971 – 1972
Robert G. Allbee, 1972 – 1973
*Craig H. Mosier, 1973 – 1974
*Ralph W. Gearhart, 1974 – 1975
*Robert V.P. Waterman, 1975 – 1976
*Stewart H.M. Lund, 1976 – 1977
*Edward J. Kelly, 1977 – 1978
*Don N. Kersten, 1978 – 1979
Marvin F. Heidman, 1979 – 1980
Herbert S. Selby, 1980 – 1981
L.R. Voigts, 1981 – 1982
Alanson K. Elgar (Hon.), 1982 – 1983
*Albert D. Vasey (Hon.), 1983
*Harold R. Grigg, 1983 – 1984
Raymond R. Stefani, 1984 – 1985
Claire F. Carlson, 1985 – 1986
David L. Phipps, 1986 – 1987
Thomas D. Hanson, 1987 – 1988
Patrick M. Roby, 1988 – 1989
*Craig D. Warner, 1989 – 1990
Alan E. Fredregill, 1990 – 1991
David L. Hammer, 1991 – 1992
John B. Grier, 1992 – 1993
Richard J. Sapp, 1993 – 1994
Gregory M. Lederer, 1994 – 1995
Charles E. Miller, 1995 – 1996
Robert A. Engberg, 1996 – 1997
Jaki K. Samuelson, 1997 – 1998
Mark L. Tripp, 1998 – 1999
Robert D. Houghton, 1999– 2000
Marion L. Beatty, 2000 – 2001
Michael W. Ellwanger, 2001 – 2002
J. Michael Weston, 2002 – 2003
Richard G. Santi, 2003 – 2004
Sharon Greer, 2004 – 2005
Michael W. Thrall, 2005 – 2006
Mark S. Brownlee, 2006– 2007
Martha L. Shaff, 2007 – 2008

IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

* Edward F. Seitzinger, President

* D.J. Fairgrave, Vice President

*Frank W. Davis, Secretary

Mike McCrary, Treasurer

William J. Hancock

* Edward J. Kelly

*Paul D. Wilson

* Deceased

EDDIE AWARD RECIPIENTS

Edward F. Seitzinger Award

In 1988 Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and first president of IDCA and for his continuous, complete dedication to IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, dubbed "The Eddie Award." This award is presented annually to the IDCA Board member who contributed most to IDCA during the year. It is considered IDCA's most prestigious award.

1989	John (Jack) B. Grier
1990	Richard J. Sapp
1991	Eugene B. Marlett
1992	Herbert S. Selby
*1992	Edward F. Seitzinger
1993	DeWayne E. Stroud
1994	Marion L. Beatty
1995	Robert D. Houghton
1996	Mark. L. Tripp
1997	David L. Phipps
1998	Gregory M. Lederer
1999	J. Michael Weston
2000	Sharon Soorholtz Greer
2001	James Pugh
2002	Michael Thrall
2003	Brent Ruther
2004	Michael Thrall
2005	Christine Conover
2006	Megan M. Antenucci
2007	Michael Thrall
2008	Noel K. McKibben

*First Special Edition "Eddie" Award

NEW MEMBERS

Please welcome the following new member admitted to the Iowa Defense Counsel Association from September 2008 – August 2008.

Joan Bolin, Des Moines, IA

Jason M. Craig, Des Moines, IA

Kami L. Holmes, Waterloo, IA

Jordan Kaplan, Davenport, IA

Laura J. Ostrander, Des Moines, IA

Vidhya K. Reddy, Des Moines, IA

Edward J. Rose, Davenport, IA

Lisa A. Simonetta, Des Moines, IA

Ken J. Smith, Newton, IA

2009 STANDING COMMITTEES

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.

Chair: 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

Board of Editors - Defense Update
Responsible for keeping the creating a timeline for the quarterly newsletter and keeping the committee members on track.

Chair: Michael Ellwanger
Rawlings Nieland Probasco Killinger Ellwanger Jacobs & Mohrhauser LLP
522 Fourth Street, Suite 300
Sioux City, IA 51101
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Fax: (712) 277-3304
E-mail: mellwanger@rawlingsnieland.com

Co-Chairs: Noel McKibben, Tom Waterman, Kevin Reynolds, Tom Read, Kermit Anderson, Bruce Walker

CLE Committee
Assists in organizing annual meeting events and CLE programs.

Chair: 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

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.

Chair: Daniel B. Shuck
Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P.
701 Pierce Street, Suite 200
Sioux City, IA 51102
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.

Chair: David H. Luginbill
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Email: dluginbill@ahlerslaw.com

2009 STANDING COMMITTEES

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.

Chair: 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 & 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.

Chair: 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
Email: Bwaterman@l-wlaw.com

Jury Instructions
Monitor activities of ISBA civil jury instructions committee and changes in civil jury instructions, recommend positions of IDCA on proposed instructions and addition to IDCA recommended jury instructions.

Chair: Stephen J. Powell
Swisher & Cohrt P.L.C.
528 West 4th Street
Waterloo, IA 50704
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.

Chair: Christine L. Conover
Simmons, Perrine, Albright & Ellwood, P.L.C.
115 Third Street S.E., Suite 1200
Cedar Rapids, IA 52401
Phone: (319) 366-7641
Fax: (319) 366-1917
E-mail: cconover@simmonsperrine.com

Co-Chair: Hannah Rogers
Nyemaster, Goode, West, Hansell & O'Brien, P.C.
700 Walnut, Suite 1600
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Phone: (515) 283-3123
Fax: (515) 283-8045
E-mail: hmrogers@nyemaster.com

2009 STANDING COMMITTEES

Legislative
Monitor legislative activities affecting judicial system; advise Board of Directors on legislative positions concerning issues affecting members and constituent client groups.

Chair: 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.

Chair: 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 product liability issues. Advise and assist in amicus curiae participation on product liability issues.

Chair: 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.

Chair: Robert V.P. Waterman, Jr.
Lane & Waterman
220 North Main Street, Suite 600
Davenport, IA 52801
Phone: (563) 324-3246
Fax: (563) 324-1616
E-mail: Bwaterman@l-wlaw.com

2009 STANDING COMMITTEES

Public Relations/Website

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.

Chair: Brent Ruther
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321 North Third Street
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Co-Chair: Randall Willman
Leff Haupert Traw & Willman LLP
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Iowa City, IA 52244
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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.

Chair: Brian Ivers
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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.

Chair: 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

2009 STANDING COMMITTEES

Worker's Compensation Committee

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.

Chair: Peter Sand
Scheldrup Law Firm
900 Des Moines Street, 3rd Floor
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Fax: (515) 286-1743
E-mail: psand@scheldruplaw.com

Young Lawyers

(35 yrs old & younger or 10 yrs & under in practice)
Liaison with law school and young lawyer trial advocacy programs. Planning of Young Lawyer Annual Meeting reception and assisting in newsletter and other programming. Liaison with law school trial advocacy programs and young lawyer training programs.

Chair: Hannah Rogers
Nyemaster, Goode, West, Hansell & O'Brien, P.C.
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SPEAKER BIOGRAPHIES

The Hon. Mark W. Bennett, United States District Judge, Northern District of Iowa
Mark W. Bennett was appointed a United States District Court Judge in the Northern District of Iowa in 1994. On January 1, 2000, he became Chief Judge of the Northern District and served in this capacity for seven years. Judge Bennett previously served as a United States Magistrate Judge in the sister district, the Southern District of Iowa. Judge Bennett graduated from the Drake University Law School in 1975. Upon graduation, he started his own law firm in Des Moines, in the basement of a long since demolished building. The firm eventually became Babich, Bennett & Nickerson. During more than 16 years, his extensive practice in employment discrimination, constitutional law and other civil rights litigation took him to numerous state and federal trial and appellate courts throughout the United States resulting in more than 70 reported decisions, including arguing Evans v. Oscar Mayer Co., 441. When he was in private practice, Judge Bennett was admitted to and practiced in the United States Supreme Court; the United States Courts of Appeals for the Fifth, Seventh, Eighth and Tenth Circuits; the United States District Courts for the Northern and Southern Districts of Iowa; and the Iowa Supreme Court and state courts of Iowa. He was also admitted, pro hac vice, in numerous jurisdictions, including the United States District Courts for the District of Arizona, District of Colorado, Southern District of California, Northern District of Illinois, Southern District of Indiana, District of Minnesota, Eastern and Western Districts of Missouri, District of New Mexico, Northern District of New York, and District of Wyoming; and state courts of Illinois, Minnesota, Missouri, Montana, South Dakota and Wisconsin. Prior to his appointment to the federal bench, Judge Bennett was actively involved in professional organizations and community service. This included serving as the first Chair of the Civil Justice Reform Act of 1990 Advisory Group for the United States District Court for the Southern District of Iowa, as a member of the Board of Governors of the Association of Trial Lawyers of Iowa, as a Fellow in the Iowa Academy of Trial Lawyers and as a Master of the Bench and founding member of the Blackstone Inn of Court. He has been active in the Iowa State Bar Association, where he has served as a member of and co-chaired several committees, including the Federal Practice Committee, the Professional Development Committee, the Committee on Professionalism, the Labor and Employment Law Section Council, the Litigation Section, the Committee on Legal Aid, the Study Committee on Women and Minorities Involvement in Bar Association and Judicial System of Iowa, the Executive Council of the Young Lawyers Section, the Silent Partner Program Committee of the Young Lawyers Section, the Committee on Federal Practice Manual and the Committee on the State Adoption of the Federal Rules of Evidence. Prior to becoming a federal judge, Judge Bennett was selected for inclusion in Naifeh & Smith, THE BEST LAWYERS IN AMERICA. He was the youngest lawyer in the state to receive an AV rating by Martindale-Hubbell and to be inducted as a Fellow in the Iowa Academy of Trial Lawyers. Judge Bennett has a keen interest in technology which led him to complete a project for the United States Courts where he was instrumental in the design, development, testing and implementation of new case management software based on state of the art WEB browser technology. He has applied technology to judging, which has led to the remodeling of the main historic courtroom in Sioux City, to add state of the art technology. Judge Bennett has tried hundreds of cases in his high-tech courtroom over nearly a decade. Judge Bennett has also consulted with other federal courts and two law schools on courtroom technology. Judge Bennett is a prolific writer and his numerous published opinions reflect his keen interest in legal scholarship. He has co-authored a book entitled, Employment Relationships Law & Practice (Aspen Law & Business 1998) and he has also published recent articles on “high tech courtrooms” and “the vanishing civil jury trial.”

Mark S. Brownlee, Kersten Brownlee Hendricks LLP, Fort Dodge, IA
Mark Brownlee is a partner at Kersten Brownlee Hendricks LLP in Fort Dodge. He graduated from the University of Iowa College of Law in 1979. He is a past president of the Iowa Defense Counsel Association and is a member of the Association of Defense Trial Attorneys, Defense Research Institute, the Iowa Academy of Trial Lawyers, and IDCA.

Gerald D. Goddard, Cray Goddard Miller & Taylor LLP, Burlington, IA
Gerald Goddard has practiced law in Burlington, Iowa, for 35 years. He is a member of the Iowa Defense Counsel Association and the Iowa Academy of Trial Lawyers. He has completed mediation training by the International Academy of Dispute Resolution.

Frank B. Harty, Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, IA
Frank Harty is the Chair of the Labor and Employment Department of Nyemaster Goode Law Firm in Des Moines. Frank is recognized as one of the State’s “best” individual attorneys in employment and labor matters (representing mainly defendants) in the State of Iowa in “Chapters USA America’s Leading Business Lawyers.” He is names as “Top Labor and Employment Lawyer” by Corporate Counsel Magazine. He also is recognized in “The Best Lawyers in America” and “Super Lawyers.” He is a Fellow in the Iowa Academy of Trial Lawyers. Frank is a member of the National Institute for Trial Advocacy and employment law at Drake University Law School. Frank is Past Chair of the Labor and Employment Law Section of the Iowa State Bar Association. Frank has given numerous speeches and authored many articles on labor and employment law. He works include pieces on sex discrimination, litigating wrongful discharge cases, arbitration agreements, enforcing non-compete agreements and using expert witnesses at trial.

SPEAKER BIOGRAPHIES

Kami L. Holmes, Swisher & Cohrt P.L.C., Waterloo, IA
Kami is an associate attorney with the Swisher & Cohrt law firm in Waterloo, Iowa. Kami received her undergraduate degree from Coe College in Cedar Rapids and graduated from the University of Iowa College of Law in 2006. At Iowa, she was a contributing member of the Journal of Gender, Race & Justice. Kami was admitted to practice law in Iowa in 2006 and was admitted to practice in the U.S. District courts of Northern and Southern Iowa in 2007. Kami is a member of the Iowa State Bar Association, the Black Hawk County Bar Association, the Defense Research Institute and the Iowa Defense Counsel Association. Kami's main areas of practice include family law, education law, insurance defense and general civil litigation.

Michael P. Jacobs, Rawlings, Nieland, Killinger, Ellwanger, Jacobs, Mohrhauser, Nelson & Early LLPm Sioux City, IA
Mike attended The University of South Dakota where he earned a Bachelor of Science Degree in 1976. He majored in Political Science and minored in History and Economics. He attended Drake Law School in 1976 and 1977 and then returned to The University of South Dakota where he received his Juris Doctorate Degree in 1979. Mike returned to Sioux City in 1979 to practice law at Kindig, Bebee, Rawlings, Nieland, and Killinger. Mike became a partner in 1982 and has devoted his entire legal career to his practice in Sioux City. Mike is admitted to practice in all state and federal courts in Iowa and in South Dakota. He has represented both plaintiffs and defendants in complex litigation in both states. He served as a president of the Sioux City Young Lawyers Club and on the Woodbury County Bar Association Grievance and Courts Committees. He is a member of the Iowa Association of Workers' Compensation Lawyers, Inc. He is currently serving on the Iowa Bar Association Jury Instruction Committee and on the Board of Directors of the Iowa Defense Counsel Association. Mike was recently appointed to a four-year term on the Sioux City Civil Service Commission. Mike is engaged in the general practice of law which includes but is not limited to litigation, personal injury, product liability, insurance, and workers' compensation.

Robert M. Kreamer, IDCA Executive Director, Kreamer Law Firm, Des Moines, IA
Mr. Kreamer is with the Kreamer Law Firm in Des Moines. He is a Bachelor of Arts graduate of Iowa and a graduate of the University of Iowa Law School. He has been involved in the Iowa Legislative process for the past thirty-nine (39) years, having served four (4) terms in the Iowa House of Representatives beginning in 1969. After holding such leadership positions as assistant majority leader, assistant minority leader and speaker pro tem, Mr. Kreamer retired from the legislature and has worked the past thirty one (31) years as a multi-client contract lobbyist. Mr. Kreamer has just completed his 15h year of representing the Iowa Defense Counsel Association and, through his efforts; the Iowa Defense Counsel Association had another successful legislative session in 2008.

Harold (Pete) Peterson, Petersen & Associates, DRI Mid Region, Salt Lake City, UT
Harold "Pete" Petersen is the Managing Attorney with, Petersen & Associates, Salt Lake City, UT, Branch Legal Office for the Farmers Insurance Group of Companies since 1999. In this position, he manages all claims litigation in the State of Utah for the Farmers Insurance Group of Companies. Prior to this, he was Senior Trial Attorney with State Farm Insurance, Salt Lake City, UT covering all aspects of insurance defense litigation plus numerous jury trials in State and Federal Courts. Pete graduated from the University of Utah, College of Law, Salt Lake City, Utah, Juris Doctor 1985; Brigham Young University, Provo, Utah with a Master of Arts Government, 1978; and Brigham Young University, Provo, Utah with a Bachelor of Arts Political Science 1976. He is licensed to practice before the Utah Supreme Court, Virginia Supreme Court, United States District Court for Utah, United States District Court for the Eastern District of Virginia, Tenth Circuit Court of Appeals, and Fourth Circuit Court of Appeals. Pete serves on the Defense Research Institute (DRI), and was elected as Regional Director for national Board of Directors to serve a three year term 2007–2010. In that capacity, he supervises DRI activity in Utah, Colorado, Nebraska, Kansas, Missouri, and Iowa as well as other national board of director duties. DRI is the national insurance defense bar with over 22,000 members nationally.

Larry S. Pozner, Reilly Pozner LLP, Denver, CO
Larry Pozner is a founding partner of the 21-lawyer litigation firm Reilly Pozner LLP. His national practice centers around complex commercial litigation, (plaintiff and defense) and criminal defense cases. He frequently works in the financial services sector, handling such matters as defense of trade secrets, sub-prime mortgage issues, and investment litigation. Among other high-profile clients, Mr. Pozner is litigation counsel to the Denver Broncos football franchise. He is co-author (with Roger J. Dodd) of America's best selling book on cross-examination, *Cross-Examination: Science and Techniques, Second Edition* (Lexis Nexis). Mr. Pozner has been listed in The Best Lawyers in America for 20 consecutive years, and has been named a Colorado Super Lawyer and a Top 50 Colorado lawyer. Mr. Pozner is a Past President of the 10,000 member National Association of Criminal Defense Lawyers. He served many years on the faculty of the University of Denver Sturm College of Law, where he was voted Best Professor. Mr. Pozner is a nationally recognized legal commentator and lecturer, and has presented more than 400 seminars in 48 states on trial tactics and cross examination. He consults on cross examination drafting and strategy and jury selection. He served as the NBC News legal analyst for the Oklahoma City Bombing trials and the Jon Benet Ramsey case. He has frequently appeared on such shows as the *NBC Today Show*, *Countdown with Keith Olberman, Fox News*, *CNN*, and *Court TV*.

SPEAKER BIOGRAPHIES

Amanda M. Richards, Betty, Neuman & McMahon, P.L.C., Davenport, IA
Amanda M. Richards practices with the law firm of Betty, Neuman & McMahon, P.L.C. in Davenport, Iowa. She received her J.D. with honors from Drake University in 2003. Amanda practices in the area of civil litigation and workers' compensation.

Doug Richmond, Aon Global Professions Practice, Chicago, IL
Doug Richmond is a Senior Vice President in Aon's Global Professions Practice, where he consults with Aon's many large law firm clients on professional responsibility and liability issues. Before joining Aon, he was a partner with Armstrong Teasdale LLP in Kansas City, Missouri, where he had a national trial and appellate practice. In 1998, he was named the nation's top defense lawyer in an insurance industry poll. He is the author of two insurance law treatises and more than 50 law review articles on ethics, insurance law, and trial and appellate advocacy. In addition to his work for Aon, Doug teaches Legal Ethics at the Northwestern University School of Law.

Amy R. Teas, Bradshaw Fowler Proctor & Fairgrave PC, Des Moines, IA
Amy Teas is an Associate with the Litigation Department of Bradshaw, Fowler, Proctor & Fairgrave, P.C., in Des Moines. Her practice areas include Insurance Law, Employment Law and Appellate Practice. Prior to joining the Bradshaw Law Firm, Amy served as a judicial law clerk for the Fifth Judicial District of Iowa for Judge Vaitheswaran of the Iowa Court of Appeals.

The Hon. Marsha K. Ternus, Chief Justice, Iowa Supreme Court
Chief Justice Ternus, Des Moines, has served on the Iowa Supreme Court since 1993. The members of the court selected her as chief justice in 2006. She is the first woman to serve as chief justice of Iowa's highest court. Chief Justice Ternus, is a native of Vinton, Iowa. She received her bachelor's degree with honors and high distinction, Phi Beta Kappa, from the University of Iowa in 1972. She earned her law degree with honors, Order of the Coif, from Drake University Law School in 1977. While at Drake, she served as Editor-in-Chief of the Drake Law Review. Before joining the supreme court, Chief Justice Ternus worked in the private practice of law in the Des Moines firm of Bradshaw, Fowler, Proctor and Fairgrave. While in private practice, she served as president of the Polk County Bar Association, on the Board of Governors of the Iowa State Bar Association, on the Iowa Jury Instructions Committee, and on the Board of Directors of the Polk County Legal Aid Society. She also served as president of the Board of Counselors of Drake University Law School. In addition to her judicial duties, Chief Justice Ternus has worked on a number of court initiatives and other efforts to improve the administration of justice. She served as the judicial branch representative on the IOWAccess Advisory Council, on the judicial team that oversaw the design, development and construction of the Judicial Branch Building, on the steering committee of the Iowa Supreme Court Commission on Planning for the 21st Century and as co-chair of the commission's administration team. She also served on the Multi-State Performance Test Policy Committee of the National Conference of Bar Examiners. Chief Justice Ternus' current term of office expires December 31, 2010.

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Case Law Update I:

Employment, Commercial, Contract, Constitutional Law, Damages, Government

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APPELLATE CASE UPDATE I

Damages, Contract, Employment, Government, Constitutional Law, and Commercial Law
2008-2009

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CASE LAW UPDATE I

DAMAGES

Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009).

Facts: Nizam owned and operated Kid University, a day-care facility in Johnston, Iowa. Jasper was employed as director of the center. Within a short time after she started her employment, Nizam informed Jasper that the center was not making enough money to justify the size of the staff. He also encouraged Jasper to attract more children to the center. Jasper expressed concerns that any staff cuts would place the center in jeopardy of violating state regulations governing the minimum ratio between staff and children. Nizam was generally aware of the staffing requirements imposed by state regulations, but continued to insist that the staff be cut. The staff-to-child ratio became a subject of friction between Nizam and Jasper. Jasper was soon terminated. She believed the termination was due to her unwillingness to violate the staff-to-child ratios. Jasper sued Nizam for wrongful-discharge and sought damages for lost earnings, emotional pain and suffering, and punitive damages. She testified that the termination caused her to cry a lot, lose sleep, worry about money, and feel generally depressed.

The district court submitted the case to the jury but did not submit Jasper's punitive damage claim. The jury found that Nizam had wrongfully terminated Jasper in violation of public policy, and awarded Jasper past emotional distress of $100,000.00. The district court granted Nizam's motion for judgment n.o.v. by concluding that Japser had not proven a public policy violation. It also found the emotional distress damages to be excessive and reduced them to $20,000.00.

The court of appeals reversed on the public policy issue, affirmed the reduction of emotional distress damages, and reversed on the refusal to submit punitive damages. The Iowa Supreme Court granted Nizam further review.

Holding: The District Court did not abuse is discretion in finding the emotional distress damages were excessive. Jasper's case fell within a lower range of emotional distress damages compared to prior cases. Punitive damages were properly refused by the District Court.

Analysis: Wrongful discharge of employment is an intentional tort in Iowa. Emotional harm is recoverable under the tort. There must be a causal link between the discharge and the injury (damages). A court may grant a new trial when an excessive or inadequate award of damages was made that was influenced by passion or prejudice or when the verdict was not supported by sufficient evidence. A clearly excessive verdict gives rise to a presumption that it was the product of passion or prejudice. An award for emotional distress damages is not without boundaries, but is limited to a reasonable range derived from the evidence. Review of precedent provides parameters in which to examine particular awards of emotional distress damages. Here, the award of $100,000 was excessive, and properly reduced to $20,000 by the district court because Jasper had only worked at the center a few months, she was young, she found alternate

employment soon after her termination, and evidence of emotional distress was not supported by medical testimony and was largely nonspecific. Further, punitive damages were not recoverable because no previous judicial decision could have put Nizam on notice that any administrative regulation, including this particular regulation, could serve as the basis for a termination in violation of public policy.

Iowa Beta Chapter v. State, 763 N.W.2d 250 (Iowa 2009).

Facts: A freshman at the University of Iowa ("Pledge") became a prospective member of a fraternity on campus. Because Pledge was unable to obtain the minimum grade point average set by the fraternity, the fraternity did not accept him as a member. The fraternity rented rooms in the fraternity house to nonmembers during the summer for income. The renters did not have access to the chapter meeting rooms. Pledge rented a room in the summer 2001. Because Pledge was no longer a member of the fraternity, he was not allowed to attend secret meetings or other fraternity events. In the fall of 2001, Pledge filed a formal complaint to Dean Jones, VP on student affairs, alleging the fraternity had hazed its members. The complaint contained a two-and-a-half hour tape recording of an alleged hazing session. The tape was obtained by concealing an audio-recording device in the chapter's meeting room. The University revoked its official recognition of the fraternity based on the hazing allegation and an alcohol violation. The University relied on the tape recording as exclusive evidence of the hazing violation through the University's administrative hearing and appeal process, which ended June 29, 2004. The fraternity filed suit on February 4, 2005, alleging that the University and Dean Jones had relied on the tape recording in violation of Iowa Code § 808B.7, which prohibits the interception and use of a recorded communication as evidence. After a bench trial, the district court found in favor of the fraternity, holding the University and Dean Jones had violated Iowa Code ch. 808B. The court awarded liquidated damages of $98,300, pursuant to Iowa Code § 808B.8(2) ($100 per day of unauthorized use); punitive damages of $5,000.00 against Dean Jones; and attorney fees of approximately $60,000.00.

Holding: The Iowa Supreme Court reviewed the damage awards. The punitive damage award against Dean Jones reversed because insufficient evidence. Compensatory damages were reduced pursuant to liquidated damage provision of Iowa Code Ch. 808B. Attorney fees were reduced pursuant to Iowa Code Ch. 808B.

Analysis: *Punitive damages*. Iowa Code § 808B.8(1)(b)(2) provides that, to recover punitive damages, a person must prove "at least a voluntary, intentional violation of, and perhaps also a reckless disregard of, a known legal duty." Evidence did not establish Jones knew his use of tape violated the act.

Compensatory damages. Iowa Code § 808B.8(1)(b)(1) allows for an award of "actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation…" The District Court's award of $98,300 was incorrect because violation ended on November 21, 2003, date

when University dropped hazing charges. Appropriate compensatory damage amount is $73,200, reflecting 732 violation days.

Attorney fees. As a general rule, Iowa courts cannot award attorney fees in absence of a statute or contract authorizing such an award. Iowa Code § 808B.8(1)(b)(3) allows for "reasonable attorney's fee and other litigation costs reasonably incurred." Fraternity only allowed to recover its fees incurred in prosecuting its claim under Iowa Code Ch. 808B. Attorney fees award is modified to disallow recovery of $24,000 for administrative process.

Doe v. Central Iowa Health System, 766 N.W.2d 787 (Iowa 2009).

Facts: John Doe, an employee, of Central Iowa Health System, tried to commit suicide but was instead taken to the hospital and admitted to the mental health unit. Doe had his friends inform his supervisor that he would not be at work because of his hospitalization. Supervisor visited Doe in the hospital. During that meeting, Doe gave Supervisor permission to tell two of his co-employees that he was in the mental health unit. Upon his return to work, Doe suspected that an employee at Iowa Health accessed his records and gossiped about his hospitalization. He made a complaint to the privacy officer at Iowa Health regarding the unauthorized access and disclosure of his records. The privacy officer determined that six persons had accessed his records. Later, Doe was accused of sexual harassment. He was investigated, disciplined, and ultimately transferred to a new health facility to avoid embarrassment.

Doe brought action against Central Iowa Health System alleging that they unlawfully disclosed his medical and/or mental health information to Doe's co-employees. He alleged that Iowa Health violated the privacy rules of the Federal Health Insurance Portability and Accountability Act, breached its fiduciary duty, and violated the privacy rules of Iowa Code Ch. 228. Doe further alleged that the violations caused him to suffer humiliation, embarrassment, mental anguish, fear of social ostracism, fear regarding job security, and other severe emotional distress.

The jury found in favor of Doe and awarded him $175,000 for emotional distress.

Holding: Iowa Supreme Court considered whether Doe presented enough evidence on causation to support emotional distress damages of $175,000. Court held Doe needed expert testimony to prove causation. Court upheld district court's grant of defendant's motion for judgment notwithstanding the verdict.

Analysis: Generally, a plaintiff needs expert testimony to prove causation of emotional distress damages unless the causation is so obvious that it is within the common knowledge and experience of a layperson. Doe presented no expert witness to testify there was a connection between the unauthorized disclosures of his records and the changes in his behavior. The evidence was insufficient to allow a layperson to determine whether the unauthorized disclosures of the records caused Doe's alleged emotional distress. Doe did not reasonably and sufficiently explain the circumstances and progression of his emotional distress. He merely relied on conclusory statements to support his claim. Court concluded that lay

jurors, unaided by expert testimony, could not distinguish the emotional distress, if any, arising from the unauthorized disclosures of Doe's records from pre-existing emotional distress.

Moore v. Eckman, 762 N.W.2d 459 (Iowa 2009).

Facts: In May 2005, Moore was sitting on the truck of a car that was driven by Eckman. Eckman drove forward with Moore still on the back. He fell off and hit his head on the pavement, which ultimately caused his death. His mother ("Mother") did not witness the accident, but arrived at the scene immediately after it occurred. She was the first person to arrive at her son's side and the first person to render aid after the accident. Mother sued Eckman and Eckman's parents (owners of vehicle), and Insurance Company as the underinsured motorist carrier. She stated claims for negligence, loss of consortium, underinsured motorist coverage, and a bystander claim for negligent infliction of emotional distress.

Insurance Company moved for partial summary judgment with respect to the bystander claim. The district court denied the motion, finding that there were factual issues precluding summary judgment that should be resolved by a trier of fact. Insurance Company filed an application for grant of appeal in advance of final judgment, which was granted by the Iowa Supreme Court.

Holding: The Iowa Supreme Court was called upon to decide whether Mother had a claim for bystander liability when it was undisputed she did not see her son fall from the car. Court held that a family member who did not actually witness the accident is not entitled to emotional distress damages. Therefore, district court erred in denying partial summary judgment to Insurance Company on Mother's bystander claim for negligent infliction of emotional distress.

Analysis: Court reviewed elements of bystander claim from *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981): 1) Bystander near scene of accident; 2) Emotional distress resulted from direct emotional impact from the sensory and contemporaneous observance of accident; 3) Bystander and victim were closely related; 4) Reasonable person in position of bystander would believe, and bystander did believe, direct victim would be seriously injured or killed; 5) Emotional distress must be serious. Here, Mother did not actually see accident occur. Court did not accept Mother's argument that Barnhill merely separates emotionally distressed bystanders into two camps: those who learn of an accident from others after its occurrence and those who do not learn of the accident after its occurrence. Court concluded that Iowa has adopted bright-line rule that family members must actually witness accident to recover emotional distress damages.

Overturff v. Raddatz Funeral Serv., Inc., 757 N.W.2d 241 (Iowa 2008).

Facts: Jack and Marilyn were married in 1988. In 2003, Jack was diagnosed with cancer and was given only several months to live. On September 10, 2003, Jack filed a petition for dissolution of his marriage with Marilyn. Because he wished to dispose of his estate without regard to Marilyn, he filed a motion to waive the 90-day waiting period. The district court denied the motion because it had

"substantial concerns regarding [Jack's] competency." Jack died on December 21, 2003. He was still married to Marilyn.

Representative of funeral home met with Jack's sons and obtained Jack's body. Funeral home believed that Jack was divorced based on statements made by Jack's sons. Funeral home did not learn about Marilyn until after Jack's body was cremated. Marilyn did not attend Jack's funeral because she feared the funeral would become a "circus" were she in attendance. She did not learn Jack's body had been cremated until after the funeral.

Marilyn filed suit against several defendants, including the funeral home. She stated claims for negligent infliction of emotional harm, and negligent interference with a contractual relationship. The district court granted funeral home's motion for summary judgment on Marilyn's claim for emotional distress. It held the funeral home owed no duty to Marilyn for her emotional distress damage claim.

Holding: The Iowa Supreme Court held that because there was no violation of the regulation in place at the time of Jack's death and cremation, the regulation cannot be relied upon to establish a duty to Marilyn. Therefore, her claim for emotional distress damages was properly dismissed by the district court.

Analysis: Marilyn argued that the funeral home owed her a duty to avoid causing her emotional harm. She based this allegation on administrative rules and regulations pertaining to the funeral home industry. The Court found there was no such 'statutory duty', nor a common law duty owed to Marilyn. It held that absent some physical injury to the plaintiff, emotional distress damages are allowed only in a few situations where unique circumstances justify the imposition of a duty on the defendant. Iowa has recognized negligent infliction of emotional distress claims, absent some physical injury, "in the negligent performance of contractual services that carry with them deeply emotional responses in the event of breach," such as services incident to a funeral and burial. However, because Marilyn was not privy to a contractual relationship with the funeral home, she could not recover damages for emotional distress. Further, the Iowa regulations at play here did not create a duty to Marilyn because Jack's attorney-in-fact had priority over her to make funeral arrangements, and he did so.

CONTRACT

Great Plains Real Estate Develop., L.L.C. v. Union Central Life Ins. Co., 536 F.3d 939 (8th Cir. 2008)(Iowa).

Facts: In 1989, Great Plains Real Estate ("Borrower") executed a ten-year promissory note in the amount of $5,875,000 to United Central Life Insurance ("Lender") in exchange for a mortgage. The note had a 10-year life with a fixed interest rate of 9.25%. The note contained a prepayment premium provision ("PPP") under which Borrower could prepay the loan with a penalty that reflects the Lender's lost interest income. In 1997, Borrower sought to refinance the note. Borrower sent a letter to Lender that proposed a waiver of the PPP requirement. That waiver was never discussed again, nor memorialized in the parties' written note modification. In 2002, Borrower secured new financing at a lower interest rate

and notified Lender of its intent to pay off the note. Lender refused to accept payment of the principal unless the PPP was paid. Borrower paid the PPP charge of $627,000.00 and Lender released the mortgage. Borrower then filed an action in Polk County seeking to recover the PPP because Lender allegedly waived the PPP requirement. Lender removed the case to federal court and later filed a motion for summary judgment. The federal district court granted Lender's motion for a summary judgment. Borrower appealed.

Holding: The Eighth Circuit Court of Appeals considered whether the parties had modified the promissory note to exclude the PPP, or whether Lender waived the PPP. The Court held that Lender never voluntarily or involuntarily relinquished its right to the PPP and no reasonable jury could find Lender waived the PPP. Further, the PPP was held to be reasonable and thus, enforceable under Iowa law, because it was calculated based upon prevailing market rates in an attempt to gauge Lender's actual loss of earnings from Borrower's prepayment.

Analysis: First, the Court found that Lender did not waive the PPP. Waiver is defined as the voluntary or intentional relinquishment of a known right. Waiver requires the existence of a right, knowledge of that right, and an intention to relinquish such right. The only time the PPP was mentioned during the renegotiation of the promissory note in 1997 was when Borrower proposed the PPP be waived. Lender did not respond to such proposal, nor was the PPP ever again specifically negotiated. The PPP was not addressed in Lender's refinancing offer, and was absent from the ultimate written agreement. That agreement provided "Except as expressly modified… all of the terms of the Note… remain in full force and effect." Therefore, the Court held that no reasonably jury could find Lender waived the PPP.

Second, the Court responded to Borrower's argument that the PPP was unenforceable under Iowa law because it constituted an unreasonable liquidated damages provision. The Court disagreed. It stated that where a party retains control over the manner of performance, alternatives are not damage provisions. Here, Lender gave Borrower the choice of paying according to the note's terms, or alternatively prepaying the note in full and paying the PPP. Because the Borrower could elect to prepay, the PPP was not a liquidated damages provision. Further, the payment was not unreasonable, as Borrower contended. An unreasonably large PPP would have been unenforceable on public policy grounds as a penalty. However, the PPP here was calculated based upon prevailing market rates in an attempt to calculate Lender's actual loss of earnings resulting from Borrower's prepayment. Thus, it was reasonable and upheld by the Court.

In Re Marriage of Shanks, 758 N.W.2d 506 (Iowa 2008).

Facts: Randall and Teresa were married in April 1998. Prior to their marriage, Randall suggested a premarital agreement to preserve his assets in the event their marriage ended by his death or a divorce. Randall, an attorney, drafted a premarital agreement and presented it to Teresa. The draft proposed the parties would maintain separate ownership of their assets acquired before and during the marriage, and provided the parties did not intend to hold jointly-owned

property except a marital home and a joint checking account. Also, the draft agreement included a mutual waiver of alimony, and provided Randall would maintain $500,000 in life insurance coverage on his life with Teresa as the beneficiary. Upon receiving the draft, Teresa had questions. Randall insisted Teresa seek independent legal counsel as to the meaning and legal effect of the proposed agreement. Teresa consulted a friend, who referred her to an attorney in Nebraska. The attorney in Nebraska pointed out to Teresa that the agreement waived all Teresa's rights as spouse in Randall's pension assets. The Nebraska attorney then told Teresa she should seek Iowa counsel. Teresa did not seek the advice of Iowa attorney. Thereafter, Randall revised the agreement, gave a new draft to Teresa, and again told her to review with an attorney. Teresa again refused independent counsel and signed the premarital agreement shortly before their wedding.

Of course, their marriage failed. Randall filed a petition requesting a dissolution of marriage, and sought the enforcement of the premarital agreement, which Teresa opposed. The district court bifurcated the trial, first taking up the question of enforceability of the premarital agreement. After a trial of that matter, the court found Teresa's execution of the agreement was involuntary, and thus unenforceable. Randall appealed.

Holding: The Iowa Supreme Court was afforded its first opportunity to determine the validity of a premarital agreement under Iowa Code section 596.8, the provision of Iowa's Uniform Premarital Agreement Act (IUPAA) dealing with enforcement. Specifically, the Court reviewed the premarital agreement for voluntariness and unconscionability. The Court held that Teresa voluntarily executed the premarital agreement, and that the agreement was conscionable.

Analysis: First, the Court held that the issues concerning the validity and construction of premarital agreements are equitable matters subject to the Court's de novo review. Next, the Court noted that premarital agreements are subject to the requirements of the Iowa Uniform Premarital Agreement Act, Iowa Code chapter 596. Premarital agreements may be found unenforceable on any of three bases: 1) not executed voluntarily; 2) agreement unconscionable; or 3) no fair and reasonable disclosure of property or financial obligations of other spouse. Here, Teresa contended she did not execute the premarital agreement voluntarily, or it was unconscionable.

Voluntariness. The Court noted that the IUPAA significantly altered and clarified the voluntariness inquiry. The IUPAA requires only that the agreement be executed "voluntarily," without offering a definition. In pre-IUPAA case law, the Court determined that a voluntarily executed premarital agreement was free from duress and undue influence. The Court here decided that proof of duress or undue influence is required under the IUPAAA to establish involuntariness. Duress requires 1) a wrongful or unlawful threat, and 2) no reasonable alternative to entering the contract. Teresa was not under duress when she signed the premarital agreement. Her argument that Randall issued an ultimatum that he would not get married without a premarital agreement was not wrongful or unlawful. Also, Teresa had the reasonable alternative of cancelling the wedding. Teresa was also not under undue influence. Randall suggested Teresa seek

counsel as to both drafts of the premarital agreement. Finally, despite Randall's position as a lawyer, there was insufficient evidence to establish undue influence.

Unconscionability. The IUPAA prohibits premarital agreements from adversely affecting spousal support. Thus, the alimony waiver in the premarital agreement was invalid and unenforceable. The rest of the premarital agreement, however, was conscionable and enforceable. Unconscionability is examined using the factors of assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness. The concept of unconscionability includes both procedural and substantive elements. Procedural unconscionability involves employment of "sharp practices" as well as a "lack of understanding and inequality of bargaining power." Substantive unconscionability focuses on "harsh, oppressive, and one-sided terms" of a contract. The premarital agreement here was essentially mutual in scope, as it sought to maintain the parties' premarital assets as separate property and to perpetuate the parties' premarital financial conditions throughout the marriage. Also, although Teresa unilaterally waived marital interest in certain assets, she derived potential benefits under the agreement such as life insurance benefits. Further, Teresa's decision to forego her opportunity to seek legal advice was a choice that emasculated her unconscionability claim.

Wells Dairy, Inc. v. Am. Indus. Refrigeration, 762 N.W.2d 463 (Iowa 2009).

Facts: In January 1999, Wells Dairy and Pillsbury entered into a contract whereby Wells agreed to manufacture Pillsbury ice cream products at its facility in Le Mars, Iowa. The contract included minimum levels of production by Wells over a fixed term. Two months after the contract was signed, an explosion and fire occurred at the Wells facility. The explosion resulted from a catastrophic failure of the check valve in a pipeline of the ammonia refrigeration system. The explosion and subsequent fire shut down the facility. In August 2002, Pillsbury filed a lawsuit against Wells for breach of contract and negligence. Wells filed a third party action against American Industrial Refrigeration ("AIR") and Refrigeration Values & Systems Corp. ("RVS"), seeking indemnification for any damages owed to Pillsbury in the underlying action. Wells contended the explosion and fire were caused by a defective refrigeration system that AIR and RVS installed, designed, and sold to Wells.

Wells' relationship with AIR was contractual in nature. Wells hired AIR to design its multimillion dollar refrigeration system for its ice cream facility. AIR's system was to be code-compliant, made of the highest quality materials, and include numerous safety controls. Further, the contract provided AIR would service the system. Wells' relationship with RVS was without a contract, though Wells contended there was a contractual relationship based on blueprints and engineering specifications prepared by RVS for Wells. RVS was the supplier of vessels, piping, and components for the refrigeration system.

The district court granted AIR's and RVS's motions for summary judgment. It found there was no express agreement to indemnify between the parties and there was no implied duty to indemnify. Wells appealed.

Holding: The Iowa Supreme Court reviewed Wells' claims against AIR and RVS to determine whether implied contractual indemnity or equitable indemnity existed to hold either as indemnitors for the underlying explosion damages claimed by Pillsbury. The Court launched into an in depth review of indemnity law. It held that implied contractual indemnity requires a mutual intent to indemnify among the parties, which was not present as to AIR or RVS. Further, equitable indemnity is proper when there is a special relationship and "independent" duty between the parties, regardless of a contract or intent to indemnify. Both AIR and RVS could be held as indemnitors under equitable indemnity theory.

Analysis: The Court seized on the opportunity to "peer into the abyss of indemnity law." It identified and discussed the two broad categories of indemnity other than express indemnity – implied contractual indemnity and equitable indemnity – then analyzed their application to defendants AIR and RVS.

Implied contractual indemnity. Implied contractual indemnity arises from an existing contractual relationship even if the parties did not expressly include an indemnity clause in the contract. In Iowa, an implied contractual duty to indemnify may arise where there are "independent duties" in the contract to justify the implication. "Independent duties" arise when the contract implies "a mutual intent to indemnify for liability or loss resulting from a breach of the duty." The question in an implied contractual indemnity case is whether a duty arising from the contract has been violated, and if so, what damages flow directly from that breach. Implied indemnity only arises in situations with specific and defined contractual duties. It does not arise from "plain vanilla contracts," and is something beyond a routine service contract triggering only general duties of care. Here, Wells asserted it was entitled to implied contractual indemnity from both AIR and RVS. With regard to AIR, Wells asserted that implied indemnity arose from AIR's contractual duty to inspect and perform necessary repairs on the refrigeration system, and from AIR's contractual duty to provide safety devices. The Court disagreed. It held that the contract to perform maintenance services as needed does not give rise to an implied contractual obligation to indemnify if the equipment, which is under the day-to-day control of the purchaser, fails to perform. Further, a contractual obligation to provide equipment that meets certain safety standards is merely a promise to provide equipment with certain characteristics. With regard to RVS, the Court found that there was no contract to underlie implied indemnity. Wells asserted that engineering specifications, blueprints, and sales invoices collectively amounted to a contractual agreement. Such documents did not suggest offer, acceptance, or legal duty, required to form a contract.

Equitable indemnity. Equitable indemnity arises from non-contractual obligations. The law imposes indemnity due to the relationship of the parties and the underlying loss, regardless of the parties' intentions. It is a "murky doctrine based on notions of fairness and justice." Classic branches of equitable indemnity include vicarious liability and joint tortfeasors with great disparity in fault. Also, equitable indemnity may be based upon an "independent duty" between the parties such that indemnity may be imposed on the indemnitor as a matter of law. Such cases are based on notions of fairness based on the nature of the relationship between the parties and the underlying cause of damage claimed by the first-party plaintiff. Numerous cases have held that a breach of a

duty by licensed engineering professionals toward their clients is sufficient to support indemnification, based upon their special relationship. Here, Wells asserted that equitable indemnity existed as to both AIR and RVS. With regard to AIR, Wells contended that because its contract with AIR involved professional engineering services, AIR had an "independent duty" to support an equitable indemnity claim. The Court agreed. It further stated it was not necessary that AIR be liable to the first-party plaintiff in order to establish equitable indemnity based on an independent duty. With regard to RVS, the Court held that because Wells asserted equitable indemnity based on RVS's professional engineering negligence, a fact issue remained such that summary judgment was improper.

Meincke v. Northwest Bank & Trust Co., 756 N.W.2d 223 (Iowa 2008).

Facts: Janine loaned Daughter and Nephew $90,000.00. The loan was secured by a mortgage on property owned by Daughter and Nephew's plumbing business. The building was already subject to a mortgage held by Northwest Bank & Trust. Later, Northwest Bank & Trust offered to issue the plumbing business another loan to restructure and refinance existing loans. The loan would be secured by a mortgage on the building. Before granting the restructure and refinance loan, Northwest Bank informed Daughter and Nephew that Janice would have to subordinate her loan to Northwest's. To comply with this condition, it was necessary for Janine to sign a subordination agreement. Northwest Bank would not have made the loan if Janine had refused to sign the subordination agreement. Several months after the restructure and refinance loan was made, the plumbing business decided to close. The business agreed to a voluntary foreclosure on the mortgages held by Northwest Bank. The building was sold, and the proceeds were applied to the remaining Northwest Bank loans. However, debt remained. Therefore, Janice did not receive any proceeds from the sale.

Janice filed a petition asking the court to find the subordination agreement null and void for lack of consideration and lack of acknowledgment. The district court found the agreement was supported by consideration because Northwest Bank suffered a detriment by loaning the plumbing business additional funds in response to Janice signing the subordination agreement. Janice appealed. The appeal was routed to the Iowa Court of Appeals, who found the consideration was not bargained for. Northwest Bank petitioned the Iowa Supreme Court for further review, which was granted.

Holding: The Iowa Supreme Court agreed with the district court that there was bargained for consideration to validate the subordination agreement. Northwest Bank suffered a detriment by loaning the plumbing business additional funding. Also, the Court upheld the rule that improper acknowledgment is not a valid defense in a controversy between original parties.

Analysis: The Court reviewed the fundamentals of consideration for a valid contract. Consideration can be either a legal benefit to the promisor, or a legal detriment to the promisee. The benefit or detriment must be "bargained for." Restatement (Second) of Contracts § 73 provides: 1) To constitute consideration, a performance or a return promise must be bargained for; and 2) a performance or

return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise. A sufficient legal detriment exists if the promisee performs any act, regardless how slight or inconvenient, which he is not obligated to promise or perform. Here, the detriment suffered by Northwest Bank was bargained for. The evidence showed that Janice understood the bank would lend more money to Daughter and Nephew only if she signed the subordination agreement. By signing the subordination agreement, Janice impliedly requested Northwest Bank to refinance Daughter and Nephew's loans. Thus, she requested the bank to suffer a detriment.

With regard to the allegedly deficient acknowledgment, Janice argued that the subordination agreement was not properly notarized. The Court held that the improper acknowledgment is not a valid defense in a controversy between original parties. It would only overturn that rule if it was found to be inconsistent with the sense of justice or with the social welfare. The court did not so find.

EMPLOYMENT

Sims v. NCI Holding Corp., 759 N.W.2d 333 (Iowa 2009).

Facts: Employee worked as Operator at American Building Components manufacturing facility in Oskaloosa. Employee's position was a "safety sensitive position" that required him to oversee operation of steel decoiling machines, operate forklifts, etc. When Employee was hired, he was provided the company's employee manual, which contained its "Drugs, Narcotics, and Alcohol" policy. Such policy prohibited employees from being present on company property while under the influence of alcohol or illegal narcotics. The company engaged in random drug tests to enforce the policy. Employee was selected for a random drug test. He tested positive for methamphetamine and was told orally of his right to undertake a confirmatory test at his own expense. Nonetheless, he was immediately terminated. Six months later, the company sent Employee written notice of his right to obtain a confirmatory drug test. Employee filed suit against company, claiming: 1) it violated Iowa Code § 730.5 by failing to notify him in writing by certified mail of the positive test result; and 2) the company's "Drug, Narcotics, and Alcohol" policy failed to make disclosures required by Iowa Code § 750.5(9)(a)(1) regarding the company's testing and retesting.

The District Court held that the company's written drug policy was noncompliant with Iowa Code § 730.5(9) because it failed to disclose Employee's right to request and obtain a confirmatory test. However, because company ultimately provided Employee the right to confirm the positive drug test, the company "substantially complied with the statute." Despite the company's delay in giving written notice of Employee's right to retest, the district court found Employee was orally advised and followed up with a writing.

Holding: The Iowa Supreme Court was called upon to determine whether the company "substantially complied" with the drug policy provisions of Iowa Code § 730.5, Iowa's "drug-free workplace" statute. Court held that if an employer's actions fall short of strict compliance, but nonetheless accomplish the important objective of

providing notice to the employee of the positive test result and a meaningful opportunity to consider whether to undertake a confirmatory test, the employer's conduct will substantially comply with the statute.

Analysis: The Court had not previously had an opportunity to determine whether strict compliance with the provisions of Iowa Code § 730.5, Iowa's "drug-free workplace" statute, is required or whether substantial compliance will suffice. "Substantial compliance" is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute. Section 730.5 is intended to protect an employer's right to ensure a drug-free workplace, and more narrowly, to ensure the accuracy of any drug test serving as the basis for adverse employment action. In that way, the statute provides protections to employees. If the employer provides notice to an employee of a positive test result and a meaningful opportunity to consider whether to challenge the test, the employer's conduct substantially complies with the statute.

First, the company's written drug policy complied with the requirement that it disclose "drug or alcohol testing or retesting by an employer" per Iowa Code § 730.5(9)(a)(1). The written policy need not disclose the employee's right to retest a positive drug test. Instead, the Iowa Code requires such a disclosure only *after* a positive drug test in a written notice sent to the employee. Thus, the company's written policy complied with the mandates of Iowa Code § 730.5(9)(a)(1).

Second, the company did not substantially comply with the requirement of Iowa Code § 730.5(7)(i)(l) that an employee be notified in writing of 1) a positive test result for drugs, and 2) the employee's right to request and obtain a confirmatory test. The company provided only oral notice of the same. The Court held that the requirement of a formal, written notice, conveys to the addressee "a message that the contents of the document are important" and worthy of the employee's deliberate reflection. Finally, the company's six-month late follow-up writing to Employee did not bring the company's notice to Employee into substantial compliance with Iowa Code § 730.5(7).

Kern v. Palmer College of Chiropractic, 757 N.W.2d 651 (Iowa 2008).

Facts: Kern was a professor at Palmer College of Chiropractic ("Palmer College"). A written contract established the terms of his employment, including reference to the faculty handbook that addressed specific grounds for termination. All parties agree that dismissal could only be "for cause," pursuant to the faculty handbook. One of the grounds for termination included "willful failure to perform the duties of the position to which the faculty member is assigned or willful performance of duty below accepted standards." During a faculty meeting, Kern's supervisor requested all faculty members submit 25 proposed questions suitable for inclusion on the national chiropractic board examination, as well as a statement of professional goals for the year. Both documents were to be submitted by email to Supervisor. Kern submitted handwritten board exam questions and a single goal to Supervisor. Kern's single goal was to restore the Palmer College to its former curriculum structure. The College had recently undergone a curriculum structure change of which Kern was a known opponent among the

College faculty. Supervisor was offended by the substance of Kern's goal, and also instructed Kern to resubmit his board exam questions in electronic form. Because Kern struggled with a computer, he was tardy in resubmitting his questions in electronic form. He was reprimanded through email and also during a meeting with Supervisor and other administrators at the college. Kern was given an ultimatum to either resubmit his exam questions, or suffer dismissal. Kern submitted handwritten exam questions immediately prior to the Supervisor's ultimatum deadline. Several days later, Kern received a letter dismissing him from employment for "willful failure to perform the duties of the position to which the faculty member is assigned and/or willful performance of duty below accepted standards."

Kern appealed his dismissal to the faculty judiciary committee. Ultimately, the committee found that the totality of the evidence presented during the hearing did not provide clear and convincing basis to justify the rationale indicated in the letter of dismissal. The committee recommended a rescission of the dismissal. Palmer College President disagreed and issued a decision that Kern was properly terminated. Kern then brought an action against Palmer College alleging a breach of employment contract. The district court granted Palmer College's motion for summary judgment, finding as a matter of law that Palmer had not breached the employment contract.

Holding: The Iowa Supreme Court, faced with a split of authority in sister jurisdictions, laid solid precedent for how fact finders are to judge "good cause" employment agreements. The Court adopted the "*Toussaint* rule," named for a Michigan Supreme Court case, which provides that "good cause" employment agreements are not so different from other contracts and "good cause" should be determined by the fact-finder. The Court reversed the district court's grant of summary judgment and found there were fact questions as to whether Kern willfully failed to perform his duties.

Analysis: The Court had an opportunity to determine proper standards for adjudicating "good cause." Generally, a "good cause" employment agreement provides that an employee may be terminated for reasons that relate to performance of the job and the impact of that performance on an employer's ability to attain its reasonable goals. Here, the parties agreed that specific enumerations, listed in the faculty handbook, controlled what would constitute a valid termination "for cause." Palmer College contended, and the district court concluded, that judicial review of the employer's finding of cause for termination should be constrained by deference for the employer's decision.

The Court noted that a majority of courts addressing the standard by which performance of employment contracts is judged view employment contracts as fundamentally different from other contracts, and consequently grant employers great deference in making "cause" termination decisions. This approach is generally described as judicial review for "objective reasonableness." In such jurisdictions, the fact-finder's role is not to determine whether the facts underlying the employer's "cause" determination were actually true, or whether they amounted to "cause." Instead, the judicial fact-finder determines only whether the cause claimed was fair, reasonable, regulated by good faith by the employer, and based on facts supported by substantial evidence. For example, a North

Dakota court concluded "the practical considerations of running a business overwhelmingly favor a legal presumption that an employer retain the fact-finding prerogative underlying the decision to terminate employment."

The Iowa Supreme Court refused to apply the "objective reasonableness" approach to adjudicating "good cause" employment agreements. Instead, the Court applied the *Toussaint* rule, named for a Michigan Supreme Court case, which provides greater protection for employees who have secured "for cause" terms in their employment contracts. That approach rejects the narrow role of the judicial fact finder. It provides that the question of whether "cause" for termination actually existed is for the fact-finder to decide. The jury, as trier of facts, decides whether the employee was, in fact, discharged for unsatisfactory work. When the parties have adopted a specific standard for the determination of "good cause," the *Toussaint* rule is appropriate because it strikes balance between the employer's strong interest in making employment decisions and the employee's substantial interest in employment stability offered by contracts that may only be terminated for specified "good cause." Further, the Court holds that employment contracts that provide specific definitions of "good cause" are not so different from other contracts as to justify a legal construct favoring the employer's interests over those of employees. Applying the *Toussaint* rule here, the Court found that the evidence presented several fact questions as to whether Kern willfully failed to perform his duties. Therefore, the Court found summary judgment was inappropriate.

King v. United States, 553 F.3d 1156 (8th Cir. 2009)(Iowa).

Facts: In January 2005 the United States Department of Agriculture announced a position opening for a "single family housing specialist" in the rural development section of its office in Le Mars, Iowa. Several people applied for the position, including employees Old (54 years old) and Young (25 years old). The selection committee considered the applicants, ranking them using a "knowledge, skills, and abilities" process. Old and Young were the top two candidates. The committee decided unanimously to hire Young based upon her undergraduate and graduate degrees, experience in a bank, "go-getter" attitude, computer skills, and familiarity with the rural development section's loan-writing process. Thereafter, Old sued the USDA, alleging the USDA discriminated against her because of her age when it selected Young for the specialist position. At bench trial, Old elicited testimony from fellow employees regarding statements allegedly made by selection committee members. Examples: "Wanted to bring in educated, young blood;" and "the has-beens need to listen to the newbies." Old claimed that such statements are direct evidence of age discrimination. Old also presented the following indirect evidence: testimony the committee members made statements that exhibited their preference for younger employees; Young lacked the qualifications cited by the USDA; Old's qualifications were superior to Young's; selection process was procedurally different for Old and Young because their interview questions differed; and there was an atmosphere of discrimination against older employees. The USDA offered testimony to demonstrate that age was not a consideration in the committee's employment decision. The district court entered judgment in favor of the USDA, finding that the statements offered by Old were not direct evidence because they did not

demonstrate a specific link between the alleged discriminatory animus and the committee's decision to select Young. Further, the court found Old established a prima facie case of age discrimination based on indirect evidence, though she did not prove the USDA's reasons were pretexts for age discrimination. Old appealed.

Holding: The Eighth Circuit Court of Appeals reviewed well established age discrimination principles and applied them to the case at bar. Direct evidence of age discrimination is analyzed under a "mixed-motives" framework. The Court did not dive into the "mixed-motive" framework because it held Old presented no direct evidence. Indirect evidence is analyzed under a burden-shifting framework. The Court held that the USDA satisfied its burden to articulate a legitimate, non-discriminatory reason for its employment action.

Analysis: *Direct evidence*. Where a plaintiff presents direct evidence of discrimination, the court analyzes her claim under the mixed-motives framework established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Direct evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision. It does not include "stray remarks in the workplace," or "statements by non-decisionmakers." Direct evidence may include "evidence of actions or remarks of the employer that reflect a discriminatory attitude," or "comments which demonstrate a discriminatory animus in the decisional process." The Court agreed that Old's direct evidence claim based on several statements was not "direct evidence" because the statements did not establish a specific link between the alleged animus and the committee's decision to select Young. The statements were apparently made months before the USDA announced the position vacancy, thus they were not connected to the decision making process.

Indirect evidence. Where a plaintiff presents indirect evidence of discrimination, the court analyzes her claim under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). With regard to indirect evidence of age discrimination, the *McDonnell Douglas* burden-shifting framework requires that once the plaintiff establishes a prima facie case the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment action. If the employer meets that burden, the burden then shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the stated non-discriminatory rationale was a mere pretext for discrimination. Here, the Court found that the USDA's articulated, legitimate, non-discriminatory reasons for selecting Young for the specialist position was supported by substantial evidence and were not pretexts for age discrimination.

Hertz v. Woodbury County, 566 F.3d 775 (8th Cir. 2009)(Iowa).

Facts: Seven police officers employed by the Woodbury County Sherriff's Department filed suit against the County for its alleged failure to pay overtime compensation in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19. The officers claimed that the County failed to compensate them for work performed during their commute time mealtimes, and other general overtime. The County uses a

Computer Aided Dispatch ("CAD") system to track the duty-status of an officer. For example, the code "10-41" signifies an officer has begun his or her tour of duty and is prepared to answer calls for assistance. The CAD system is used merely for tracking what officers are available to respond to emergencies and is not used for payroll purposes. Rather, the County keeps track of the officers' working house through a sign-in sheet, which the officers initial to indicate they have worked the scheduled hours that day. Overtime is tracked using "overtime" slips that must be turned into their supervisors for approval. The officers moved for summary judgment, arguing there were no material facts in dispute as to whether the County owed wages for unpaid commute time, mealtime, and general overtime. The motion was denied. At trial, a jury returned a verdict in favor of the County on all claims. The officers appealed, contending the court erred in denying its motion for summary judgment, and in its issuance and refusal to issue certain jury instructions.

Holding: First, the Eighth Circuit Court of Appeals determined that it was precluded from considering the district court's denial of summary judgment because the matter had been tried on its merits to a jury. Further, the matter did not meet the Court's slim exception to that rule for summary judgment review post-judgment based on "purely legal" questions. Here, there were numerous questions of material fact with regard to the compensability the officers' overtime claims. Second, the Court held that the CAD system was not "constructive knowledge" of the officers' overtime. It would be unreasonable to require the County to weed through non-payroll records to determine whether or not its many employees were working overtime. Third, the Court held that the burden was not on the County to disprove that the officers' worked during mealtimes. Rather, the officers' bore the burden to show that the mealtimes were compensable because they were in the best positions to prove their actions during scheduled mealtimes were for the benefit of the County and not part of a bona fide meal period.

Analysis: *Summary judgment review*. The Court found that summary judgments may not be reviewed after a trial on the merits. The proper redress for a denial of summary judgment following final judgment is through subsequent motions and appellate review of those motions. The Court has, at least once, allowed a party to appeal a district court's denial of summary judgment when there were no disputed material facts and the denial was based on the interpretation of a "purely legal question." This was not the case here because there were numerous and varied questions of material fact with regard to the compensability of commute-time, mealtime, and other overtime claims.

Disputed jury instructions. According to the officers, the inclusion of certain jury instructions constituted reversible error. First, the jury was instructed that the County had no legal duty to consult the CAD logs for to determine the officers' overtime. The officers argued that such an instruction precluded them from establishing that the County knew or should have known they were working overtime. According to the FLSA, an employee must be compensated for overtime if the employer knows or has reason to believe the employee is continuing to work beyond their regular hours. The CAD system was not "constructive knowledge" of the officers' overtime because it was not regularly used for payroll purposes. Just because the County "could" have known about the overtime through extraneous review of the CAD records, it does not follow

that the County "should have known" the overtime hours shown by the CAD system. The Court noted that requiring the County to reference CAD logs for 40+ employees in the Sheriff's Department would be an administrative burden.

Second, the jury was instructed that it was the officers' burden to prove they were engaged in conduct "primarily for the benefit of the employer" and that their mealtimes were thus compensable. The officers argued that mealtimes amount to an "exemption" from compensation under the FLSA. Normally, the application of an exemption under the FLSA is a matter of affirmative defense on which the employer has the burden of proof. However, the Court found that mealtimes are not an exemption. Rather, the gravamen of the officers' complaint is that they performed "work" during mealtimes that amounted to overtime. Because a claim for unpaid mealtime work is no different than other overtime claims, the officers bore the burden to show 1) they performed compensable work, and 2) the number of hours were not properly paid. Both jury instructions were upheld.

Ricci v. DeStefano, 129 S.Ct. 2658 (2009).

Facts: In 2003, over 100 New Haven, Connecticut firefighters took oral and written examinations for promotion to officer ranks. The test would determine all promotions for the next two years. The City prescribed that individuals who scored over 70% on the exam would pass. Of the 118 firefighters who took the exam, the score for African American candidates was approximately half of that for white candidates.

As a result of the public debate that followed the test results, the City held a series of hearings that ultimately resulted in a decision to throw out the test results. Eighteen test takers, 17 whites and one Hispanic, including the lead plaintiff, Frank Ricci, brought suit against the City and its mayor, John DeStefano, Jr. They claimed that by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000 *et seq.,* and the Equal Protection Clause of the Fourteenth Amendment. The City and officials defended their actions, arguing that had they certified the result, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.

The Federal District Court granted the City's summary judgment. On appeal, a three-judge panel in the Second Circuit, led by now Associate United States Supreme Court Justice Sonya Sotomayor, heard arguments in the case. The three-judge panel initially affirmed the district court's ruling in a summary order without opinion but later withdrew the summary order and issued a *per curiam* opinion adopting the trial court's decision as "thorough, thoughtful and well reasoned." The Supreme Court granted certiorari.

Holding: The United States Supreme Court held that before an employer can engage in intentional discrimination for purposes of avoiding "unintentional disparate impact," employer must have "strong basis in evidence" to believe that it will be subject to disparate-impact liability if it fails to take race-conscious action. Here,

the Court found the City of New Haven did not have a strong basis in evidence and overturned the Second Circuit's decision.

Analysis: The Court looked at Title VII's proscription of disparate impact. The Court construed the statute and held that in instances of conflict between the disparate treatment and disparate impact provision of Title VII, permissible justifications for disparate treatment claims must be grounded in the strong basis in evidence standard. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). (Croson did not provide a framework for determining what constituted strong basis and evidence. Commentators have suggested that statistical disparities between minorities and the percentage of minorities willing and able to do certain work may form an appropriate basis.) The Court expressed concern that the City's policy in withdrawing the certification of testing after the fact would encourage race-based claims at the slightest hint of disparate impact which would amount to a de facto quota system.

In this 5-4 decision, Associate Justice Anthony Kennedy narrowly viewed the evidence suggesting that the City of New Haven had failed to recognize potential disparate impact liability as it formulated its written and oral testing for promotions. Unfortunately, the Court did not provide much guidance with the type of evidence that would be necessary and failed to provide guidance for those who would formulate testing that might have differences between protected groups in the future. The Court did not reach the equal protection issue because a construction of Title VII disposed of the case.

GOVERNMENT

City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008).

Facts: Driver was caught speeding by Davenport's automated traffic enforcement ("ATE") system. The ATE system was adopted by Davenport in 2004 and authorized by a municipal ordinance. It uses a combination of cameras and sensors to allow Davenport officials to detect traffic violations without a law enforcement officer present on the scene. The information obtained from the ATE devices is forwarded to the Davenport Police Department for review, who then determine whether there has been a violation of the city's traffic control ordinances. Under the ATE ordinance, a vehicle owner is issued a notice and is liable for a civil fine as a result of any detected violation. A vehicle owner may dispute a citation at trial before a judge or magistrate. Driver contested his citation and his case was tried to a magistrate. Driver made several constitutional challenges to the Davenport ordinance. He also argued that the Davenport ordinance was invalid because it was preempted by traffic regulations and enforcement mechanisms contained in Iowa Code Ch. 321 and other various parts of the Iowa Code. The magistrate rejected all Driver's claims and entered judgment against him. Driver's application for discretionary review was granted by the Iowa Supreme Court.

Holding: The Iowa Supreme Court considered whether the Davenport ATE ordinance was preempted because it was inconsistent or contrary to Iowa's statewide traffic laws. Ultimately, it held that the ordinance was not preempted because it was

not irreconcilable with Iowa law. Rather, it was an appropriate measure taken by a municipality to supplement Iowa traffic regulations.

Analysis: The Iowa Supreme Court provided a thorough review of preemption principles in its opinion. It discussed the three types of preemption: express preemption, field preemption, and conflict preemption. Because Davenport was not specifically prohibited by the Iowa legislature from enacting such an ATE ordinance, the ordinance was not expressly preempted. Therefore, the Court's analysis focused on implied preemption by state law. The Davenport ordinance could not stand if it was irreconcilable with state law (conflict preemption), or if the legislature had made some clear expression of intent to preempt a field from regulation by local authority (field preemption). The Court found that the provisions of Iowa Code Ch. 321 ("Rules of the Road") allow local authorities to adopt additional traffic regulations which are not in conflict or inconsistent. Here, while there are differences between statewide traffic regulations and the ATE ordinance, the differences are not irreconcilable such that a bitter choice must be made. The Court concluded that the Davenport ATE ordinance simply cannot be said to authorize what the legislature has expressly prohibited, or to prohibit what the legislature has authorized. Further, every effort should be made to harmonize a local ordinance with a state statute.

Hook v. Lippolt, 755 N.W.2d 514 (Iowa 2008).

Facts: Hook brought suit for injuries she sustained in a June 2000 motor vehicle accident caused by Lippolt, who ran a red light and struck Hook's vehicle. At the time of the accident, Lippolt was acting as a volunteer for the Iowa Department of Human Services. Lippolt was granted leave to amend his answer to assert an immunity defense under Iowa Code Ch. 669, which provides immunity from personal liability for persons performing voluntary services for a state agency. Hook dismissed her claim against Lippolt without prejudice. About the same time, nearly three years after the accident, Hook filed an administrative claim with the state appeal board seeking compensation for her personal injuries. After six months passed with no response from the board, Hook withdrew her claim and filed a new lawsuit against Lippolt and the State of Iowa. The District Court denied the State's and Lippolt's motions for summary judgment.

Holding: The Iowa Supreme Court reviewed the district court's ruling denying Lippolt's motion for summary judgment on Hook's negligence claim based on Lippolt's immunity defense under Iowa Code § 669.24. The Court reversed the district court because it found Lippolt was entitled to immunity for personal liability as a volunteer for a state agency, per §669.24.

Analysis: Iowa Code § 669.24 provides:

> A person who performs services for the state government or any agency or subdivision of state government and who does not receive compensation is not personally liable for a claim based upon an act or omission of the person performed in the discharge of the person's duties, except for acts or omissions which involve intentional misconduct or knowing violation of the law, or for a

transaction from which the person derives an improper personal benefit. For the purposes of this section, "compensation" does not include payments to reimburse a person for expenses.

Hook argued that a related statute governing DHS volunteers, Iowa Code § 217.13(3) provides that Lippolt is an "employee… for purposes of chapter 669." Therefore, Hook argued, Lippolt does not enjoy protection from personal liability provided by section 669 to volunteers. The Court disagreed. It reasoned that the legislature did not intend to deprive DHS volunteers of immunity under section 669.24 by its enactment of section 217.13(3). Rather, the legislature intended to assume responsibility under chapter 669 for the torts of persons purporting to act for DHS only if such persons were registered with the DHS and in compliance with departmental rules. The Court concluded that the plain language of section 669.24 states that a volunteer "is not personally liable." Therefore, Lippolt was immune from personal liability.

George v. D.W. Zinser Co., 762 N.W.2d 865 (Iowa 2009).

Facts: In January 2007, George filed a complaint with the Iowa Division of Labor Services Occupational Safety and Health Bureau (the "Division") alleging his employer, Zinser, violated provisions of IOSHA. The complaints arose out of violations George witnessed while performing lead abatement jobs for Zinser in 2006. Zinser was subsequently investigated, cited for eight serious IOSHA violations, and assessed penalties. Zinser learned that George had filed the IOSHA complaints against the company and after several face-to-face meetings to discuss the IOSHA situation, George was terminated. In March 2006, George filed a complaint with the Division alleging retaliatory discharge for reporting unsafe working conditions. The Division dismissed George's complaint, and the labor commissioner affirmed the dismissal. Later in March 2006, George filed a lawsuit against Zinser in the district court containing the same retaliation claim. Zinser moved to dismiss the claim, arguing that Iowa Code § 88.9(3) provides the exclusive remedy for pursuing retaliation claims under IOSHA, and the doctrine of res judicata barred George from relitigating that issue in district court. The District Court dismissed George's petition on the grounds that the final adjudicatory decision of an administrative agency is entitled to res judicata effect. The Court of Appeals affirmed, concluding George had "a full and fair opportunity to litigate the retaliatory discharge claim in the administrative proceedings…"

Holding: The Iowa Supreme Court accepted the appeal to determine whether an administrative decision made after a brief investigation is a final adjudicatory action entitled to preclusive effect. The Court held that because the Division did not decide the issues through a procedure substantially similar to those employed by the courts, it was not engaged in adjudication. Thus, it would be inherently unfair to apply the doctrine of res judicata to George's retaliatory discharge claim.

Analysis: The Court discussed that an administrative agency's determination of a matter may be entitled to preclusive effect in a judicial proceeding. The United States Supreme Court has held such a preclusive effect applies "when an administrative agency is acting in a judicial capacity and resolved disputed issues of fact

properly before it which the parties have had an adequate opportunity to litigate." Iowa applies the factors set forth in the Restatement (Second) of Judgments § 83(2) to determine whether an agency is acting in a judicial capacity. Those factors include: a) adequate notice to persons who are to be bound by the adjudication; b) the right to present evidence and legal arguments and a fair opportunity to rebut opposing evidence and arguments; c) a formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction or situation; d) a rule of finality, specifying a point when presentations are terminated and a final decision is rendered; and e) other procedural elements necessary to allow the proceeding a means to determine the matter in question. Also, the individual sought to be precluded must have had the ability to exert control over the proceeding. Here, the statutory description of the Divisions investigation lacked the characteristics of an adjudication. As described in Iowa Code § 88.9, the commissioner "shall conduct an investigation as the commissioner deems appropriate." There was no evidence or weighing of legal arguments. Further, the Division did not act in a judicial capacity during the investigation. George simply filed a complaint, without any further control. The Division conducted a quick nine-day investigation without contacting any of the witnesses George provided. The Court concluded that George did not have a full and fair opportunity to present evidence of respond to Zinser's position. Therefore, the Division was not engaged in adjudication and George's complaint was not precluded by res judicata.

Barnhill v. Iowa District Court for Polk County, 765 N.W.2d 267 (Iowa 2009).

Facts: Attorney represented the named plaintiffs in a class action suit against Tamko Roofing Products, Inc., who allegedly manufactured and sold defective roofing shingles that were installed on the plaintiffs' homes. Attorney also named Tamko's CEO and president, Humphreys, as a defendant. The petition asserted seven claims against Tamko and Humphreys, most based in contract. Defendants' moved for summary judgment. All but one of the claims against Humphreys were dismissed by the district court, and most of the case against Tamko was dismissed. The Court of Appeals affirmed the dismissal of the six claims against Humphreys and reversed the district court's failure to grant summary judgment on the remaining claim. During these appeals, Humphreys filed a motion for sanctions against Attorney pursuant to Iowa Rule of Civil Procedure 1.413(1). He asserted that none of the claims pursued by plaintiffs were well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. The district court held that Attorney violated Rule 1.413 with respect to each and every claim against Humphreys. It sanctioned Attorney and ordered Attorney to pay $25,000 of the nearly $150,000 Humphreys had incurred to defend the frivolous actions. Attorney filed a petition for writ of certiorari. The Court of Appeals annulled the writ and the Iowa Supreme Court took the matter for further review.

Holding: The Iowa Supreme Court further reviewed Attorney's writ of certiorari to determine if the district court abused its discretion when it imposed sanctions. The Court held that Attorney had violated Rule 1.413 because Attorney's conduct, measured by an objective standard, was frivolous.

Analysis: The Court reviewed the standard by which sanctions are imposed against attorneys in Iowa. Iowa Rule 1.413 creates three duties known as the "reading, inquiry, and purpose elements." The goal of the rule is to maintain a high degree of professionalism in the practice of law and to discourage counsel from filing frivolous suits and otherwise deter misuse of pleadings and motions. Further, deterrence is a primary purpose of sanctions. The district court did not abuse its discretion in sanctioning Attorney. Attorney had no reasonable basis to assert the many claims against Humphreys because the allegations were not grounded in facts or law. For example, Attorney alleged breach of warranty against Humphreys, though a corporate officer is not ordinarily liable for the contracts of a corporation. Attorney argued that the breach of warranty claim against Humphreys was based in tort, and cited Iowa case law. The Court found that no reasonably competent attorney would conclude, based on the Iowa case law cited, that a breach of warranty can be based on a tort theory. Further, Attorney filed a claim based on a Missouri statute, which requires that the action be brought in a Missouri circuit court. Therefore, the Court upheld the sanction against Attorney.

Richter v. Shelby County, 745 N.W.2d 505 (Iowa 2008).

Facts: On December 20, 2004, Shelby County Deputy Sheriff Butler shot and killed a suspect following a high-speed pursuit through rural Iowa. The suspect was unarmed at the time of the shooting. After the shooting, Butler was questioned by the Shelby County Attorney, who was acting as a prosecutor, and not providing Butler a defense. Butler was represented by two local attorneys. Subsequently, a grand jury indicted Butler, in his individual capacity, on the charge of voluntary manslaughter. The parties stipulated that Butler "was on duty at the time that he shot and killed [Suspect] and was acting in his official capacity as an officer for Shelby County during the incident." After a three-day trial in June 2005, Butler was found not guilty of voluntary manslaughter. Butler's attorneys presented a bill to the Shelby County Board of Supervisors totaling $63,000.00 in legal fees and costs arising from the defense. The Board asserted that it lacked the authority to pay for Butler's criminal defense. Butler's attorneys then filed a petition at law asserting the county was statutorily required to assume Butler's defense, pursuant to Iowa Code § 331.756(6). That section provides that the county attorney "shall … defend all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party." The district court entered judgment in favor of Butler's attorneys, and the county appealed.

Holding: The Iowa Supreme Court reversed the district court's grant of attorney fees and costs to Butler's attorneys. It held that a county is only responsible for indemnification and reimbursement of its officials when they are involved in actions in their official capacities. Here, Deputy Sheriff Butler was prosecuted in his individual capacity and successfully defended against criminal sanctions personal as to him.

Analysis: The Court determined that the resolution of this county-official dispute turned on the proper interpretation of Iowa Code section 331.756(6), which was the sole

basis asserted by plaintiffs for payment of Butler's criminal defense. The county argued that 1) Butler was not a "county officer," 2) he was not a party in his official capacity as the statute requires, and 3) Butler waived any entitlement to a defense by failing to obtain court approval of his counsel as the statute requires. Butler's attorneys argued: 1) the stipulation of the parties that Butler was acting in his official capacity at the time of the incident precludes the County from claiming Butler was not a "county officer; 2) the county has an interest in the criminal proceeding because an adverse finding against a peace officer would harm the public regard for law enforcement; and 3) the County had the burden to comply with the statute's requirement that defense attorneys obtain court approval.

The Court did not determine whether Butler was a "county officer" because it found the issue, and its preservation at trial, was clouded by the parties' stipulation regarding Butler acting in his official capacity. However, Butler's status as a "county officer" or not was not determinative, as Butler failed to meet an additional requirement of the statute. The statute limits the duty to defend "actions and proceedings" where the county officer is a party or interested in his or her official capacity. Bulter was not defending the criminal action in his official capacity. Rather, his goal was to avoid criminal sanctions personal as to him. The fact that the underlying incident arose in the Butler's official capacity is distinct from the issue of whether he was defending the criminal case in his official capacity. Finally, the court found that no defense was owed on account of the County's purported "interest" in the proceeding. While the County may have been "interested" in the proceeding, such interest did not rise to a legal interest in the proceeding under the statute. The Court also noted its interpretation of the statute was supported by the fact that at common law, public officials were not entitled to mandatory reimbursement of fees resulting from criminal prosecutions. It is improbable that the legislature intended to significantly rework the common law through the language in the statute.

Wallace v. Iowa State Bd. of Educ., 2009 WL 2342461 (Iowa 2009).

Facts: The school districts in Polk County proposed, and the voters approved, a "Schools First" plan that called for a one-percent local option sales tax for a period of 10 years commencing July 1, 2000. The plan included a needs assessment for 60 school buildings in the Des Moines Independent Community School District ("the District") and provided a list of proposed building improvements should adequate tax revenue be generated. In 2004, the District undertook a complete review of the plan's status, which included a review of the school buildings that had not been improved to date. The District gathered the anticipated costs of the remaining projects, and compiled a report for the school board. The school board eventually recommended the closure of six schools due to revenue shortfalls and costs increases. A timeline was approved by the board for publication of the proposed adjusted plan including the school closures, solicitation of public input, and decision by the board. The board then voted to close five schools. The plaintiff-taxpayers challenged the District's decision by filing an appeal with the Iowa State Board of Education. They claimed the decision should be set aside because the District failed to comply with administrative rules prescribing procedural steps to be followed when making school closure decisions. The District intervened to challenge the ISBE's

authority to promulgate rules related to the closure of schools, and in the alternative, claimed it substantially complied with the ISBE rules in closing the schools. The ISBE affirmed the school closure decision, concluding it had authority to adopt rules regulating school closures and finding the District substantially complied with them. The district court affirmed the ISBE ruling. The plaintiff-taxpayers appealed the decision to the Iowa Supreme Court.

Holding: The Iowa Supreme Court was called upon to determine whether the ISBE had the authority to promulgate rules relating to the procedure school districts must follow in making school closing decisions. The Court finds that the legislature did not intend for the ISBE to promulgate such rules. Therefore, the ISBE's rules pertaining to closure of schools are void. The District's decision to close schools was unaffected.

Analysis: The District asserted that the administrative rules pertaining to the process school districts must follow in deciding to close schools are void because the legislature did not give the ISBE authority to propound them. The Court reviewed the power vested in state agencies to propound administrative rules. "Agencies have no inherent power and have only such authority as they are conferred by statute or is necessarily inferred from power expressly granted." When rules are adopted that exceed an agency's statutory authority, the rules are void and invalid. When an agency's power to enact rules is challenged, the burden is on the party challenging the administrative rule to demonstrate that a "rational agency" could not have concluded the rule was within its delegated authority. With regard to the ISBE, Iowa Code chapter 256 expressly authorizes the ISBE to promulgate administrative rules on a multitude of subjects. However, noticeably absent in that chapter is legislative authorization for the ISBE's adoption of rules prescribing the procedure school districts must follow in making school closing decisions. The absence of such power is consistent with the legislatures grant to school districts of "exclusive jurisdiction in all school matters," including the discretion to determine the number of schools to be taught. The Court concluded that a rationale agency could not conclude it had authority to propound rules relating to school closures. Therefore, such administrative rules were declared void. The District's decision to close the schools was unaffected by the Court's ruling because the District initially decided to close the schools, and the Court affirmed its authority to do so.

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

Facts: Baker was a landowner in Iowa City. Because he lived out of state, Baker hired a resident manager for the property. In 2003 Baker advertised for a new manager. He later rejected a female applicant because she failed to provide the requested references and because she indicated she intended to have her 11-year old son perform outside property maintenance, which Baker believed was unsafe and violated child labor laws. 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. Prior to the hearing scheduled on the discrimination complaint, Baker filed a lawsuit against the City of Iowa City and the IC Human Rights Commission. He requested a declaratory judgment that the city ordinances were inconsistent with state law and therefore

unconstitutional. Specifically, Baker's constitutional claim focused on two aspects of the Iowa City ordinances: 1) the City's employment discrimination ordinance included *all* employers within its prohibitions, whereas state law exempts employers having fewer than four employees from its prohibition of unfair employment practices; and 2) the City's ordinance prohibits discrimination on the basis of marital status; a prohibition not found in state law.

Before the administrative hearing on the civil rights complaint was held, Baker settled with the complainant applicant. The discrimination complaint was dismissed with prejudice. The district court subsequently dismissed Baker's claim against IC and the IC Human Rights Commission as moot due to the settlement of the underlying discrimination claim. The Iowa Court of Appeals affirmed that Baker's claims were moot, holding "with the dismissal of the discrimination complaint, the controversy that precipitated the plaintiff's lawsuit was eliminated." The Iowa Supreme Court granted Baker's application for further review.

Holding: The Iowa Supreme Court held that Baker's claim that the Iowa City discrimination ordinances were unconstitutional was not moot because of the fact that the underlying discrimination complaint was dismissed. As an Iowa City housing owner and employer, Baker remained constrained by the restrictions imposed by the IC ordinances. The Court found that Iowa City's prohibition against unfair employment practices was unconstitutional because it applied to all employers, which exceeds the authority granted to Iowa City under the home rule doctrine. The Court found that the Iowa City prohibition against employment and housing discrimination based on marital status was constitutional because state law, Iowa Code chapter 216, permits latitude to enact ordinances that prohibit "broader or different categories of unfair or discriminatory practices."

Analysis: First, the Court decided that the dismissal of the underlying discrimination complaint did not render Baker's unconstitutional claims moot. Baker remained constrained by the Iowa City ordinances. Therefore, he would continue to have a specific personal interest in whether the city ordinances were valid and to be injuriously affected by the ordinances.

With regard to the constitutionality of the Iowa City ordinances, the Court reviewed Iowa's "legislative home rule" doctrine and compared Iowa City's ordinances to the state's discrimination statutes. The Iowa Constitution, art. III, § 38A provides that municipalities in Iowa are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs. The Iowa General Assembly retains the power to trump or preempt local law. An exercise of city power is inconsistent with state law if it is irreconcilable with the state law. Iowa City's City Code made it illegal for any employer to utilize unfair employment practices. The corresponding Iowa state law provides an exemption to prohibition of unfair employment practices to employers with less than four employees. The rationale for the exemption is that freedom of association should preponderate over concepts of equal opportunity in these situations because the smallness of the staff usually means a close, intimate, personal, and constant association with one's employees. Iowa law allows local governments to enact ordinances that prohibit broader or different categories of unfair discriminatory practices. The Iowa City ordinance applying to

all employers, without the exemption for employers with less than four employees, is not an authorized variation under Iowa law because the class of small employers is not a broader or different category of "practices." It is therefore unconstitutional. Conversely, the Iowa City ordinance regarding discrimination in employment and housing based on marital status is a permitted variation under Iowa law because it prohibits a different category of discriminatory practices – marital status.

CONSTITUTIONAL LAW

Godfrey v. State, 752 N.W.2d 413 (Iowa 2008).

Facts: In September 2004, the Iowa General Assembly met at the State Capitol for a special one-day extraordinary legislative session. The legislature passed a single bill affecting a wide variety of subjects relating to the Iowa Values Fund and a separate appropriations bill. Governor Vilsack signed the bill into law. The division of the bill dealing with workers' compensation included a provision that changed compensation benefits for successive injuries. Godfrey was a citizen, prospective workers compensation litigant, and taxpayer. She received workers' compensation benefits based on two prior work-related injuries. Godfrey filed a petition against the State seeking a declaratory judgment that the new law violated the single-subject rule of Article III, section 29 of the Iowa Constitution. The district court dismissed her petition for lack of standing.

Holding: The Iowa Supreme Court reviewed Godfrey's standing to bring a claim against the state for allegedly unconstitutional actions. The Court ultimately decided that Godfrey lacked standing because she had no injury-in-fact. To have standing, a litigant must have a specific or legal interest in the litigation, and must have an injury-in-fact.

Analysis: The Court provided a thorough review of Iowa and federal standing jurisprudence. It discussed Iowa's general two-prong test of standing to consider how it has been augmented by parallel state and federal law over the years. To have standing, first, a plaintiff must have a specific personal *or* legal interest in the litigation. That is, a plaintiff must have a special interest in the action as distinguished from a general interest. The first element allows litigants to enforce certain public interests. Second, a plaintiff must be "injured in fact." The plaintiff must show some specific and perceptible harm from the challenged action, "distinguished from those citizens who are outside the subject of the action but claim to be affected." By allowing private persons to enforce public rights, the focus is on the factual-injury element. To satisfy the injury-in-fact requirement, litigants who share tangible interest in common with all other citizens must also identify some individual connection with the affected subject matter. Some intangible interests may satisfy the injury-in-fact requirement, while general "abstract" grievances are insufficient. When a litigant asserts an injury arising from government's allegedly unlawful regulation (or lack of regulation), additional elements are useful to determine standing. Under such a circumstance, a litigant must establish 1) a causal connection between the injury and the conduct complained of, and 2) that the injury is likely, as opposed to merely speculative, to be redressed by a favorable decision.

Here, Godfrey first asserted standing as a potential workers' compensation claimant whose benefits may be limited in the future should she sustain additional work-related injuries. The Court acknowledged that the loss of work comp benefits by a litigant is the type of injury that would give rise to standing. However, the injury cannot be "conjectural" or "hypothetical," such as the future injury Godfrey assumes. The Court held that Godfrey had no standing because her status as a worker with prior injuries does not make it any more likely she will suffer an injury in the future. Godfrey next asserted standing as a citizen and taxpayer. Again, the Court discussed the possibility of standing as a citizen-taxpayer, but reiterated that the litigant must demonstrate some personal injury connected with the alleged unconstitutional act. The Court held Godfrey lacked standing as a citizen-taxpayer because she had not been injured. She claims nothing more than the general interest in seeing that the legislature acts in conformity with the constitution. Finally, the Court refused to apply a public policy or "great-public-importance" exception to allow Godfrey standing.

Seymour v. City of Des Moines, 519 F.3d 790 (8th Cir. 2008)(Iowa).

Facts: On March 20, 2002, Mother took one of her sons with her to do some shopping, leaving her husband, Father, at home with their other two sons. Sometime during the evening, Nathaniel, one of the infant sons left home with Father, became fussy. Father tried to calm Nathaniel, and believing the child might be hungry, twice tried to call Mother to tell her to come home. Nathaniel eventually calmed down and Father put him on the chair where Nathaniel normally slept during the day. Soon, Mother returned home. When she checked on Nathaniel, she found he was not breathing. Mother called 911, and emergency personnel came to the home shortly thereafter. Members of the Des Moines Police Department arrived around the same time as the ambulance. Mother accompanied Nathaniel in the ambulance to the hospital and Father remained home with the other children. Officer called Sergeant, head of department's child abuse investigative team, and apprised him of the facts. Sergeant instructed Officer to keep Father at the home until he arrived, and also called other detectives to the scene. At some point, Father told the officers that he wanted to leave for the hospital, but was informed he had to stay where he was until the detectives arrived. Once the detectives and Sergeant arrived, they briefly discussed with Father who would stay behind with the children. They then drove Father to the hospital. En route, Father was questioned about the possibility Nathaniel was dropped or shaken. Father stated nothing out of the ordinary happened. Nathaniel died of SIDS shortly after Father arrived at the hospital. Mother and father sued the Des Moines Police Department for alleged violations of their constitutional rights, under 42 U.S.C. § 1983. The district court granted defendants' motion for summary judgment, concluding the § 1983 claim failed because the officers were entitled to qualified immunity.

Holding: The Eighth Circuit Court of Appeals was called on to review whether the defendant officers were entitled to qualified immunity from § 1983 liability. The Court applied the two-step qualified immunity analysis and determined that the officers violated Father's constitutional right against unreasonable search and seizure, but that right was not clearly established in the situation the officers faced. Therefore, the officers were entitled to qualified immunity and the grants of the officers' motions for summary judgment were affirmed.

Analysis: To determine whether an officer is entitled to qualified immunity from § 1983 liability, courts undertake a two-part analysis: 1) Whether the officers' conduct violated a constitutional right; and 2) whether that right was clearly established in the context of the situation the officer faced.

Violation of constitutional right. The stop involved here was a *Terry*-type seizure. Such a stop requires reasonable suspicion that a crime is being committed based on particularized, objective facts, taken together with rationale inferences from those facts. The Court's inquiry here focused on whether Father's detention was a reasonable law enforcement measure, based upon the state's interest in investigating a possible child crime. Father's detention commenced the moment he was told by an officer on the scene that he was to remain at the home until detectives arrived. A reasonable person in Father's position would have believed he was not at liberty to ignore the officer's instructions. Defendants' contended the seizure was based upon reasonable suspicion that Father may have committed a crime based on the officers' training for child abuse situations. However, the Court noted there was no indication that Nathaniel's unexplained medical distress should have been attributed to criminal conduct, as opposed to non-criminal causes. Therefore, the Court held Father's constitutional right to be free from unreasonable seizure was violated.

Right not clearly established. It is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation he or she confronts. If an officer makes a reasonable mistake in supposing that his or her actions were legal, he or she is entitled to qualified immunity. Here, the Court found the officers' made a reasonable mistake in believing their actions were legal. First, because Father initially desired to stay home with his son and because Sergeant planned on arriving promptly, an officer in Sergeant's position could have reasonably believed Father's detention would not effectively result in an appreciable curtailment of Father's liberty. Second, the state has a strong interest in investigating child death cases. Third, child deaths can be difficult to investigate and it is important to interview the person who cared for the victim child immediately before the incident. Fourth, weighing the magnitude of the intrusion against the governmental interest, conducting this unintrusive and useful investigation was reasonable. In conclusion, the Court held that even if the seizure had effectively developed into a de facto arrest because it was prolonged, a reasonable officer could have concluded that the seizure was investigative in nature. Therefore, the officers were entitled to qualified immunity against § 1983 liability.

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

Facts: Six gay and lesbian couples in Iowa sought marriage licenses in Polk County, despite the prohibition against gay marriage in Iowa Code section 595.2(1). That section provides: "Only a marriage between a male and a female is valid." The County recorder, following the law, refused to issue the licenses. Thereafter, the six couples sought to declare the marriage statute unconstitutional because it violated certain liberty and equality rights under the Iowa Constitution. The individual rights claimed by the couples to be adversely affected included the fundamental right to marry, as well as rights to privacy and family association. Additionally, they claimed the statute discriminated on the basis of sexual orientation. The gay couples claimed they were disadvantaged by their inability to obtain civil marriage in Iowa. These disadvantages and problems included: legal inability to make many life and death decisions affecting their partner; inability to share in their partners' state-provided health insurance and public employee pension benefits; denied tax benefits; adoption proceedings more expensive and cumbersome for unmarried partners; and the inability to obtain the personal and public affirmation that accompanies marriage. The defendant, Polk County, argued that the primary interests of society in support of the legislature's exclusive definition of marriage were broadly related to the advancement of child rearing. Specifically, the objectives centered on promoting procreation, child rearing by a mother and a father within a marriage, and stability in an opposite-sex relationship to raise and nurture children. Additionally, the County argued that conservation of state resources, and protection of the integrity of the traditional notion of marriage supported the law. The district court heard competing testimony on both sides regarding the effect of raising children in same-sex households versus opposite-sex households, and other issues. It concluded the marriage statute was unconstitutional under the due process and equal protection clauses of the Iowa Constitution.

Holding: The Iowa Supreme Court was called upon to determine whether excluding gay and lesbian people from civil marriage is substantially related to any important governmental objective. The Court found that no proffered governmental objective could overcome the violation of gay and lesbian persons' equal protection rights. The effect of the decision is the legality of same-sex marriage in Iowa.

Analysis: The Court began is monumental opinion by discussing the court's role in protecting constitutional rights of individuals from over-reaching legislative enactments, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law. The legal focus of the same-sex marriage issue is the doctrine of equal protection. At the outset, the Court wondered how a state premised on the constitutional principle of equal protection could justify exclusion of a class of Iowans from civil marriage. Iowa's promise of equal protection is essentially a direction that all persons similarly situated should be treated alike.

Similarly situated people. The County sought to undercut the gay couples' equal protection claim by asserting the plaintiffs' are not similarly situated to heterosexuals. This threshold argument needed to be considered before the Court applied its equal protection test. The Court held that the couples were

similarly situated because they are in committed and loving relationships, many raising families, just like heterosexual couples. In short, they are similarly situated in every way but for their sexual orientation.

Heightened scrutiny required. The Court found that the classification sought to be excluded was based on sexual orientation, a class which had not previously been assigned to a level of scrutiny such as race or gender. To determine whether heightened scrutiny was appropriate in analyzing the Iowa marriage law, the Court considered four factors: 1) history of invidious discrimination against class burdened by legislation; 2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; 3) whether the distinguishable characteristic is "immutable" or beyond the class members' control; and 4) the political power of the subject class. Applying the factors, the Court found heightened scrutiny was appropriate here. First, the Court recognized a long and painful history of discrimination against gay and lesbian persons. It noted that sexual orientation is a characteristic protected in the Iowa Civil Rights Act. Second, a person's sexual orientation is not indicative of a person's general ability to contribute to society. Third, sexual orientation forms a significant part of a person's identity. The immutability prong is satisfied when the identifying trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change it." Fourth, gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation. Therefore, the Court concluded that heightened (intermediate) scrutiny was necessary to evaluate the couples' equal protection assertions.

Government objectives. The marriage statute could survive only if the County proved excluding gay and lesbian people from civil marriage was substantially related to any important governmental objective. The County offered numerous governmental objectives to support the statute and the Court rejected them all: 1) Maintaining traditional marriage. The Court rejected this objective because the County did not offer any particular *governmental* reason underlying the tradition of limiting civil marriage to heterosexual couples. 2) Promotion of optimal environment to raise children. The Court rejected this objective because intermediate scrutiny requires the classification employed to further the objective must be "substantial." 3) Promotion of procreation. Court determined that gay and lesbian persons are capable of procreation. 4) Promoting stability in opposite-sex relationships. 5) Conservation of resources. Court rejected because no evidence same-sex couples would use more state resources if allowed to marry than heterosexual couples who are married. Therefore, because no important governmental objective was substantially related to the marriage statute, the law was unconstitutional as a violation of the doctrine of equal protection.

COMMERCIAL LAW

C & J Leasing Corp. v. Beasley Inv., Inc., 767 N.W.2d 420 (Iowa Ct. App. 2009).

Facts: Leasing Corp. (lessor) entered into a leasing lease agreement with Beasley Investments (lessee) for tanning equipment to be placed in Beasley's tanning

salon. Scott Beasley and his wife personally guaranteed performance of the lease. Leasing Corp. purchased the tanning equipment for $140,000. The lease agreement provided that ownership of the equipment remained with Leasing Corp. as lessor, but gave Beasley the option to purchase the equipment for $17,053 at the end of the lease. Beasley was to pay rent of $3,432 each month for 59 months. Late fees and interest was to be paid on any delinquent rent payments. Further, Leasing Corp. could require the lessee an amount equal to all unpaid rental payments in the event of lessee's default. Beasley soon defaulted on the lease. After the default, Leasing Corp. took possession of the tanning equipment and sold it to a new business for $125,000.00. Leasing Corp. did not notify Beasley Investments, or Scott Beasley of its intended disposition until after it had already disposed of the equipment. Leasing Corp. then brought suit against Beasley Investments as the defaulting lessee, and Scott Beasley as the secondary obligor, for the breach of the lease agreement.

The district court found for the defendants because the sale of the tanning equipment was not done in a commercially reasonable manner under the Iowa UCC. The court ruled that failure to give notice of the sale of the collateral (tanning equipment) precluded Leasing Corp. from a deficiency judgment against defendant. Leasing Corp. appealed, claiming the district court erred in determining the disposition of the tanning equipment was not commercially reasonable and in failing to enter a deficiency judgment against Beasley.

Holding: The Iowa Court of Appeals considered whether a secured creditor is entitled to a deficiency judgment against a lessee in default, when the secured creditor failed to dispose of collateral in a commercially reasonable manner. The Court held that a secured creditor cannot recover a deficiency judgment if its disposition was not commercially reasonable, and if it failed to prove that compliance with the Iowa UCC's provisions dealing with commercially reasonable disposition would have yielded less proceeds.

Analysis: The Court took the opportunity to review secured transaction provisions of Iowa's UCC. A creditor may repossess and dispose of collateral upon a debtor's default, but such disposition must be commercially reasonable. A creditor is additionally required to provide the debtor and secondary obligor with reasonable notification of the disposition. However, when the amount of a deficiency is in issue, the secured creditor need not prove compliance unless the debtor or secondary obligor places the secured creditor's compliance in issue. Therefore, because Leasing Corp.'s compliance is in issue, Leasing Corp. bore the burden to prove its disposition was commercially reasonable. The Court found it was not commercially reasonable because Leasing Corp. failed to provide notice to Beasley (lessee).

The next issue was what effect Leasing Corp.'s noncompliance had upon its claim to deficiency judgment against Beasley. The Court discussed that older versions of Iowa's UCC provided that a secured creditor's failure to notice or sell collateral in a commercially reasonable manner was an absolute bar to any right to recover a deficiency. Currently, there is a rebuttable presumption that the collateral is at least equal to the unpaid balance of the debt when a secured creditor's failure to give notice or sell collateral in a commercially reasonable manner. This rule forces the secured creditor to prove what the sale would have

brought if done in compliance with the commercially reasonable standard. Unless the secured creditor proves that compliance would have yielded a smaller amount, the amount that a complying disposition would have yielded is deemed to be equal to the amount of the secured obligation. The secured party consequently cannot recover any deficiency unless it meets this burden. Here, Leasing Corp. did not prove that compliance would have yielded a lesser amount, and therefore, it was not entitled to a deficiency judgment against Beasley Investments.

Wells Dairy, Inc. v. Am. Indus. Refrigeration, 762 N.W.2d 463 (Iowa 2009).

Facts: In January 1999 Wells Dairy and Pillsbury entered into a contract whereby Wells agreed to manufacture Pillsbury ice cream products at its facility in Le Mars, Iowa. The contract included minimum levels of production by Wells over a fixed term. Two months after the contract was signed, an explosion and fire occurred at the Wells facility. The explosion resulted from a catastrophic failure of the check valve in a pipeline of the ammonia refrigeration system. The explosion and subsequent fire shut down the facility. In August 2002, Pillsbury filed a lawsuit against Wells for breach of contract and negligence. Wells filed a third party action against American Industrial Refrigeration ("AIR") and Refrigeration Values & Systems Corp. ("RVS"), seeking indemnification for any damages owed to Pillsbury in the underlying action. Wells contended the explosion and fire were caused by a defective refrigeration system that AIR and RVS installed, designed, and sold to Wells.

Wells' relationship with AIR was contractual. Wells hired AIR to design its multimillion dollar refrigeration system for its ice cream facility. AIR's system was to be code-compliant, made of the highest quality materials, and include numerous safety controls. Further, the contract provided AIR would service the system. Wells' relationship with RVS was without a contract, though Wells contended there was a contractual relationship based on blueprints and engineering specifications prepared by RVS for Wells. RVS was the supplier of vessels, piping, and components for the refrigeration system.

The district court granted AIR's and RVS's motions for summary judgment. It found there was no express agreement to indemnify between the parties and there was no implied duty to indemnify. Wells appealed.

Holding: The Iowa Supreme Court reviewed Wells' claims against AIR and RVS to determine whether implied contractual indemnity or equitable indemnity existed to hold either as indemnitors for the underlying explosion damages claimed by Pillsbury. The Court launched into an in depth review of indemnity law. It held that implied contractual indemnity requires a mutual intent to indemnify among the parties, which was not present as to AIR or RVS. Further, equitable indemnity is proper when there is a special relationship and "independent" duty between the parties, regardless of a contract or intent to indemnify. Both AIR and RVS could be held as indemnitors under equitable indemnity theory.

Analysis: The Court seized on the opportunity to "peer into the abyss of indemnity law." It identified and discussed the two broad categories of indemnity other than

express indemnity – implied contractual indemnity and equitable indemnity – then analyzed their application to defendants AIR and RVS.

Implied contractual indemnity. Implied contractual indemnity arises from an existing contractual relationship even if the parties did not expressly include an indemnity clause in the contract. In Iowa, an implied contractual duty to indemnify may arise where there are "independent duties" in the contract to justify the implication. "Independent duties" arise when the contract implies "a mutual intent to indemnify for liability or loss resulting from a breach of the duty." The question in an implied contractual indemnity case is whether a duty arising from the contract has been violated, and if so, what damages flow directly from that breach. Implied indemnity only arises in situations with specific and defined contractual duties. It does not arise from "plain vanilla contracts," and is something beyond a routine service contract triggering only general duties of care. Here, Wells asserts it is entitled to implied contractual indemnity from both AIR and RVS. With regard to AIR, Wells asserted that implied indemnity arises from AIR's contractual duty to inspect and perform necessary repairs on the refrigeration system, and from AIR's contractual duty to provide safety devices. The Court disagreed. It held that the contract to perform maintenance services as needed does not give rise to an implied contractual obligation to indemnify if the equipment, which is under the day-to-day control of the purchaser, fails to perform. Further, a contractual obligation to provide equipment that meets certain safety standards is merely a promise to provide equipment with certain characteristics. With regard to RVS, the Court found that there was no contract to underlie implied indemnity. Wells asserted that engineering specifications, blueprints, and sales invoices collectively amounted to a contractual agreement. Such documents did not suggest offer, acceptance, or legal duty, required to form a contract.

Equitable indemnity. Equitable indemnity arises from noncontractual obligations. The law imposes indemnity due to the relationship of the parties and the underlying loss, regardless of the parties' intentions. It is a "murky doctrine based on notions of fairness and justice." Classic branches of equitable indemnity include vicarious liability and joint tortfeasors with great disparity in fault. Also, equitable indemnity may be based upon an "independent duty" between the parties such that indemnity may be imposed on the indemnitor as a matter of law. Such cases are based on notions of fairness based on the nature of the relationship between the parties and the underlying cause of damage claimed by the first-party plaintiff. Numerous cases have held that a breach of a duty by licensed engineering professionals toward their clients is sufficient to support indemnification, based upon their special relationship. Here, Wells asserted that equitable indemnity exists among both AIR and RVS. With regard to AIR, Wells contended that because its contract with AIR involved professional engineering services, AIR had an "independent duty" to support an equitable indemnity claim. The Court agreed. It further stated it was not necessary that AIR be liable to the first-party plaintiff in order to establish equitable indemnity based on an independent duty. With regard to RVS, the Court held that because Wells asserted equitable indemnity based on RVS's professional engineering negligence, a fact issue remained such that summary judgment was improper.

A Gross Exaggeration:

“but for” Causation is not Dead

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INTRODUCTION

Justice David Souter once theorized that it would be sufficient to instruct a jury in a discrimination case to "do the right thing." [1] Those words should strike fear into the hearts of every practicing defense lawyer. Seasoned trial lawyers know that juries truly do try to do the right thing – by following the instructions they receive from the firm guiding hand of a trial judge. It is for this reason that lawyers spend so much energy on jury instructions.

In *Gross v. FBL*, the Supreme Court was presented with the opportunity to refine and clarify the burden of proof instructions used in Age Discrimination in Employment Act cases. The Court squarely addressed the question and stated:

> We hold that a Plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.[2]

This article will discuss the *Gross* decision and its impact on the future of age discrimination litigation.

SETTING THE SCENE: BURDEN SHIFTING IN THE FEDERAL COURTS

For over four decades the United States Supreme Court has refined the process for dealing with proof burdens under the federal civil rights laws.[3] By and large, the Court has looked to traditional common law litigation constructs to allocate the burden of proof in new causes of action created by Congress.[4] While the Court in *McDonald Douglas v. Green* adopted a proof analysis that shifted the burden of production in Title VII cases, it explained that the ultimate burden of persuasion at all times rested with the plaintiff.[5]

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[1] Transcript of Oral Argument at 27, *Gross v. FBL*, No. 08-441 (557 U.S. June 18, 2009).
[2] *Gross v. FBL*, No. 08-441, slip op. at 12 (557 U.S. June 18, 2009).
[3] *See, e.g., McDonald Douglas Corp. v. Greene*, 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).
[4] *See, e.g., Desert Palace*, 539 U.S. at 99.
[5] *McDonald Douglas*, 411 U.S. at 797.

In its 1989 decision in *Price Waterhouse v. Hopkins,*[6] the Court made a radical departure from traditional litigation constructs. In a fractured decision, the Court shifted the burden of persuasion to the defendant in Title VII cases.[7] In response in part to *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991.[8] The Civil Rights Act of 1991 amended Title VII in several respects including granting the right to a jury trial and enhanced damages. A decade later the Court interpreted the 1991 Act in *Desert Palace v. Costa*.[9] In *Desert Palace* the unanimous Court interpreted the language of the 1991 Act as not imposing any special evidentiary requirements.[10] The Court held that the 1991 Act clearly shifts the burden of persuasion to defendants in mixed motive Title VII cases.[11]

Emboldened by *Desert Palace*, some scholars and plaintiff's lawyers argued that *McDonald Douglas* was dead and that *Desert Palace* caused the burden to shift in all discrimination cases.[12] Civil rights advocates argued that every discrimination case was converted into a "mixed motives" case by *Desert Palace*.[13] Careful scholars cast a wary eye on these arguments and, secure with the knowledge that *Desert Palace* had limited applicability, watched for a sign from the Court. That sign came in the form of the Court's decision in *Gross v. FBL Inc.*[14]

GROSS V. FBL: A SHORT HISTORY

Petitioner Jack Gross worked in various capacities for FBL Financial Group, Inc. (FBL) and/or its predecessor company since 1987.[15] In 1999, at the age of 51, Gross was promoted

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[6] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[7] *Id.* at 262 (O'Connor, J., concurring in the judgment).
[8] Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991).
[9] *Desert Palace v. Costa*, 539 U.S. 90 (2003).
[10] *Id.* at 101.
[11] *Id.* at 101-02.
[12] *See, e.g.*, Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71 (2003).
[13] *See, e.g.*, Brief of National Employment Lawyers Association as Amicus Curiae in Support of Petitioner, *Gross v. FBL*, No. 08-441 (557 U.S. June 18, 2009), 2009 WL 271054.
[14] No. 08-441 (557 U.S. June 18, 2009)
[15] *Gross*, Pet. App. 2a.

to the position of Claims Administration Vice President. As a result of two corporate reorganizations, Gross was reassigned to the position of Claims Administration Director in 2001, and in 2003, to the position of Claims Project Coordinator.[16] Many of the duties Gross had performed as Claims Administration Director were transferred to the newly created Claims Administration Manager position, which was given to Lisa Kneeskern, an employee in her early forties.[17]

Gross brought an action in the U.S. District Court for the Southern District of Iowa claiming that FBL demoted him because of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*.[18] Over FBL's objection, the trial court gave a mixed-motive jury instruction providing that Gross had the burden of proving that he was demoted and that age was a "motivating" factor in the demotion decision. [19] The trial court went on to instruct the jury that a defense verdict would be warranted if FBL could prove "by a preponderance of the evidence that [it] would have demoted [Gross] regardless of his age."[20] The jury returned a verdict for Gross in the amount of $46,945, representing compensation for lost wages.[21] The jury declined to award Gross any damages for emotional distress which were available under Iowa law. The jury also found that FBL's conduct was not willful.

FBL filed post-trial motions for judgment as a matter of law or, in the alternative, for a new trial, arguing among other things that Gross failed to present any direct evidence of age discrimination, and all of the decision makers testified that age was not a factor in the employment decision.[22] The district court denied FBL's motions, concluding that despite the absence of any direct evidence of discrimination, there was "ample circumstantial evidence presented during trial for the jury to conclude that FBL intentionally discriminated against Gross

[16] *Id.*
[17] *Id.*
[18] *Id.* at 3a.
[19] *Id.*
[20] *Id.*at 6a (quoting Final Jury Instruction No. 11) (internal quotations omitted).
[21] *Id.* at 3a.
[22] *Id.*

based on his age."[23] It pointed out that Gross himself testified that "the only common thread" linking the people affected by the reorganization was age, and that "everybody over 50" was impacted.[24] The district court found that "an *inference* of age discrimination is raised by the decision to place Kneeskern in the claims administration manager position instead of Gross."[25] It also found that there was sufficient evidence for the jury to find that the company's stated reason for reassigning Gross to the Claims Project Coordinator position — that "it was a good fit for his strengths and weaknesses" — was false and a pretext for unlawful discrimination, because at the time the demotion decision was made, "there was no defined position for Gross to 'fit' into."[26]

FBL appealed the decision to the Eighth Circuit, which found that the district court erred in providing a mixed-motive instruction to the jury where no direct evidence of age discrimination was presented.[27] It determined that the approach to allocating the burden of proof that the Court articulated in *Price Waterhouse*[28] applies to mixed-motive age discrimination cases, noting that Justice O'Connor's concurrence is viewed as "the controlling opinion that sets forth the governing rule of law" in such cases.[29]

Applying that rule, the Eighth Circuit found that "to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show by direct evidence that an illegitimate factor played a substantial role in the employment decision."[30] "Direct evidence," it continued, must consist of more than "stray remarks" or "statements by nondecisionmakers" suggesting a discriminatory motivation.[31] Rather, "[d]irect evidence for these purposes is evidence showing a specific link between the alleged discriminatory animus

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[23] *Id.* at 25a.
[24] *Id.*
[25] *Id.* (emphasis added)
[26] *Id.* at 28a.
[27] *Id.* at 3a.
[28] *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).
[29] Pet. App. at 5a.
[30] *Gross v. FBL Financial Services, Inc.*, 526 F.3d 356 (8th Cir.).
[31] *Id.*

and the challenged decision, sufficient to support a finding by a reasonable fact finder that the illegitimate criterion actually motivated the adverse employment action."[32] Absent such a showing, the Eighth Circuit found, the burden-shifting analysis that the Supreme Court first established in the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) applies, under which the burden of persuasion "remains with the plaintiff throughout . . . ."[33] Because Gross failed to present any direct evidence of age discrimination, the Eighth Circuit concluded that the district court's mixed motives jury instruction was improper.[34]

In doing so, the Eighth Circuit soundly rejected Gross' contention that both Section 107 of the Civil Rights Act of 1991 — which amended Title VII of the Civil Rights Act of 1964 (Title VII),[35] to, among other things, codify the "motivating factor" burden-shifting approach applicable to mixed-motive cases — and *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) — which held that direct evidence is not required in order to proceed on a mixed-motive theory under Title VII — supersede *Price Waterhouse*.[36] The Eighth Circuit observed that Section 107 applies only to Title VII and does not affect claims arising under the ADEA.[37] The Eighth Circuit also pointed out that the Supreme Court in *Desert Palace* expressly declined to rule on whether direct evidence is required in order to obtain a mixed-motive jury instruction in non-Title VII cases.[38] The Eighth Circuit reversed and remanded the case for a new trial. Gross petitioned for a writ of certiorari.

GROSS: THE ARGUMENTS OF THE PARTIES

Against the backdrop of confusion generated by *Price Waterhouse* and *Desert Palace*, the Supreme Court granted Gross' petition for certiorari. Both of the parties in *Gross* were, in essence, asking the Supreme Court to overrule *Price Waterhouse*. Gross asked the Court to

[32] *Id.* (citations and quotations omitted).
[33] *Id.* at 4a.
[34] *Id.* at 6a.
[35] 42 U.S.C. §§ 2000e *et seq.*
[36] *Gross v. FBL Financial Services, Inc.*, 526 F.3d 356 (8th Cir.).
[37] *Id.* at 8a.
[38] *Id.* at 10a.

partially abandon *Price Waterhouse* and dispense with the requirement of direct evidence imposed by the Eighth Circuit.[39] Likewise, in an Amicus brief, the United States asked the Court to hold that *Desert Palace* overruled the direct evidence requirement of *Price Waterhouse* not only as it would have applied under Title VII, but also as it applied to cases under the ADEA. In a bold move, FBL chose to urge the Court to abandon *Price Waterhouse* entirely.[40] As the respondent framed it: "[*Price Waterhouse*'s] holding was never clear, it was a departure from conventional rules of civil litigation; it proved unworkable in practice; and it has unfairly shifted to employers the burden of persuasion."[41] FBL urged the Court to hold that the *McDonnell Douglas* framework governed in all cases and that the employee always retains the burden of persuasion in demonstrating that the challenged employment action was "because of such individual's age."[42]

THE BURDEN AND NATURE OF PROOF

In *Gross*, the Petitioner and the United States Solicitor General argued that because the statutory language of the ADEA does not contain any special evidentiary provision requiring direct evidence to shift the burden of persuasion as to causation to the employer in a case alleging disparate treatment, the Court's typical reliance on "conventional rules of civil litigation" dictates that no such requirement should be imposed.[43] Instead, Gross and the United States argued that, in all ADEA disparate treatment cases, once the employee presents any evidence of age-based animus, the burden of persuasion should shift to the employer to prove the absence of causation.[44]

FBL agreed that the language of the ADEA contains no elevated evidentiary threshold. To that extent, therefore, FBL agreed with Petitioner's and the United States' contention. But

[39] Petitioner's brief at 16-21.
[40] Respondent's brief at 15.
[41] *Id.*
[42] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[43] *See* Brief of United States.
[44] *Id.*

FBL argued that Gross and the United States failed to follow their argument to its logical conclusion, namely, that just as the ADEA contains no elevated evidentiary threshold, it also contains no provision requiring a shift of the burden of persuasion on causation to the employer.[45] As a consequence, FBL argued, as would be true under "conventional rules of civil litigation," in disparate treatment cases, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[46]

A. The ADEA Operative Language

The ADEA makes it unlawful "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[47] As the language makes plain, an employer is liable for violating the ADEA only if it takes an employment action adverse to an employee based on the employee's age.[48] The outer reaches of the meaning of the phrase "because of" are not free from doubt, but FBL argued the phrase is best interpreted as imposing a common sense but-for causation standard.[49] FBL asserted that in the mine-run of cases, a factfinder must find that age-related animus caused the employer's challenged action to find a violation. If the employer acted for some other reason or reasons, it did not act "because of" the employee's age.

FBL noted that Gross cited to the ADEA's legislative history for support. FBL pointed out that Senator Yarborough, floor manager of the bill that became the ADEA, noted in his opening statement describing the purpose of the legislation and its major provisions: "In simple terms, this bill prohibits discrimination in hiring and firing workers *solely because* they are over 40. . .

[45] Respondent Brief p. 18.
[46] *Id.* (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981)).
[47] 29 U.S.C. § 623(a)(1).
[48] 29 U.S.C. § 623(a)(1).
[49] Respondent Brief p. 20.

."[50] Similarly, the Committee Report on the ADEA recognized that "[t]he purpose of this legislation, simply stated, is to insure that age, within the limits prescribed herein, is not a *determining factor* in a refusal to hire."[51]

This argument rang true as the Court has repeatedly interpreted the ADEA's statutory text to require an employee to prove as an essential element of his claim that the consideration of age was outcome determinative as to the adverse action at issue.[52] For example, in *Kentucky Retirement Systems v. EEOC*,[53] the Court had to decide whether Kentucky's retirement system for those working in hazardous positions violated the ADEA because it treats some who become disabled *before* becoming eligible for retirement more favorably than it treats some who become disabled *after* becoming eligible for retirement on the basis of age. Even though the potential size of an employee's retirement benefits depended on his or her age at the time of disability, this Court held that, for several reasons, the distinctions in the Kentucky system "were not '*actually motivated*' by age."[54] That holding makes sense only if the ADEA requires that age be the *actual* cause of the challenged action.[55]

B. Burden of Persuasion Under the ADEA.

FBL asserted that just as the language of the ADEA is clear that it requires "but-for" causation to hold an employer liable for age discrimination, it is equally clear that the ADEA

[50] *Id.* at 20 citing 113 Cong. Rec. 31,252 (1967) (emphasis added).
[51] *Id.* citing 113 Cong. Rec. 31,251 (1967) (emphasis added).
[52] *See, e.g.*, *Reeves*, 530 U.S. at 141 ("the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a *determinative influence* on the outcome'") (emphasis added); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (the employee must prove that age actually motivated the employer's decision).
[53] 128 S.Ct. 2361 (2008)
[54] *Id.* at 2367 (emphasis added).
[55] The Court has interpreted comparable statutory text under Title VII, 42 U.S.C. § 2000e-2(a), to require an employee to prove that consideration of an unlawful factor was outcome determinative in the adverse action at issue. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 256; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (to establish causation, a plaintiff must show the impermissible consideration was a "but for" cause of the adverse employment action). In these cases, the Court has consistently held that the ultimate question is "discrimination *vel non*." *Reeves*, 530 U.S. at 143; *St. Mary's Honor Ctr.*, 509 U.S. at 518; *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

never shifts to the employer the burden of persuasion as to the determination of causation.[56] Gross argued the legislative history of the ADEA supported the best reading of the text. Senator Javits made the following comment:

> The whole test is somewhat like the test in an accident case – did the person use reasonable care. A jury will answer yes or no. The question here is: Was the individual discriminated against solely because of his age? The alleged discrimination must be proved and the burden of proof is upon the one who would assert that that was actually the case.

Gross reminded the Supreme Court that it has consistently held that conventional rules of civil litigation are applicable to federal employment discrimination statutes.[57] Absent statutory language otherwise allocates the burden of production and persuasion, the "plaintiffs bear the risk of failing to prove their claims."[58]

Even when the Court first grappled with Congress's newly minted anti-discrimination statutes in *Burdine* and *McDonnell Douglas*, the Court left the burden of persuasion where it traditionally lay — with the plaintiff-employee. In both cases, although the Court created a framework for determining causation — specifically, the employee must present a prima facie case of discrimination at which time the burden of production switches to the employer to proffer a non-discriminatory reason — it never abandoned the traditional rule.[59] Rather, the Court was careful to note, that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[60]

The only place in the ADEA in which one finds support for placing the burden of persuasion on the employer is in Section 623(f), which defines the ADEA's affirmative defenses. More specifically, after delineating the ways in which an employer could violate the ADEA,

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[56] Respondent's brief at p. 22.
[57] *Id.* citing *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, 2406 (2008); *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 99 (2003); *Aikens*, 460 U.S. at 714 n.3
[58] *Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 103 (3d ed. 2003) (standard rule is the plaintiff asserting a claim "wins only if, on the basis of the evidence, the facts seem more likely true than not").
[59] *Burdine*, 450 U.S. at 253.
[60] *Burdine*, 450 U.S. at 253.

Congress, in 29 U.S.C. § 623(f), provided an employer may, without violating the ADEA, rely on age in the following ways: 1) employ "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; 2) employ a differentiation based on reasonable factors other than age; 3) employ a differentiation in order to comply with local foreign law; 4) observe the terms of a bona fide seniority system (with some exceptions); and 5) observe the terms of a bona fide employee benefit plan (with some exceptions).[61]

As the Supreme Court noted in *Meacham v. Knolls Atomic Power Laboratory*, the placement and purpose of these provisions make clear that they are affirmative defenses.[62] And, because they are affirmative defenses, the Court held that they should be interpreted against the "longstanding convention" that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it."[63]

FBL pointed out that *Meacham* is significant for two reasons. First, it demonstrates that the Supreme Court, when interpreting the ADEA, has chosen not to depart from settled conventions concerning the placement of the burden of persuasion and that it would not generally do so unless it has "compelling reasons" to think Congress intended that result.[64] Second, *Meacham* makes plain that when Congress wished to place the burden of proof on employers under the ADEA, it knew how to do so explicitly.[65] Given the absence of statutory language articulating a departure from the conventional rule allocating to the employee the burden of persuasion of his or her claims, FBL argued that the Court should not impose a

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[61] 29 USC § 626(p).

[62] 128 S.Ct. at 2400 ("Given how the [ADEA] reads, with exemptions laid out apart from the prohibitions (and expressly referring to prohibited conduct as such)," this Court has consistently described the provisions contained in Section 623(f) as "the ADEA's 'five affirmative defenses.'" *Meacham*, 128 S.Ct. at 2400 (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985))).

[63] *Id*. (quoting in part, *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910)).

[64] *See Meacham*, 128 S.Ct. at 2400. For all the reasons noted above, no such compelling reasons exist here.

[65] 128 S.Ct. at 2400; s*ee also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Lehman v. Nakshian*, 453 U.S. 156, 162-63 (1981) (declining to infer right to jury trial for federal employees suing for age discrimination where Congress expressly recognized right to jury trial under the ADEA but did not do so for federal employer cases).

different burden-shifting framework on the ADEA, but instead read the ADEA "the way Congress wrote it."[66]

C. The Rationale for Overruling *Price Waterhouse*.

In *Price Waterhouse*, the hopelessly divided Supreme Court departed from the conventional rules allocating the burden of persuasion to the employee and engrafted onto Title VII a rule shifting the burden of persuasion to the employer in certain circumstances. More specifically, the Court articulated an exception to the longstanding *McDonnell Douglas* framework for use in cases where substantial or direct evidence demonstrates that the employer considered both permissible and impermissible factors in the decision-making process. Under the *Price Waterhouse* framework, once an employee presents such evidence that an impermissible consideration was a substantial factor in the decision-making process, the burden of persuasion shifts to the employer to show the absence of causation.[67]

Twenty years later, the question of which of three opinions in *Price Waterhouse* was controlling remained unsettled.[68] The four-Justice plurality opinion described a mixed-motive framework as an alternative to the *McDonnell Douglas* pretext framework in cases where "both legitimate and illegitimate considerations played a part in the decision."[69] Justice O'Connor's concurring opinion, by contrast, set forth an evidentiary standard shifting the burden of persuasion to the employer on the issue of causation only after the employee showed by "direct evidence that decision-makers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[70] Once the employee made such a showing, Justice O'Connor found that the burden of persuasion should be shifted to the employer to prove that it would have made the same decision based upon other, legitimate considerations.[71] Justice White's

[66] *Meacham*, 128 S.Ct. at 2406.
[67] 490 U.S. at 244-45, 259-60, 277-78.
[68] In *Desert Palace*, the Court declined to decide which *Price Waterhouse* opinion was controlling. 539 U.S. at 98.
[69] *Id.* at 247 n.12.
[70] *Id.* at 277-78.
[71] *Id.* at 278.

concurring opinion expressed agreement with Justice O'Connor's analysis that an employee's "burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action."[72] But Justice White did not expressly embrace Justice O'Connor's language regarding direct evidence of discrimination.[73]

The Eighth Circuit in *Gross* recognized that a fragmented court decides a case and "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court is typically viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[74] In *Price Waterhouse*, Justice O'Connor concurred in the judgment on the narrowest ground in that she would permit burden shifting only when an employee has presented direct evidence that the illegitimate factor played a substantial role in motivating the employer's decision. Applying *Marks,* most Courts of Appeal viewed Justice O'Connor's concurring opinion is the controlling opinion that sets forth the governing rule of law.[75]

Regardless of the opinion considered to be controlling in *Price Waterhouse,* at the very least, however, it seemed clear under *Price Waterhouse* that an employee must show substantially more than a prima facie case in order to receive a burden-shifting instruction. Justices White and O'Connor both explicitly said so.[76] The plurality in *Price Waterhouse* noted that an employee must show more than a prima facie case under *McDonnell Douglas*, but failed

[72] *Id.* at 259 (emphasis in original),
[73] *Id.*
[74] *Marks v. United States*, 430 U.S. 188, 193 (1977).
[75] *See, e.g., Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 342 n.7 (4th Cir. 2008); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 n.2 (3d Cir. 2002); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc.*, 273 F.3d 30, 35 (1st Cir. 2001); *Haynes v. W.C. Caye & Co.*, Inc., 52 F.3d 928, 931 n.8 (11th Cir. 1995). *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004); *Frobose v. Am. Savings & Loan Ass'n of Danville*, 152 F.3d 602, 617 (7th Cir. 1998); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568-69 (2d Cir. 1989).
[76] 490 U.S. at 259 (White, J., concurring in the judgment) ("And here . . . as the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action," at which point the burden shifts) (emphasis in original); *id*. at 278 (O'Connor, J., concurring in the judgment) (employee must show that illegitimate factor "was a substantial factor in the particular employment decision" to receive instruction).

to provide further detail.[77] The plurality did note its belief that its conception of the required employee's proof was not "meaningfully different" from Justice O'Connor's.[78]

FBL argued that, regardless of which *Price Waterhouse* opinion was considered controlling, it was time to abandon *Price Waterhouse's* clumsy and vague burden shifting framework. It went on to argue that: "Shifting the burden of persuasion as to causation to the employer is inconsistent with the ADEA's statutory text and legislative history, with the Court's opinions interpreting the ADEA, and with conventional rules applicable to civil litigation."[79]

In evaluating whether to overrule existing precedent, the Court typically considers the extent to which a decision has created an unworkable legal regime, the practical workability of the rule promulgated by the decision, the degree of reliance on the rule and the hardship or inequity, if any, that would result from repudiation of the rule, the extent to which the rule is nothing more than a remnant of an abandoned doctrine,[80] and the degree to which circumstances have changed so as to "rob[] the old rule of significant application or justification."[81] FBL convinced the Court that these factors militated in favor of retreating from *Price Waterhouse*.

FBL demonstrated that *Price Waterhouse* was unsupported by the ADEA's statutory text or the common law rules applicable to civil litigation that have traditionally underpinned that text's interpretation. This was no less true with respect to the text of Title VII in effect at the time *Price Waterhouse* was decided and that was at issue in that case. In order to justify the shift in burden, the plurality, Justice White, and Justice O'Connor all looked to what they believed was the "intent of Congress and the purposes behind Title VII."[82] Justice O'Connor in particular

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[77] *Id*. at 237-38.
[78] *Id*. at 250 n.13.
[79] Respondent Brief at 31.
[80] *Id.* at 855.
[81] *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2685 (2007), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992),
[82] 490 U.S. at 263 (O'Connor, J., concurring in the judgment); *see also id.* at 239-42, 248 (plurality); *id*. at 260 (White, J., concurring in the judgment).

seemed to think that, once the employee showed direct evidence of discriminatory motive, the employer should be viewed with a jaundiced eye.[83] Even though Justice O'Connor's test had the salutary feel of rough justice, nothing in Title VII at the time of *Price Waterhouse*, and nothing in the ADEA at the time of *Gross*, supported her decision. As the Court held in *Meacham*, it "ha[s] to read [the ADEA] the way Congress wrote it."[84]

It was particularly persuasive that the *Price Waterhouse* opinion was splintered and difficult to interpret.[85] As a result, and as the Court recognized, it was not wholly clear what the rule in *Price Waterhouse* was.[86] FBL argued that overruling *Price Waterhouse* would bring needed clarity back to this area of the law rather than upset any settled expectations.[87]

FBL also pointed out that courts have found *Price Waterhouse* hard to implement in the jury trial context.[88] Applying *Price Waterhouse* to disparate treatment claims cultivates unpredictability for litigants in preparing for and presenting cases at trial.[89] Procedurally, *Price Waterhouse* involved an appeal of a judgment rendered after a bench trial. In the jury trial context, however, the framework was impractical and imprecise. Parties need to have some

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[83] *Id*. at 265-66 (O'Connor, J., concurring in the judgment) (once direct evidence has been proffered, "[t]he employer has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination").

[84] 128 S.Ct. at 2406.

[85] One commentator has noted that Justice O'Connor's controlling concurrence, while widely adopted, has proven "practically unworkable and theoretically unprincipled . . . ." Jamie Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511, 532 (2008). *See also* Robert Kearney, *The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination*, 5 U. Pa. J. Lab. & Emp. L. 303 (2003).

[86] *See Desert Palace*, 539 U.S. at 98.

[87] Respondent's brief at 33.

[88] *See, e.g.*, *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 220 (3d Cir. 2000) (recognizing the challenge of trying to instruct jurors on the mixed-motive instruction while noting it would be uncommon for a plaintiff to make the demonstration demanded under Justice O'Connor's *Price Waterhouse* concurrence); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 186 (2d Cir. 1992) (discussion of confusion *Price Waterhouse* caused in the ADEA jury trial context because *Price Waterhouse* involved a bench trial under Title VII); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992) (describing the task of devising a *Price Waterhouse* jury instruction as "the murky water" of shifting burden in discrimination cases); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) ("As Justice Kennedy observed in his *Price Waterhouse* dissent, formulating a jury instruction that explains the burden shifting analysis applicable to mixed motive cases in the wake of that decision is no mean feat.").

[89] *See* 490 U.S. at 291-92 (Kennedy, J., dissenting) ("Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under . . . the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials.").

understanding as to what jury instructions a court will use well before exchanging witness and exhibit lists, offering opening statements, or presenting evidence at trial. The *Price Waterhouse* dual framework does not provide certainty with respect to how a trial court will instruct the jury on the elements of proof and the parties' respective burdens. Parties must wait until the eleventh hour, on the eve of closing argument, to find out whether the trial court has identified the case as falling within the single motive or mixed-motive framework.

The *Gross* case illustrated that uncertainty and its costs. Gross and FBL litigated a classic *McDonnell Douglas* case that Gross's own counsel characterized as turning not on a "smoking gun," but rather on "circumstance."[90] Only after the close of the evidence was FBL faced with the specter of a "mixed-motive" instruction with its shifting burden of persuasion.

Finally, FBL pointed out that there was no practical distinction between a single motive and a mixed-motive case, so *Price Waterhouse* had no functional purpose.[91] If an employee has "direct" evidence of discrimination, such as a facially discriminatory policy, the conventional method of allocating the burden of proof and persuasion does not impair the employee in presenting his or her case.[92] The employee simply offers the evidence, which both establishes a prima facie case and satisfies the ultimate burden of persuasion. This likely explains why the *McDonnell Douglas* framework has always contemplated that a disparate treatment case may be characterized as single motive or mixed-motive. In *Burdine*, for example, the Court recognized that under Title VII a disparate treatment employee may succeed "directly by persuading the [trier of fact] that a discriminatory reason *more likely* motivated the employer . . . ."[93] The Court was apparently contemplating that in the first set of circumstances it was *less likely* another, non-discriminatory reason caused the employer's decision.

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[90] *Gross,* Trial Tr. 740, 746.
[91] Respondent's Brief at 35.
[92] *See*, *e.g.*, *Thurston*, 469 U.S. at 122.
[93] 450 U.S. at 256 (emphasis added).

Congress, by enacting the 1991 Act, abandoned *Price Waterhouse* in the very context in which it first arose.[94] More specifically, Congress amended Title VII to affirm that the conventional rules of civil litigation govern, and the burden of persuasion always rests with the party making the claim.[95] One portion of the 1991 Act, now contained in 42 U.S.C. § 2000e-2(m), created an alternative basis for imposing liability, stating:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.[96]

The 1991 Act went on to state, for purposes of Title VII, "[t]he term 'demonstrates' means meets the burdens of production and persuasion."[97] In other words, Congress expressly returned the burden of persuasion to the employee on all elements of Title VII claims.[98]

Those who closely watch the Supreme Court were not surprised by *Gross*. Prior to *Gross*, Court had only recently passed on the opportunity to apply *Price Waterhouse* to the ADEA in *Reeves v. Sanderson Plumbing Products, Inc.*, which involved a disparate treatment age discrimination claim.[99] In *Reeves*, the employee presented evidence that the decision at issue was motivated by permissible and impermissible considerations. In particular, the employee presented testimony that the manager who made the decision to fire him had told him

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[94] Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991).

[95] H.R. Rep. No. 102-40(II) (1991), states in part that

> In *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), the Supreme Court ruled that an employment decision motivated in part by prejudice does not violate Title VII if the employer can show after the fact that the same decision would have been made for nondiscriminatory reasons. Section 5 of the Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal. At the same time, the Act makes clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring, retention or promoting of a person not qualified for the position.

[96] Pub. L. No. 102-166, § 107.

[97] Pub. L. No. 102-166, § 104.

[98] As noted, the 1991 Act made it easier for employees to establish employer liability for unlawful discrimination. *Price Waterhouse* imposed liability only if the employer was unable to satisfy its burden of persuasion as to causation. Under the 1991 Act amendments, an employer is liable after an employee shows the presence of an unlawful motive. An employer found liable under § 2000e-2(m) may limit remedies, but may not avoid liability, if it "demonstrates" it would have made the same decision absent the impermissible factor, formally making the "same decision" defense a affirmative one, at least as to remedy. Pub. L. No. 102-166, § 107. Nevertheless, what is relevant here is the 1991 Act's return of the burden of persuasion as to causation to the employee.

[99] 530 U.S. at 133.

he "was so old [he] must have come over on the Mayflower" and on one occasion said that he "was too damn old to do [his] job."[100] The employer presented evidence that in making the decision to fire the employee, it was motivated by legitimate considerations, including the employee's conduct in falsifying company pay records. Despite the presence of "direct" evidence of impermissible considerations and other evidence of permissible considerations, or the presence of a quintessential "mixed-motive" case, the Court applied the *McDonnell Douglas* framework rather than the *Price Waterhouse* mixed-motive framework and found for the employee.

DESERT PALACE AND *GROSS*

In *Gross*, the Petitioner, numerous amici and even the United States contended that Desert Palace should be engrafted onto ADEA. It was noteworthy that, with the change in administrations, the Solicitor General assumed the role of a turncoat.[101] In *Desert Palace* itself, the United States argued that the 1991 Act had not displaced *Price Waterhouse*'s holding that an employee should be required to adduce direct evidence of discriminatory intent to invoke a jury instruction under § 2000e-2(m).[102] It further stated that

> the better reading of *Price Waterhouse* is that direct evidence means non-circumstantial or non-inferential evidence. In other words, in order to justify shifting the burden of persuasion to the defendant, the plaintiff must submit evidence that, without resort to inferences or presumptions, establishes that race or gender was a substantial, motivating factor in the employer's decision.[103]

The Petitioner and amici erroneously assumed that *Desert Palace* meant *Price Waterhouse* was overruled not only as it applied to Title VII, but also as applied to the ADEA.[104] As the *Gross* decision points out, this was plainly wrong. *Desert Palace* interpreted specific provisions of the

[100] 530 U.S. at 151.
[101] Brief for the United States as Amicus Curiae Supporting Petitioner, p. 10, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (No. 02-679).
[102] *Id.*
[103] *Id.*
[104] *Id.*

1991 Act and found that the Act statutorily overruled *Price Waterhouse* in Title VII cases.[105] In *Gross*, FBL pointed out that Congress deliberately chose not to apply its new provision to ADEA cases, and thus the analysis of *Desert Palace* was inapposite to *Gross*.[106]

The 1991 Act created a new Title VII claim, imposing liability on an employer when an employee "demonstrates" that an impermissible consideration "was a motivating factor for any employment practice, even though other factors also motivated the practice."[107]

In *Desert Palace*, a unanimous Court examined the effect of the aforementioned language in the 1991 Act on *Price Waterhouse's* direct evidence requirement under Title VII.[108] Not surprisingly, given the clear language of the 1991 Act, and the legislative history surrounding its enactment, the Court held a Title VII plaintiff presenting a claim under § 2000e-2(m) could establish liability merely by showing that an impermissible factor motivated the decision at issue and without adducing any direct evidence to that effect.[109]

Contrary to the urging of the plaintiff's employment bar and lobby, *Desert Palace* and the relevant provisions of the 1991 Act had no effect on claims arising under the ADEA. As an initial matter, the language of the 1991 Act at issue in *Desert Palace* applies by its terms only to Title VII.[110] There is no similar language in the ADEA. Moreover, where Congress desired to amend the ADEA in the 1991 Act, it did so explicitly. For example, the 1991 Act amended the ADEA by conforming its limitations period to corresponding changes to Title VII.[111] Of particular importance, the legislative history reflects that Congress considered the application of specific cases to ADEA claims and specified cases that it was expressly disapproving for application under the ADEA. For example, in the House Report accompanying the bill, Congress referenced explicitly the "danger that *Lorance v. AT&T Technologies* . . . will continue to be

[105] *Desert Palace* at 90, 94-95.
[106] *Id.* at 95.
[107] Pub. L. No. 102-166, § 107 (now contained in 42 U.S.C. § 2000e-2(m)).
[108] 539 U.S. at 92.
[109] *Id.* at 101-02.
[110] 42 U.S.C. § 2000e-2(m).
[111] Pub. L. No. 102-166, § 115.

applied under the ADEA, if the statute of limitations is changed in Title VII but not in the ADEA," and it amended the language of the ADEA to prevent such application.[112] Congress's express treatment of, and amendments to, the ADEA in the 1991 Act made clear that Congress's failure to apply Title VII's new provision to ADEA claims was a deliberate choice.

The Court's decision came as no surprise to those who carefully examined prior precedent. The Court had earlier recognized that it is the pre-1991 Act Title VII regime that is analogous to the ADEA and that governs claims arising under the ADEA.[113]

THE TRIAL EVIDENCE IN *GROSS*

In *Gross,* the Petitioner and United States argued that the burden of persuasion should switch to the employer in an ADEA case when an employee presents evidence adequate to establish a *McDonnell Douglas* prima facie case or suggests that the employer's explanation for its adverse action is pretextual. That argument overlooked more than 30 years of opinions endorsing, and explaining the purpose of, the ADEA and the role of the *McDonnell Douglas* framework in determining liability.

From the inception of the *Gross* litigation, Gross attributed his allegedly improper demotion to "no apparent reason" and from this, concluded it must have been age because of the "lack of any other reason." In closing argument, Gross's trial counsel conceded there was no direct evidence to show that the challenged decision involved impermissible motives.[114] Instead, he asked the jury to disbelieve FBL and find Gross was demoted because of age on the theory that there was no other explanation for the demotion.[115] Gross's counsel conceded the absence of direct evidence of discrimination at a post-trial hearing on FBL's Renewed

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[112] H.R. Rep. No. 102-40(I), at 97 (1991).

[113] *See, e.g., Smith*, 544 U.S. at 240 ("*Ward's Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."); *see also Meacham*, 128 S.Ct. at 2404 (noting that *Smith v. City of Jackson* said "a plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact . . . is the employee's burden under both the ADEA and the *pre-1991 Title VII*.") (emphasis added).

[114] Tr. 740-41, 46.

[115] Tr. 694, 701

Motion for Judgment as a Matter of Law.[116] Additionally, the district court recognized that Gross did not present substantial or direct evidence of age discrimination at trial.[117]

Gross's effort to justify the mixed-motive instruction, revealed that he was in effect asking the United States Supreme Court to place determinative weight on the prima facie case from *McDonnell Douglas*. The Supreme Court crafted the *McDonnell Douglas* framework as a means of establishing an order for the presentation of proof.[118] For that reason, the Court noted that the burden of establishing a prima facie case of disparate treatment is "not onerous," *Burdine*, 450 U.S. at 253, and a prima facie case "is not the equivalent of a factual finding of discrimination," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978).

Gross's proposed standard would have permitted a jury to find an employer liable upon an employee's mere suggestion of mendacity by an employer, regardless of whether age motivated the decision. Gross attempted to justify the mixed-motive instruction with that very contention, arguing "[i]f as to even *one* of those proffered justifications the jury concluded that it was a phony explanation, the jury could have inferred . . . that age was a motivating factor."[119] The Court squarely rejected the standard Gross proposed.

FBL successfully convinced the Court that Gross's proposed test would not comport with Congress's purposes in enacting the ADEA. It simply set too low a standard for shifting the burden of persuasion on an element of the employee's claim. Under the ADEA, Employers may lawfully consider factors that readily correlate with age, such as years of service or salary,

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[116] *Gross*, Appellant's Appendix 596

[117] The district court stated in a post-trial order

> Here, the court finds that while the jury ultimately returned a verdict in favor of plaintiff on his claims of age discrimination, neither liability nor damages were "fairly certain." Defendant presented evidence of a legitimate, nondiscriminatory reason for demoting plaintiff and, in the absence of any direct evidence of discrimination, the jury had to rely on circumstantial evidence and inferences of discrimination to conclude that defendant discriminated against plaintiff based on his age.

Appellee's Appendix 174.

[118] *St. Mary's Honor Ctr*., 509 U.S. at 506

[119] *Gross*, Petitioner's Brief 48 (emphasis in the original).

without violating the ADEA.[120] The Court in *Gross* recognized that the Petitioner almost solely identified as evidence of age discrimination just this type of factor, including years of service, voluntary early retirement incentive packages, and salary.[121] Shifting the burden of persuasion based on such evidence would have allowed an inference of unlawful discrimination to arise from employers' wholly legitimate personnel decisions.[122]

THE MAJORITY OPINION IN GROSS

The question presented in the petition for writ of certiorari in Gross was whether a Plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in an action brought under the age discrimination and employment act of 1967.[123] Justice Thomas, writing for the majority, stated that "before reaching this question, however, we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[124] The majority held the clear language of the ADEA as well as its legislative history indicated that the burden should never shift to the defendant in an age discrimination case.[125] In addition, the

[120] *See Ky. Ret. Sys.*, 128 S.Ct. at 2369-70 (holding that employer may consider pension status even when correlated with age); *Hazen Paper*, 507 U.S. at 609-11.

[121] In *Gross*, FBL asked the district court to instruct the jury regarding the governing law to avoid such confusion. ("Defendant is entitled to make its own subjective personnel decisions, absent intentional age discrimination, even if the factor motivating the decision is typically correlated with age, such as pension status, salary or seniority"). *Gross*, Tr. 673-75. FBL objected to the district court's refusal to do so. *Id*.

[122] Gross argued that FBL could have "overcome" the error in the instruction by showing that it would have made the same decision absent consideration of Gross's age. FBL's trial strategy was based on Eighth Circuit precedent recognizing that a mixed-motive instruction would be improper here because Gross did not have substantial or direct evidence of intentional age discrimination. In *Gross*, neither discovery nor the material facts identified by Gross in resisting FBL's Motion for Summary Judgment gave FBL any reason to expect Gross to present substantial or direct evidence of age discrimination at trial. In fact, Gross offered no such evidence. The district court informed the parties of its final decision to use a mixed-motive instruction after the close of the evidence. The jury would surely have noticed (to the prejudice of FBL) if FBL changed its strategy between opening statement and closing argument. Gross's argument that an employer need only present argument regarding the same-decision defense to avoid liability overlooked the reality of trial by jury and the substantial risk that a jury will interpret an employer's same-decision argument as an implicit admission that an impermissible factor played a role in the adverse decision at issue.

[123] *Gross* slip opinion at 1.

[124] Footnote omitted. Slip opinion at 4-5.

[125] Slip opinion at 9.

Court squarely rejected the Gross' contention that the Court's interpretation of the ADEA was controlled by Pricewaterhouse or Desert Palace.[126]

Justice Clarence Thomas delivered the opinion in which Chief Justice Roberts and Justices Scalia, Kennedy and Alito joined. Justice Stevens filed a fiery dissent which was joined by Justices Souter, Ginsburg and Breyer. Justice Breyer also filed a separate dissenting opinion in which Justices Ginsburg and Souter joined.

As FBL anticipated, the majority concluded that they could not reach the question presented by the petition without first determining whether the burden of proof should ever shift in an ADEA action. The Court concluded that it is never proper in an ADEA action to shift the burden of proof to the defendant.

The Court pointed out that it had never held that the *Price Waterhouse* burden shifting analysis applied to ADEA claims. The Court based its decision on the clear language of ADEA and on Congress's decision to amend portions of ADEA in the Civil Rights Act of 1991 but to refrain from grafting onto ADEA the burden shifting analysis that was added to Title VII.

The Court in *Gross* stopped short of reversing *Price Waterhouse.* The Court did, however, reject *Gross*'s contention that its decision should be governed by *Price Waterhouse*, it noted that it was doubtful the Court would take the same approach today as had been adopted in *Price Waterhouse* and it noted that *Price Waterhouse* and its burden shifting framework are difficult to apply.

In his dissent, Justice Stevens accepted *Gross*'s "sleight of hand" and "ambush" arguments. Justice Stevens argued that *Price Waterhouse* applied to the ADEA and Justice Stevens also accused the majority of judicial activism, charging it with ignoring precedent, prudential practices and Congress's intent.

[126] Slip opinion at 10-11.

GROSS'S IMPACT ON ADEA LITIGATION

The impact of the Court's decision in *Gross* on ADEA cases seems somewhat unclear. On one hand, it could be argued that Gross has limited weight because few cases turn on the subtle difference between a "but for" and "mixed motive" instruction. That argument seemed flawed however, in that it ignores the reality of Gross itself. FBL's counsel interviewed the jurors in *Gross* after the district court trial. Of six jurors who agreed to be interviewed, four indicated that they were not of the belief that FBL engaged in discrimination, but they tried to follow the district court's instructions and they believed the court was essentially instructing them to hold for Gross.[127]

On the other hand, it could be argued that the *Gross* opinion will greatly expand the ability of an employer to obtain summary judgment in an ADEA case. If an employer establishes there is no issue of fact as to a legitimate nondiscriminatory explanation for an employment action, *Gross* will dictate summary judgment for the employer. Upon closer analysis, however, it seems that *Gross* will have limited impact on the number of cases disposed of by summary judgment. If an ADEA plaintiff creates an issue of fact regarding intent, he or she will get to a jury.[128] At best, *Gross* will cause trial courts to more closely scrutinize supposed "evidence" of discrimination.

GROSS'S IMPACT ON OTHER TYPES OF EMPLOYMENT LITIGATION

It seems that *Gross* may have more impact on non-ADEA claims than on age discrimination litigation. *Gross* suggests that mixed motive instructions are inappropriate in claims arising under other statutes that were not amended by the 1991 Civil Rights Act.[129] Because *Gross* interpreted ADEA language that is comprised of language from other statutes such as the FLSA, *Gross* may apply in wage claims. Likewise, language in some federal and

[127] Presentation of Frank Harty to the Iowa Defense Counsel, September 19, 2009.
[128] In truth, *Gross* had little to do with summary judgment standards.
[129] *See, e.g.*, 1866 Civil Rights Act, 42 U.S.C. § 1981; Americans With Disabilities Act, 42 U.S.C. § 12111 *et seq.*

state laws is drawn directly from the ADEA.[130] *Gross* may apply to FMLA claims and even to Title VII retaliation claims that are not governed by the language of the 1991 amendments.

Finally, *Gross* may impact Title VII litigation in another manner. Some argue that *Gross* seems to have breathed new life into portions of Title VII. Where Congress added the mixed motive provision to Title VII in the form of Section 107 of the Civil Rights Act of 1991[131], it left the prior operative provisions intact. Although the Court in *Gross* did not explicitly overrule *Price Waterhouse*, it laid the groundwork for the argument that some Title VII cases may still be litigated as direct evidence cases. Even some plaintiff's counsel and employee advocacy groups opine that a Title VII plaintiff may choose to pursue a direct evidence case under Section 2000e-2(a) or a mixed motive claim under Section 2000e-2(m). If true, an employer may desire to force a plaintiff to select one of the alternative remedial avenues early in litigation. One vehicle for doing so might be a request for a ruling on a point of law, a motion in limine or a contention interrogatory.[132]

GROSS'S ROLE AS A POTENTIAL CATALYST FOR LEGISLATION

Immediately following the release of *Gross* a clamor for a legislative "response" to a perceived injustice arose.[133] Senator Patrick Leahy was quoted as saying that the Court disregarded the "plain reading" of ADEA and "stripped our most senior American employees of important protections."[134] In addition, Senator Al Franken questioned Supreme Court nominee Sonia Sotomayor at length regarding the *Gross* decision.[135] Senator Franken seemed to accept as true the contention that the Supreme Court allowed FBL to "ambush" Gross and the Solicitor General.[136] Upon close examination, it is clear that any claim of surprise is the product of sour

[130] *See* The Family Medical Leave Act, 29 U.S.C. § 2601 *et seq*.
[131] Publ. L. No. 102-166 § 107 (now contained in 42 U.S.C. § 2000e-2(m).
[132] As *Gross* spawns more case law a procedural path for forcing such a choice may become more clear.
[133] *See* Editorial, *Age Discrimination*, THE NEW YORK TIMES, July 7, 2009, at A22.
[134] *See* Daphne Eviatar, *Supreme Court Undermines Age Discrimination Plaintiffs*, THE WASH. INDEP., June 18, 2009, http://washingtonindependent.com/47814/supreme-court-undermines-age-discrimination-plaintiffs.
[135] Tr. Senate Judiciary Committee Hearing, p. 4-6.
[136] *Id*.

grapes or lack of insight on the part of Gross, the United States and amici. Gross was unquestionably asking the Court to partially overrule *Price Waterhouse*. Under the standard of *Desert Palace*, Gross and amici made a full scale assault on the direct evidence requirement of *Price Waterhouse*. It was folly to believe that FBL would defend a nonsensical evidentiary requirement as opposed to joining in the attack on *Price Waterhouse*.

CONCLUSION

Gross is unquestionably a landmark decision with uniquely Iowa roots. Its full impact remains to be seen.

Legislative Update

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2009 Iowa 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. After the November 2008 general election, this control increased for the Democrat party in the Iowa Senate to a 32–18 margin and in the House of Representatives to a 56–44 Republican margin but, because of a session-long deployment to Iraq of one Republican member, the actual working margin was 56–43. These new political margins, coupled with Governor Chet Culver serving only his third year of a four-year term, gave the Democrat party their strongest control of the legislative process since 1965.

With this strengthened control, most of the prior legislative priorities of the Iowa Defense Counsel Association were doomed from the beginning since they had historically been opposed by organized labor and by the Iowa Trial Lawyers Association (currently operating under the name of Iowa Association for Justice), two key support groups of the Iowa Democrat party. Because of this strong history, the IDCA Board of Directors elected to abandon almost all of their prior legislative priorities and instead concentrate on defending against anticipated legislative proposals that would be initiated by organized labor and the Iowa Association for Justice. During the course of the 2009 legislative session, there were numerous bills introduced and supported by these two groups that were of grave concern and interest to your IDCA Board, including the following:

1. **House File 712** – creates a private cause of action for certain consumer fraud violations. This bill originally lacked many necessary components and contained numerous flawed or negative provisions. The bill initially contained no statute of limitations. The initial bill, while providing for punitive damages, provided no standard for the granting of such damages. The bill lacked any requirement of knowledge that the person must have that the conduct was false or fraudulent. Also lacking was any exemption from the provisions of the bill for licensed and well-regulated professionals.

   The Iowa State Bar Association in the Fall of 2008 convened a task force of interested members to look at the above omissions from HF 712 and other problems and made recommendations, along with recommendations from other interest groups, including IDCA, to the 2009 Legislature.

   After many meetings and many discussions, HF 712 was approved by the Legislature and signed into law by Governor Culver on May 26th, effective July 1, 2009. The approved legislation contained a two-year statute of limitations. The awarding of punitive damages would be on the same basis as in Iowa Code Chapter 668A. The requirement of knowledge was added so that the alleged wrongdoer "knows or reasonably should know" the conduct was wrong or fraudulent must be proven. Finally, the bill contains approximately 35 exclusions from the bill for highly regulated entities and professionals.

2. **House File 795** – This legislation would allow an injured employee the right to select their own doctor and health care in Worker's Compensation cases. This legislation was strongly promoted by organized labor and the Iowa Association for Justice. This legislation was approved by the House Labor Committee and placed on the House Debate Calendar. While there was no further action taken by the Iowa House, an amendment (H-1650) was offered in the final days of the session that was an attempt to compromise this issue by the floor manager of HF 795. This bill and amendment will be alive and pending in the 2010 Legislature and will again be opposed by IDCA and its allies on this issue.

3. **Senate File 321** – This legislation was initiated by the Iowa Association for Justice and they referred to it as the "Car Insurance Consumer Fairness Act of 2009." This legislation was strongly opposed by IDCA, the insurance industry and business interests. Once reason for opposition was that it would require insurance companies selling UM/UIM coverage to cover injuries caused by "physical contract with or reasonable avoidance of physical contact with" another vehicle. A second reason for opposition to this legislation was that it would require those selling UM/UIM

coverage to offer policies with UM/YIM limits oat least equal to those of the liability (the "bodily injury or death") portion of the policy. Finally, this legislation would have allowed an injured person who paid premiums for UM/UIM coverage to sue UM/UIM insurance companies who unreasonably refused to pay claims for benefits in good faith. The problem, however, with this legislation is that the insurer would have the burden of proving that it acted in good faith. This legislation was approved on a party-line vote by the Senate Judiciary Committee but received nor further attention during the balance of the session. It remains alive, however, for the 2010 session.

4. **House File 758** – This bill provided, under Iowa's wrongful-death statute, Code Section 633.336, that damages recoverable may include damages for a decedent's loss of enjoyment of life, measured separate and apart from the economic productive value the decedent would have had if the decedent had lived. This legislation was the number one priority of the Iowa Association for Justice later in the 2009 session and had passed the Iowa House on a vote of 58–41 and was still under consideration by Senate leadership until the very final hours of the last session day.

   Presently only five states – Alabama, Arkansas, Georgia, Hawaii and North Carolina – allow an estate to recover these damages for a decedent's loss of enjoyment of life. Interestingly, these five states, in a study commissioned by the United States Chamber of Commerce to evaluate the overall quality and treatment of tort and contract litigation in the 50 states, ranked Alabama 20, Arkansas 34, Georgia 28, Hawaii 45, North Carolina 21, and Iowa 7. These five states are hardly the states Iowa should want to model in adopting new tort law.

In a March 25th Legislative Alert to IDCA members, Past-President Michael Thrall gave the following reasons to oppose HF 758:

1. Loss of enjoyment of life is too speculative in a death case to be awarded.
2. Loss of enjoyment of life will necessarily be based on emotion, sentiment and sympathy.
3. HF 758 creates an entirely new category of damages never recognized nor awarded in Iowa wrongful-death cases.

House File 758 is still alive for the 2010 legislative session and is certain to be the subject of intense lobbying throughout.

In conclusion, the 2009 legislative session, while extremely difficult, was highly successful. A large reason for this success was the willingness of IDCA leadership to come to the Capitol to provide expert testimony as to why the above-mentioned legislative bills were unnecessary and would make bad law for the State of Iowa. Additionally, a big thank you goes out to you, the IDCA membership, for promptly responding to the IDCA Legislative Alerts in contacting your legislator and voicing your concerns over the identified legislation. Legislators generally respond favorable to constituent contacts and in 2009 your contacts helped make the difference – thank you!

Finally, a big thank you to Megan Antenucci, President, and to Greg Witke, IDCA Legislative Chair, for their leadership and support throughout this past session and to you, the IDCA membership, for allowing me the opportunity to represent you on Capitol Hill – THANKS!

Dancing with the Neutral:

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I. Why mediation?

A. Less cost

B. Less stressful

C. Faster result

D. Eliminates risks; (see VI (A) below)

E. Parties control outcome

F. Private

G. More flexible: noneconomic and non-litigated issues can be addressed

H. Finality

I. Brings peace

J. Allows parties and attorneys to move on

II. Is the case appropriate for mediation?

A. Discuss mediation with the client. What are the client's expectations and where did they come from?

B. Is the client appropriate for mediation?

1. Need to identify any hidden agendas, nonmonetary dynamics

C. Will the parties have a continuing relationship?

D. Will extra-mediation strategies frustrate the mediation process?

1. To use mediation as a tool of discovery

2. To learn other side's maximum figure and later negotiate from than number

3. To get the mediator to "hammer" the other side

E. Is the case one that will make new law?

III. When to mediate?

A. Rule: When the case is ready for trial

B. Exception to the Rule: When the cost of getting the case ready for trial outweighs the risk of mistake

IV. Choosing the mediator

A. Do you need a mediator-expert?

B. Judges as mediators

C. Facilitation v. Evaluation

V. Who should attend the mediation?

A. The parties

B. Significant family members?

C. Insurance representatives

1. Arrangements for additional authority if needed

D. Structured settlement representative

E. Lien holders

VI. Mediation preparation

A. Evaluate the risks. *Risk is the possibility that unlikely or unforeseen events will happen.*

1. Fact risk

2. Legal risk—adverse rulings, presiding judge

3. Damage risk

4. Venue risk

5. Cost risk

    (a) Attorneys fees

    (b) Experts

    (c) Appellate cost

    (d) Additional discovery cost

    (e) Time cost

6. Appellate risk

7. Client presentation risk. Sometimes even very good people do not present well to strangers in a courtroom setting.

8. Jury Risk: Juries tend to be difficult for doctors (not including med mal cases), lawyers, and insurance people.

9. Black Swan risks: "the unknown unknowns"

B. What will be your mediation strategy?

C. Attorney preparation

1. Review and update legal issues and authorities

2. Review and update damages

3. Subrogation interests and liens

4. Premediation confidential statement to mediator

5. Consider strengths and weaknesses

6. Consider best-case, worst-case outcomes

7. Consider how the mediator might help you with your client

D. The client

1. Determine what the client really wants

2. Explain the mediation process

    (a) Need to be patient

    (b) Need to be flexible

    (c) Need to be creative

3. Discuss whether a structured settlement might be appropriate

E. The insurance carrier

1. Update and review case evaluation

2. Make arrangements to obtain additional authority if needed

F. The mediator

1. Prepare and submit confidential premediation statement

    (a) Factual background

    (b) Damages

    (c) Important legal issues

    (d) Status of settlement discussions

G. Logistics

1. Room arrangements

2. Food

VII. The mediation session

A. Attorney approach and demeanor must change from combatant to reasoned chess-player and peacemaker.

B. Defendant must try to read the tea-leaves: what does the plaintiff really want?

C. Opening statements:

1. To give or not to give?

2. Adopt a tone that is conducive to the settlement atmosphere. Project an attitude of respect and a willingness to listen

D. The initial sessions

1. Be candid and truthful

2. Usually best to discuss the non-economic issues early, even if they are not addressed with the other side until later

(a) Apology

(b) Continued employment

(c) Employment recommendation or silence

(d) Letter of commendation

(e) Retirement or resignation

3. Questions the mediator will ask

(a) Tell the mediator about your case

(b) The mediator will want to hear from the client

(c) Strengths and weaknesses

(d) Ranging: what a judge/jury is likely to do

4. Be prepared to present opening demand or offer

E. The middle sessions

1. Keep it going

2. Most important: Work, work, work-- never give up

F. Closing sessions

VIII. Elements of failure

A. Unrealistic expectations of client, lawyer, or both

B. Unresolved attorney-client issues

C. Using mediation for other purposes

D. Using mediation for generate billable hours

E. Impatience-- mediation is a process, not a fast-food restaurant

IX. What if the case does not settle?

A. Don't give up

B. Keep the mediator involved and working

1. Telephone communication

2. Additional caucuses

3. How long should mediations last?

(a) Fatigue factor is not conducive to successful outcomes

(b) Time is the friend of successful mediation

(c) Pillow talk

X. The settlement agreement

A. Methods

1. Type and sign at mediation

2. Dictate at mediation and sign later (keep tape until signed)

3. Prepare later

4. Rely on mediator's notes

5. Include further mediation or arbitration

6. Confidentiality clause

B. Enforceability

1. Settlement agreements are contracts and general principles of contract law apply to their creation and interpretation. The intent of the parties controls. Sierra Club v. Wayne Weber LLC, 689 N.W.2d 696 (Iowa 2004) (tape-recording at conclusion of mediation session used to determine intent).

Defense Lawyers in the Crosshairs:

Ethics and Professional Liability

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DEFENSE LAWYERS IN THE CROSSHAIRS: ETHICS AND PROFESSIONAL LIABILITY

By Douglas R. Richmond

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I. Introduction

The description of relationships as comprising an "eternal triangle" is common. For example, a relationship involving three lovers, such as two women involved with one man or two men and one woman, may be described as an eternal triangle. In addition to love, this eternal triangle is characterized by betrayal and jealousy. For lawyers, the term "eternal triangle" refers to the tripartite relationship created when a liability insurer hires counsel to defend its insured when the insured is sued by a third-party. The insurer, the insured, and insurance defense counsel form the points of this eternal triangle. The eternal triangle of insurance defense is, like three-sided love, a source of suspicion, alleged conflict, and perceived betrayal.

Although much has been written about the tripartite relationship that characterizes insurance defense practice, and about ethical dilemmas in insurance litigation generally, the relationship between insurer, insured and insurance defense counsel is a recurring source of disputes. These disputes typically are connected to the conflicts of interest inherent in insurance defense practice. For present purposes, a conflict of interest between insurer and insured occurs if there is a significant risk that their common lawyer's representation of one will be materially limited by the lawyer's representation of the other, the lawyer's responsibilities to a third person, or the lawyer's personal interests. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008) [hereinafter MODEL RULES]; *see also Armstrong Cleaners, Inc. v. Erie Ins. Exch.,* 364 F. Supp. 2d 797, 807-08 (S.D. Ind. 2005) (adopting Model Rule 1.7(a)(2) standard); *Belanger v. Gabriel Chems., Inc.,* 787 So. 2d 559, 565 (La. Ct. App. 2001) (quoting Rule 1.7). At least one court has held that there can be no conflict of interest in cases where the insurer is not defending the insured or is not controlling the insured's defense. *Economy Fire & Cas. Co. v. Brumfield,* 894 N.E.2d 421, 427 (Ill. App. Ct. 2008). That makes perfect sense, of course, because in such a case the insurer and insured do not share a common lawyer.

These materials explain the problems that plague lawyers navigating the eternal triangle of insurance defense ethics. We begin in Section II with an examination of the attorney-client relationship in the insurance defense context. In short, whom does the defense lawyer represent? Section III discusses recurring conflicts of interest arising out of insurance defense practice. It concludes with an examination of the relationship between insurers, insureds and independent counsel when a conflict of interest mandates independent counsel. Section IV addresses the special problems of insured professionals. Section V reviews the ethical contours of defense lawyers' adherence to insurers' outside counsel guidelines. Section VI

examines insurers' imposition of unreasonable financial terms as a condition of engagement. Section VII analyzes problems posed by flat fee agreements. Finally, Section VIII discusses conflicts of interest related to insurers' use of staff counsel to defend insureds.

II. The Attorney-Client Relationship

The eternal triangle's inherent conflicts of interest are attributable to the concept of dual representation, best known as the "dual client doctrine." The dual client doctrine recognizes that insurance defense counsel represent both the insurer and the insured. As the court in *National Union Fire Insurance Co. v. Stites Professional Law Corp.,* 1 Cal. Rptr. 2d 570 (Cal. Ct. App. 1991), explained: "As long as the interests of the insurer and the insured coincide, they are both clients of the defense attorney and the defense attorney's fiduciary duty runs to both the insurer and the insured." *Id.* at 575; *see also Kroll & Tract v. Paris & Paris,* 86 Cal. Rptr. 2d 78, 81 (Cal. Ct. App. 1999) (quoting *Stites*). Defense counsel therefore serve two masters in any given case. The problems created by the dual client doctrine rest on the premise that defense counsel cannot loyally represent the insured in a case in which the insured's and insurer's interests do *not* coincide. Forced to choose between a repeat client and the insured, the reasoning goes, defense counsel will necessarily side with the insurer.

The dual client doctrine appears to represent the majority rule. *See, e.g., Home Indem. Co. v. Lane Powell Moss & Miller,* 43 F.3d 1322, 1331 (9th Cir. 1995) (interpreting Alaska law); *Nat'l Union Ins. Co. v. Dowd & Dowd,* 2 F. Supp. 2d 1013, 1017 (N.D. Ill. 1998) (interpreting Illinois law); *Mitchum v. Hudgens,* 533 So. 2d 194, 198 (Ala. 1988); *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone,* 93 Cal. Rptr. 2d 534, 542-44 (Cal. Ct. App. 2000); *Unigard Ins. Group v. O'Flaherty & Belgum,* 45 Cal. Rptr. 2d 565, 569 (Cal. Ct. App. 1995); *Pa. Ins. Guar. Ass'n v. Sikes,* 590 So. 2d 1051, 1052 (Fla. Dist. Ct. App. 1991); *Coscia v. Cunningham,* 299 S.E.2d 880, 881 (Ga. 1983); *Preferred Am. Ins. Co. v. Dulceak,* 706 N.E.2d 529, 533 (Ill. App. Ct. 1999); *Mobil Oil Corp. v. Md. Cas. Co.,* 681 N.E.2d 552, 561 (Ill. App. Ct. 1997); *Cincinnati Ins. Co. v. Wills,* 717 N.E.2d 151, 161 (Ind. 1999); *McCourt Co. v. FPC Props., Inc.,* 434 N.E.2d 1234, 1235 (Mass. 1982); *Moeller v. Am. Guarantee & Liab. Ins. Co.,* 707 So. 2d 1062, 1070 (Miss. 1996); *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court,* 152 P.3d 737, 742 (Nev. 2007); *Lieberman v. Employers Ins.,* 419 A.2d 417, 423-25 (N.J. 1980); *Nationwide Mut. Fire Ins. Co. v. Bourlon,* 617 S.E.2d 40, 45-46 (N.C. Ct. App. 2005); *United States Fid. & Guar. Co. v. Pietrykowski,* No. E99-38, 2000 WL 204475, at **3-4 (Ohio Ct. App. Feb. 11, 2000); *Spratley v. State Farm Mut. Auto. Ins. Co.,* 78 P.3d 603, 607 (Utah 2003); *In re Illuzzi,*

616 A.2d 233, 236 (Vt. 1992); *Barry v. USAA,* 989 P.2d 1172, 1175 (Wash. Ct. App. 1999); *see also In re Allstate Ins. Co.,* 722 S.W.2d 947, 952 (Mo. 1987) (permitting dual representation). This has been the case for some while.

The recognition of an attorney-client relationship between insurers and defense counsel is not universal. Many jurisdictions hold that the insured is the defense lawyer's sole client. *See*, *e.g.*, *Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves,* 929 F.2d 103, 108 (2d Cir. 1991); *In re A.H. Robins Co.,* 880 F.2d 694, 751 (4th Cir. 1989); *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP,* 357 F. Supp. 2d 951, 957 (E.D. Va. 2005) (discussing Virginia law); *Essex Ins. Co. v. Tyler,* 309 F. Supp. 2d 1270, 1272 (D. Colo. 2004) (discussing Colorado law); *Gibbs v. Lappies,* 828 F. Supp. 6, 7 (D.N.H. 1993); *First Am. Carriers, Inc. v. Kroger Co.,* 787 S.W.2d 669, 671 (Ark. 1990); *Higgins v. Karp,* 687 A.2d 539, 543 (Conn. 1997); *Finley v. Home Ins. Co.,* 975 P.2d 1145, 1153 (Haw. 1998); *Cincinnati Ins. Co. v. Hofmeister,* –S.W.3d–, 2008 WL 4601140, at *20 (Ky. Ct. App. Oct. 17, 2008); *Kirschner v. Process Design Assocs., Inc.,* 592 NW.2d 707, 711 (Mich. 1999); *In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures,* 2 P.3d 806, 814 (Mont. 2000); *Feliberty v. Damon,* 527 N.E.2d 261, 265 (N.Y. 1988); *Givens v. Mullikin,* 75 S.W.3d 383, 396 (Tenn. 2002); *Barefield v. DPIC Cos.,* 600 S.E.2d 256, 270 (W. Va. 2004). At least one state holds that in a case defended under a reservation of rights, the insurer's reservation trumps otherwise acceptable dual representation and transforms the insured into the defense lawyer's sole client. *See Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.,* 169 P.3d 1, 8 n.10 (Wash. 2007); *see also Vigilant Ins. Co. v. Behrenhausen,* 889 F. Supp. 1130, 1135 (W.D. Mo. 1995) (indicating that defense lawyer represents only insured, but perhaps not widely authoritative because district court was applying Missouri law in unusual case defended under reservation; Missouri law generally holds that an insurer defending under a reservation of rights loses the ability to control the insured's defense).

So, which view is correct—dual client or sole client? In fact, both the dual client and sole client models assume too much. As a general rule, whether a defense lawyer represents the insurer in addition to the insured—who is always a client—is a matter of contract. *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.,* 261 S.W.3d 24, 42 (Tex. 2008). Beyond that, the existence of an attorney-client relationship is a question of fact. Douglas R. Richmond, *Liability Insurers' Right to Defend Their Insureds,* 35 CREIGHTON L. REV. 115, 145 (2001). Unless a jurisdiction has adopted the sole client model as a matter of law, an insurer and the attorney it hires to defend its insured can share an attorney-client relationship in any given case depending on their conduct and understanding. *See id.* at 145-46.

In most cases, defense lawyers should be deemed to have an attorney-client relationship with insurers that engage them. Defense lawyers supply insurers with legal advice intended to benefit them. An insurer, which likely will be obligated to pay a settlement or judgment against the insured, relies on defense counsel's advice. For example, defense attorneys advise insurers on verdict value, settlement value, the likelihood that an insured will be found liable, the likely assessment of comparative fault, whether there are other potential defendants to be joined or against which cross-claims might be asserted, the prospects for winning by dispositive motion, whether the case should be settled or tried, the likely composition of the jury pool, the judge's reputation or perceived leanings, the skill or record of the plaintiff's attorney, the likelihood of success on appeal in the event of an unfavorable trial outcome, and more. Insurers expect to receive such advice from defense counsel and incorporate it when making critical decisions, both points being known to the defense lawyers willingly supplying the advice.

Courts have begun recognizing the importance of fact-specific inquiry into the existence of an attorney-client relationship between a liability insurer and the lawyer it employs to defend an insured. *See, e.g., Pharmacists Mut. Ins. Co. v. Billet & Connor,* No. Civ.A. 05-5216, 2006 WL 328349, at *3 (E.D. Pa. Feb. 9, 2006) (discussing Pennsylvania law); *Swiss Reinsurance Am. Corp. v. Roetzel & Andress,* 837 N.E.2d 1215, 1220-21 (Ohio Ct. App. 2005). In *Paradigm Insurance Co. v. Langerman Law Offices,* 24 P.3d 593 (Ariz. 2001), for example, the Arizona Supreme Court embraced the general rule that the existence of an attorney-client relationship turns on whether (a) the would-be client has manifested to the lawyer its intent that the lawyer provide legal services for it; and (b) the lawyer manifests his consent to do so. *Id.* at 595-96 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000)). The Minnesota Supreme Court supplemented the general rules concerning the creation of attorney-client relationships in *Pine Island Farmers Coop v. Erstad & Riemer, P.A.,* 649 N.W.2d 444 (Minn. 2002), to provide a "bright-line rule to determine whether defense counsel represents the insurer as well as the insured." *Id.* at 451. Under the *Pine Island* approach:

> [I]n the absence of a conflict of interest between the insured and the insurer, the insurer can become a co-client of defense counsel based on contract or tort theory if two conditions are satisfied. First, defense counsel or another attorney must consult with the insured, explaining the implications of dual representation and the advantages and risks involved. . . . Second, after consultation, the insured must give its express consent to the dual representation.

Id. at 452 (citations omitted). Without this consultation and the insured's express consent, the insured is the defense lawyer's sole client. *Id.* at 451.

The *Pine Island* approach is not altogether desirable. For starters, it ignores the logical argument that the insured has already agreed to the attorney's dual representation by purchasing an insurance policy that grants the insurer the right to control the defense. More fundamentally, how is it that only the *insured* has a voice in deciding whether the *insurer* has or should have the benefits of an attorney-client relationship with the defense lawyer? In most cases it is only the insurer's money that is at stake. And what if the insured refuses to consent to the lawyer's dual representation? If the insured unreasonably withholds its consent to dual representation, is that a breach of the insured's duty to cooperate?

Two final points must be made. First, defense lawyers who do not want an attorney-client relationship with an insurance company are free to structure their engagements so that the insured is their sole client. This can be accomplished in an engagement letter. The use of such an engagement letter is important given that an attorney-client relationship between the defense lawyer the insurer can generally be implied from their conduct and communications. A lawyer who accepts only the insured as a client significantly diminishes the likelihood of a conflict of interest. *See CHI of Alaska, Inc. v. Employers Reinsurance Corp.,* 844 P.2d 1113, 1116 (Alaska 1993). On the other side of the coin, an insurer that desires an attorney-client relationship with defense counsel is free to resist the lawyer's attempt to limit the engagement. There are valid reasons for an insurer wanting an attorney-client relationship with defense counsel. Among other things, an attorney-client relationship (a) gives the insurer the greatest degree of control over the litigation; (b) creates or preserves ethical duties on the part of defense lawyers that are owed only to clients; (c) better ensures the protection of critical communications as privileged; and (d) affords the insurer a legal malpractice cause of action against a defense lawyer in the unlikely event that the insured's defense goes seriously awry.

Structuring an engagement such that the insured is the defense lawyer's sole client has obvious advantages for the defense lawyer. First, as noted above, having but one client in the representation reduces the potential for conflicts of interest. It does not *eliminate* conflicts, of course, because the lawyer might represent the insurer in other matters, and a lawyer cannot be adverse to a current client even in unrelated matters. Also, defense lawyers may have former client, material limitation, or personal interest conflicts that cannot be avoided by structuring an engagement on a sole client basis. Still, this arrangement does substantially reduce the potential for conflicts of interest, and that's a positive step. Second, structuring an engagement this way eliminates any other obligations to the insurer in the particular matter that might otherwise be imposed by rules of professional conduct governing lawyers' duties to clients. Third, in states adhering to the strict privity rule in legal malpractice actions, the sole client

structure eliminates the prospect of malpractice liability to the insurer should the defense lawyer substantially err in defending the insured. *See Fed. Ins. Co. v. N. Am. Specialty Ins. Co.,* 847 N.Y.S.2d 7, 11-12 (N.Y. App. Div. 2007). Its benefit as a risk management technique is less certain in states that permit legal malpractice claims by third-party beneficiaries, but it has value even there.

A sole client relationship also has advantages for an insurer. For one thing, by reducing the potential for conflicts of interest it also reduces the potential for bad faith claims. For another thing, a defense lawyer who represents the insured alone is not an agent of the insurer and, thus, the insurer avoids potential liability tied to the lawyer's alleged agency. *Hofmeister,* 2008 WL 4601140, at **15-22. Of course, this second point probably holds true only if the insurer does not control the details of the lawyer's work, or dictate the strategies or tactics to be employed. *See Trau-Med of Am., Inc. v. Allstate Ins. Co.,* 71 S.W.3d 691, 697-98 (Tenn. 2002).

Second, some courts that recognize the dual client doctrine further hold that a defense attorney owes her "primary allegiance" to the insured. *See, e.g., Paradigm Ins. Co.,* 24 P.3d at 598; *Spratley,* 78 P.3d at 607. This simply cannot be. A lawyer generally cannot favor one co-client over another absent the clients' informed consent; to do so would be the very embodiment of a conflict of interest. Co-clients have a right to expect that their common lawyer is equally loyal. Furthermore, this approach is unnecessary in light of general conflict of interest rules, which protect insureds in cases where their interests and those of their insurers are not aligned. Finally, the primary allegiance approach is insidious. It is insidious from insurers' perspective because an insurer relying on a defense lawyer to protect its interests along with the insured's may be vulnerable on several fronts without knowing it. It is also insidious from insureds' standpoint, because if the concern that a lawyer hired by an insurer is bound to be influenced by economic self-interest to favor the insurer—even if subconsciously—is true, then an insured in a case presenting a conflict of interest should be defended by independent counsel owing it undivided loyalty rather than by a lawyer supposedly owing it "primary allegiance."

Long story short, the dual client and sole client models generally represent default rules. Judgments about attorney-client relationships are best made on a case-by-case basis.

III. Common Conflicts of Interest

Conflict of interest analysis is important to defense counsel and insurers alike. For defense counsel, obviously, conflict of interest allegations may expose them to professional discipline and to liability for malpractice or breach of fiduciary duty. An insurer that fails to

recognize a conflict of interest may be estopped from raising coverage defenses or exposed to bad faith liability. *See Stoneridge Dev. Co. v. Essex Ins. Co.,* 888 N.E.2d 633, 644 (Ill. App. Ct. 2008) (noting possibility of estoppel). In determining whether a conflict of interest exists, a court may look beyond the allegations in the complaint or petition. *Id.* at 647 (examining reservation of rights letter and noting that other extrinsic evidence may be fair game).

Conflicts of interest are most commonly are alleged to arise in cases where the insurer is defending under a reservation of rights, where the defense attorney represents multiple parties, where defense counsel's activities generate information suggesting or perfecting a coverage defense, where the insured shares confidential information with defense counsel, where punitive damages are claimed, where the potential damages exceed the limits of the insured's coverage, or where defense costs reduce the coverage available to the insured. Occasionally, an insured alleges that an insurer's unwillingness to adopt the insured's desired litigation strategy, or the insurer's or defense lawyer's unwillingness to prosecute an affirmative claim for relief on the insured's behalf, creates a conflict of interest entitling the insured to independent counsel at the insurer's expense. These situations are discussed in order below. Afterwards, we briefly examine the independent counsel relationship.

A. Reservations of Rights

An insurer's duty to defend is determined at the outset of the litigation. Accordingly, insurers often begin their insureds' defense with open coverage questions, or with coverage issues unresolved. When coverage is an issue, a liability insurer may defend its insured under a reservation of rights. It notifies the insured of its decision by way of a reservation of rights letter, typically sent via certified mail. A reservation of rights letter is simply an insurer's unilateral declaration that it is reserving its right to later deny coverage on specified grounds, despite its initial decision to defend. A reservation of rights letter does not evidence or imply the insured's consent to the insurer's conditional defense.

In theory, an insurer's reservation of rights presents a potential conflict of interest "because the insurer may be more concerned with developing facts showing non-coverage than facts defeating liability." *State ex rel. Rimco, Inc. v. Dowd,* 858 S.W.2d 307, 308 (Mo. Ct. App. 1993); *see also Kan. Bankers Sur. Co. v. Lynass,* 920 F.2d 546, 549 (8th Cir. 1990); *Rockwell Int'l Corp. v. Superior Court,* 32 Cal. Rptr. 2d 153, 158 (Cal. Ct. App. 1994). Defense counsel may be able to steer a case toward a coverage result favorable to the insurer. For example, a defense attorney might elicit deposition testimony supporting a coverage defense.

Assuming that an insurer's reservation of rights creates a conflict of interest, how might the conflict be resolved or ameliorated? The most common approach is to appoint independent counsel to represent the insured at the insurer's expense.

Not every reservation of rights creates a conflict of interest requiring the insurer to provide its insured with independent counsel. Mere disagreement between an insured and the defense lawyer engaged by an insurer is insufficient to create a conflict of interest requiring the appointment of independent counsel for the insured. *Steinman v. Silbowitz,* 714 N.Y.S.2d 209, 210 (N.Y. App. Div. 2000). An insured's concern that a defense lawyer engaged by an insurer might have a "possible conflict of interest" in connection with a defense under reservation does not trigger the insured's right to independent counsel. *Silacci v. Scottsdale Ins. Co.,* Case No. C 04-04125 JF, 2006 U.S. Dist. LEXIS 6076, at **8-12 (N.D. Cal. Feb. 16, 2006) (not available on Westlaw). Rather, an insurer is obligated to provide its insured with independent counsel at the insurer's expense only when the outcome of a coverage issue can be affected by the defense of the underlying action. *Rx.com Inc. v. Hartford Fire Ins. Co.,* 426 F. Supp. 2d 546, 559 (S.D. Tex. 2006) (applying Texas law); *James 3 Corp. v. Truck Ins. Exch.,* 111 Cal. Rptr. 2d 181, 186 (Cal. Ct. App. 2001); *Nisson v. Am. Home Assur. Co.,* 917 P.2d 488, 490 (Okla. Ct. App. 1996). Conversely, an insurer has no obligation to provide independent counsel for the insured when the manner in which the underlying action is defended cannot affect coverage. *Cybernet Ventures, Inc. v. Hartford Ins. Co. of the Midwest,* D.C. No. CV-01-07548-LGB, 2006 WL 448842, at *1 (9th Cir. Feb. 23, 2006) (citing California statute); *Armstrong Cleaners,* 364 F. Supp. 2d at 807 (discussing Indiana law); *Dynamic Concepts, Inc. v. Truck Ins. Exch.,* 71 Cal. Rptr. 2d 882, 887 (Cal. Ct. App. 1998); *Golden Eagle Ins. Co. v. Foremost Ins. Co.,* 25 Cal. Rptr. 2d 242, 257 (Cal. Ct. App. 1993); *Blanchard v. State Farm Fire & Cas. Co.,* 2 Cal. Rptr. 2d 884, 887 (Cal. Ct. App. 1991); *Steinman,* 714 N.Y.S.2d at 210. The inquiry here focuses not whether defense lawyers *intend* their actions to affect coverage, but simply whether they *could* influence coverage through their activities. *Gafcon, Inc. v. Ponsor & Assocs.,* 120 Cal. Rptr. 3d 392, 418-19 (Cal. Ct. App. 2002). As a California court recently explained:

> [W]hen the reservation of rights is based on coverage disputes that have nothing to do with the issues being litigated in the underlying action—for example, whether the defendant is an insured under the insurance policy (see *McGee v. Superior Court* (1985) 176 Cal. App. 3d 221, 227-28, 21 Cal. Rptr. 421 [reservation of rights based on resident relative exclusion in automobile liability policy])—there is no conflict of interest, and no duty to appoint independent counsel. . . . Conversely, when the facts on which resolution of the reserved coverage dispute depends are at issue in the underlying action, independent

> counsel must be appointed because counsel selected and controlled by the insurer could determine the outcome of those issues in the third-party action.

Long v. Century Indem. Co., 78 Cal. Rptr. 3d 483, 491 (Cal. Ct. App. 2008) (citations and footnote omitted).

In what circumstances might defense counsel be able to affect coverage? The best example is a case in which the insurer is defending under a reservation of rights because the insured's conduct may have been intentional. *State Farm Fire & Cas. Co. v. Mabry,* 497 S.E.2d 844, 847 (Va. 1998). While both the insured and the insurer are interested in defeating the plaintiff's claims outright, "if liability is found, their interests diverge in establishing the basis for that liability. *Long,* 78 Cal. Rptr. 3d at 491. After all, if the insured can be shown to have intentionally injured the plaintiff, there was no "occurrence," and the policy's intentional acts exclusion will additionally bar coverage. Accordingly, the insured may be entitled to a defense by independent counsel. *See, e.g.*, *Aquino v. State Farm Ins. Cos.,* 793 A.2d 824, 830 (N.J. Super. Ct. App. Div. 2002); *State Farm Mut. Auto. Ins. Co. v. Van Dyke,* 668 N.Y.S.2d 821, 822-28 (N.Y. App. Div. 1998); *see also Britt v. Cambridge Mut. Fire Ins. Co.,* 717 S.W.2d 476, 481 (Tex. App. 1986) (stating that insured was entitled to independent counsel in wrongful death case where he had previously been convicted of murder in a separate criminal action).

Defense counsel also may be able to affect coverage in a "mixed action," i.e., a case in which multiple claims are made against the insured but only some are covered. The archetypal mixed action is one in which some causes of action allege negligence and others intentional wrongs. The worry here is that a defense attorney can through discovery steer the case away from coverage, or might successfully move for summary judgment on covered claims and thus leave the insured defenseless on uncovered causes of action. Alternatively, a defense lawyer might insist on special interrogatories or special verdicts so that damages can be allocated between covered and uncovered claims. *See St. Paul Fire & Marine Ins. Co. v. Engelmann,* 639 N.W.2d 192, 201 (S.D. 2002) (indicating that lawyer doing this would breach duty to insured). Some courts therefore hold that a mixed action creates a conflict of interest entitling the insured to independent counsel. *See, e.g.*, *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.,* 788 N.E.2d 522, 539 (Mass. 2003); *Moeller v. Am. Guarantee & Liab. Ins. Co.,* 707 So. 2d 1062, 1070-71 (Miss. 1996); *Aquino v. State Farm Ins. Cos.,* 793 A.2d 824, 830 (N.J. Super. Ct. App. Div. 2002). South Dakota would also seem to fall into this camp, although that is not entirely clear. *See Englemann,* 639 N.W.2d at 199-201.

In *Tank v. State Farm Fire & Casualty Co.*, 715 P.2d 1133 (Wash. 1986), the Supreme Court of Washington attempted to resolve the conflict posed by a reservation of rights defense by imposing an "enhanced" duty of good faith on the reserving insurer. *Id.* at 1137. Other states have followed Washington's lead. *See, e.g.*, *Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co.,* 839 So. 2d 614, 616 (Ala. 2002); *Finley v. Home Ins. Co.,* 975 P.2d 1145, 1156-57 (Haw. 1998). Insurers can demonstrate enhanced good faith by (1) thoroughly investigating the plaintiff's claim; (2) retaining competent defense counsel who, like the insurer, must understand that the insured is counsel's sole client; (3) fully informing the insured of all coverage issues and the progress of the case; and (4) refraining from any action that demonstrates a greater concern for the insurer's financial interests than for the insured's potential exposure. *Tank*, 715 P.2d at 1137; *see also Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.,* 169 P.3d 1, 8 n.10 (Wash. 2007) (discussing *Tank* standards and pointing out that a defense lawyer in this situation has insured as sole client). The *Tank* standard and criteria effectively safeguard insureds' interests without impugning defense counsel's loyalty or integrity. *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1304 (Ala. 1987).

The failure to satisfy any of the four *Tank* criteria can result in the insurer's loss of coverage defenses. In *Shelby Steel Fabricators, Inc. v. United States Fidelity & Guaranty Co.*, 569 So. 2d 309 (Ala. 1990), attorneys hired by USF&G defended Shelby for more than two years after the insurer assumed the defense under a non-waiver agreement. In the twenty-nine months between its receipt of the non-waiver agreement and accompanying letter, and the insurer's ultimate denial of coverage, Shelby Steel was not kept informed about the progress of its defense. Because appointed defense counsel did not keep the insured informed, USF&G failed to meet its enhanced obligation of good faith. *Id.* at 312. The insurer's breach of its enhanced duty of good faith estopped it to deny coverage.

The Alabama Supreme Court reasoned that this result would not unfairly burden insurers because "[i]t merely requires that if an insurer intends to defend a case pursuant to a non-waiver agreement or reservation of rights, then the insurer not only must provide notice to its insured of that fact, but also must keep its insured informed of the status of the case." *Id.* at 313. The court concluded that enforcing a reporting requirement would protect insureds and compel insurers to meet their acknowledged duties to insureds when coverage is at issue.

In *Finley v. Home Insurance Co.,* 975 P.2d 1145 (Haw. 1998), the insured asserted that a conflict of interest automatically arises in mixed actions defended under a reservation of rights. Accordingly, insureds in such cases are entitled to be defended by independent counsel

at the insurer's expense. The Hawaii Supreme Court disagreed, placing its trust in presumptively ethical defense counsel.

> When retained counsel, experienced in the handling of insurance defense matters, is allowed full rein to exercise professional judgment, the interests of the insured will be adequately safeguarded. If the insurer or retained counsel fail to meet the standards mandated by [state ethics rules], alternate remedies exist which can be utilized by the insured.

Id. at 1154. The "alternative remedies" available to an insured who is harmed by a conflict of interest and related misconduct by an insurer's chosen defense counsel include (1) suing the defense attorney for malpractice; (2) suing the insurer for bad faith; and (3) using the doctrine of estoppel to prevent the insurer from denying coverage. *Id.* at 1155.

The *Finley* court did not rule out the possibility that a conflict of interest warranting independent counsel could arise in a case defended under a reservation of rights; it simply declined to "adopt a blanket rule based on the assumption that the attorney will slant his or her representation to the detriment of the insured." *Id.* at 1154. The court cautioned insurers that their right to control the defense in a given case and their desire to limit expenses must yield to defense attorneys' professional judgment, and to the attorneys' ethical obligation to competently represent the insured. *Id.*

Even the most loyal and ethical counsel defending an insured under a reservation of rights can inadvertently create an actual conflict of interest through a lack of communication. Settlement offers are the most common pitfall. While a plaintiff's settlement offer within policy limits is usually the insurer's to accept or reject, the same rule does not apply if the insurer reserves its rights. Under a reservation of rights, the insured ultimately may be required to pay any settlement or judgment. Accordingly, there is authority for the proposition that the insured must therefore make the final decision regarding settlement. *See Carrier Express, Inc. v. Home Indem. Co.,* 860 F. Supp. 1465, 1483 (N.D. Ala. 1994) (quoting *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.,* 521 So. 2d 1298, 1303 (Ala. 1987)). Defense counsel must timely inform the insured of all settlement offers, *Lloyd v. State Farm Mut. Auto. Ins. Co.,* 860 P.2d 1300, 1305 (Ariz. Ct. App. 1992), *Miller v. Byrne,* 916 P.2d 566, 574 (Colo. Ct. App. 1995), and allow the insured to decide.

Insurers and their counsel are well-advised to keep insureds' independent counsel abreast of settlement issues. There is no advantage to withholding such information, and any perceived advantage is surely outweighed by the risk of litigation and liability flowing from concealment.

In summary, no conflict of interest necessarily exists in a reservation of rights defense. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP,* 433 F.3d 365, 366, 372 (4th Cir. 2005) (discussing South Carolina law and collecting cases); *Trinity Universal Ins. Co. v. Stevens Forestry Serv., Inc.,* 335 F.3d 353, 356 (5th Cir. 2003) (applying Louisiana law); *Rx.com Inc. v. Hartford Fire Ins. Co.,* 426 F. Supp. 2d 546, 559 (S.D. Tex. 2006) (applying Texas law); *Tyson v. Equity Title & Escrow Co. of Memphis, LLC,* 282 F. Supp. 2d 829, 831-32 (W.D. Tenn. 2003); *MetLife Capital Corp. v. Water Quality Ins. Synd.,* 100 F. Supp. 90, 94 (D.P.R. 2000); *Delmonte v. State Farm Fire & Cas. Co.,* 975 P.2d 1159, 1174 (Haw. 1999); *Mut. Serv. Cas. Ins. Co. v. Luetmer,* 474 N.W.2d 365, 368-69 (Minn. Ct. App. 1991); *Twp. of Readington v. Gen. Star Ins. Co.,* 2006 WL 551404, at *4 (N.J. Super. Ct. App. Div. Mar. 3, 2006); *Nisson,* 917 P.2d at 490; *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.,* 261 S.W.3d 24, 40 (Tex. 2008); *Johnson v. Cont'l Cas. Co.,* 788 P.2d 598, 600 (Wash. Ct. App. 1990). *But see Hartford Underwriters Ins. Co. v. Found. Health Servs., Inc.,* 524 F.3d 588, 592-93 (5th Cir. 2008) (discussing Mississippi law); *Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.,* 200 F. Supp. 2d 84, 89-90 (D.R.I. 2002) (holding that insurer's reservation of rights creates conflict of interest entitling insured to independent counsel); *Great Divide Ins. Co. v. Carpenter ex rel. Reed,* 79 P.3d 599, 604 (Alaska 2003) (same); *First Jeffersonian Assocs. v. Ins. Co. of N. Am.,* 691 N.Y.S.2d 506, 506-07 (N.Y. App. Div. 1999) (same); *see also Twin City,* 433 F.3d at 370-71 (collecting cases holding that a mere reservation of rights creates conflict of interest entitling insured to independent counsel). The same principle holds true when a defense is provided under a non-waiver agreement. On a daily basis defense lawyers hired by insurers are called upon to handle cases in which the insured's interests and those of the insurer do not fully coincide. The defense bar generally has shown no inability to zealously defend insureds (their clients) under such circumstances. The overwhelming majority of defense attorneys vigorously defend the insureds they represent without regard for insurers' coverage positions. Nevertheless, if defense counsel can affect coverage through the litigation of the third-party action, the insured may be entitled to independent counsel at the insurer's expense. *Great W. Cas. Co. v. Dekeyser Express, Inc.,* 475 F. Supp. 2d 772, 778-80 (C.D. Ill. 2006); *Cunniff v. Westfield, Inc.,* 829 F. Supp. 55, 57 (E.D.N.Y. 1993); *Am. Family Mut. Ins. Co. v. W.H. McNaughton Builders, Inc.,* 843 N.E.2d 492, 498 (Ill. App. Ct. 2006); *Am. Family Mut. Ins. Co. v. Blackburn,* 566 N.E.2d 889, 892 (Ill. App. Ct. 1991); *Roussos v. Allstate Ins. Co.,* 655 A.2d 40, 44 (Md. Ct. Spec. App.1995); *Nisson,* 917 P.2d at 490. If an insurer determines that an insured is entitled to independent counsel, it must so inform the insured, even if the insured has not

demanded independent counsel. *Elacqua v. Physicians' Reciprocal Insurers,* 800 N.Y.S.2d 469, 473 (N.Y. App. Div. 2005).

Defense counsel must exercise care when attempting to settle a case being defended under a reservation of rights. All settlement offers must be communicated to the insured, inasmuch as the insured may face personal exposure on uncovered claims or causes of action. Concealing the fact or status of settlement negotiations from the insured is never advisable.

B. Representation of Multiple Parties

The representation of multiple parties by a single lawyer or law firm routinely raises conflict of interest concerns. *See, e.g., Reitzel v. Hale,* No. 2001-28224, 2006 WL 1835013 (N. Y. Sup. Ct. June 30, 2006) (disqualifying law firm from representing five defendants in medical malpractice action). Different defendants may have adverse interests. *See, e.g., Murphy v. Nutmeg Ins. Co.,* 773 N.Y.S.2d 413, 415 (N.Y. App. Div. 2004) (finding that insurer was required to provide separate counsel for multiple insureds with potential contribution claims against each other). In construction, for example, a landowner is typically an additional insured under a general contractor's commercial general liability (CGL) policy. An attorney hired by the general contractor's CGL insurer to defend a premises liability action may be asked to defend the landowner, as well. The doctrine of comparative fault necessarily makes the landowner and general contractor potential adversaries, notwithstanding their common interest in defeating the plaintiff's claim. If an injured automobile passenger sues both the owner and the driver, the owner and driver may be adverse. It may be in the driver's best interest to argue that she is the owner's agent, while the owner may benefit by arguing that the driver was impermissibly operating the vehicle. *See*, *e.g.*, *Murphy v. Urso,* 430 N.E.2d 1079, 1083-84 (Ill. 1981). *But see Allied Am. Ins. Co. v. Ayala,* 616 N.E.2d 1349, 1358 (Ill. App. Ct. 1993) (finding no conflict where permissive use acknowledged). In other cases, a driver and a passenger may be adverse. *See, e.g.*, *Gustafson v. City of Seattle,* 941 P.2d 701 (Wash. Ct. App. 1997). Representing both a trucking company and its driver may pose a conflict of interest when there is a potential dispute as to whether the driver was acting in the course and scope of his employment. *See, e.g., Yost v. K Truck Lines, Inc.,* No.Civ.A. 03-2986-DJW, 2006 WL 313348 (D. Kan. Jan. 7, 2006). Indeed, representing an organizational insured and its employee is often potentially troublesome because of "course and scope" issues. Co-defendants may have indemnification agreements or common law indemnity rights, essentially requiring defense counsel to assert cross-claims. *See*, *e.g.*, *Clement v. Marathon Oil Co.,* 724 F. Supp. 431 (E.D.

La. 1989). In such circumstances, an insurer may be required to provide independent counsel. *See Atl. Mut. Ins. Co. v. Struve,* 621 N.Y.S.2d 5, 6 (N.Y. App. Div. 1994) (stating that insurer's retention of separate counsel fulfills its initial obligation to mutually adverse insureds) (quoting *Goldberg v. Am. Home Assur. Co.,* 439 N.Y.S.2d 2, 4 (N.Y. App. Div. 1981)).

The problems that can flow from multiple representation are illustrated by a recent bad faith case in a Pennsylvania federal court, *Jurinko v. Medical Protective Co.,* No. 03-CV-4053, 2006 WL 785234 (E.D. Pa. Mar. 29, 2006), *aff'd in part, rev'd in part,* Nos. 06-3519, 06-3666, 2008 WL 5378011 (3d Cir. Dec. 24, 2008). The insurer, Med Pro, appointed a single lawyer, Kilcoyne, to represent two doctors in a medical malpractice action. The doctors' interests were incompatible, since either could escape liability by pointing the finger at the other with respect to the alleged failure to diagnose the plaintiff's skin cancer. The Med Pro claims handler testified at trial that he knew that Kilcoyne had a conflict of interest and that "the dual representation was unethical," but that he insisted on it "to save [Med Pro] money." *Id.* at *5. Based on this and other misconduct, the jury returned a verdict against Med Pro of just over $7.9 million, including $6.25 million in punitive damages. On appeal, the Third Circuit let the bad faith verdict stand, but reduced the punitive damage award to just under $2 million on the basis that the original award was unconstitutionally excessive.

The plaintiff in *Fullmer v. State Farm Insurance Co.*, 514 N.W.2d 861 (S.D. 1994) (*Fullmer II*), Rita Fullmer, was injured in an automobile accident with State Farm's insured, Joyce Beuning. Fullmer complained of pain in her neck and arms, and her physical therapist noticed color changes and swelling in her arms and hands. Fullmer went to State Farm's claims office to meet with Mona Drolc, to whom the Fullmer/Beuning claim was assigned. *Fullmer v. State Farm Ins. Co.,* 498 N.W.2d 357, 358-59 (S.D. 1993) (*Fullmer I*). During the course of this meeting, Fullmer extended her left hand to Drolc to show her the color changes. Suddenly and without warning, Drolc grabbed Fullmer's hand and raised her left arm in the air. Drolc's manipulation injured Fullmer for a second time, leaving her with excruciating pain in her left arm. *Fullmer I*, 498 N.W.2d at 359. Fullmer sued Beuning, State Farm and Drolc. Curt Ireland, one of State Farm's regular defense counsel, appeared and answered on behalf of all three defendants. *Fullmer I*, 498 N.W.2d at 359.

Drolc eventually requested separate counsel, which State Farm provided. Ireland continued to defend both State Farm and Beuning. He later elicited testimony from a doctor engaged as an expert witness by State Farm that was adverse to Beuning. Specifically, the doctor testified that Fullmer's injuries were caused by the automobile accident with Beuning, not by Drolc's clumsy attempt at diagnosis. *Id.*

Ireland then moved to withdraw from representing Beuning, citing the "'potential conflict of interest'" between State Farm and Beuning. *Fullmer II*, 514 N.W.2d at 862. Before that motion was ruled, State Farm hired Jean Cline as separate counsel for Beuning. The trial court refused to let Ireland withdraw, reasoning that State Farm could protect Beuning's interest by having Cline merely monitor Ireland's activities on Breuning's behalf, and by agreeing to indemnify Beuning. The court further reasoned that Ireland's withdrawal and the attendant entry of a third defense attorney would delay the trial, and prejudice the plaintiff. *Id.* at 862-63. The Supreme Court of South Dakota reversed the trial court.

The supreme court reasoned that Cline was not truly independent counsel. Ireland apparently continued to direct the defense of both Beuning and State Farm even after Cline was hired, and State Farm directed Cline. *Id.* at 864. The court saw the need "to assure that there is no interference with the independence of professional judgment of the counsel hired by State Farm for Beuning." *Id.* at 865. Beuning was entitled to independent counsel of her choice, rather than an attorney selected by State Farm.

The insurer in *Wolpaw v. General Accident Insurance Co*., 639 A.2d 338 (N.J. Super. Ct. App. Div. 1994), issued a $50,000 homeowners policy to Saranne Frew. The policy also covered other members of Frew's household, including her sister Karanne Wolpaw, and Karanne's son, Heath. Heath Wolpaw blinded a playmate, Michael Heim, when he shot him with a BB gun. Heim and his parents sued Heath, his mother, his father Ivan, and Frew. General Accident hired a single law firm to represent all of the defendants except Ivan. *Id.* at 339. The Heims also sued the BB gun manufacturer and the store that sold it, both of which had different insurers and defense counsel.

General Accident immediately paid its $50,000 policy limits into court as a settlement offer. The Heims rejected the offer. A jury awarded the Heims $502,000 after finding Michael Heim fifty percent at fault, Heath Wolpaw twenty percent at fault, and Ivan Wolpaw thirty percent at fault. Post-judgment interest brought the total judgment to $709,964.20. Karanne Wolpaw then sued General Accident, alleging that the insurer's failure to provide separate counsel constituted a breach of contract.

The *Wolpaw* court noted the general rule that an insurer of codefendants whose interests conflict must retain independent counsel for each insured, or permit each insured to do so at the company's expense. That was clearly the case at bar.

> The three insureds had the common interests of minimizing the amount of the Heims's judgment and maximizing the percentage of fault attributable to the other defendants. However, their interests in maximizing the percentage of the other insureds' fault

> and minimizing their own was clearly in conflict. For interest, it was in [Karanne Wolpaw's] interest to argue that she adequately had secured the rifle from Heath's unattended use and had carefully instructed him in its safe use, which he negligently disregarded; on the other hand, it was in Heath's interest to argue that [his mother] negligently failed to secure the rifle, and that he was not negligent in view of his mother's negligence and his youth.
>
> [S]eparate attorneys representing . . . Heath [and his mother] might well have asserted cross-claims for contribution against the other's client. That was not done . . . . It was also in plaintiff's interest to assert a cross-claim against her sister and that she remain a codefendant to share the liability burden. Yet the single firm of attorneys, discharging its duty to her sister, not only did not file a cross-claim for contribution on plaintiff's behalf, but successfully moved to have Frew dismissed from the case.

Id. at 340. The court termed the conflict of interest "obvious," and concluded that the insurer breached its policy by virtue of its failure to provide independent counsel for its various insureds. The court then remanded the case so that damages attributable to the conflict could be apportioned in a separate trial.

The *Wolpaw* court reached the correct result. Defense counsel generally cannot represent co-insureds in a comparative fault case. While both insureds' interests may appear to be aligned, there is a substantial possibility—if not a probability—that one will eventually have to "point the finger" at the other. A defense attorney that attempts to avoid this problem by maintaining a unified defense at all costs may end up hurting both clients. Although co-insureds may knowingly consent to joint representation, thus solving defense counsel's ethical dilemma, there are cases in which defendants probably should not so consent. This is certainly true where potential damages exceed coverage, and where one insured's coverage may be challenged.

Defense counsel may be able to represent multiple defendants, however, if the insurer provides sufficient coverage to relieve all defendants of all personal liability and the insureds do not have cross-claims. *Davenport v. St. Paul Fire & Marine Ins. Co.,* 978 F.2d 927, 932 (5th Cir. 1992) (applying Mississippi law). This principle holds true even if two insureds are insured by the same carrier under separate policies with different liability limits. *See Spindle v. Chubb/Pacific Indem. Group,* 152 Cal. Rptr. 776, 778-81 (Cal. Ct. App. 1979).

Occasionally, an insurer and its insured are named as defendants in the same action. Under such circumstances the insured must be provided with separate counsel. No matter how closely aligned the insured's and insurer's interests may initially appear, the inherent potential

conflicts of interest and the appearance of impropriety are often insurmountable. *Steptore v. Masco Construction Co.*, 643 So. 2d 1213 (La. 1994), is an illustrative case.

The *Steptore* plaintiff was injured while working as a laborer on a barge. A steel cable from a crane on an adjoining crane barge owned by Masco Construction broke, striking him in the face. He sued Masco's primary liability insurer, Ocean Marine, and Certain Underwriters at Lloyd's, who provided excess coverage. He alleged that Masco was negligent, and that Ocean Marine's policy and the Lloyd's policy covered the liability asserted. *Id.* at 1214-15.

Upon receiving notice of the suit on September 21, 1987, Ocean Marine hired the law firm of Evans & Company to represent both it and Masco. The plaintiff's petition clearly stated that the accident occurred in a different parish than that in which Masco's crane barge was supposed to be located, putting Ocean Marine on notice that Masco had violated its navigation warranty—a valid coverage defense. *See id.* at 1217. Nonetheless, Ocean Marine assumed Masco's defense without reserving its rights. Masco's president told Evans of the precise location of the accident, again highlighting Ocean Marine's coverage defense. Evans remained in the case defending both Masco and Ocean Marine, and handled discovery for both defendants. On March 2, 1988, Ocean Marine finally denied coverage. Evans withdrew as Masco's counsel, but continued defending Ocean Marine.

After Ocean Marine denied coverage, Masco retained independent counsel and sued Ocean Marine, alleging that it was obligated to indemnify it in the underlying action. The Supreme Court of Louisiana agreed. The *Steptore* court concluded that Ocean Marine waived its breach of navigation warranty defense. The conflict of interest between Ocean Marine and Masco was a key factor in the court's decision. As the court explained: "Waiver principles are applied stringently to uphold the prohibition against conflicts of interest between the insurer and the insured which could potentially affect legal representation in order to reinforce the role of the lawyer as the loyal advocate of the client's interest." *Id.* at 1216. Ocean Marine should have provided separate counsel for Masco. *Id.* at 1217.

An unusual situation involving multiple parties was litigated in *State Farm Mutual Automobile Insurance Co. v. Armstrong Extinguisher Service, Inc.*, 791 F. Supp. 799 (D.S.D. 1992). The defendant and third-party plaintiff in the underlying state court action sued Armstrong and its employee, Michael Larson, alleging Larson's contributory fault and Armstrong's vicarious liability in connection with an automobile accident. Armstrong's insurer, State Farm, hired the ubiquitous Curt Ireland to represent both Armstrong and Larson; however, State Farm defended under a reservation of rights. *Id.* at 800. In depositions, a conflict was

discovered that required Ireland to cease representing both Armstrong and Larson. Ireland withdrew as Larson's counsel, but continued to represent Armstrong.

State Farm then filed a declaratory judgment action in federal court, seeking a determination that Armstrong's policy afforded no coverage. Both Armstrong and Larson were named as defendants. The attorney who prosecuted the declaratory judgment action for State Farm was none other than Ireland, who was still defending Armstrong. While admitting State Farm's right to seek a declaratory judgment, attorneys defending Armstrong and Larson in that action moved to disqualify Ireland, alleging his conflict of interest. Ireland opposed the motion on three grounds: First, both defendants were sent reservation of rights letters at the outset of the state court litigation. Second, the defendants were fully advised of the coverage issue, and were also fully advised of their right to retain independent counsel. Third, the coverage dispute was a separate contractual question that did not compromise his loyalty to Armstrong. *Id.*

The *Armstrong Extinguisher* court made short work of Ireland's arguments against his disqualification.

> State Farm has not given equal consideration to Larson's and Armstrong's interests in this case. Mr. Ireland as counsel for Armstrong, and at one time Larson, owes a duty of loyalty to his clients and cannot under South Dakota Rules of Professional Conduct represent parties with conflicting interests without the consent of all parties after full disclosure of the facts. . . . At the very least, Mr. Ireland's representation of the insurance company in the declaratory judgment action and Armstrong in the underlying litigation creates an appearance of impropriety.

Id. at 801. Ireland's decision to simultaneously represent Armstrong and actively work against it created a classic conflict of interest. The court removed Ireland from the declaratory judgment action and required State Farm to obtain new counsel. *Id.* at 802.

C. Defense Counsel's Activities Generate Information Suggesting a Possible Coverage Defense

The dual client doctrine poses serious communication and disclosure problems for defense attorneys. An appointed attorney who learns of information suggesting a possible coverage defense during the course of an insured's representation faces an obvious dilemma. If the attorney shares the information with the insurer, the insured will be prejudiced. With a potential loss of coverage comes exposure to personal liability. On the other hand, withholding the information prejudices the insurer, which may have to pay a judgment for which there is no coverage. Of course, it is the insurer that pays defense counsel's bills, and it is the insurer with

which the attorney desires a continuing relationship. Regardless of whether defense counsel discovers the information or whether the insured shares confidential information, defense counsel are generally barred from sharing the information with the insurer.

The insurer in *Parsons v. Continental National American Group,* 550 P.2d 94 (Ariz. 1976), CNA, hired counsel to defend its insureds, the Smitheys, in connection with their son Michael's alleged assault on three neighbors. The plaintiffs made a settlement demand within policy limits which CNA rejected. The defense attorney CNA hired later obtained Michael Smithey's confidential file from the juvenile facility where he was incarcerated, and determined that his attack was knowing and deliberate. It therefore followed, the attorney told CNA, that the assault was intentional. *Id.* at 96. CNA then issued a reservation of rights letter, informing the Smitheys that their son's assault may have been intentional and that their policy specifically excluded liability for bodily injury caused by intentional acts. The case proceeded to trial and the court directed a $50,000 verdict for the plaintiffs, which exceeded the Smitheys' $25,000 policy limits. Judgment was entered in the verdict amount.

The plaintiffs garnished CNA, which responded by offering its $25,000 policy limits. The plaintiffs declined CNA's offer. CNA successfully defended the garnishment action by asserting its intentional acts exclusion. The same attorney that represented the Smitheys at trial defended CNA in the garnishment action. *Id.* at 97.

The plaintiffs contended on appeal that CNA was estopped to deny coverage and waived its intentional acts exclusion because it exploited defense counsel's fiduciary relationship with Michael Smithey. The *Parsons* court agreed, reasoning that public policy mandated this result. *Id.* at 99. CNA was ultimately responsible for the entire amount of the judgment.

More offensive conduct was exposed in *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973). The *Tilley* insurer filed a declaratory judgment action seeking a determination that its insured's late notice relieved it of its duty to defend a personal injury action.

Before filing the declaratory judgment action, Employers obtained a non-waiver agreement from Tilley and hired counsel to defend the personal injury action. Defense counsel knew of Employers' late notice contention and of the insured's related explanation. For nearly eighteen months, the defense attorney secretly developed evidence for Employers on the coverage question. The attorney took witness statements from five of the insured's employees to establish their knowledge of the accident and related communications with Tilley (contrary to Tilley's stated position); briefed the late notice question for Employers without informing Tilley; interviewed two independent witnesses at the insurer's request to establish late notice; and

wrote numerous letters and had multiple conversations with Employers about developing its coverage defense, suggesting additional investigation, and offering legal advice. *Id.* at 556. This conduct became the basis for the declaratory judgment action filed by separate counsel.

The Texas Supreme Court concluded that it would be "untenable" to permit the insurer to disclaim its defense obligation based on late notice. *Id.* at 560. The question was not the validity of Employers' late notice defense, but whether it was improperly developed. Because Employers' conduct violated the "guiding principles and public policy" governing the insurer-insured relationship, the *Tilley* court held that Employers was estopped from denying its contractual duties.

Montanez v. Irizarry-Rodriguez, 641 A.2d 1079 (N.J. Super. Ct. App. Div. 1994), is among the more interesting and unusual cases. *Montanez* was a personal injury case involving a tire blowout. The plaintiff was the defendant's wife. Defense counsel called his client as a witness and elicited testimony about the blowout. Claiming to be surprised by the defendant's testimony, which he represented to be inconsistent with a prior recorded statement, the defense attorney asked the judge for permission to treat his client as a hostile witness. *Id.* at 1081. The attorney then asked the defendant a series of leading questions. The defendant, who spoke only limited English, was obviously troubled, and attempted to protest that his testimony was consistent. When the plaintiff's attorney asked to listen to the recorded statement, defense counsel refused, remarkably asserting the attorney-client privilege. *Id.* at 1082.

The defense attorney argued in closing that the defendant and his wife were in collusion, and that the defendant wanted his wife to win. The jury returned a defense verdict and the plaintiff appealed.

It was obvious to the *Montanez* court that the defense attorney had no reason to impeach his client's testimony were it not for his unexpressed concern that the purportedly "surprising" testimony would hurt the insurer that hired him. By impeaching his own client he perfected the insurer's coverage defense. The court reasoned that the attorney could not be allowed to elevate the insurer's interests over the insured's.

> Nothing can be more devastating to an insured than to have his or her credibility challenged by assigned insurance counsel. In this case, defendant was left essentially defenseless to his attorney's attack on his credibility . . . . [D]efendant maintained that his testimony was not inconsistent . . . . However, because he was abandoned by counsel, he was unable to advocate that position in a meaningful fashion. Without actual proof that defendant's proposed testimony at trial was, in fact, contradictory to prior statements . . . the jury was . . . left with the impression that defendant's attorney believed that defendant was a liar.

Id. at 1084.

The issue of fraud and collusion prejudiced the defendant and caused the jury to focus on issues not pleaded. *Id.* at 1084-85. The *Montanez* court enforced the general rule prohibiting an insured's impeachment by insurance defense counsel, and reversed and remanded for a new trial. The court further indicated that "[p]resent defense counsel should withdraw from the case." *Id.* at 1085. Ironically, and assuming there was no spousal collusion, the defense attorney obtained a good result for the insured, inasmuch as the jury returned a defense verdict.

D. The Insured Shares Confidential Information

A lawyer's ethical obligation to maintain client confidences is fundamental to the attorney-client relationship. *See Commonwealth v. Downey,* 793 N.E.2d 377, 381 (Mass. App. Ct. 2003) (branding confidentiality one of lawyers' "highest duties"); *In re Lane's Case,* 889 A.2d 3, 12-13 (N.H. 2005) (stating that "the confidentiality of attorney-client communications serves as the foundation of the attorney-client relationship"); *A v. B.,* 726 A.2d 924, 926 (N.J. 1999) (calling the duty of confidentiality "[c]rucial to the attorney-client relationship"). Confidentiality is necessary because it encourages clients to be candid with their lawyers and to trust them. *In re Disciplinary Proceeding Against Schaefer,* 66 P.3d 1036, 1041 (Wash. 2003). Almost all states have adopted the American Bar Association's Model Rules of Professional Conduct in some form. Model Rule 1.6(a) provides in pertinent part that "[a] lawyer shall not reveal information relating to representation of a client" unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or certain other conditions are met. MODEL RULES R. 1.6(a).

A lawyer with multiple clients owes each an equal and undivided duty of confidentiality. Independent duties to multiple clients may become a problem in the insurance defense context, where a defense attorney must keep both the insurer and the insured informed about the status of the case. Outside counsel guidelines typically require defense attorneys to periodically report to the insurer, to timely report significant case developments, and to report after specified events, such as depositions. If the insured shares confidential information with the defense attorney, can the attorney pass on that information to the insurer? What if the company's guidelines mandate the communication of such information?

A defense attorney certainly cannot develop confidential information in the course of the insured's representation with the intent to benefit the insurer by perfecting a coverage defense.

Unfortunately, few confidentiality issues are that clear. Two situations come immediately to mind: First, an insured shares with a defense attorney confidential information that affects coverage. For example, the insured may confide in the attorney that she intentionally caused the subject harm. Second, the insured shares with the defense attorney confidential information that does not affect coverage, but that likely affects the insurer's defense strategy or settlement decisions. Perhaps the insured abused drugs at relevant times, has a criminal record, or holds inflammatory personal views. In both situations the cooperation clause in the insured' policy arguably requires the insured to communicate the information to the insurer. In both situations the insurer's outside counsel guidelines apparently require the defense attorney to share the information with the insurer. In the latter situation, standard practice does the same.

Assuming a dual client relationship, the defense lawyer must determine whether the confidential information at issue is the kind that the insured might be required to communicate to the insurer under the duty to cooperate. *See* Jill B. Berkeley, *Tripartite Ethics*, THE BRIEF, Spring 1997, at 23, 24. The lawyer also must determine whether the information is such that the insurer would expect to receive in the course of the representation. *Id.* at 24.

If the confidential information falls into either category, the lawyer must explain to the insured the lawyer's relationship with the insurer. The attorney must explain to the insured the significance of the information to the insurer, either as it relates to coverage or as it affects the defense. The attorney must explain to the insured the duty to cooperate and the effect his failure to cooperate may have on coverage or on the insurer's defense obligation. If the information relates to coverage, the lawyer may have to advise the insured to retain separate coverage counsel. In addition to needing immediate coverage advice, the insured will need separate counsel to defend any subsequent coverage action by the insurer. Douglas R. Richmond, *The Business and Ethics of Liability Insurers' Efforts to Manage Legal Care,* 28 U. MEM. L. REV. 57, 104 (1997) [hereinafter Richmond, *Business and Ethics*].

Having fully informed the insured about all possibilities and all consequences of secrecy, the defense attorney may ask the insured for permission to share the information with the insurer. If the insured consents, the defense attorney may divulge the insured's confidences to the insurer. If the insured refuses to consent, the defense attorney must maintain the insured's confidentiality; the attorney cannot share the information with the insurer.

If the insured instructs the defense attorney to maintain confidentiality, the resulting conflict of interest mandates the attorney's withdrawal from the representation. The lawyer cannot continue to represent the insured. The lawyer cannot thereafter represent the insurer in a coverage dispute with the insured, nor can the attorney represent the insurer in a suit against

the insured for the insured's breach of its duty to cooperate. The defense attorney's involvement in the case is over. *Id.* at 104-05.

It does not matter whether the confidential information is detrimental to the insured because it affects coverage, or whether it simply affects the insurer's case evaluation or defense strategy, except as it relates to the lawyer's efforts to persuade the insured to authorize disclosure. If the information affects the insurer's case evaluation or defense strategy, but does not affect coverage, it should be easier for the defense attorney to persuade the insured to authorize disclosure of the information to the insurer. The insured should see the wisdom of cooperating with the insurer to defeat or minimize the third-party claim, even if the information to be revealed may be embarrassing or derogatory. The insured is unlikely to see any value in disclosing information suggesting a potential coverage defense to the insurer for obvious reasons. The insured's instruction to maintain confidentiality seals the defense lawyer's lips without regard for whether the information affects coverage. *Id.* at 105.

Of course, a lawyer may reveal a client's confidential information where it is impliedly authorized to carry out the representation. MODEL RULES R. 1.6(a). If coverage is established, a defense attorney is impliedly authorized to communicate to the insurer information obtained from the insured in confidence to carry out the dual representation. Accepting that as true, is not a defense attorney impliedly authorized to share the insured's confidences with the insurer if that information may shape defense strategy or cause the insurer to settle the case? The answer is yes. If the insured instructs the lawyer to maintain confidentiality, however, implied authority is irrelevant. The insured's specific instruction to keep quiet clearly trumps the attorney's implied authority. Richmond, *Business and Ethics, supra,* at 105-06.

To be sure, an insured's instruction to a defense lawyer to keep information confidential could conceivably lead to absurdity, as one defense lawyer withdraws because of the insured's instruction, only to be replaced by another who must withdraw, and then a third, and so on. In addition, the first lawyer's withdrawal for unspecified reasons seems certain to raise a giant red flag for the insurer, which is bound to conclude that there is a veiled coverage issue requiring investigation. But assuming that the first lawyer's withdrawal hoists a red flag and the insurer's resulting coverage investigation prevents the serial retention and withdrawal of defense lawyers, that is of no concern to the lawyer. It is the insured who is responsible for the situation and no one else.

For lawyers interested in learning more on the duty of confidentiality in the insurance defense context, a recent American Bar Association formal ethics opinion is on-point. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-450 (2008).

E. Punitive Damages are Claimed

Plaintiffs regularly plead their entitlement to punitive damages whether justified or not. Depending on the jurisdiction, a plaintiff's punitive damage claim may create a conflict of interest for insurance defense counsel. *See, e.g.*, *Mobil Oil Corp. v. Md. Cas. Co.,* 681 N.E.2d 552, 561-62 (Ill. App. Ct. 1997).

States are divided on the insurability of punitive damages. Some states prohibit the insurability of punitive damages as a matter of public policy, reasoning that insurance would undermine the goals of punishment and deterrence, or that insurers would unfairly shift the burden imposed by punitive awards to the public through increased premiums. Of those states that generally prohibit the insurability of punitive damages, some make exception for punitive damages awarded solely under vicarious liability principles. *See*, *e.g.*, *Magnum Foods, Inc. v. Cont'l Cas. Co.,* 36 F.3d 1491, 1497 (10th Cir. 1994) (applying Oklahoma law); *Hartford Accident & Indem. Co. v. Am. Red Ball Transit Co.,* 938 P.2d 1281, 1290-93 (Kan. 1997). Other states do not prohibit the insurability of punitive damages. In these states, standard policy language providing that the insurer will pay "all sums which the insured shall become legally obligated to pay as damages" is sufficiently broad to insure punitive damages. *See Shelter Mut. Ins. Co. v. Dale,* 914 So. 2d 698, 701 (Miss. 2005) (discussing Mississippi statute and auto liability insurer's ability to exclude coverage for punitive damages). *But see Heartland Stores, Inc. v. Royal Ins. Co.,* 815 S.W.2d 39, 42-43 (Mo. Ct. App. 1991) (stating that punitive damages were not covered because they were not attributable to "bodily injury" or "property damage"). Intentional acts exclusions do not bar coverage for punitive damages. Insurers wishing to avoid coverage for punitive damages should specifically exclude them, or should define "damages" so as to effectively exclude them.

In states prohibiting the insurability of punitive damages, or where a policy explicitly precludes coverage for punitive damages, an insurer may be thought to have no interest in defending such claims. *See, e.g.*, *Emons Indus., Inc. v. Liberty Mut. Ins. Co.,* 749 F. Supp. 1289, 1298 (S.D.N.Y. 1990). Of course, insureds are vitally interested in avoiding punitive damages. Hence defense counsel's alleged conflict of interest.

A California court considered whether the existence of a punitive damage claim creates a conflict of interest in *Foremost Insurance Co. v. Wilks*, 253 Cal. Rptr. 596 (Cal. Ct. App. 1989). California prohibits coverage for punitive damages as a matter of public policy. The *Wilks* court concluded that the plaintiff's punitive damage claim did not create a conflict of interest, because it was in the insurer's best interest to vigorously defend the underlying suit to avoid liability for

compensatory damages. *Id.* at 602. Although evidence might be developed that the insured acted recklessly or maliciously, thus exposing her to punitive damages, the insurer would not benefit from pursuing such a theory. Ergo, there was no conflict of interest.

Wilks is well-reasoned. Aggravating circumstances or conduct giving rise to punitive damages simultaneously increase compensatory damage exposure. An insurer must therefore vigorously defend aggravated litigation to reduce its potential indemnity obligation to its insured. Accordingly, the mere existence of a punitive damage claim does not create a conflict of interest. A punitive damage claim might create a conflict of interest only if coupled with an allegation that the insured acted intentionally. In that case, however, it is the alleged intentional act that creates any conflict; the punitive damage claim is incidental. *Illinois Municipal League Risk Management Ass'n v. Seibert,* 585 N.E.2d 1130 (Ill. App. Ct. 1992), illustrates this point.

Seibert was a Mattoon, Illinois, police officer sued for allegedly violating a suspect's civil rights. The plaintiff also sued the city and two other officers. The plaintiff alleged that Seibert's conduct was intentional, malicious, willful and reckless, potentially opening the door for a later punitive damage claim. *Id.* at 1132. The Association insured all of the defendants.

The Association informed Seibert that the plaintiff's allegations might support a punitive damage award, which it did not insure, and that he might wish to consult independent counsel with respect to the punitive damage claim at his own expense. The Association also reserved its rights because of other unresolved coverage issues (including malicious or intentional acts). At Seibert's request, the Association hired separate defense counsel for him, i.e., a lawyer separate from counsel representing the other defendants. Seibert also hired his own counsel.

Seibert's private attorney demanded that the Association offer its policy limits to settle the plaintiff's claims against Seibert. He did not explain why he believed a policy limits offer to be reasonable. The Association declined to make such an offer. When Seibert's assigned defense counsel refused the plaintiff's policy limits offer, the plaintiff amended his complaint to add a $5,000,000 punitive damage claim. *Id.* at 1133. Seibert's private attorney then demanded that the Association immediately tender its $3,000,000 policy limit to the plaintiff, agree to indemnify Seibert for any punitive damage award, or hire him to represent Seibert and pay all defense costs.

The Association instead filed a declaratory judgment action. The Association sought a declaration that there was no conflict between it and Seibert, and it therefore had the sole right to appoint defense counsel and control the defense. It also asked the court to declare that it was not obligated to reimburse Seibert for his private attorney's fees. The trial court sustained the Association's summary judgment motion on both points and Seibert appealed.

The *Seibert* court first noted the Illinois rule that "when an insurmountable conflict arises," the insurer loses the right to control the defense. *Id.* at 1135. The conflict must rise to a level from which it appears that the insurer may not vigorously defend a claim against the insured. *Id.* at 1136. The severity of the alleged conduct was debatable.

> The Association . . . argues there is no conflict . . . because each defendant . . . is receiving separate defenses and the counts against Seibert are not mutually exclusive. A finding that Seibert is liable for punitive damages does not necessarily mean [that] no compensatory damages will be awarded, as may be indemnified by the Association.
>
> Seibert contends that although the claims in the complaint are not mutually exclusive, the Association could reduce its liability exposure for compensatory damages while increasing his personal liability exposure for punitive damages. The Association could present a case to a jury which would limit the extent of [the plaintiff's] injuries, or the degree to which the injuries could be attributed to Seibert's actions, while less than vigorously defending the allegations that Seibert acted willfully or maliciously . . . . In addition, the Association could later argue [that] compensatory damages awarded were excluded from coverage if the trier of fact found Seibert's conduct was malicious because the policy provides no protection for such acts.
>
> The Association argues [that] no conflict exists because defending the punitive damages claim without vigor would increase its exposure to liability for compensatory damages.

Id. at 1136-37.

The *Seibert* court concluded that there was an insurmountable conflict requiring the Association to surrender control of Seibert's defense to his private counsel, and to pay for private counsel. Defense counsel appointed by the Association could manipulate Seibert's defense so as to reduce the Association's liability exposure, if not eliminate it all together. Depending on how the case was presented, compensatory damages might be minimal, while a punitive damage award could be staggering. *Id.* at 1138-39. If Seibert's conduct were found to be malicious there would be no coverage at all, because the Association's policy excluded liability for malicious acts. *Id.* at 1139. In short, there was "a conflict between the parties' interests in the way the constitutional claim and the punitive damages claim might be defended." *Id.*

The *Seibert* court reached the right result, albeit by way of detour. Again, the problem was not the prospect of punitive damages, but that defense counsel hired by the insurer could

handle matters so as to affect Seibert's questionable coverage. The plaintiff's punitive damage claim, while threatening to Seibert, simply coincided with a common mixed action problem.

There may be cases in which a plaintiff's compensatory damages are minimal, but the insured's conduct is so outrageous or reckless that it may be exposed to punitive damages. *See, e.g., Nandorf v. CNA Ins. Cos.,* 479 N.E.2d 988 (Ill. App. Ct. 1985) (seeking $700,000 in punitive damages and $5,000 in compensatory damages for false imprisonment). For example, a plaintiff might suffer relatively minor injuries in an automobile accident in which the insured driver was drunk, or an African-American shopper briefly detained by a store's security force because of her race might sue the store for false imprisonment. Here the defendant's insurer need not worry about minimizing compensatory damage exposure because it is already small. The potential for a punitive damage award is of no concern to the insurer because it is not obligated to indemnify the insured for punitive damages. It might therefore be argued that the insurer has no interest in zealously defending the insured, and that because of this conflict of interest the insured is entitled to independent counsel. *See id.* at 992-94.

This argument misses the mark. While it is true that the insurer's provision of a robust defense is no longer guaranteed by its interest in defeating or mitigating compensatory damages, that does not mean that it has no incentive to protect the insured against punitive damages. To the contrary, an insurer that does not zealously defend its insured in this situation will almost certainly be exposed to bad faith liability. The threat of bad faith provides the insurer with all the incentive it needs to protect the insured by way of an aggressive defense. The potential for bad faith liability means that the insurer cannot afford to cut corners or to defend the insured half-heartedly. Accordingly, a defense lawyer hired by an insurer in such a case should face no conflict of interest.

F. Potential Damages Exceed Coverage

Cases in which potential damages exceed available insurance coverage may spawn conflicts of interest. This is especially true if defense counsel believes that a probable jury verdict, and not just the amount pleaded in the plaintiff's *ad damnum* clause or prayer for relief, will exceed coverage.

Conflicts arise when a plaintiff offers to settle within policy limits. *See Lehto v. Allstate Ins. Co.,* 36 Cal. Rptr. 2d 814, 820 (Cal. Ct. App. 1994). As soon as a policy limits offer is made, the insured's interests and those of the insurer diverge. The insured wants the insurer to accept the offer in order to avoid excess liability and potential financial ruin. Such a settlement is not

necessarily in the insurer's best interests. By going to trial, the insurer may escape liability altogether, or obtain a judgment lower than the plaintiff's settlement offer. The insurer might therefore be tempted to gamble with its insured's money. Precisely to avoid this problem, courts imply a duty on insurer's part to settle claims for their insureds' benefit. Defense counsel are frequently caught in the middle.

In *Mid-America Bank & Trust Co. v. Commercial Union Insurance Co.*, 587 N.E.2d 81 (Ill. App. Ct. 1992), the insured's truck struck a teenage boy, causing brain damage. The insured's Commercial Union policy had limits of $50,000 per person and $100,000 per occurrence. The plaintiff's attorney almost immediately offered to settle for policy limits. The offer remained open, but was never accepted. Commercial Union hired defense counsel for its insured. On Commercial Union's advice, and because potential damages exceeded coverage, the insured also hired independent counsel. *Id.* at 82.

Three years later, the plaintiff again offered to settle for $50,000. Insurance defense counsel countered with $30,000, telling the plaintiff to "take it or leave it." Defense counsel did not tell the insured of his $30,000 counteroffer. The plaintiff was offended and withdrew all offers. Six days later, defense counsel offered the $50,000 policy limits to settle, telling the plaintiff's attorney that he always had authority to settle for policy limits. The plaintiff declined to accept the offer and the case was ultimately tried. The jury returned a $911,536.50 verdict for the plaintiff.

The insured then settled with the plaintiff, and assigned his claims against Commercial Union to the plaintiff in exchange for a covenant not to execute. The plaintiff sued Commercial Union for negligence and bad faith in failing to settle the underlying claim. Commercial Union filed a third-party complaint seeking contribution and indemnity against defense counsel. A jury awarded plaintiff $686,536.00, representing the unpaid balance of the underlying judgment. The jury found Commercial Union to be 75 percent at fault, and defense counsel 25 percent at fault.

Because the trial court permitted inadmissible testimony potentially affecting the jury's division of liability, the appellate court remanded the case for retrial on the apportionment of liability only. *Id.* at 85. Nevertheless, both the insurer and defense counsel were held liable for failing to settle the claim. *Mid-America Bank* thus illustrates defense counsel's personal exposure in excess verdict cases.

The court in *Allstate Insurance Co. v. Campbell*, 639 A.2d 652 (Md. 1994), concluded that potential excess liability, standing alone, does not create a conflict of interest requiring the insurer to surrender control of the defense and pay for the insured's independent counsel. *Id.* at

659. The *Campbell* court acknowledged the potential conflict, but observed that the insured's and insurer's interests "are in no way adverse to the extent that exists where coverage is an issue." *Id.* The court concluded that any conflict of interest was mitigated by the insured's ability to later pursue a bad faith claim and recover any excess judgment should the insurer unreasonably refuse to accept a policy limits offer. Absent a separate conflict of interest necessitating the retention of independent counsel for the insured, the insurer retains the right to control the defense of a potential excess verdict case. *Id.* at 659-60.

Campbell is a sound decision. Insurers must vigorously defend potential excess verdict cases to minimize their potential indemnity obligation up to policy limits, and to avoid bad faith liability. The latter factor provides special incentive. The mere possibility of an excess verdict does not create a conflict of interest depriving an insurer of the right to control the defense. *See Littlefield v. McGuffey,* 979 F.2d 101, 108 (7th Cir. 1992) (deciding case under Illinois law).

The fact that the insurer retains control of the defense in a potential excess verdict case does not relieve defense attorneys of certain ethical obligations, however. Generally speaking, defense counsel must make the insured aware that a potential conflict of interest exists, and advise the insured of its right to consult independent counsel regarding any excess liability. *Campbell,* 639 A.2d at 659. Defense counsel must also inform the insurer of any potential excess liability. *See Barney v. Aetna Cas. & Sur. Co.,* 230 Cal. Rptr. 215, 224 (Cal. Ct. App. 1986); *Hartford Accident & Indem. Co. v. Foster,* 528 So. 2d 255, 273 (Miss. 1988); *Boston, Bates & Holt v. Tenn. Farmers Mut. Ins. Co.,* 857 S.W.2d 32, 35 (Tenn. 1993). Both parties can then take the steps necessary to protect their respective interests. Under no circumstances can defense counsel play settlement games. Failure to settle a policy limits case in the pursuit of some personal agenda exposes defense counsel to personal liability. *See, e.g.*, *Mutuelles Unies v. Kroll & Linstrom,* 957 F.2d 707 (9th Cir. 1992) (affirming $2,183,381 malpractice judgment against defense counsel who instructed insurer to reject plaintiff's policy limits offer); *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.,* 587 N.E.2d 81 (Ill. App. Ct. 1992).

The insured in *Ladner v. American Home Assurance Co.*, 607 N.Y.S.2d 296 (N.Y. App. Div. 1994), Dr. Judith Ladner, was a psychologist sued for malpractice. The plaintiffs alleged that Ladner had negligently treated, tested and counseled a patient. They also alleged that she was guilty of sexual misconduct with the patient. Ladner's malpractice insurer, American Home, provided general liability coverage of $1,000,000, but the policy also provided that claims for "erotic physical contact" were subject to a $25,000 limit. *Id.* at 297.

Ladner contended that defense counsel hired by the insurer could not represent her because of her conflict of interest with American Home. Specifically, the policy provisions

governing claims of sexual misconduct made it advantageous for American Home to have all the claims against her linked to sexual misconduct, thus subjecting them to the $25,000 liability limit. The *Ladner* court agreed.

> [C]ounsel for [Ladner] could conceivably decide that the best defense would be to argue that, as a factual matter, the allegations of sexual misconduct were untrue, while less vigorously contesting the allegations of other types of malpractice. Such an outcome would be beneficial to [Ladner], since any damages arising out of the malpractice would in that case be subject only to the $1,000,000 limit, but for the same reason would not be beneficial to [American Home]. Clearly, such tactical decisions should be in the hands of an attorney whose loyalty to [Ladner] is unquestioned and not an attorney employed by [American Home] with a potential for a conflict of interest.

Id. at 298. The court concluded that Ladner was entitled to counsel for her choice to be paid by American Home. *Id.* at 298-99.

Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992), is a somewhat unusual case. In the underlying action, Phillip Bohna was involved in a collision with Anthony Stevens, which left Stevens a brain-damaged quadriplegic. Bohna was only 17 at the time of the accident and he had no significant personal assets. He was, however, insured under his father's Allstate policy with a $50,000 liability limit. Bohna's potential liability was significant, and alcohol apparently contributed to the accident. *Id.* at 750-51.

Under Alaska Civil Rule 82, a prevailing party is awarded attorneys' fees as a matter of course. Rule 82 establishes a fee schedule based on the size of the judgment and the extent to which the suit was contested before the entry of judgment. In catastrophic injury cases in which the insured has coverage with low bodily injury limits, insurers often pay more in plaintiffs' attorneys fees than they do for bodily injury. *Id.* at 748-49. It is in this context that disaster struck the Hughes, Thorsness firm, which Allstate hired to defend Bohna when it could not resolve Stevens' claim before suit was filed.

James Powell, the Hughes, Thorsness lawyer assigned to defend Bohna, offered Stevens' attorney Bohna's $50,000 policy limits. Stevens' attorney, Ray Nesbett, disagreed with Powell on the proper amount of his Rule 82 attorney's fee. Nesbett valued the case at between $3,000,000 and $10,000,000, and insisted that his fee would be 10 percent under the schedule provided by the Rule. Powell believed that the value of the case was lower and that Nesbett's Rule 82 fees would be lower unless the case went to trial. *Id.* at 749. Settlement negotiations then fell through, because Nesbett believed that Allstate had not offered its policy limits.

Powell later suggested to Bohna that he make offers of judgment exceeding policy limits. Powell told Bohna that he could consult with independent counsel at his own expense, and that Allstate would pay his attorneys' fees and costs in a bankruptcy proceeding if he agreed and Stevens accepted an offer of judgment. *Id.* at 749-50. Bohna consulted private counsel, who approved the strategy. Nesbett finally accepted a $3,000,000 offer of judgment on Stevens' behalf. Judgment was ultimately entered in an amount just over $4,600,000. The judgment initially resulted in Allstate paying a total of $167,647.53: the $50,000 policy limits, attorney's fees of $116,897.53, and $750 in costs.

Bohna initiated bankruptcy proceedings roughly one year after the entry of judgment. Nesbett then informed Bohna's bankruptcy attorney that the Stevens judgment might not be dischargeable because alcohol was involved in the accident. Bohna eventually agreed to dismiss his bankruptcy, and sued Allstate and Hughes, Thorsness. Stevens agreed not to execute on the judgment while Bohna's suit against Allstate and Hughes, Thorsness was pending. *Id.* at 750-51.

Bohna sued Allstate and Hughes, Thorsness for negligence, breach of fiduciary duty, and bad faith. Allstate cross-claimed against Hughes, Thorsness, seeking indemnity. A jury returned a $6,139,544.94 verdict for Bohna. The jury found Bohna 15 percent at fault, found Allstate 51 percent at fault, and assessed 34 percent of the fault to Hughes, Thorsness. Bohna's allocation of fault was ultimately reversed and the verdict was reapportioned. Hughes, Thorsness ended up with 60 percent fault, translating into a $2,014,120.30 judgment after application of damage caps. Allstate's indemnity claim against the firm was barred by its own fault.

G. Defense Costs Reduce Available Coverage

Some insureds have what is known as a "defense within limits," "self-liquidating," or "ultimate net loss" policy. This is especially common with in directors' and officers' (D & O) and errors and omissions (E & O) coverage. These policies provide that defense costs (e.g., attorneys' fees) are paid out of policy limits rather than being paid in addition to policy limits via a supplementary payments provision. In other words, defense costs erode or reduce available coverage. An insured is potentially prejudiced every time defense counsel acts, since every dollar the attorney earns in fees reduces the amount of money available to fund settlements or satisfy judgments. *See Edwards v. Daugherty,* 883 So. 2d 932, 942 (La. 2004) (discussing defense within limits policies generally and noting that defense expenditures correspondingly

reduce the insurer's ability to settle or indemnify). In such cases, insurers should timely inform insureds of defense expenditures and the amount of remaining coverage. *See Ross v. Frank B. Hall & Co. of Wash.,* 870 P.2d 1007, 1011 (Wash. Ct. App. 1994). The insurer also has a duty to see that all defense expenditures are reasonable. *See id.*

Does a defense within limits policy in and of itself create a conflict of interest between insured and insurer entitling the insured to a defense by independent counsel? In a word, no. The insurer has no incentive to spend wastefully in defending the insured. The insurer might conduct the defense negligently or imprudently decline to settle—and, in either instance, be held liable to the insured—but these possibilities do not create a conflict of interest. As for steps that a defense lawyer might take to reduce her own risk in the event of an unfavorable outcome, three come immediately to mind. First, the lawyer should explain the implications of a defense within limits policy to the insured. Second, the lawyer should send the insured copies of all bills that the lawyer submits to the insurer. Third, the lawyer should invite the insured to be involved in any decisions affecting defense spending. The lawyer should take these steps even if the insurer is communicating with the insured concerning defense expenditures and their effect on available coverage. Of course, as in matters defended under other types of policies, the lawyer should keep the insured fully informed of case developments.

H. Conflicts Regarding Insureds' Affirmative Claims

An insurer defending its insured generally has no obligation to prosecute counterclaims or third-party claims that the insured may have either as a matter of contract or by virtue of its duty of good faith and fair dealing. *Ramsey v. Lee Builders, Inc.,* 95 P.3d 1033, 1040 (Kan. Ct. App. 2004); *Towne Realty, Inc. v. Zurich Ins. Co.,* 548 N.W.2d 64, 68-69 (Wis. 1996); *Shoshone First Bank v. Pac. Employers Ins. Co.,* 2 P.3d 510, 516-17 (Wyo. 2000). It is still possible, however, for insureds' affirmative claims to spawn disputes, as *Northern County Mutual Insurance Co. v. Davalos,* 140 S.W.3d 685 (Tex. 2004), illustrates.

Davalos was injured in an automobile accident in Dallas County, Texas. He resided in Matagorda County, Texas. He sued the driver of the other car in Matagorda County. The other driver and his wife then sued Davalos and a third party in Dallas County. Davalos turned over the Dallas County litigation to his lawyers in the Matagorda County case, who answered the suit and moved to transfer it to Matagorda County. The attorneys then notified Davalos's insurer, Northern, of the Dallas County suit. Northern responded in writing to Davalos, telling him that it would defend him, that did not wish to hire the lawyers he had selected to defend the Dallas

County case, that it opposed the motion to transfer the Dallas County case to Matagorda County, that it had retained another attorney to defend him in the Dallas County action, and warning him that his coverage might be jeopardized if his personal counsel did not abandon their motion to transfer venue and withdraw. Northern also told Davalos that he was free to retain his personal counsel at his own expense to consult on the Dallas County case, and that Northern's chosen lawyer would cooperate with that lawyer so long as it did not jeopardize the defense. *Id.* at 687. Northern legitimately believed Dallas County to be the proper venue for both actions arising out of the accident. *See id.*

Davalos's lawyers rejected Northern's defense, asserting that the company's offer of a defense was qualified and thus breached the duty to defend, and that Northern could not select defense counsel because its dispute with Davalos over the venue motion created a conflict of interest. Despite Davalos's resistance and the fact that Northern was never allowed to assume the defense, the Matagorda County action was transferred to Dallas County on another party's motion. Northern settled the claims against Davalos that had been asserted in the original Dallas County case, obtaining his full release at the company's sole expense. In the meantime, Davalos sued Northern in Matagorda County, claiming that the insurer had breached its duty to defend the Dallas County action, and alleging that Northern was guilty of bad faith and had violated the Texas Insurance Code. *Id.* at 688.

Davalos's suit against Northern proceeded, with both the trial court and a lower appellate court concluding that Northern had breached its duty to defend and violated the Texas Insurance Code. Northern then sought review by the Texas Supreme Court. *Id.* The supreme court granted review and reversed. *Id.* at 691.

The supreme court rejected Davalos's claim that Northern had improperly conditioned his defense. An insurer's "right to conduct the [insured's] defense includes the authority to select the attorney who will defend the claim and make other decisions that would normally be vested in the insured as the named party in the case." *Id.* at 688. The court recognized that not every disagreement between an insurer and an insured about the conduct of a defense amounts to a conflict of interest; were that the case, the insured, not the insurer, could control the defense merely by disagreeing with the insurer's actions or strategy. *Id.* at 689. Instead, an insured may "rightfully refuse an inadequate defense and may also refuse any defense conditioned on an unreasonable, extra-contractual demand that threatens the insured's independent legal rights." *Id.* Thus, and by way of example, Northern could not have conditioned Davalos's defense on his agreement to dismiss his Matagorda County action. *Id.*

Here, however, the disagreement centered on the appropriate venue for the defense of the third-party action, not Davalos's right to pursue his own remedy.

Northern never deprived Davalos of a defense. Choosing venue is a strategic decision entrusted to defense counsel. "The choice of venue should ordinarily have no impact on the insured's legitimate interests under the policy." *Id.* at 690. While Davalos had the right to reject Northern's offer of a defense because he did not want the case against him defended in Dallas County, he was not entitled to recover the costs of that defense. Northern's offer to defend the Dallas County action satisfied its contractual obligations. Northern did not breach its duty to defend Davalos. *Id.*

The court likewise found that Northern did not violate the Texas Insurance Code. The company's disagreement with Davalos over venue did not render its offer to defend him equivocal. *Id.* at 691.

There is much positive in the *Northern County* decision, but an argument can be made that Davalos was onto something. The court decided against Davalos by reasoning that venue is a matter of convenience. Thus, the consolidation of the two actions in Dallas County would little affect Davalos. But Davalos surely believed that venue is more than a convenience issue. In all likelihood, he believed that Matagorda County was a favorable plaintiffs' venue, or at least more favorable than Dallas County. Therefore, consolidating the actions in Dallas County reduced the likelihood of winning the action in which he was the plaintiff, or diminished the verdict value in that case. From Davalos's perspective, Northern's venue stance *was* an unreasonable demand that threatened his independent rights.

On the other side of the coin, courts are unlikely to credit arguments that one venue is preferable to another for tactical reasons. Judges know that different venues are perceived to favor different sides, but they avoid expressing that in opinions. Additionally, the Dallas and Matagorda County actions were going to be consolidated somewhere. Their consolidation in Matagorda County would have enhanced the other driver's case against Davalos, just as that venue favored Davalos as a plaintiff. (Northern was only obligated to give Davalos's interests consideration equal to its own; it was not obligated to prioritize his interests.) Finally, the supreme court focused on Davalos's interests under his policy with Northern, not on his affirmative claims. That is logical given that the principal issue in the case was Northern's alleged breach of its duty to defend, but that focus foreordained the outcome.

In most cases, a defense lawyer will be able to responsibly defend an insured without compromising the insured's affirmative claims. The defense lawyer should be able to make strategic decisions that account for the insured's interest in success on its affirmative claims.

The insured's personal counsel handling the affirmative claims is sure to advise the defense lawyer of the effect that strategic decisions may have on the insured's affirmative claims. Accordingly, there is no need to deny the insurer the right to select defense counsel. In the unlikely event that defense tactics may adversely affect the insured's affirmative claims, the insurer will in all likelihood defer to the insured's strategic choice simply because doing so avoids allegations of bad faith.

I. Who, or What, Is "Independent Counsel"?

Disputes occasionally surface even where the insured and insurer agree on the insured's right to independent counsel. The issue here is the identification or selection of "independent counsel." The insurer understandably wants the insured to be represented by an able lawyer who is familiar with the subject of the litigation, and who is willing to undertake the representation at an hourly rate (or alternative fee agreement) that the insurer considers reasonable. The insured wants to be represented by a lawyer who is in no way beholden to the insurance company.

There several ways to select independent counsel. For example, the insured could submit a list of preferred lawyers or law firms to the insurer, which then selects one. On the other side of the coin, the insurance company could provide the insured with a list of law firms or lawyers from which the insured then selects one. In any event, the lawyer engaged to be independent counsel for the insured must operate independently of the insurer; the insurer cannot control the litigation. *Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.,* 200 F. Supp. 2d 84, 90 (D.R.I. 2002). Independent counsel must understand that they are loyal only to the insured even though they are paid by the insurer. They cannot provide the insurer with coverage advice. Of course, insurance company staff counsel cannot be appointed as independent counsel. *Id.* One court has indicated that the insurer may select independent counsel for the insured so long as it instructs the firm it appoints to defend the insured to represent the insured only, to direct its efforts exclusively to the insured's best interests, and to avoid any involvement with coverage issues. *Fed. Ins. Co. v. X-Rite, Inc.,* 748 F. Supp. 1223, 1228 n.1 (W.D. Mich. 1990). Other courts, however, are reluctant to allow an insurer to have exclusive control over the selection of independent counsel.

A few states afford the insured the exclusive right to select independent counsel, although this right is tempered by the insured's implied duty of good faith and fair dealing. As the Alaska Supreme Court explained:

> [T]he covenant of good faith and fair dealing in this context requires that the insured select an attorney who is, by experience and training, reasonably thought to be competent to conduct the defense of the insured. Such a result, in our view, fairly balances the interest of the insured—being defended by competent counsel of undivided loyalty—with the interests of the insurer—having the defense of the insured conducted by competent counsel.

CHI of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113, 1121 (Alaska 1993). An insurer has a right to reject independent counsel selected by the insured, provided that it acts reasonably in doing so. *See Center Found. v. Chicago Ins. Co.,* 278 Cal. Rptr. 13, 21 (Cal. Ct. App. 1991).

With respect to compensating independent counsel, an insurer is obligated to pay only reasonable defense costs. *IMC Global v. Cont'l Ins. Co.,* 883 N.E.2d 68, 80 (Ill. App. Ct. 2007); *Nisson v. Am. Home Assur. Co.,* 917 P.2d 488, 490-91 (Okla. Ct. App. 1996). This provides the insurer with some measure of protection against overbilling or over-litigating by independent counsel. *CHI of Alaska, Inc.,* 844 P.2d at 1121. This risk is sometimes significant. *See, e.g., Center Found.,* 278 Cal. Rptr. at 17-18 (detailing gross overbilling by independent counsel selected by insured). Of course, the insurer could have no other obligation, because ethics rules prohibit lawyers from charging or collecting unreasonable fees or expenses. MODEL RULE R. 1.5(a). Lawyers' duty not to charge or collect unreasonable fees or expenses extends to all payors and not just to clients.

Independent counsel are not necessarily entitled to charge insurers their standard hourly rates. *Aquino v. State Farm Ins. Cos.,* 793 A.2d 824, 832 (N.J. Super. Ct. App. Div. 2002). The reasonableness of fees that independent counsel propose to charge must be measured against the factors enumerated in Model Rule 1.5(a). *See, e.g., Mobil Oil Corp. v. Md. Cas. Co.,* 681 N.E.2d 552, 563 (Ill. App. Ct. 1997). The Rule 1.5(a) factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;

> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

MODEL RULES R. 1.5(a). Not all factors apply in all cases.

To the extent an insurance company wants to tie independent counsel's hourly rate to the discounted hourly rate its regular counsel presumably charge, *see Aquino,* 793 A.2d at 832, the third Rule 1.5(a) factor accommodates that approach. The same factor also allows comparison to insurance defense rates in the community as a whole. On the other hand, the rule's sixth element recognizes that independent counsel are unlikely to receive the volume of work from an insurer that panel counsel do, or that is common to insurance defense practice generally, and thus that significant discounting is perhaps inappropriate. Bottom line, the fact that independent counsel charge hourly rates higher than those an insurer typically pays does not alone make independent counsel's rates unreasonable. *Mobil Oil Corp.,* 681 N.E.2d at 563.

Insurers must be reasonable when negotiating hourly rates with independent counsel. If an insurer insists on hourly rates that are unreasonably low or other unreasonable payment terms and a firm otherwise deemed acceptable as independent counsel cannot be retained as a result, there is a risk that a court will treat the insurer's conduct as a breach of its duty to defend. *See, e.g., Rector, Wardens & Vestrymen of St. Peter's Church in the City of Phila. v. Am. Nat'l Fire Ins. Co.,* 97 F. App'x 374, 376-78 (3d Cir. 2004).

In some cases, an insured will have both personal counsel and independent counsel. For example, a commercial enterprise may have regular outside counsel and independent counsel engaged to defend particular litigation. These lawyers may work together on the matter being defended by independent counsel, or the insured's regular outside counsel may advise or direct independent counsel. Whatever the case may be, an insurer has no obligation to pay for the insured's personal counsel. *Bituminous Cas. Corp. v. Zadeck Energy Group,* 416 F. Supp. 2d 654, 660-61 (W.D. Ark. 2005); *Hartford Cas. Ins. Co.,* 200 F. Supp. 2d at 92. The insurer's only obligation is to pay independent counsel. "If the insured chooses to also have representation by personal counsel in a matter that is being handled by [independent] defense counsel, it does so at its own expense." *Hartford Cas. Ins. Co.,* 200 F. Supp. 2d at 92.

IV. The Special Problem of Insured Professionals

Standard policy language grants an insurer the right to settle a claim or suit at its discretion. For insurers, settlements are a cost of doing business. Insurers therefore look at the net costs when evaluating settlement offers. If a case can be settled for less than the cost of defense, or if the chance of a verdict exceeding a settlement offer is significant, sound business judgment often compels the insurer to settle. Of course, non-economic factors may become part of the settlement equation. For example, insurers cannot afford to be viewed as easy marks by the plaintiffs' bar, willing to settle even frivolous claims. Some claims have to be litigated on principle. Even so, insurers' overall focus understandably is on economics.

Insureds, on the other hand, tend to focus on non-economic issues. They may view settlement as an admission of guilt or fault. They often consider settlement offers to be a form of extortion. Inflammatory allegations of wrongdoing by an insured often complicate prospective settlements. Insureds subjected to such allegations routinely want vindication.

This divergence of perspective or opinion is particularly acute when the insured is a professional sued for malpractice. Professionals who are sued for malpractice often consider the very existence of such disputes as wrongful attacks on their professional ability or integrity. A professional may believe that even a token payment in settlement would be, if not immoral, an intolerable admission against interest. A professional's reputation may be damaged by malpractice allegations. A professional's reputation also exists wholly independent of any insurance coverage. Professionals also may have independent business interests that could be harmed by insurers' imprudent conduct in settlement. Medical malpractice settlements may affect a doctor's ability to practice or drive up her malpractice insurance rates. *See Webb v. Witt,* 876 A.2d 858, 866 (N.J. Super. Ct. App. Div. 2005).

As a general rule, an insurer's contractual right to settle as it deems expedient trumps an insured professional's financial or reputational interest. *W. Polymer Tech., Inc. v. Reliance Ins. Co.,* 38 Cal. Rptr. 2d 78, 85 (Cal. Ct. App. 1995); *Shuster v. S. Broward Hosp. Dist. Physicians' Prof. Liab. Ins. Trust,* 591 So. 2d 174, 176-77 (Fla. 1992); *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman,* 978 P.2d 922, 928-29 (Kan. 1999); *Webb,* 876 A.2d at 866-69. This rule respects courts' philosophy that public policy favors settlement over litigation. *See Sharpe v. Physicians Protective Trust Fund,* 578 So. 2d 806, 809 (Fla. Dist. Ct. App. 1991); *Webb,* 876 A.2d at 867. Giving a professional veto power over settlement in the absence of a consent to settle provision in her policy would needlessly consume judicial time and resources, and cause the parties to incur unnecessary expense. *Webb,* 876 A.2d at 867. While a professional may

claim that her malpractice premiums will increase as a result of any settlement, such claims are offset by the equally speculative prospect of an excess verdict, as well as by the likelihood of increased premium costs for all insureds if the insurer's settlement ability is unreasonably circumscribed. *Sharpe,* 578 So. 2d at 808.

Even where a professional's insurance policy vests the insurer with the right to make all settlement decisions, defense lawyers may encounter trouble where they do not communicate with the insured, or where they ignore the insured's instructions or wishes, as in *Rogers v. Robson, Masters, Ryan, Brumund & Belom,* 407 N.E.2d 47 (Ill. 1980). In that case, Dr. James Rogers was insured by Employers Fire Insurance Company ("EFIC"). EFIC's policy provided that the insured's consent to settlement was not required. *Id.* at 48. Dr. Rogers was sued in the underlying action for his alleged negligence in allowing a patient to develop a post-operative infection. EFIC hired the Robson law firm to defend him.

Dr. Rogers repeatedly told defense counsel that he would not consent to settlement and that he wanted the action defended. He was assured that the action would be defended. No one on his defense team suggested to him that EFIC intended to settle the suit. In fact, the defense attorneys negotiated a $1,250 settlement with the plaintiff. Dr. Rogers then sued Robson, Masters for malpractice.

The trial court sustained the defendants' summary judgment motion and the plaintiff appealed. The intermediate appellate court reversed, expressly recognizing that the insurance policy expressly authorized the insurer to settle the underlying action without the plaintiff's consent. It held, however, that when defense counsel learned that settlement was imminent and that Dr. Rogers did not want the case settled, a conflict arose which prevented their continuing dual representation without full and frank disclosure. The court held that by continuing to represent both Dr. Rogers and EFIC without the requisite disclosure, the defense lawyers breached their duty to the doctor and were liable for any resulting loss. *Id.*

The Illinois Supreme Court affirmed the court of appeals. Noting that the doctor was defense counsel's client (as was the insurer), the *Rogers* court concluded that he was entitled to a full disclosure of the insurer's intent to settle without his consent contrary to his express instructions. *Id.* at 49. Defense counsel's duty to make that disclosure stemmed from their attorney-client relationship with the doctor, and was unaffected by the insurer's contractual authority to settle without his consent. The *Rogers* court did not even consider the insurer's contractual right to settle without the plaintiff's consent. *Id.*

Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman, 978 P.2d 922 (Kan. 1999), is another case involving defense lawyers' failure to communicate that grew out of a medical

malpractice action. The professional liability insurance policy in *Miller* expressly granted the insurer the right to settle claims within policy limits when it considered settlement appropriate. For that reason the doctor being sued, Dr. Stephen Miller, could not prevent the insurer from tendering its policy limits in settlement, and the insurer's offer of its policy limits was not an act of bad faith. *See id.* at 928-99.

But the insurer's right to settle as it considered appropriate did not eliminate the defense lawyers' duty to communicate with Dr. Miller. For some unknown reason, Dr. Miller's defense counsel hired by his insurer did not notify him of the settlement hearing, a failure amounting to "a serious breach of fiduciary duty." *Id.* at 931. The defense lawyers escaped liability, however, because Dr. Miller could prove no damages attributable to their breach. *Id.* at 930-31.

Teague v. St. Paul Fire & Marine Insurance Co., 974 So. 2d 1266 (La. 2008), is the most recent case in which defense lawyers hired by an insurer allegedly failed to adequately represent the physician they were hired to defend. Dr. Michael Teague was sued for malpractice and his insurer, St. Paul, assigned his defense to the law firm of Seale, Smith, Zuber & Barnette. Donald Zuber, a partner, and Catherine Nobile, an associate, were responsibile for Dr. Teague's defense. Nobile failed to file a required jury bond and Teague thus lost the right to a jury trial. Neither Zuber nor Nobile informed Teague of this error; indeed, they concealed it from him. They promptly informed St. Paul of the mistake, however. *Id.* at 1269.

The parties' lawyers eventually mediated the case. The defense lawyers never told Dr. Teague about the mediation. As a result of that mediation, St. Paul agreed to settle the case against Dr. Teague for $50,000. Notably, Dr. Teague's insurance policy did not contain a consent-to-settle provision, which would have obligated St. Paul to obtain his consent to settle any claim covered by the policy. When the mediation concluded, Nobile left a message for Dr. Teague telling him that the case had been settled, and the doctor confirmed the settlement in a telephone conversation with Nobile later that day. *Id.*

Dr. Teague called Zuber the next business day and expressed his dissatisfaction that the case—which the doctor considered specious—was settled rather than tried. When St. Paul reported the settlement to the National Practitioner Data Bank, Dr. Teague became upset and sought other counsel. Nobile's error then came to light and the doctor sued the law firm, Zuber and Nobile for malpractice, alleging a litany of wrongdoing. He contended that the defendants' mistakes and misconduct harmed his business reputation, caused his malpractice insurance premiums to increase, contributed to a loss of income, and caused him emotional distress and mental anguish. *Id.* at 1269-70. Dr. Teague later amended his complaint to allege that the

defendants violated Louisiana Rule of Professional Conduct 1.4 by failing to keep him advised of all pertinent developments in his case and by intentionally concealing the fact that Nobile had cost him his right to a jury trial by failing to post the jury bond. *Id.* at 1270.

The legal malpractice case was tried to a jury and Teague won a $138,500 verdict. A lower appellate court reversed the judgment on statute of limitations grounds and Teague sought review by the Louisiana Supreme Court. The supreme court resolved the critical statute of limitations issue in the doctor's favor, but, before doing so, analyzed whether the defendants committed malpractice. This required Dr. Teague to prove the existence of an attorney-client relationship, a breach of duty by the lawyers, and resulting damage. *Id.* at 1272.

It was undisputed that Dr. Teague shared an attorney-client relationship with Zuber, Nobile, and their law firm. Thus, the defendants unquestionably "owed Dr. Teague a fiduciary duty to legally represent him with integrity, skill and due diligence, which encompassed keeping Dr. Teague reasonably informed about the status of his case." *Id.*

The defendants acknowledged that they failed to timely post the jury bond and that they so informed St. Paul but did not tell Dr. Teague. They further admitted that they mediated the case because of Nobile's failure to post the bond. They acknowledged that they informed Dr. Teague of the mediation only after it was conducted and the case was settled. But, they argued, they were not guilty of malpractice because, under St. Paul's policy, they did not need Dr. Teague's consent to settle the case against him. This argument did not impress the court.

> We fail to see how the ability to settle the case under the policy without Dr. Teague's consent lessens the obligations owed by the attorneys to their client. Indeed, it does not. It is most telling that defendants did keep St. Paul apprised of their omission, but yet decided not to inform Dr. Teague of their course of conduct and strategy in his case. Clearly, defendants breached a fiduciary duty . . . by failing to keep him reasonably informed.

Id. After discussing the *Rogers* case, described above, the *Teague* court continued thrashing the lawyers. The court was bothered by the lawyers' dishonesty and by the fact that they favored St. Paul over the doctor.

> Here, Dr. Teague was led to believe that his case would not be settled because the claim against him was very defendable. The issue of settling the case was never discussed. We find this a compelling factor in Dr. Teague's claim of legal malpractice.
>
> In the present case, it is apparent that defendants felt more loyalty to St. Paul than they did for Dr. Teague. If divided loyalties arise during dual representation . . . it must be disclosed in order to avoid injury to the client. Here, by failing to inform Dr. Teague of the loss of a jury trial, which in turn led to the mediation and

> settlement of his case, defendants deprived Dr. Teague of the opportunity of hiring independent counsel to defend him in the malpractice claim against him. This clearly constitutes a claim for legal malpractice. . . .

Id. at 1273.

The court in *Teague* went on to determine that the doctor's legal malpractice claim was not time-barred. It thus reversed the lower appellate court's judgment and remanded the case to that court to consider other alleged errors raised by the defendants. *Id.* at 1278.

Teague is a flawed decision in that the court skipped over the issues of proximate cause and damages in deciding against the lawyers. This is perhaps understandable, given that the principal issue before it was the statute of limitations, but the court's analytic hop is awkward nonetheless. Because Dr. Teague's policy with St. Paul did not contain a consent-to-settle provision, the lawyers' errors either did not proximately cause his damages, or the doctor had no damages. *Id.* at 1278-79 (Traylor, J., dissenting). As the dissent aptly noted:

> There is no disagreement that Dr. Teague's policy did not contain a "consent to settle" clause, which means that the insurer did not have to obtain Dr. Teague's consent to any proposed compromise of a malpractice claim covered by the policy.
>
> Thus, whether the law firm properly filed a jury bond is without effect in this context. The law firm could have filed the jury bond timely and yet subsequently settled the medical malpractice law suit with the same consequences of which Dr. Teague complains in his legal malpractice suit. Due to the clear language of Dr. Teague's malpractice insurance policy with St. Paul, he [was] without authority to contest the compromise of his malpractice claim.

Id. at 1278 (Traylor, J., dissenting) (footnote omitted).

Even assuming that the lawyers should not be held liable for malpractice, however, the opinion does not paint a flattering picture of their conduct. Regardless of the outcome of the malpractice suit, Dr. Teague would have been justified in filing an ethics complaint against them. Zuber and Nobile unfortunately broke The First Rule of Holes—when in one, stop digging. Once Nobile missed the jury bond deadline, she and Zuber needed to inform Dr. Teague of that fact, just as they informed St. Paul. They then should have told him of the plan to mediate his case, rather than concealing that strategy. It is impossible to know what would have happened had they done these things, but it is reasonable to assume that the outcome could have been no worse than it actually was.

Lawyers must always keep insureds informed of all settlement offers and negotiations even if the policy under which the defense is provided grants the insurer the discretion to make settlement decisions. *See* MODEL RULES R. 1.4(a)(3). If the insured objects to a proposed settlement, or instructs the defense lawyer not to settle, the lawyer should explain to the insured the insurer's contractual right to settle. If the insured still resists settlement, the lawyer must communicate that position to the insurer. The insurer is certainly free to engage separate counsel to effect settlement, or to negotiate with plaintiff's counsel on its own. But the defense lawyer cannot participate in the settlement over the insured's objection. If the insurer instructs the defense lawyer to effect the settlement despite the insured's opposition, the lawyer must withdraw from the representation unless the insured relents. Insured professionals can, of course, bypass settlement problems by purchasing policies that obligate the insurer to obtain their consent to settlement, presumably at greater cost. *See Webb,* 876 A.2d at 867.

V. Insurers' Outside Counsel Guidelines

Many insurers employ formal guidelines to manage their relationships with outside counsel. Outside counsel guidelines typically mandate the form and timing of reports to claims personnel; condition, limit or restrict discovery; limit the number of attorneys who may attend depositions, hearings or trials; condition the engagement of expert witnesses; require prior approval for travel; condition or restrict time spent on legal research; and impose budgeting requirements. Attorneys must adhere to an insurer's guidelines, for they form part of the contract between the law firm and the carrier. Outside guidelines replace the negotiation over tasks to be performed, expenses to be charged, etc., that typically characterize new engagements between law firms and corporate clients.

Some defense attorneys view insurers' guidelines as unreasonable restrictions on their professional judgment. At the very least, they see outside counsel guidelines as an unnecessary administrative bother. Some courts have expressed concern that insurers' restrictions on defense lawyers' activities potentially imperil insureds' representations. *See, e.g.*, *Dynamic Concepts, Inc. v. Truck Ins. Exch.,* 71 Cal. Rptr. 2d 882, 889 n.9 (Cal. Ct. App. 1998); *State Farm Mut. Auto. Ins. Co. v. Traver,* 980 S.W.2d 625, 633-34 (Tex. 1998) (Gonzalez, J., concurring in part and dissenting in part). But insurers do not intend outside counsel guidelines to inhibit defense counsel. Insurers never anticipated that their outside counsel guidelines might have ethical or malpractice ramifications for defense counsel; indeed, in some jurisdictions insurers may be vicariously liable for defense counsel's malpractice. *See*

Douglas R. Richmond, *The Insurer's Vicarious Liability for Defense Counsel's Malpractice,* COVERAGE, Sept./Oct. 2002, at 3, 5-7.

From insurers' perspective, outside counsel guidelines serve legitimate purposes. First, they enhance communication with defense counsel. In terms of reporting on case developments, they may guarantee communication. Second, outside counsel guidelines clearly define the scope of the defense attorney's representation. Third, outside counsel guidelines allow the insurer to better control litigation costs. The best way to control defense costs is to monitor the reasonableness and necessity of the tasks performed by defense counsel.

Though defense counsel must honor insurers' reasonable economic restrictions and reporting requirements, insurers' outside counsel guidelines do not trump state ethics rules. As the Texas Supreme Court observed in *State Farm Mutual Automobile Insurance Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998), a lawyer "must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions." *Id.* at 628. Similarly, a California court stated that "[u]nder no circumstances can [outside counsel] guidelines be permitted to impede the attorney's own professional judgment about how best to competently represent" an insured. *Dynamic Concepts, Inc.,* 71 Cal. Rptr. 2d at 889 n.9. Of course, and perhaps most significantly, the Montana Supreme Court rejected insurers' pre-approval requirements in outside guidelines just a few years ago. *See In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures,* 2 P.3d 806, 815-17 (Mont. 2000).

This Section examines those ethics rules that are most likely to be implicated by insurance companies' use of outside counsel guidelines. Those are, in order, Model Rules 1.1, 1.3, 1.4, 2.1 and 5.4.

A. Competence: Model Rule 1.1

Model Rule 1.1 is a fundamental statement of professional responsibility: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES R. 1.1. Competent representation requires analysis of factual and legal elements, and the use of methods and procedures meeting competent practitioners' standards. "Competence" also includes adequate preparation. *Id.* cmt. 5.

Outside counsel guidelines sometimes preclude certain travel or discovery, limit the number of attorneys who may attend certain events, condition attendance at depositions, and condition or limit legal research. Restrictive guidelines often may be circumvented by timely

communication with the insurer, or are deemed inapplicable in predetermined circumstances. Even if guidelines do not include provisions allowing their avoidance in some set conditions, common sense suggests that a defense layer who feels that a requirement may jeopardize her competent representation of an insured should promptly communicate her concern to the insurer. It is a rare insurer that will turn a defense ear to its defense lawyers' concerns. But what if timely communication with the insurer is unrealistic? What if the insurer will not make an exception to the guidelines despite defense counsel's reasonable request?

Rule 1.1 requires defense attorneys to take those actions necessary to competently represent the insured even if they run afoul of outside counsel guidelines. Defense counsel may have to conduct discovery, file motions or research legal issues for which the insurer will not in the first instance pay. An attorney forced to work "free" can, presumably, sue the insurer on a quantum meruit theory to recover for the time spent on tasks for which the insurer unreasonably refused to pay. Another alternative for an attorney who cannot adequately prepare an insured's defense because of an insurer's restrictions is to advise the insured that he is incompetent to handle the case and seek leave to withdraw from the representation. Regardless, defense attorneys must understand and appreciate that "competence" for professional responsibility purposes does not depend on insurers' guidelines, the reimbursement of professional expenses, or the payment of fees.

B. Diligence: Model Rule 1.3

Rule 1.3 is succinct: "A lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES R. 1.3. Rule 1.3 requires an attorney to pursue a matter on a client's behalf despite opposition, obstruction or personal inconvenience. Although Rule 1.3 focuses on attorneys' neglect or failure to timely pursue matters, often accompanied by a lack of communication or false assurances, it directly applies to defense counsel following insurers' guidelines. A defense attorney who unreasonably delays or postpones activities because of outside counsel guidelines may violate Rule 1.3. The same holds true for a defense attorney who does not perform a task because it requires the insurer's advance approval, or because it is impermissible under the insurer's guidelines.

C. Communications: Model Rule 1.4

Model Rule 1.4 governs attorneys' communications with clients. The Rule obligates lawyers to reasonably consult with clients about the means by which the client's objectives are to be accomplished, and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. MODEL RULES R. 1.4(a)(2); *id.* R. 1.4(b). The adequacy of communication with a client depends on the nature of the case or matter. An attorney generally is not permitted to withhold from the client important information affecting the matter for which the attorney is employed. An attorney must always share with a client information related to the client's personal liability. *See, e.g., State ex rel. Okla. Bar Ass'n v. Patmon,* 939 P.2d 1155, 1161 (Okla. 1997) (holding that lawyer violated Rule 1.4 when she failed to notify clients that court might personally sanction them).

Rule 1.4 may require defense counsel to reveal to the insured that the insurer has outside counsel guidelines affecting the insured's defense. If a lawyer knows that the client's objectives in the representation are imperiled, he has a duty to inform the client of relevant facts and related legal implications so that the client may make informed decisions about alternative courses of action. If an insured inquires about outside counsel guidelines, the lawyer must disclose them. The insured is free to review the insurer's guidelines, and to inquire into their effect on the defense. A defense attorney who feels that outside counsel guidelines unreasonably interfere with the insured's defense is obligated to tell the insured.

Must defense counsel disclose the existence of outside counsel guidelines even if they do not affect the insured's defense? Doubtful, so long as the attorney does not withhold the information to serve the attorney's own interests or convenience. Unless outside counsel guidelines affect the nature or quality of the insured's representation, defense counsel have no duty to volunteer the information.

D. Lawyers' Independent Professional Judgment: Model Rule 2.1

A lawyer must use independent legal judgment in all client matters. Lawyers' professional independence is mandated by Model Rule 2.1, which provides in pertinent part: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." MODEL RULES R. 2.1. Although Rule 2.1 is seldom invoked in the insurance defense context, it is a separate, free-standing pronouncement of attorneys' obligation to exercise independent professional judgment in all representations.

If a defense attorney finds that outside counsel guidelines threaten her independent professional judgment, she is ethically bound to inform both the insurer and the insured of the problem. In the improbable event that the insurer will not make an exception to the interfering guideline, or will not otherwise act to resolve the problem, the defense attorney may face unpleasant choices. The lawyer may have to disregard the guideline knowing that she risks the insurer's displeasure, she may have to obtain the insured's consent to an alternative course of action sure to irk the insured, or she may have to withdraw from the representation.

E. Lawyers' Professional Independence: Model Rule 5.4(c)

Rule 5.4 mandates a lawyer's professional independence. Paragraph (c) states: "A lawyer *shall* not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." *Id.* R. 5.4(c). Rule 5.4(c) differs from Rule 2.1 in its specificity. Because Rule 5.4(c) contemplates the situation where someone other than the client pays a lawyer's fees, or where one client pays for another client's representation by their common lawyer, it directly applies to insurance defense counsel.

Depending on the circumstances, Rule 5.4(c) may make outside counsel guidelines irrelevant. The Rule recognizes that defense counsel must make strategic and tactical decisions to best represent the insured, regardless of the insurer's pecuniary interest. Compliance with Rule 5.4(c) may require defense counsel to disregard outside counsel guidelines.

F. Conclusion

There is nothing improper about insurers' use of outside counsel guidelines to manage their relationships with defense counsel. Nor do defense attorneys breach any duties to insureds by striving to obey insurers' outside counsel guidelines. As a client of the defense lawyers it hires, a liability insurer has the right to instruct the lawyers in the defense of the company's insureds. The problem with outside counsel guidelines is that what is fine in theory may prove troublesome in practice. Particular insurance companies or claims handlers may implement guidelines in a way that threatens defense counsel's professional independence, with a derivative effect on insureds' defense. Fortunately, such instances are extremely rare.

Insurers should draft outside counsel guidelines with an eye toward potential conflicts of interest. Guidelines must be sufficiently flexible that defense attorneys can, in fact, exercise

professional judgment in the course of a representation. Defense attorneys must alert insurers to potential problems posed by particular outside counsel guidelines. Attorneys and insurers may modify the obligations imposed by outside counsel guidelines in attorneys' retainer agreements or in subsequent communications affecting the scope of representation.

VI. Objectionable Financial Terms

Several years ago, liability insurers routinely sent defense lawyers' bills to outside legal auditors in an effort to ensure compliance with their billing guidelines. Insurers' use of outside legal auditors posed several professional responsibility concerns—some greater than others. *See* Douglas R. Richmond, *Of Legal Audits and Legal Ethics,* 65 DEF. COUNS. J. 512 (1998). In any event, insurers dramatically decreased their use of outside legal auditors after the Montana Supreme Court rejected the practice in *In re Rules of Professional Conduct & Insurer Imposed Billing Rules & Procedures,* 2 P.3d 806 (Mont. 2000). Insurers have many valid reasons for controlling their legal costs, however, and so they replaced outside legal auditors with software performing many of the same functions. Now some companies have begun asking their firms to help pay for this software. They typically provide in engagement letters that as a condition of doing business with the company the firm must agree to a one percent reduction from the gross amount of each invoice submitted. Participation in such programs is not voluntary. As one company states in its letters: "If there are circumstances that prevent you from participating in this process, we will certainly discuss them with you. If you decide that you do not wish to participate, we will arrange for the orderly transfer of your . . . cases to other counsel." Wash. State Bar Ass'n, Rules of Prof'l Conduct Comm., Informal Op. 2012, at 2 (2003) [hereinafter Wash. Op. 2012]. These fees are sometimes labeled "invoice processing fees." Insurers often say things like: "As you can imagine, the expense related to [discontinuing the use of outside auditors and transitioning to internal software usage] is substantial. We ask that you share a portion of the cost with us." *Id.* Some companies describe these reductions as "volume discounts" or as fees for the "privilege" of doing business with them or for the "privilege" of using their auditing software.

This practice is at best annoying and unfair. Why should lawyers have to pay a company for its voluntary decision to purchase new software? If a company upgrades its voicemail or e-mail systems should its outside counsel bear some portion of those costs? After all, they are sure to have the "privilege" of using those systems when communicating with their client. Moreover, this sort of chiseling erodes a company's relationship with outside counsel.

But some clients are insensitive to these issues or care nothing about them, so the question is whether circumstances prevent lawyers from participating in this practice.

The Washington State Bar Association ("WSBA") concluded in a 2003 informal ethics opinion that insurers' "invoice processing fees" deducted from the gross amount of defense lawyers' bills violates Rule 1.8(e), which generally prohibits lawyers from providing financial assistance to clients in connection with pending or contemplated litigation. Wash. Op. 2012, at 2. The WSBA further concluded that insurers' invoice processing fees violate Rule 5.4(a), which generally prohibits fee splitting with non-lawyers. *Id.* at 2-3. The WSBA probably erred with respect to Rule 1.8(e). This is not the sort of transaction to which Rule 1.8(e) is intended to apply. *See* MODEL RULES R. 1.8 cmt. 10. Rather, the Rule 1.8(e) prohibition on lawyers providing financial assistance to clients in litigation is intended to reduce the prospect of clients filing lawsuits that they might otherwise forego, and to prevent lawyers from obtaining too great of a financial stake in their cases. *See id.*

The tougher issue is whether this arrangement violates the Rule 5.4 prohibition on fee splitting. A good argument can be made that the WSBA got it right with respect to this issue. None of the exceptions to Rule 5.4(a) applies and there is no obvious way around the rule. The approach, to the extent a firm is willing to pay "invoice processing fees," is to say that the fee is simply an addition to any other hourly discount to which the firm has agreed. If, for example, a firm has agreed to discount its fees by twenty-five percent for a regular client, it can argue to disciplinary authorities that it has in fact discounted its hourly rates by twenty-six percent, but that the client simply chooses to account differently for this portion of the reduction. Or, if the client otherwise pays the firm's full rates, simply tacking on this fee is like any other negotiated discount except that it is accounted for differently. There is no doubt that lawyers can agree to discount their hourly rates without violating Rule 5.4(a).

It is possible, of course, that companies imposing such fees have determined that doing so is ethical, as evidenced by their invitation to firms to "discuss" issues that might prevent firms from "participating in this process." It would therefore be reasonable to respond to a client's letter imposing an invoice processing fee this way: "We understand your desire to have our firm share in your cost of implementing new auditing software by way of invoice processing fees. We value your business. We are concerned, however, that disciplinary authorities in our state would view this process as fee splitting in violation of [State Rule of Professional Conduct] 5.4(a). We enclose an opinion from the Washington State Bar Association to this effect. We are sure that you have already considered this issue and, accordingly, we would very much appreciate receiving your analysis, so that we can be prepared to respond to any critics of this

practice." Maybe the company has considered the issue and maybe it hasn't, but at least this statement puts the issue on the table. The insurer should have no objection to the firm presenting the issue; after all, the firm is merely attempting to comply with ethics rules while satisfying its client, and the insurer—like all clients—has an interest in its lawyers practicing carefully and responsibly. (Unfortunately, many in the insurance industry reacted with noticeable hostility when lawyers questioned insurers' use of outside legal auditors.)

VII. Alternative Fee Arrangements

Insurers sometimes limit their defense expenditures by insisting that defense counsel enter into alternative billing arrangements. Chief among these are "flat fee" or "fixed fee" agreements, whereby defense counsel agree to defend certain kinds of cases for a set price. The complexity and duration of the representation are irrelevant. The defense firm receives the pre-established fee no matter how many hours it spends on the representation. For example, a law firm might agree to defend all slip-and-fall cases for a flat fee of $12,500 plus costs.

Insurance companies favor flat fees because they offer great certainty when budgeting claim expenses. Flat fee agreements require attorneys to defend cases efficiently. Flat fees discourage dishonest or inept attorneys from churning files, because attorneys working for a flat fee do not see their income rise with their billable hours.

The problem is that flat fees may create a conflict of interest between defense counsel and insureds because they discourage a zealous defense. Flat fee agreements encourage defense attorneys to do as little work as possible. An attorney who spends sixty hours earning a flat fee practices more profitably than another attorney who spends one hundred hours defending the same type of case for the identical fee. Alternatively, a firm may assign flat fee cases to young associates whose hourly rates are low, such that the firm sacrifices less money per billable hour. Insureds are then defended by less experienced lawyers, while the firm's best trial lawyers work on more profitable matters.

Flat fee agreements between liability insurers and defense counsel have been declared ethically permissible, but these declarations are qualified. For example, the Oregon State Bar Association Board of Governors (OSB) concluded in a 1991 opinion that attorneys may enter into flat fee agreements *so long as* the attorneys do nothing to assist insurers in violating their fiduciary obligations to provide their insureds a competent defense. Formal Op. No. 1991-98, 1991 WL 279200 (Or. State Bar Ass'n Bd. of Governors 1991). The OSB noted that attorneys owe the same duties to flat fee clients that they owe to any other client. If an insurer demands

that an attorney accept a flat fee so low as to compel the conclusion that the company is shirking its duty to defend its insureds, the attorney cannot accept the representation. *Id.* at *1.

Flat fee agreements drew intense scrutiny in *American Insurance Ass'n v. Kentucky Bar Ass'n,* 917 S.W.2d 569 (Ky. 1996). In that case, the Kentucky Supreme Court was presented this issue: "May a lawyer enter into a contract with a liability insurer in which the lawyer or his firm agrees to do all of the insurer's defense work for a set fee?" *Id.* at 569. The Kentucky Bar Association's Board of Governors had answered this question negatively. The court agreed with the Board, reasoning that flat fee arrangements allow insurers to constrain defense counsel by effectively limiting the defense budget. The pressure that an insurer can exert through a flat fee agreement interferes with defense counsel's independent professional judgment, in contravention of what was then Rule 1.8(f)(2). The *American Insurance* court further observed that flat fee agreements potentially violate what was then Rule 1.7(b) because they create a situation whereby the defense attorney's interest in the outcome of the litigation clashes with the attorney's duties to the insured. *Id.* at 572.

Even if an insured's purchase of a liability insurance policy containing provisions giving control of any defense to the insurer constitutes the insured's advance consent to the insurer's defense with counsel of its choice, the insured certainly did not contract for an inadequate defense. In flat fee cases, the lawyer's interests and the insured's interests are not necessarily aligned. The lawyer likely wants to do no more than is necessary to defend the insured. The insured expects a full defense. The insured does not expect that discovery will go undone, or that necessary motions might go unwritten, so that a law firm can maximize its profit.

The insured also expects a full defense by experienced and able lawyers. The law firm defending a flat fee case, on the other hand, is best served by staffing the case either (1) with young associates whose hourly rates are low; or (2) with lawyers who have time available because of professional deficiencies that make them unattractive to other lawyers in the firm who have quality work to distribute. In this way the firm's better lawyers are freed to work on more lucrative matters. Although the associates may be talented young lawyers, in some cases their lack of experience may translate into a less effective defense for the insured. As for a firm's use of under-employed lawyers to staff flat fee cases, why should an insured accept representation by lawyers who are deemed unfit to handle significant matters for the firm's other clients?

Attorneys who question the ethical implications of flat fee agreements need look no further than Model Rule 1.7. Rule 1.7(a)(2) provides that a concurrent conflict of interests exists if "there is a significant risk that the representation of one or more clients will be materially

limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES R. 1.7(a)(2). The rule makes it improper for an attorney to represent a client when that representation would be materially limited by the attorney's responsibilities to another client, or by the attorney's own interests.

Flat fee agreements are clearly within the ambit of Rule 1.7(a)(2). To begin, a lawyer's representation of an insured may be materially limited by the lawyer's flat fee agreement with the insurer. By merely entering into a flat fee agreement, an attorney is arguably subordinating the insured's interest in a zealous defense to the insurer's interest in controlling litigation costs. Thereafter, the lawyer's responsibilities to the insured may be materially limited by the lawyer's own financial interest. The more aggressively he defends the insured, the less money he makes on an hourly basis. Under that view of flat fee agreements, a defense attorney's responsibilities to the insured are *always* materially limited, either by her responsibilities to the insurer, or by the attorney's self-interest.

Flat fee agreements also implicate other ethics rules. For example, Model Rule 1.8(f) prohibits a lawyer from accepting compensation from someone other than the client unless the client consents and the relationship does not interfere with the lawyer's independent professional judgment or the attorney-client relationship. *See id.* R. 1.8(f). Model Rule 5.4(c) provides that a lawyer "shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." *Id.* R. 5.4(c).

It is possible, of course, to structure flat fee agreements so as to make them ethically permissible. The agreement might be written to include terms or conditions that eliminate the danger that the defense lawyer's representation of the insured will be materially limited by the lawyer's responsibilities to the insurer or by his own interests. For example, a flat fee agreement might provide for additional compensation to be paid to the lawyer in certain circumstances or situations, such that the lawyer is not tempted to let tasks go undone for economic reasons. Or, a flat fee agreement might contain an escape clause that allows the parties to proceed on an hourly basis if it reasonably appears that the representation will be more complex or demanding than originally anticipated.

Even if such contractual provisions do not eliminate the possibility of a material limitation on defense counsel's representation of the insured, they may support the lawyer's reasonable belief that the insured's representation will not be adversely affected. Either way, the insured to be defended for a flat fee must be fully informed of the agreement's nature and terms, and must be afforded the opportunity to consent to the representation. *Id.* R. 1.7(b)(4). The lawyer must

explain to the insured the implications of the representation and the advantages and risks involved. *Id.* R. 1.7 cmt. 18. If the insured then consents, the flat fee representation passes ethical muster.

Both insurers and lawyer should shy away from flat fee representations. Insurers should avoid flat fee representations because any perceived savings in defense costs are dwarfed by potential bad faith liability should a defense lawyer lamely represent an insured in the pursuit of profit. An insured who arguably is damaged by an inadequate flat fee defense is sure to allege that the insurer deemed its economic interests paramount, abandoning the insured in the process. An attorney who agrees to work for a flat fee must perpetually fear the compromise of his ethical and professional duties. Every strategic or tactical decision, whether to do something or not do something, potentially presents ethics and malpractice dilemmas.

Having outlined the negatives, there certainly are arguments supporting insurers' use of flat fee agreements and defense lawyers' decisions to enter into them. First, defense lawyers' own economic interests operate as a safeguard; that is, lawyers who enter into flat fee agreements plan successful defenses and budget responsibly before striking an agreement. This may be true on a case-by-case basis, or success may be calculated across a firm's portfolio of flat fee matters. That is, lawyers know that some flat fee cases will be handsomely profitable because little work will be required and others will not be profitable because of their intensity, but they calculate flat fees so as to comfortably ensure that their book of flat fee business as a whole will be profitable. Either way, because lawyers budget for success before entering into flat fee agreements, there is no incentive for them to unfairly economize during any subsequent defense. In short, there is no conflict of interest.

Second, and as for the quality of the defense provided under a flat fee agreement, the insurer never promised the insured a lavish defense: it promised the insured *a defense*. It does not matter if the defense lawyer is young and inexperienced, or whether the lawyer is being dumped on the insured because she is incompetent to do the law firm's other work: so long as the lawyer is admitted to practice in the state, the insured has received the defense to which it is entitled under the policy. It is not up to the insurer to guarantee defense attorneys' ability or competence; that task falls to state bars and to the courts.

This argument fails even assuming that the insurer cannot grasp the link between incompetent (or less competent) defense counsel and increased indemnity payments. Defense attorneys owe insureds a duty of competence. Competent representation of a client requires the lawyer to possess the legal knowledge and skill necessary to handle the matter. Mere passage of a bar examination does not make a lawyer competent.

The best argument in favor of flat fee agreements is simple: insurance defense lawyers should be presumed to be ethical. The insurance defense bar has proven its ability to zealously defend insureds in cases where their interests do not fully coincide with insurers because of coverage issues. Given insurance defense attorneys' commendable record in cases where they might be tempted to favor the carriers who pay their bills, are not those attorneys entitled to a favorable presumption in flat fee cases?

This is a powerful argument. We well know that many lawyers defend insureds pursuant to flat fee agreements and do so effectively and zealously. As someone who for many years was routinely engaged by insurers to defend their insureds, I favor this presumption. Unfortunately, presumptions are only that. Defense attorneys hired by insurers cannot represent insureds in reservation of rights cases where the attorneys can affect coverage through their activities. In such cases, insureds are entitled to representation by independent counsel. Defense attorneys' potential favoritism toward their regular insurance company clients—fueled by financial self-interest—disqualifies them. So must a defense attorney's financial self-interest prevent work under a flat fee agreement, for his financial interest in a flat fee case is at least as powerful as that in an open coverage case, even if the insured's risk is not as great.

Some commentators urge that flat fee agreements are permissible because the problems that arise in the insurance defense context are present whenever a client and attorney enter into a flat fee agreement. In the first-party payor context, as in third-party representations, attorneys working for a flat fee always have an incentive to do as little work as possible to maximize their hourly return; in other words, the client's zealous defense is always at risk. Unlike the client in first-party payor situations, however, the insured does not negotiate the flat fee; she is probably unaware that a flat fee agreement exists. She never gets to weight the risks and benefits of flat fee representation. She has no opportunity to protect his interests either at the outset of the representation or at any time thereafter.

These same commentators deal with the third-party payor situation found in insurance defense by analogizing to criminal defense representations. Assume, for example, that a young man is charged with a serious crime and he cannot fund his own defense. His parents thus pay an attorney their entire life savings to defend their son, leaving them penniless. The defense lawyer, then, is working for a flat fee. With that flat fee comes the usual impediment to a zealous defense; the less the lawyer does, the greater his hourly return. If a flat fee is permissible in this extreme situation, flat fee proponents argue, flat fees are permissible in the relatively low stakes insurance defense context.

The criminal defense situation, however, is distinguishable. First, this hypothetical flat fee may not be ethically permissible if it compromises the son's zealous defense. The amount of money the parents paid and the complexity of the son's case would determine the adequacy of the fee. Second, the son presumably is aware of his parents' financial situation, such that he knowingly enters into the representation. He can either accept the flat fee defense, or decline the representation and proceed with appointed counsel. An insured being defended under a flat fee agreement typically does not enjoy even this limited option. Third, the son paid nothing for his defense and thus had no contractual right to a zealous defense, while an insured pays premiums for liability coverage, including a defense against third-party claims. The insured has contract rights that the hypothetical young man does not. Fourth, because the parents do not share a contractual relationship with the son, they do not owe him a duty of good faith and fair dealing. A liability insurer, on the other hand, owes its insured a duty of good faith and fair dealing that extends to the insured's defense. In short, this analogy is seriously flawed.

In the end, flat fee agreements are so fraught with conflicts of interest that courts are arguably justified in banning them as a prophylactic measure in the third-party context. *Am. Ins. Ass'n,* 917 S.W.2d at 573. *But see* Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205 (1997-98) (stating opposing view). This may well be an overreaction, since it is possible to structure flat fee agreements in ways that make them ethically permissible, and there is no empirical evidence that flat fee agreements have spawned substantial professional responsibility challenges. At the same time, flat fees are an unnecessary aggravation given that insurers can reasonably control their costs in other ways that do not expose them to extra-contractual liability, do not threaten to compromise their lawyers' professional responsibilities, and do not jeopardize their insureds' zealous defense.

VIII. Insurers' Use of Staff Counsel

Liability insurers routinely employ "staff counsel" to defend insureds. Staff counsel generally practice in their own names or in the names of senior lawyers (e.g., Smith & Jones). Staff counsel do not use their names to disguise their insurance company affiliation, but because insurance companies (corporations) cannot engage in the practice of law. The majority of jurisdictions that have considered the issue have held that insurers' use of staff counsel does not constitute the unauthorized practice of law. *Gafcon, Inc. v. Ponsor & Assocs.,* 120 Cal. Rptr. 2d 392, 404 (Cal. Ct. App. 2002); *King v. Guiliani,* No. CV92 0290370 S, 1993

WL 284462, at **2-6 (Conn. Super. Ct. July 27, 1993); *In re Rules Governing the Conduct of Attorneys in Fla.,* 220 So. 2d 6, 7-8 (Fla. 1969); *Coscia v. Cunningham,* 299 S.E.2d 880, 883 (Ga. 1983); *Kittay v. Allstate Ins. Co.,* 397 N.E.2d 200, 202 (Ill. App. Ct. 1979); *Cincinnati Ins. Co. v. Wills,* 717 N.E.2d 151, 160 (Ind. 1999); *In re Allstate Ins. Co.,* 722 S.W.2d 947, 951 (Mo. 1987); *In re Youngblood,* 895 S.W.2d 322, 330-31 (Tenn. 1995); *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.,* 261 S.W.3d 24, 39 (Tex. 2008). It appears that Kentucky and North Carolina are the only states in which staff counsel's defense of third-party actions is always considered to be the unauthorized practice of law. *Am. Ins. Ass'n v. Ky. Bar Ass'n,* 917 S.W.2d 568, 571, 573-74 (Ky. 1996); *Gardner v. N.C. State Bar,* 341 S.E.2d 517, 523 (N.C. 1986).

Insurers long ago moved toward staff counsel to reduce costs. Many insurers have had staff counsel operations in place for decades. Salaried counsel are simply less expensive than outside counsel charging by the hour. Efficient claims handling can also reduce insurers' costs. Theoretically, staff counsel can handle claims more efficiently by learning the particular liability lines the insurer writes, and repeatedly applying that knowledge to claims in volume.

Staff counsel operations are not uniformly welcomed. Outside counsel may feel threatened when a staff counsel office opens, since staff counsel's arrival surely means a reduction in their business. Critics believe that staff counsel are less competent than outside counsel, and that any perceived savings are offset by larger verdicts and settlements in cases handled by staff counsel. Attorneys who become staff counsel would still be practicing on the outside were they successful, critics contend. There is no empirical support for these positions. Indeed, many insurance company staff counsel are accomplished lawyers.

A bigger problem for staff counsel is the perception that they are loyal to their employer, the insurer, and not to the insured. The distrust that causes courts, litigants and many attorneys to believe that insurers always place their own economic interests ahead of their insureds' interests taints staff counsel. This distrust oddly exists despite the fact that there is absolutely no evidence of any injury to private or public interests attributable to staff counsel's representation of insureds. *See Unauthorized Practice of Law Comm.,* 261 S.W.3d at 39.

Courts are seldom called upon to resolve alleged conflicts involving staff counsel. *In re Allstate Insurance Co.,* 722 S.W.2d 947 (Mo. 1987), is one of the few reported cases involving staff counsel. Allstate employed full-time salaried attorneys to defend cases in which coverage was undisputed and claimed damages were within policy limits. The informants argued that a liability insurer could not use staff counsel to defend its insureds without creating conflicts of interest. *Id.* at 951. Observing that both staff counsel and outside counsel were bound by ethics

rules requiring withdrawal if a conflict existed, the Supreme Court of Missouri disagreed. The *Allstate* court reasoned that there was "no basis for a conclusion that employed lawyers have less regard for the Rules of Professional Conduct than private practitioners do." *Id.* at 953.

In *Cincinnati Insurance Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999), the Indiana Supreme Court analyzed Cincinnati Insurance Company's use of staff counsel to defend its insureds. The *Wills* court rejected any suggestion that staff counsel's representation of insureds presents an inherent conflict of interest.

> It is of course true that conflicts may arise in the course of representation of an insured by house counsel. The same is true if the insurer pays for a law firm to represent its insured. In either case there may be a conflict based on coverage disputes, the risk of a claim in excess of policy limits, the acquisition of information from the insured that bears on coverage, or a variety of other items. If such a situation arises retention of new counsel to represent the policyholder may be either preferred or necessary. But this potential does not require the abandonment of a mode of doing business that the insurer finds efficient and cost effective, and the insured knowingly accepts. Presumably ultimately the marketplaces of ideas and premium charges will sort this out and strike a balance between claimed cost advantages and perceived desirability of wholly independent counsel. We find nothing in our Rules of Professional Conduct to prevent the partes from continuing to duke this issue out in those marketplaces without interference from the judiciary. If and when abuses are perceived by policyholders they may seek the aid of the courts or the insurance commissioner. Our point is not, . . . that two wrongs make a right. . . . Rather, it is that the potential for conflict is inherent in the insurer-insured relationship regardless of whether the attorney is house counsel or outside counsel, and the employment relationship is not qualitatively different in this respect.

Id. at 162-63 (citation omitted).

While staff counsel may be subject to pressures from their employer—the insurance company—it is unreasonable to suggest that outside counsel are immune to the same pressures. This is particularly true where the insurer is a significant client. *Id.* at 163. Ultimately, all attorneys are bound to place the insured's interests ahead of their own if a conflict between the insurer and insured somehow develops. An attorney who subordinates an insured's interests to his own or to the insurer's interests is subject to the full range of disciplinary sanctions and civil remedies. This is true without regard for whether the attorney is an insurance company employee, a partner in a firm that depends significantly on an insurer's business, or a lawyer relatively free from direct economic pressure. *See id.*

Unauthorized Practice of Law Committee v. American Home Assurance Co., 261 S.W.3d 24 (Tex. 2008), is the most recent case discussing insurers' employment of staff counsel to defend their policyholders in third-party actions. In that case, the Texas Supreme Court held that an insurer may use staff attorneys to defend its insureds in cases in which the

insured's interests and the insurer's interests are "congruent." *Id.* at 26-27, 39, 46. An insurer's and insured's interests are deemed to be congruent "when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured." *Id.* at 27. Additionally, staff attorneys must fully disclose their affiliation with an insurer to the insureds they are engaged to represent. *Id.* at 45-46.

Of course, the holding in *Unauthorized Practice* raises the question of what constitutes a disqualifying conflict of interest in this context. In other words, when are an insurer's and an insured's interests incongruent? There obviously are many fact-specific scenarios in which that might be the case, but, according to the Texas Supreme Court, there appear to be three situations in which insurers' employment of staff counsel to defend insureds is especially troublesome. First, cases that present "serious coverage" issues are not good candidates for staff counsel representations. *Id.* at 40. Seriousness is not measured by the issuance of a reservation of rights letter, but by the facts. *Id.* Mixed actions and cases in which the damages exceed policy limits are the two most likely sources of disqualifying conflicts. *See id.* (mentioning excess verdict cases). If one of these cases would cause a disqualifying conflict for outside counsel, so, too, should staff counsel be disqualified. Second, staff counsel should be reluctant to represent insureds in cases in which they obtain confidential information that could be used against the insured in some way, most likely to defeat coverage. *Id.* at 40-41. Indeed, the possession of such information is so problematic that it is almost automatically disqualifying, if not clearly so. *Id.* at 42-43. Third, staff counsel cannot defend insureds in a case in which the insurer attempts to compromise or interfere with the staff attorney's independent professional judgment. *Id.* at 43. Interestingly, the court in *Unauthorized Practice* was unwilling to impose a blanket rule forbidding staff counsel from representing insureds in cases defended under a reservation of rights. *Id.* at 40. The court did note, however, that declining representation in reservation of rights cases might be the safer course for staff counsel. *Id.*

In short, there is no reason to believe that insurance company staff counsel uniformly offer insureds a less competent defense, or that counsel are incapable of ethically representing their companies' insureds. Staff counsel are personally responsible for complying with ethics rules. Staff counsel have nearly the same relationship with an insurer that a private practitioner who predominantly represents only one or two insurers does. In both instances the attorney is economically dependent upon a single client. Both attorneys owe their livelihood to an insurer. For conflict of interest purposes, then, there is little difference between many attorneys in private practice and staff counsel. *Nationwide,* 155 S.W.3d at 598.

The problem with staff counsel representation of insureds is largely one of perception. Critics argue that conflicts of interest are more likely to occur when staff counsel are involved in a case because staff counsel's loyalty to the insurer may be far stronger than the loyalty a private practitioner feels. An insurer can apply much greater pressure on its employees than it can on outside counsel. Staff counsel might compromise an insured's defense to benefit the company where outside counsel would not.

It is difficult to evaluate the validity of this perception because it is unsupported by any sort of evidence. Regardless, staff counsel can safely represent insureds in third-party actions so long as insurers adhere to a few basic principles designed to avoid or to ameliorate alleged conflicts of interest. First, staff counsel should not defend insureds in mixed actions or in cases in which claimed damages reasonably appear capable of exceeding coverage. Second, staff counsel must inform the insured that they are insurance company employees. Third, claims representatives must not be allowed to interfere with staff counsel's independent professional judgment. Finally, in any case in which an insured is to be defended under a reservation of rights, staff counsel should carefully analyze whether they should undertake the representation. The safest course is for staff counsel to always decline to defend any case to be defended under reservation, but such a blanket rule may not be realistic. Fortunately, anecdotal evidence suggests that insurers with staff counsel operations adhere to these principles.

IX. Conclusion

Conflicts of interest are an inevitable hazard in the eternal triangle. Insurance defense attorneys can best avoid conflicts by embracing the principle that their sole client is the insured they are hired to defend in any given case. They should reflect this position in their engagement or acknowledgment letters sent to insureds when accepting new matters. Thereafter, defense counsel's only reliable means of avoiding conflicts is to take the approach that their primary duty is to further the insured's best interests. Defense counsel must keep the insured fully informed of all settlement offers, and must keep the insured informed of all general case developments. This is especially true if the defense is being provided under a reservation of rights, or under a non-waiver agreement. Finally, defense counsel must appreciate the confidential relationship they share with the insureds they defend.

If this rudimentary advice seems inadequate, that is because it is. Most insurers expect that they share an attorney-client relationship with the lawyers they hire for insureds. This expectation is generally justified and confirmed by defense attorneys' routine behavior. Defense

attorneys routinely advise insurers on litigation strategy, counsel them with respect to settlement, and offer opinions on legal issues. The dual client doctrine pervades this line of work. In other instances, professional responsibility trouble lurks in the form of insurers' outside counsel guidelines, unreasonable financial constraints, and alternative fee arrangements.

In summary, insurance defense counsel routinely face thorny professional responsibility challenges. To their credit, they meet the vast majority of them.

Case Law Update II:

Negligence, Torts

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I. NEGLIGENCE: GENERALLY

A. Contact Sports Exception

Feld v. Borkowski, 759 N.W.2d 2 (Table), No. 07-1444, 2008 WL 4525837 (Iowa Ct. App. Oct. 1, 2008).

Facts: During a slow pitch softball practice, the plaintiff was struck by an aluminum baseball bat when the bat flew out of the hands of the defendant batter. The plaintiffs brought suit against the defendant under a theory of negligence, invoking the doctrine of res ipsa loquitur. The defendant filed a motion for summary judgment, arguing the case should be dismissed as a matter of law under the contact sports exception. The district court granted the motion, concluding that softball was a contact sport, and there was no evidence of reckless or deliberate conduct by the defendant. The plaintiffs appealed.

Holding: The Iowa Court of Appeals (with Huitink authoring) affirmed, finding the district court properly granted the defendant's motion for summary judgment.

Analysis: *Softball is a Contact Sport.* In *Leonard ex rel. Meyer v. Behrens*, 601 N.W.2d 76 (Iowa 1999), the Iowa Supreme Court adopted the contact sports exception, which provides that personal injury cases arising out of contact sports must be predicated on reckless disregard of safety. In *Leonard*, the Court also determined that paintball was a contact sport. Relying on *Leonard* and its several references to the game of baseball, the Court of Appeals concluded that softball is a contact sport necessitating a "reckless" standard in a negligence case.

Assumption of Risk. The Court of Appeals also concluded that the plaintiff assumed the risk of being hit by a bat when he chose to play softball, as physical contact is a part of the game of softball. The court noted that "[a]n occasional flying bat is part of the 'rough and tumble' of the game of softball. [The plaintiff] subjected himself to this risk when he stepped onto the field as a participant." *Feld*, 2008 WL 4525837, *6.

Reckless Disregard. The Court of Appeals also concluded there was no evidence the defendant acted in reckless disregard for the safety of the other participants. The plaintiffs relied on an expert witness's opinion that the defendant acted recklessly, but the Court of Appeals noted the expert's opinion was based on pure speculation. The defendant was a right-handed batter, but the plaintiff was at first base when he was injured; the plaintiffs' expert opined that in order for a right handed batter to lose control of the bat and for the bat to land at first base, the batter would have had to over swing and get his body out of control. However, in the present case, no one testified that the defendant over swung at the ball, that he used any amount of force inappropriate for a normal swing, that his body was out of control at the time he hit the ball, or that, after he made contact with the ball, he rotated around and flung the bat towards first base. The court found there was "not one scintilla of evidence" that the defendant did anything out of the ordinary when he swung.

NOTE: The Iowa Supreme Court granted further review, and the case was

submitted non-orally to the Court on March 10, 2009. As of the date of this outline, the Court had not issued its opinion.

B. Negligent Supervision

Sweeney v. City of Bettendorf, 762 N.W.2d 873 (Iowa 2009).

Facts: The plaintiff, Tara Sweeney, was injured by a flying baseball bat at a minor league game while on a field trip sponsored by the Bettendorf Parks and Recreation Department. Prior to the field trip, Tara's mother, the plaintiff Cynthia Sweeny, signed a "permission slip" for the field trip. The plaintiffs filed suit against the City and other defendants; their claims against the City were based upon negligence. The parties filed cross-motions for summary judgment. The district court granted the City's motion for summary judgment, finding that the permission slip constituted a valid waiver of the plaintiffs' claims. In the alternative, the district court found that the plaintiffs did not present sufficient evidence to establish a breach of duty owed to them. The plaintiffs appealed.

Holding: The Iowa Supreme Court (5-2, with Appel authoring, Cady dissenting, and Streit concurring in part and dissenting in part) affirmed in part, reversed in part, and remanded.

Analysis: *Permission Slip.* The Court held that the language in the "permission slip" signed by Cynthia Sweeney did not constitute an enforceable anticipatory release of claims against the City for its negligent acts or omissions in connection with the field trip. The permission slip contained no clear and unequivocal language that would notify a casual reader that by signing the document, a parent would be waiving all claims relating to future acts or omissions of negligence by the City. The language of the permission slip only referred to "accidents." "The general language in this permission slip simply does not meet the demanding legal standards of our Iowa cases." *Sweeney*, 762 N.W.2d at 879.

Inherent Risk Doctrine. The Court also rejected the City's reliance on the inherent risk doctrine, whereby the City claimed that the risk of being injured by flying bats and balls when seated outside screening is unavoidable as it is an inherent part of attending a baseball game. The Court held that this case was a negligent supervision case, not a premises liability case, such that the alleged negligence in this case does not relate to the instrumentality of the injury but rather focuses on the proper care and supervision of children in an "admittedly risky environment." The Court found that summary judgment was not proper, though the extent to which an injured party knowingly engages in risky behavior in a negligent supervision case is a factor to be considered by the fact-finder in the context of comparative fault.

Cause in Fact. As to the issue of failure to have adult supervision in close proximity, the City argued direct supervision would not have made a difference. The Court concluded that the alleged breach of duty in this case does not satisfy the "but for" element of proximate cause because the evidence was not

sufficient to allow a reasonable fact-finder to conclude that in all likelihood the injuries Tara suffered would have been avoided if the City had provided direct adult supervision. There was no reason to believe adult supervision would have been avoided if the City provided direct adult supervision. The Court held that the plaintiffs failed to generate a fact question on the proposition that enhanced direct supervision would have provided sufficient warning to Tara to avoid the injuries. The City was entitled to summary judgment as to the plaintiffs' argument that the City breached its duty of care by failing to provide direct supervision of the children once they were seated in the unprotected area of the ball park.

Dissent by Justice Cady. First, Justice Cady opined that the release of liability was valid and prevents the parents from suing here. He also opined that, while the City had a duty to supervise the children throughout the field trip and to generally protect the children from reasonably foreseeable harm, the City had no duty to protect children at the baseball park from the inherent risks of a baseball game as the children sat in their seats watching the game being played. Justice Cady characterized the majority's decision as "overprotective" noting that it will have a significant impact on recreational trips to the ball park. Justice Streit concurred in the majority's opinion as to the release of liability, but joined Justice Cady's dissent as to the duty of care issue.

C. Premises Liability

Koenig v. Koenig, 766 N.W.2d 635 (Iowa 2009).

Facts: The plaintiff, Valerie Koenig, tripped and fell on a carpet cleaner hose at the home of her son, the defendant Marc Koenig. The plaintiff filed a premises liability action against the defendant. She sought a general negligence instruction rather than the uniform jury instruction on the duty of care owed to a licensee. The district court declined to give the general negligence instruction and instead used the uniform jury instruction for licensees. A defense verdict resulted. The plaintiff filed a motion for new trial, again arguing the general negligence instruction should have been given. The district court denied the motion, noting that the stock instructions for premises liability cases remained viable in Iowa and questioning whether the plaintiff could demonstrate prejudice resulted from the use of the uniform instructions. The plaintiff appealed.

Holding: The Iowa Supreme Court (7-0, with Appel authoring and Streit specially concurring) reversed the district court's ruling.

Analysis: *Abolishment of Common Law Distinctions.* After a detailed discussion regarding the development of the common law distinctions, a survey of other states' treatment of the distinctions, and prior case law in which a majority of the Iowa Supreme Court could never agree to abolish the distinctions, the Court abolished the distinctions between licensees and invitees in Iowa law.

General Negligence Standard for Licensees and Invitees. In place of the common law formulation, the Court adopted a multifactor approach set forth by the Nebraska Supreme Court for a duty to exercise reasonable care for the

protection of lawful visitors. "Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be: (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection." *Koenig*, 766 N.W.2d at 645-46 (quoting *Sheets v. Ritt, Ritt, & Ritt, Inc.*, 581 N.W.2d 602, 606 (Iowa 1998) (quoting *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996))).

Prejudicial Error in Instruction. The Court also concluded the error in the instruction given in the instant case was material, requiring reversal. The Court held the instruction improperly shifted the burden of proof from the defendant to the plaintiff to prove that the plaintiff did not know or have reason to know of the condition and the risk involved. The Court held that on remand the district court should use a general negligence standard to define the scope of duty owed by the defendant.

No Effect on Trespasser Distinction. The Court's holding has no effect on the common law trespasser distinction, though in his special concurrence Justice Streit opined that the trespasser distinction should be abolished as well.

NOTE: The practical effect of the *Koenig* case was felt immediately, as attorneys and the district courts struggle to compose appropriate jury instructions in premises liability cases. The uniform jury instructions as to invitees (900.1) and licensees (900.2) will require modification and should no longer be relied upon.

II. NEGLIGENCE: DUTY

A. Failure to Control Use of Property; Negligent Performance of an Undertaking; Landlord/Owner Liability

Ostrem v. Home Opportunities Made Easy, Inc., No. 08-1266, 2009 WL 1492306 (Iowa Ct. App. May 29, 2009).

Facts: When he was ten months old, the plaintiff suffered a right subdural hematoma and bilateral diffuse retinal hemorrhages when his head struck a wall while at an in-home daycare. The incident occurred when the plaintiff grabbed the hair of the nine-year-old son of the day care provider, and the nine-year-old grabbed the plaintiff around the stomach and threw him off. After the plaintiff was injured, his parents learned the day care provider rented the home from Home Opportunities Made Easy, Inc. (HOME), a nonprofit corporation that provides services designed to help low-income individuals in becoming homeowners. The tenants entered into a lease purchase agreement with HOME. The agreement provided, in part, that the tenants would not sublease the property to others or use it for business purposes. The plaintiff filed a lawsuit against

HOME, Inc. alleging general negligence, negligent failure to control the use of property, negligent performance of an undertaking, and premises liability. The district court granted HOME's motion for summary judgment, finding HOME did not owe the plaintiff a duty of care under any of those theories. The plaintiff appealed.

Holding: The Iowa Court of Appeals (with Miller authoring) affirmed.

Analysis: *Restatement (Second) of Torts § 318 – Negligent Failure to Control the Use of Property.* Under the plain language of section 318, a possessor of land must be present on the land before the duty is imposed. The plaintiff relied on a comment to section 318, which implies a duty may be imposed when the activity is being carried on with the possessor's permission. In rejecting this argument, the Court of Appeals found no error in the district court's conclusion that HOME had no ability to control the nine-year-old's actions and did not know of the necessity for such control because the incident was not reasonably foreseeable.

Restatement (Second) of Torts § 324 – Negligent Performance of an Undertaking. The Iowa Supreme Court has adopted this section in the context of negligent inspection cases. As recognized by the Iowa Court of Appeals, liability under this section is imposed only where the services undertaken for another should be recognized as necessary for the protection of a third person. The court agreed with the district court's assessment that HOME did not undertake to render any services to the tenants which it recognized as necessary for the plaintiff's protection.

Landlord/owner liability. As a general rule, a landlord is not liable for injuries caused by an unsafe condition of the premises arising after the property is leased. Where the landlord retains control or has joint control with the tenant, liability may be imposed. The plaintiff argued HOME retained control over the property as the owner and pursuant to its ability to inspect the property and control whether the tenants operated a business on it. The Court of Appeals disagreed, finding that the district court correctly concluded "those facts did not establish that HOME had retained a sufficient amount of control over the property so as to justify imposing a duty on it to keep the premises safe for third persons lawfully on the land." *Ostrem*, 2009 WL 1492306, at *3.

NOTE: The Iowa Supreme Court denied the plaintiff's application for further review.

B. Negligent Infliction of Emotional Distress

Overturff v. Raddatz Funeral Servs., Inc., 757 N.W.2d 241 (Iowa 2008).

Facts: The plaintiff, the estranged widow of Jack Overturff, brought an action against a funeral home alleging negligent infliction of emotional distress, on the basis that the funeral home had a duty to determine her identity and provide her with an opportunity to make decisions regarding the disposition of Jack Overturff's remains but failed to do so. The district court granted the funeral home's

motion for summary judgment. The plaintiff appealed.

Holding: The Iowa Supreme Court (6-0, with Baker authoring and Appel taking no part) affirmed the district court's ruling in favor of the funeral home.

Analysis: The Court found the funeral home owed no duty to the plaintiff. "Absent some physical injury to the plaintiff, emotional-distress damages are allowed only in a few situations where unique circumstances justify the imposition of such a duty on the defendant." *Overturff*, 757 N.W.2d at 245. Although the Court has previously recognized such a claim arising out of the breach of a contract to perform funeral services, the plaintiff could not rely on that factor for the creation of a duty because she did not have a contract with the funeral home. The Court also rejected the plaintiff's argument that the funeral home violated a regulation controlling the funeral service industry which creates a duty; rather the Court found no violation occurred, and thus, the regulation could not be relied upon to create a duty. The Court concluded that the funeral home followed the rules in effect regarding decisions involving the deceased.

C. School District's Duty to Notify Parents of Student's Arrest

Simmons v. Sioux City Cmty. Sch. Dist., No. 08-0822, 2009 WL 1492016 (Iowa Ct. App. May 29, 2009).

Facts: When the plaintiff was a student at East High School in Sioux City, she entered a classroom and confronted and yelled at another student. A police officer working as a school liaison removed the plaintiff from her next class and took her to the principal's office. Shortly thereafter, the police officer arrested the plaintiff for disorderly conduct and took her to a juvenile detention center. The plaintiff was allowed to contact her parents but was unable to reach them. Another family member later contacted the plaintiff's father who secured her release from the facility. No one from the high school contacted or attempted to contact the plaintiff's parents to advise them of her arrest. The plaintiff sued the school district claiming the district was negligent in not notifying her parents that she had been removed from school and detained at the juvenile detention center. The district court granted the school district's motion for summary judgment, concluding it was an undisputed fact that no Iowa statute or administrative regulation required a public school to notify a parent of a student's arrest at school. The court found the plaintiff had not set forth sufficient material facts in dispute showing a genuine issue existed for trial. The plaintiff appealed.

Holding: The Iowa Court of Appeals (with Miller authoring) affirmed.

Analysis: The Court of Appeals recognized a school district has a duty of care toward a student to take all reasonable steps to protect students and to exercise the same care toward students as a parent of ordinary prudence would observe in comparable circumstances. This duty arises when the school district has the care and control of children. However, here, the police officer arrested the plaintiff and from that point on, the plaintiff was not in the "care and control" of the school district, but was rather in the care and control of the arresting officer

and juvenile authorities. The Court of Appeals found no error in the district court's conclusion that under the circumstances in this case, the school district did not have a duty to notify the plaintiff's parents that she had been taken to a juvenile detention facility.

NOTE: The Iowa Supreme Court denied the plaintiff's application for further review.

III. NEGLIGENCE: CAUSATION

Doe v. Cent. Iowa Health Sys., 766 N.W.2d 787 (Iowa 2009).

Facts: The plaintiff, an employee of Central Iowa Health System brought an action against Central Iowa Health System, Iowa Health System, Iowa Methodist Medical Center and Iowa Lutheran Hospital alleging that they unlawfully disclosed his medical and mental health information to the plaintiff's coemployees following the plaintiff's hospitalization after a suicide attempt. The case proceeded to trial on the plaintiff's claim under Iowa Code chapter 228 covering the disclosure of mental health and psychological information. The plaintiff alleged the disclosure caused him severe emotional distress. At the close of the plaintiff's evidence and again at the close of all evidence, the defendants moved for directed verdict, arguing in part, that the plaintiff failed to present substantial evidence that he suffered any emotional distress caused by defendants' employees. The district court denied the motions and submitted the case to the jury. The jury found for the plaintiff and returned a verdict in the plaintiff's favor for $175,000. The defendants filed a motion for judgment notwithstanding the verdict raising the same issues as those raised in the directed verdict motions. The district court granted the defendants' motion. The plaintiff appealed.

Holding: The Iowa Supreme Court (5-0, with Wiggins authoring, and Ternus and Appel taking no part) affirmed.

Analysis: The Court concluded the plaintiff failed to establish that any violation by defendants of chapter 228 caused the emotional distress suffered by the plaintiff. The evidence showed the plaintiff suffered emotional distress prior to his hospitalization. The plaintiff testified that after the unauthorized disclosure of his records, he believed the disclosures caused him to become less social, more introverted and less sexually active. All of the evidence of his emotional distress claim consisted exclusively of his own conclusory statements. He presented no expert witness to testify there was a connection between the unauthorized disclosure of his records and the changes in his behavior. The Court reiterated well-established principles that when the causal connection between the defendants' actions and the plaintiff's injury is not within the knowledge and experience of an ordinary layperson, the plaintiff needs expert testimony to create a jury question on causation. Here, expert testimony was needed. The plaintiff did not articulate at what point in time after the disclosures he became less social, more introverted and less sexually active. He did not testify if these conditions progressed or regressed over time and he did not obtain any medication or treatment to combat these conditions. One of

plaintiff's friends testified the plaintiff was different after his hospitalization, but did not attribute the plaintiff's change in condition to the unauthorized disclosure of his health records. Thus, the Court found the evidence was insufficient to allow a layperson to determine whether the unauthorized disclosures of the records caused the plaintiff's alleged emotional distress. "The jury had no basis upon which to determine if his emotional distress was caused by the unauthorized disclosures of the records or by the preexisting condition that led to his suicide attempt." *Doe*, 766 N.W.2d at 795. The Court concluded: "Doe's bare assertions of causation do not show his theory of causation is reasonably probable-not merely possible, and more probable than any other hypothesis based on the evidence. Accordingly, substantial evidence did not exist to submit the issue of causation to the jury." *Id.*

IV. NEGLIGENCE: DEFENSES

A. Bona Fide Transfer of Interest in Vehicle

Beganovic v. Muxfeldt, 759 N.W.2d 2 (Table), No. 07-1679, 2008 WL 4525512 (Iowa Ct. App. Oct. 1, 2008).

Facts: The plaintiff sustained severe injuries while a passenger in a car driven by her husband following a motor vehicle accident. The other car was driven by Defendant Joshua Muxfeldt. Joshua's father, Lonnie, was also named as a defendant as a co-owner of the vehicle, under Iowa Code section 321.493(1)(a). Three months prior to the accident, Lonnie transferred his interest in the vehicle to Joshua, but because Lonnie was required to co-sign on Joshua's loan, Lonnie signed the vehicle's title as a co-owner. Lonnie previously owned the vehicle through his corporation, but, pursuant to a three-party, three-vehicle transaction at a car dealership, Lonnie traded the vehicle in, and Joshua purchased the vehicle. During an offer of proof, the defendants set forth evidence in support of their position that there had been a bona fide transfer of Lonnie's interest in the vehicle pursuant to Iowa Code section 321.493(2). At the conclusion of the offer of proof, the plaintiffs moved for a directed verdict as to the issue of Lonnie's interest in the vehicle. The district court granted the motion and found as a matter of law that both Lonnie and Joshua were co-owners of the vehicle. The jury returned a verdict in the plaintiffs' favor in the amount of $952,000. The defendants appealed.

Holding: The Iowa Court of Appeals (with Mahan authoring) affirmed.

Analysis: The court noted that the Iowa Supreme Court previously emphasized that courts should discount the effect of the vehicle's registration for purposes of establishing liability. However, upon reviewing the evidence presented in the defendants' offer of proof as well as evidence cited by the plaintiffs to counter defendants' argument, the Iowa Court of Appeals found that the district court correctly determined that a bona fide transfer of interest did not occur. The court stated that the purpose of section 321.493(2) is to avoid the imposition of liability upon the prior owner merely for failing to transfer the title certificate to the new owner. "In the instant case, we are not dealing with a mere defective or incomplete transfer of title. Here, Lonnie knew he had to be a co-owner for

the sale to be approved; signed the motor vehicle purchase agreement; signed the application for new title as an owner under penalty of perjury; attempted to avoid certain tax consequences [by transferring the vehicle through the dealership]; and made damaging admissions after the accident. We conclude this is not the type of situation section 321.493(3) intended to protect." *Beganovic*, 2008 WL 4525512 at *5. On appeal, the defendants also argued that the district court abused its discretion in excluding evidence of the transfer because whether a bona fide transfer occurred was for the jury to determine. The appellate court found the district court did not err in determining as a matter of law that a transfer of Lonnie's interest had not occurred, thus, the court did not abuse its discretion by excluding evidence of the transfer from the jury's consideration.

NOTE: The Iowa Supreme Court granted the plaintiffs' application for further review, and the appeal was submitted non-orally to the Court on March 11, 2009. As of the date of this outline, the Court had not issued its opinion.

B. Immunity

1. *Discretionary Function*

Schneider v. State, 759 N.W.2d 2 (Table), No. 07-0887, 2008 WL 4525565 (Iowa Ct. App. Oct. 1, 2008).

Facts: The plaintiffs, all owners of property near Denver, Iowa, filed a petition against the State alleging negligent design and construction of the U.S. Highway 63 bypass in and around the Denver area caused flooding and resulting property damage. Following heavy rainfall and flooding in the area in May 1999, many properties were damaged. The district court granted the State's summary judgment motion on several grounds, including discretionary function immunity under Iowa Code section 669.14(1). The plaintiffs appealed.

Holding: The Iowa Court of Appeals (with Vogel authoring) affirmed.

Analysis: Although the district court granted summary judgment to the State on several grounds, the Court of Appeals found the discretionary function immunity analysis was dispositive of the appeal.

In determining whether the discretionary function immunity applied here, the court reiterated a two-part test set forth by the United States Supreme Court in *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). The first step requires a determination whether there was an element of judgment or discretion involved in the State's decision regarding the building of the bypass. The Court of Appeals held that without question, an element of judgment or discretion was involved in the design and construction of the bypass. The second step is to determine whether this kind of judgment is the type that the discretionary function immunity was designed to shield from liability. The Court noted this step function as a limitation on the judiciary and prevents judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy. The court concluded that it is

apparent here that the Department of Transportation considered various social, economic, and political policies in choosing to build the bypass and the manner in which it was built. A detailed uncontroverted affidavit addressed the factors that went into the decision to build the bypass. Thus, because both prongs of the *Berkovitz* test were satisfied, the district court properly granted summary judgment to the State on the issue of discretionary function immunity.

NOTE: The Iowa Supreme Court granted further review, and the case was submitted orally to the Court on March 11, 2009. As of the date of this outline, the Court had not issued its opinion.

2. *Domesticated Animal Activities Act*

Baker v. Shields, 767 N.W.2d 404 (Iowa 2009).

Facts: The plaintiff was employed by the defendants as a farm hand. While assisting the defendants in moving two heifers on the farm, the plaintiff was injured when the horse he was riding reared up, throwing the plaintiff to the ground. The horse landed on the plaintiff's leg, causing a serious fracture. The defendants filed motions for summary judgment, relying upon the immunity provision in Iowa Code section 673.2 of the Domesticated Animals Activities Act. The district court granted the motions, and the plaintiff appealed.

Holding: The Iowa Supreme Court (7-0, with Appel authoring) affirmed.

Analysis: Section 673.2 states: "A person...is not liable for the damages, injury or death suffered by a participant or spectator resulting from the inherent risks of a domesticated animal activity." The Court rejected the plaintiff's assertions that the detailed definitions in chapter 673 focus on activities involving participation of members of the general public and not traditional farming operations done by employers. Rather, the Court adopted a broad definition of the term "person" as used in the immunity provision to include all persons involved in a domesticated animal activity, including those arising from traditional farming. The Iowa legislature defines a "person" as an "individual, corporation, limited liability company, government . . . or any other legal entity." Iowa Code § 4.1(20). The Court stated that the legislature made a deliberate choice to use the term "person," which the legislature broadly defined. The Court rejected the plaintiff's position that a broad interpretation of the term "person" would defeat application of workers' compensation laws to employees involved in domesticated animal activities. A claim under chapter 673 is an action for damages, injury or death, while a workers' compensation action provides statutory benefits. The Court noted that claims for workers' compensation benefits filed with the industrial commissioner are not within the scope of the immunity provision of section 673.2.

3. *Sovereign Immunity Under the Iowa Tort Claims Act*

McGhee v. Pottawattamie County, 547 F.3d 922 (8th Cir. 2008).

Facts: Two former suspects (McGhee and Harrington), whose murder convictions had been vacated, brought actions against the county, current county attorney, former county attorney, and assistant county attorney asserting constitutional claims and various torts under Iowa law. McGhee and Harrington argued the county employees used perjured and fabricated testimony and withheld evidence in violation of McGhee's and Harrington's constitutional rights. They also alleged the current county attorney defamed them. The defendants moved for summary judgment based on qualified and absolute immunity. The district court found some defendants were entitled to qualified immunity on certain claims and denied qualified immunity and absolute immunity on the remaining claims. The defendants filed a consolidated interlocutory appeal.

Holding: The Eighth Circuit Court of Appeals affirmed in part and reversed in part.

Analysis: The defendants asserted the district court erred when it waived sovereign immunity for the former county attorney, former assistant county attorney, and current county attorney, arguing they were shielded by the Iowa Tort Claims Act (chapter 669) and/or the Iowa Municipal Tort Claims Act (chapter 670).

Sovereign Immunity as to Former County Attorney and Former Assistant County Attorney. The plaintiffs' state law claims included intentional infliction of emotional distress, loss of parental consortium, and false arrest and imprisonment. These claims were based on allegations that the former county attorney and former assistant county attorney arrested the plaintiffs without probable cause, coerced and coached witnesses, fabricated evidence against them and concealed exculpatory evidence. The Eighth Circuit Court of Appeals found the district court erred in failing to conduct an analysis of the scope of the county attorneys' employment for sovereign immunity purposes distinct from the court's analysis of whether they were entitled to absolute immunity. To determine whether the former county attorneys were entitled to sovereign immunity, the court must look at the duties of the county attorneys as they existed in 1977 and 1978, at the time of the investigations and arrests. A fact question remains however, and requires further record development, as to whether the county attorneys were acting within the scope of their officer or employment during the investigation. If so, the state retains sovereign immunity for the plaintiffs' false imprisonment and false arrest claims, and claims for intentional infliction of emotional distress and loss of parental consortium pursuant to Iowa Code section 669.14(4). The Court of Appeals reversed the district court's denial of sovereign immunity and remanded the matter to the district court for further development of the record and analysis consistent with the court's opinion.

Sovereign Immunity as to Current County Attorney. One of the plaintiffs asserted a defamation claim against the current county attorney for statements made during a press conference at which he announced the plaintiff's sentence would be vacated, but stated the plaintiff had made repeated admissions about being at the scene of the crime. The district court denied the county attorney's

motion for summary judgment based on sovereign immunity. The Court of Appeals stated that the county attorney was acting in his official capacity as a state employee at the press conference when discussing the prosecutions by the state, thus the Iowa Tort Claims Act applied. The Court of Appeals then found the district court erred as a matter of law in denying the motion because the defamation claim is governed by the Iowa Tort Claims Act, which explicitly bars a claim for defamation arising out of libel or slander. *See* Iowa Code § 669.14(4).

Qualified Immunity Does Not Apply to Constitutional Violation. The Court of Appeals found the district court was correct in denying qualified immunity to the former county attorneys for their acts before the filing of formal charges because their acts of obtaining, manufacturing, coercing and fabricating evidence before the filing of the true information constituted a constitutional violation. The actions of a county attorney who violates a person's substantive due process rights are not protected by immunity because such actions are not distinctly prosecutorial functions.

NOTE: The United States Supreme Court granted certiorari on April 20, 2009, and the matter is currently in the briefing process.

4. *Swimming Pool Exemption from Municipal Tort Liability*

Dang v. Des Moines Community School District, No. 08-1578, 2009 WL 1708827 (Iowa Ct. App. June 17, 2009).

Facts: The eleven-year-old plaintiff suffered permanent brain damage after she nearly drowned in a high school swimming pool during a school district-sponsored pool party. The plaintiffs brought suit against the school district, high school, middle school, and the teacher who lifeguarded for the event, alleging failure to properly supervise the children in the swimming pool. The district court granted the defendants' motion for summary judgment, on the grounds that Iowa Code section 670.4(12) exempted the school district and its employee from liability. The plaintiffs appealed.

Holding: The Iowa Court of Appeals (with Miller authoring) affirmed, with a dissenting opinion by Sackett.

Analysis: The Iowa Municipal Tort Claims Act governs this case. Section 670.4(12) provides that no liability shall be imposed under section 670.2 for claims "relating to a swimming pool . . . unless the claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or a criminal offense." The plaintiffs never alleged the defendants acted with actual malice or criminally. However, the plaintiffs argued the exemption in section 670.4(12) should not be read so broadly as to immunize the defendants from liability in a case involving negligent supervision of school children. The Iowa Court of Appeals focused its analysis on the Iowa Supreme Court's decision in *Baker v. City of Ottumwa*, 560 N.W.2d 578 (Iowa 1997), in which the court addressed this specific exemption and rejected an attempt to narrow the statute's focus. While the appellate court here

recognized that a school district is charged with the care and control of children and requires the district court to exercise the standard of care a parent would exercise, the fact that a negligence claim rests on a special duty does not prevent the extinguishment of the claim when statutory immunity has been granted for such negligence. The court concluded the defendants were immunized from liability pursuant to section 670.4(12).

Dissent by Judge Sackett. Dissenting, Judge Sackett stated she does not believe that, in passing section 670.4(12), the Iowa legislature intended to exempt a school district from liability where a child in its care and under its supervision is seriously injured because of the district's failure to adequately care for the child. Judge Sackett also opined that Baker was distinguishable because it involved a claim where a patron placed himself in a swimming pool, whereas here, an eleven-year-old child was entrusted to the school district's care, and the district should have made sure the child had adequate swimming skills and/or adequate supervision.

NOTE: As of the date of this outline, the plaintiffs' application for further review is pending before the Iowa Supreme Court.

C. Statute of Limitations

1. *Dram Shop Action*

Davis v. R & D Driftwood, Inc., No. 08-0833, 2009 WL 606477 (Iowa Ct. App. March 11, 2009).

Facts: On September 1, 2005, the plaintiff was a patron at the defendant's bar when he was assaulted and stabbed multiple times by another patron. The plaintiff alleged his assailant was served alcoholic beverages by the bar to the extent the bar employees knew or should have known the assailant was intoxicated. On January 13, 2006, the plaintiff served a written notice to the defendant's insurance carrier of his intention to bring a dram shop action against the bar pursuant to Iowa Code section 123.92. The plaintiff filed his lawsuit September 12, 2007, which was more than two years from the date of the incident, but less than two years from service of the notice. The defendant bar raised the two-year statute of limitations in section 614.1(2) as a defense. The district court concluded the statute of limitations for the plaintiff's claim expired September 1, 2007; because the suit was filed after that date, the court granted the defendant bar's motion to dismiss. The plaintiff appealed.

Holding: The Iowa Court of Appeals (with Doyle authoring) reversed and remanded.

Analysis: The Iowa Court of Appeals framed the issue as: "When does a dram shop action accrue?" After discussing the purpose of the dram shop act, the court noted that the first step in making a dram shop claim requires the injured party to notify the dram shop or its insurance carrier of his intent to sue under the dram shop statute. The dram shop act does not contain a statute of limitations, thus, the court looks to the general statute of limitations in chapter 614, which provides the time frames in which actions must be brought after their causes accrue. For personal injury claims such as the one here, actions must be

brought within two years. The court stated that since the dram shop statute requires written notice pursuant to section 123.93, without such notice, a person does not have a legal remedy under the statute and does not have a right to institute and maintain suit. Therefore, the court concluded that an action does not accrue until timely notice under section 123.93 is given, and here, the plaintiff served timely notice in January 2006, meaning he properly brought his lawsuit within two years of the date of the timely notice. Consequently, the district court erred in dismissing the case.

NOTE: The Iowa Supreme Court granted further review. The Court heard oral arguments in this appeal on September 1, 2009.

2. *Medical Malpractice*

Rock v. Warhank, 757 N.W.2d 670 (Iowa 2008).

Facts: The plaintiff brought a medical malpractice action against two doctors alleging the doctors failed to diagnose her breast cancer and that their negligence caused the cancer to spread to her lymph nodes. The defendants moved for summary judgment, alleging the plaintiff's action was barred by the two-year medical malpractice statute of limitations in Iowa Code section 614.1(9). The district court granted the motion. The Iowa Court of Appeals affirmed. The Iowa Supreme Court granted further review.

Holding: The Iowa Supreme Court (6-0, with Streit authoring, Ternus and Cady specially concurring, and Baker taking no part) reversed and remanded.

Analysis: This decision is a further continuation of the Court's holdings in *Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008), and *Murtha v. Cahalan*, 745 N.W.2d 711 (Iowa 2008), in which the Court readdressed the medical malpractice statute of limitations and held that the statute of limitations does not begin to run until the plaintiff knew or should have known through reasonable diligence of both the physical or mental harm and its cause in fact. *Murtha* further defined an "injury" for purposes of negligent misdiagnosis, holding that an injury occurs when the problem grows into a more serious condition which poses greater danger to the patient or requires more extensive treatment. Thus, in a negligent misdiagnosis case two questions must be answered: (1) at what stage did the plaintiff's condition become an "injury"; and (2) when did the plaintiff know or should have known of the injury and its cause in fact. In *Rock*, the Court concluded that "when" the plaintiff's injury occurred must be determined by expert testimony and the record in the present case lacked any such evidence because the parties did not have the benefit of *Rathje* and *Murtha* when the summary judgment motions were argued to the district court. However, the Court addressed the question when the plaintiff knew or should have known of her injury and its cause, holding that the plaintiff could not have and should not have known of her injury and its factual cause until, at the earliest, the day she was diagnosed with cancer. The Court also held that common law notions of inquiry notice should not be read into the statute. Because the Court concluded that the record did not establish as a matter of law that the plaintiff could not have known and would not have known, through

reasonable diligence, of her injury (the spread of cancer) and its cause (the misdiagnosis) more than two years prior to the filing of the action, summary judgment was not appropriate.

Special Concurrence by Justices Ternus and Cady. The special concurrence by Ternus and Cady joined in the majority's conclusion that the plaintiff did not know of her injury until she was informed she had cancer, but did "not concur in the gratuitous and inconsistent discussion regarding inquiry notice." *Rock*, 757 N.W.2d at 677.

Wilkins v. Marshalltown Med. and Surgical Ctr., 758 N.W.2d 232 (Iowa 2008).

Facts: The plaintiff brought a medical malpractice action against the defendant medical center for its alleged failure to timely diagnose his prostate cancer. The district court granted the medical center's motion for summary judgment on the grounds that the claim was filed after the expiration of the medical malpractice statute of limitations. Plaintiff appealed.

Holding: The Iowa Supreme Court (6-0, with Appel authoring and Baker taking no part) reversed and remanded.

Analysis: *Statute of Limitations.* The Court found its holding was controlled by its decision in *Rock v. Warhank*, 757 N.W.2d 670 (Iowa 2008). The two-year medical malpractice statute of limitations began to run when the patient was properly diagnosed with prostate cancer. In *Wilkins*, the patient was not informed he had cancer until sometime after August 14, 2002, which was well within two years of commencement of the action. Thus, the claim was not barred as a matter of law by the statute of limitations.

Vicarious Liability. The medical center also argued it should not be vicariously liable for the acts of the emergency room doctors who were employees of another medical clinic that contracted with the hospital to provide emergency room services. The Court held fact issues remained regarding the ostensible agency of the hospital.

D. Statute of Repose

1. *Improvements to Real Property*

St. Paul's Evangelical Lutheran Church v. City of Webster City, 766 N.W.2d 796 (Iowa 2009).

Facts: In 1978, the City of Webster City began a project to upgrade its public water main system. During installation of the water main on St. Paul's property, the City's contractor severed St. Paul's sewer line. In reconnecting the line, the contractor used the wrong material. In 2005—27 years later—sewage backed up into the church. St. Paul's brought a suit against the City to recover damages. The jury found in favor of the church, determining that the water main installation project was not an "improvement to real property" under Iowa Code section 614.1(11). The district court granted the City's motion for

judgment notwithstanding the verdict, finding that the church's damages flowed from one defect in the water main installation project that was an improvement to real property. Thus, the claim was barred by the statute of repose in section 614.1(11). The church appealed.

Holding: The Iowa Supreme Court (7-0, with Streit authoring) reversed.

Analysis: Section 614.1(11) is a statute of repose that bars an action arising out of the unsafe or defective condition of an improvement to real property more than 15 years after the date on which the act that caused the injury occurred. The Court found the negligent reconnection of St. Paul's sewer line was not an "improvement to real property" and the statute of repose in section 614.1(11) does not bar the church's claim. The Court concluded that the negligent reconnection of the sewer line was not part of the project to improve the City's water main (which was an improvement to real property), and the severing and reconnecting of the sewer line does not meet the definition of an improvement to real property as set forth in Iowa case law. As such, the 15-year statute of repose in section 614.1(11) does not bar the church's claim for damages.

2. *Medical Malpractice*

Sant Amour v. Hermanson, No. 07-1869, 2009 WL 778107 (Iowa Ct. App. March 26, 2009).

Facts: In May 1998, the plaintiff developed tinnitus and a complete loss of hearing in her left ear. She saw the defendant doctor for these problems. In November 1998, she again consulted with the defendant doctor regarding hearing fluctuations and continued tinnitus. At a routine physical exam in December 2000 with the defendant doctor, the plaintiff mentioned left ear tinnitus. At a routine physical exam in July 2002 with the defendant doctor, the plaintiff again mentioned left ear tinnitus. In July 2005, the plaintiff experienced a sudden loss of hearing and was referred to a specialist who diagnosed a brain tumor. In December 2006, the plaintiff filed suit against the defendant doctor and his employer alleging negligence. The district court granted the defendants' motion for summary judgment, concluding the two-year statute of limitations and six-year statute of repose barred the plaintiff's claim because the court determined the act or occurrence alleged in the petition occurred in May 1998. The plaintiffs appealed.

Holding: The Iowa Court of Appeals (with Sackett authoring) affirmed in part and reversed in part.

Analysis: *Statute of Limitations.* After the appeal was filed, the Iowa Supreme Court issued its decisions in *Rathje v. Mercy Hosp.*, 745 N.W.2d 443 (Iowa 2008) and *Murtha v. Cahalan*, 745 N.W.2d 711 (Iowa 2008), which clarified the law concerning what triggers the statute of limitations. Because genuine issues of material fact exist concerning when the statute begins to run here, the Iowa Court of Appeals reversed the portion of the district court's ruling granting summary judgment based on the statute of limitations.

Statute of Repose. Iowa Code section 614.1(9)(a) sets forth a six-year statute

of repose that runs from "the date on which the act or omission or occurrence alleged in the action to have been the cause of the injury or death." According to the appellate court, the present case is an example of a plaintiff alleging multiple acts, omissions, or occurrences that constitute negligent care and treatment. In her petition, the plaintiffs asserted examination took place on May 11, 1998, November 3, 1998, December 20, 2000, and July 11, 2002, during which the defendant doctor failed to order or perform appropriate diagnostic tests and evaluations and failed to refer the plaintiff to a specialist. The appellate court found that the 2000 and 2002 acts occurred within the six-year statute of repose. As to all claims prior to December 20, 2000, the court affirmed the district court's grant of summary judgment based on the six-year statute of repose. The court, however, reversed the grant of summary judgment based on the statute of repose as to the plaintiff's 2000 and 2002 claims.

V. NEGLIGENCE: CERTAIN ISSUES IN MEDICAL MALPRACTICE CASES

A. "Bad Result/Injury is Not Negligence" Jury Instruction

Smith v. Koslow, 757 N.W.2d 677 (Iowa 2008).

Facts: Patient's wife, individually and as executor of patient's estate, brought a medical malpractice action against defendant surgeon and medical professional corporation. The patient died during surgery to repair an abdominal aortic aneurism and an iliac artery aneurism. Over the plaintiff's objections, the district court instructed the jury that: "[t]he mere fact that a party was injured does not mean that a party was negligent." *Smith*, 757 N.W.2d at 679. The jury returned a defense verdict. The plaintiff sought a new trial based on error in giving the instruction. The Court of Appeals concluded the district court did not err in instructing the jury. The Iowa Supreme Court granted further review.

Holding: The Iowa Supreme Court (3-2, with Cady authoring, Hecht and Wiggins dissenting, and Appel and Baker taking no part) affirmed, concluding the district court did not err or abuse its discretion in instructing the jury.

Analysis: *"Bad Result/Injury is Not Negligence" Instruction.* The Court noted it was faced with an issue of first impression as to the propriety of submitting the specific proposition to the jury in the form of an instruction. The instruction given was based on the uniform jury instructions authored by a special committee on uniform court instructions of the Iowa State Bar Association. The Court found that submission of the "bad result/injury is not negligence" instruction to a jury in a standard medical malpractice action would not normally constitute prejudicial error as it is a correct statement of the law. The Court continued: "We recognize, however, the instruction could constitute reversible error in a particular case if it would unduly emphasize a particular theory or otherwise distract the jury in performing its responsibilities to decide the issues in the case." *Smith*, 757 N.W.2d at 681. Based on the evidence presented in this case, however, the Court concluded the district court did not err by giving the instruction.

Dissent by Justice Hecht. Justice Hecht, joined by Justice Wiggins, opined that the district court committed reversible error in giving the instruction because it gratuitously affirmed the central premise of the doctor's defense. Justice Hecht believes the instruction potentially communicated to the jury the notion that the court doubted the treatment provided by the doctor fell below the relevant standard of care, and the instruction could be understood by a juror as a backhanded comment on the evidence.

B. Expert Witness Qualifications

Smith v. Haugland, 762 N.W.2d 890 (Iowa Ct. App. 2009).

Facts: The plaintiffs filed a medical malpractice action seeking damages arising from complications suffered by Plaintiff Louetta Smith after surgical treatment for benign premature ventricular contractions (PVCs), which are irregular or extra heartbeats. The plaintiffs claimed the defendant doctor failed obtain informed consent and failed to pursue a more conservative course of treatment. In support of their claims, the plaintiffs relied on their expert witness, a cardiologist who specialized in nuclear cardiology and had experience regarding the treatment of benign PVCs. During an ablation procedure, the defendant doctor perforated Louetta's right ventricular wall, necessitating emergency cardiac surgery. Louetta suffered a lack of oxygen to her brain and two strokes resulted. She was placed in intensive care for 18 days and was later transferred to a rehabilitation unit. Both plaintiffs testified about the surgical complications and their impact on Louetta's life. The jury found the defendant doctor and his medical group were negligent, and awarded the plaintiffs $1.6 million in damages. The district court denied the defendants' motion for new trial. On appeal, the defendants argued the court erred in its ruling that the plaintiffs' expert was qualified to testify as to the appropriate standard of care.

Holding: The Iowa Court of Appeals (with Potterfield authoring) affirmed.

Analysis: *Expert Witness Qualifications.* The defendants argued the plaintiffs' expert was not qualified under Iowa Code section 147.139 to give an opinion on the standard of care governing the type of treatment for benign PVCs. Specifically, the defendants argued the plaintiffs' expert was not an electrophysiologist and could not offer an opinion as to the standard of care of an electrophysiologist. The Court of Appeals disagreed, stating that if the case had been about whether the ablation had been performed negligently, the defendants' argument might have merit; however, the plaintiffs' case did not focus on that issue. "As the district court repeatedly clarified, the issue for the jury did not involve the manner in which the ablation was performed. Rather, the question was whether the ablation was an appropriate treatment choice for Louetta's benign PVCs and whether she gave an informed consent for that treatment." *Smith*, 762 N.W.2d at 899. The court concluded the district court did not abuse its discretion in allowing the plaintiffs' expert to testify because the expert was a board-certified cardiologist who was also board-certified in nuclear cardiology, and he testified that he frequently treated patients with benign PVCs and that he had referred patients for ablation treatment. He was thus qualified to testify as to the appropriateness of the treatment options available to Louetta and

whether she gave informed consent for the procedure.

Alleged Misconduct by Plaintiffs' Counsel. During closing arguments, the plaintiffs' counsel made a statement regarding the importance of the case to the community. The defendants argued the statement constituted prejudicial misconduct requiring a new trial. The Court of Appeals found that counsel's argument was not so impassioned and inflammatory that it likely caused prejudice.

Excessiveness of Verdict. The defendants also argued a new trial was warranted because the damages awarded were excessive. Upon reviewing the evidence presented, the Court of Appeals stated: "The verdict in this case, although large, does not shock the conscience or go beyond the evidence. We are not willing to disturb the finding of the jury." *Smith*, 762 N.W.2d at 901.

C. Res Ipsa Loquitur Jury Instruction

Banks v. Beckwith, 762 N.W.2d 149 (Iowa 2009).

Facts: The defendant doctor surgically inserted a catheter in the plaintiff for the purpose of delivering chemotherapy to the plaintiff. It was later discovered that the catheter fractured and a piece of it migrated to the plaintiff's heart, requiring open-heart surgery. The plaintiff brought a medical malpractice action against the defendant doctor and defendant medical practice. At trial, the plaintiff requested the district court instruct the jury on the doctrine of res ipsa loquitur. The district court determined the instruction was not warranted and the case was submitted to the jury only on the issue of the specified negligence of the defendants. A defense verdict resulted. The plaintiff appealed. The Court of Appeals affirmed, and the plaintiff sought further review.

Holding: The Iowa Supreme Court (7-0, with Baker authoring) reversed and remanded.

Analysis: The Court found that a res ipsa instruction was warranted based on the evidence, and the district court's refusal to so instruct was prejudicial to the plaintiff. To submit a case on the theory of res ipsa loquitur ("the thing speaks for itself"), "the plaintiff must present substantial evidence that: (1) the injury was caused by an instrumentality under the exclusive control and management of the defendant, and (2) that the occurrence causing the injury is of such a type that in the ordinary course of things would not have happened if reasonable care had been used." *Banks*, 762 N.W.2d at 152. When the doctrine is used in a medical malpractice case, the plaintiff is relieved of the burden of proving specific acts of negligence were below accepted medical standards but the plaintiff must still convince the jury that the injury would not have occurred absent some unspecified but impliedly negligent act. Based on the testimony of one of the plaintiff's experts, the Court held that the plaintiff presented substantial evidence that fracture of the catheter does not happen in the ordinary course of events without negligence. The refusal to submit the instruction was prejudicial to the plaintiff; because the plaintiff could provide no evidence of specific negligent, he had no means of proving fault. The Court remanded the case for a new trial for application of the res ipsa loquitur

doctrine.

VI. OTHER TORTS AND THEORIES OF RECOVERY

A. Battery; Negligent Supervision

Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist., 759 N.W.2d 812 (Table), No. 07-1328, 2008 WL 4724739 (Iowa Ct. App. Oct. 29, 2008).

Facts: Plaintiff Jeremy Brokaw was a starting guard for Iowa Mennonite School during a varsity basketball game against Winfield-Mt. Union Community School District (WMU). Defendant Andrew McSorley was a starting guard for WMU. During the game, McSorley struck Brokaw in the head with his elbow, causing Brokaw to fall to the floor. Brokaw and his parents filed a petition against McSorley for assault and battery and against WMU for negligent supervision of McSorley. Following a trial, the district court found the plaintiffs proved McSorley committed a battery and awarded damages for out of pocket medical expenses ($13,000), loss of function to the mind and body ($5,000), and physical and mental pain and suffering ($5,000). The court denied the plaintiffs' claim for punitive damages against McSorley. The court also found the plaintiffs failed to prove WMU was negligent in supervising McSorley and dismissed the claim for negligent supervision. The plaintiffs appealed and WMU cross-appealed.

Holding: The Iowa Court of Appeals (with Eisenhauer authoring) affirmed.

Analysis: **PLAINTIFFS' APPEAL:**

Battery against McSorley. (1) Compensatory Damages. As for their claim for compensatory damages, the plaintiffs argued the court's damage award was not adequate. The Court of Appeals concluded substantial evidence supported the district court's findings of fact relating to Brokaw's damages because the plaintiffs failed to prove by a preponderance of the evidence that all of the injuries Brokaw complained of and the attendant medical expenses were attributable to McSorley. In a time frame following the basketball game, Brokaw slipped and fell on ice, and then was later struck in the head by a baseball. (2) Punitive Damages. The Court of Appeals also concluded substantial evidence supported the district court's ruling on the punitive damages issue. The district court found the elbow was not thrown with great force and was not brutal substantial physical action. The Court of Appeals noted the act occurred during the course of a heated basketball game and was a "split-second" decision. McSorley's conduct did not rise to the level warranting punitive damages.

Negligent Supervision. The plaintiffs argued WMU violated its duty to supervise McSorley because it was reasonably foreseeable that McSorley was likely to commit a battery against a player due to his past conduct. On the contrary, the district court found that no witness testified McSorley ever exhibited aggressive or assaultive behavior and did not have a reputation for being an aggressive player. The Court of Appeals found substantial evidence supported the district court's findings. Because WMU could not reasonably foresee that McSorley

would commit a battery during the game, the school district did not breach any duty to Brokaw.

DEFENDANT'S CROSS-APPEAL:

Prior to trial, the district court denied WMU's motion for summary judgment, in which the school district argued: (1) there was no cause of action at common law arising from mere negligence against a school district for injuries sustained in an assault between sports participants during the course of a sporting event, and (2) the school district was entitled to discretionary function immunity under Iowa Code section 670.4(3). In its cross-appeal, WMU contends the district court erred in denying its motion for summary judgment. The Court of Appeals affirmed the denial of summary judgment.

Cause of Action. As to whether the plaintiffs' had a valid cause of action, the court noted that based upon the special relationship between a school and its students, claims against a school district based on its own negligence may be pursued.

Discretionary Function Exception. The court also concluded the school district was not immune from liability under the discretionary function exception because the question whether McSorley should have been removed from the game was a matter of choice, but the judgment involved was not the kind the discretionary function exception was designed to shield. The exception protects government action and decisions which are made based on considerations of public policy grounded on social, economic or political reasons. Such policy considerations are not involved in the decisions made by a teacher supervising a class or to referees and coaches supervising a sporting event.

NOTE: The Iowa Supreme Court granted further review, and the case was submitted non-orally to the Court on March 11, 2009. As of the date of this outline, the Court had not issued its opinion.

B. Bystander Liability: Negligent Infliction of Emotional Distress

Moore v. Eckman, 762 N.W.2d 459 (Iowa 2009).

Facts: Anthony Moore was sitting on the trunk of a car that Nicole Eckman was driving. When Eckman drove her car forward, Anthony fell off the back of the car resulting in head injury and ultimately his death. His mother, Carole Moore, was not at the scene and did not witness her son fall off the car and hit the pavement; however, she arrived at the scene immediately after the accident and found Anthony lying in the street, unattended, and seriously injured. The plaintiffs, Anthony's parents, filed a negligence claim against Eckman and her parents, as well as the underinsured motorist carrier. Specifically at issue in this appeal was Carole Moore's bystander liability claim for negligent infliction of emotional distress. The underinsured motorist carrier filed a partial motion for summary judgment requesting dismissal of Moore's bystander claim because Carole Moore did not witness the accident itself. The district court

denied the motion, and the carrier filed an application for grant of appeal in advance of final judgment and stay of proceedings pending the appeal.

Holding: The Iowa Supreme Court (7-0, with Baker authoring, and Wiggins specially concurring) reversed and remanded.

Analysis: The Court held that summary judgment in favor of the carrier on the bystander liability claim should be granted because the elements of bystander liability were not satisfied as to Moore's claim. In *Barnhill v. Davis*, 300 N.W.2d 104, 106 (Iowa 1981), the Iowa Supreme Court first recognized the claim of bystander liability, which allows a claim for emotional distress as a result of an injury to another. One of the elements of such a claim is that the emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, rather than learning of the accident from others after its occurrence. The Court reiterated its holding from *Fineran v. Pickett*, 465 N.W.2d 662 (Iowa 1991) that family members who did not actually witness the accident are not entitled to emotional distress damages. The Court stressed that contemporaneous observance of the accident is a requirement under Iowa case law. As Moore did not observe her son's fall from Eckman's trunk, she could not recover emotional distress damages based on bystander liability.

NOTE: It is foreseeable this issue will present itself to the Court again, in a slightly modified form. According to Justice Wiggins's concurrence, he specially concurred in the result only because Carole Moore argued that existing Iowa case law permitted her bystander claim, "rather than urge we extend our holding in bystander liability cases to include persons who come on the scene of impact after the impact occurred and before the injured party is removed." *Moore*, 762 N.W.2d at 463.

C. Defamation

Brummett v. Taylor, 569 F.3d 890 (8th Cir. 2009).

Facts: Several employees of Titan International, Inc. filed a state court defamation action against Titan's president, Taylor, in connection with statements he made at a press conference during which he announced Titan was filing a RICO lawsuit against the employees. The case was removed to federal court. The district court granted summary judgment in favor of Taylor. The Eighth Circuit Court of Appeals reversed and remanded. On remand, the district court granted Taylor's motion for judgment as a matter of law, finding there was insufficient evidence of injury to the plaintiffs' reputations and insufficient evidence that Taylor made the statements in question "of and concerning" each plaintiff. The employees appealed.

Holding: The Eighth Circuit Court of Appeals affirmed.

Analysis: To establish a prima facie case of defamation in Iowa, each plaintiff must prove Taylor (1) published a statement that was (2) defamatory (3) of and concerning the plaintiff. *Brummett*, 569 F.3d at 892 (citing *Ball v. Taylor*, 416 F.3d 915, 917

(8th Cir. 2005)). This appeal addressed the third element in the context of a general statement about a large group of people that would be defamatory if directed at an individual person. The Eighth Circuit agreed with the district court that the plaintiffs presented insufficient evidence to establish that anyone in Taylor's audience understood the individual plaintiffs to be the object of his statements. The record was clear that the plaintiffs were among those intended to be the object of Taylor's statements, but there was not evidence to support a finding that any of the recipients of Taylor's statements understood each individual plaintiff to be the intended object of his statements.

D. Interception of Electronic Communications

Phi Delta Theta Fraternity v. State, 763 N.W.2d 250 (Iowa 2009).

Facts: A disgruntled college student who was denied membership into the Iowa Beta Chapter of Phi Delta Theta Fraternity because he was unable to obtain the minimum grade point average established by the fraternity, clandestinely recorded an alleged hazing incident that occurred in the subbasement of the fraternity house. The University of Iowa, including its president for student services and the dean of students, Phillip E. Jones, relied upon the digital tape recording to file charges against the fraternity for alcohol and hazing violations. The hazing charges were later dropped, but Jones imposed sanctions on the fraternity for the alcohol violation admitted by the fraternity. Administrative proceedings commenced, during which University officials admitted they relied on the digital tape recording. The fraternity later filed suit against the State, the University, and several individuals, alleging the defendants used the audiotape in violation of Iowa Code chapter 808B, Interception of Communications. After a bench trial, the district court found in favor of the fraternity, and held that the State, the University and Jones violated chapter 808B. The court awarded the fraternity liquidated damages, punitive damages, and attorneys fees. The defendants appealed.

Holding: The Iowa Supreme Court (6-0, with Wiggins authoring and Baker taking no part) affirmed the district court's finding of liability, but disagreed with the district court's findings on punitive and actual damages.

Analysis: *Findings Under Chapter 808B.* The Court's analysis touches upon several issues. In sum, the Court concluded: (1) the fraternity was the real party in interest to bring the action; (2) the fraternity was a protected party under Iowa Code section 808B.8; (3) substantial evidence supported the finding that the intercepted communication was an "oral communication" protected by the statute because the fraternity had an expectation of privacy in the intercepted conversations that society is prepared to recognize and protect as reasonable; (4) the defendants' conduct was "willful," (requiring only purposeful conduct without a bad motive or a knowing unlawful component) as used in the statute, § 808B.2(1)(d); and (5) the defendants "used" the intercepted communication in violation of the section 808B.8(1).

Personal Liability of Jones. Post-trial, counsel for Jones attempted to argue that under amended section 669.5(2)(a), Jones could not be held personally

liable. The section was amended during the 2006 legislative session, after the fraternity filed its petition in February 2005. The amendment limits the right of a person seeking compensation from a state employee by relieving the state employee from personal liability when the employee is acting within the scope of his employment. The district court rejected this argument, noting that the amended statute only applied prospectively. The Iowa Supreme Court agreed, finding that section 669.5, as amended, does not apply retrospectively in this case because the law is a substantive law that creates, defines, and regulates rights rather than merely being the practice or method of enforcing rights or addressing an existing grievance.

Punitive Damages. The Court reversed the district court's award of punitive damages against Jones in the amount of $5,000, finding that although Jones purposefully used the digital tape recording, he did not voluntarily, intentionally, or recklessly violate a known legal duty and that the evidence did not establish that Jones knew his use of the tape violated the act.

Liquidated Damages and Attorneys Fees. The Court also reduced the liquidated damages award based on the evidence in the record as to when the hazing charges were dismissed. Further, the Court reversed the award of attorneys fees incurred by the fraternity in the administrative proceedings, but affirmed the award of attorneys fees incurred by the fraternity to prosecute the case in district court.

E. Iowa Tort Claims Act

1. *Application of Iowa Tort Claims Act Outside United States*

Griffen v. State, 767 N.W.2d 633 (Iowa 2009).

Facts: The University of Northern Iowa runs a program called Camp Adventure, which sends college students overseas to conduct summer camps for military children living outside the United States living on military bases. Ten-year-old Blake Jermon nearly drowned in a swimming pool in Germany while participating in a Camp Adventure Sports program. He suffered serious injuries and died 3 years later during surgery to correct problems related to those injuries. Vinnell Griffen, Blake's mom, individually and as administrator of his estate, brought a negligence action against the State under the Iowa Tort Claims Act. The State filed a motion to dismiss alleging the Act has no extraterritorial applicability. The district court granted the motion, and Griffen appealed.

Holding: The Iowa Supreme Court (7-0, with Streit authoring) reversed and remanded.

Analysis: The Iowa Tort Claims Act waives sovereign immunity from tort liability. Section 669.4, the venue provision, provides: "The district court of the state of Iowa for the district in which the plaintiff is resident or in which the act or omission complained of occurred, or where the act or omission occurred outside of Iowa and the plaintiff is a nonresident, the Polk county district court has exclusive jurisdiction to hear, determine, and render judgment on any suit or claim as defined in this chapter." The State argued there is a presumption against

extraterritoriality in all laws enacted. The Court held the legislature's intention to apply the ITCA beyond Iowa's borders is clear. If the legislature wanted to include a foreign country exception, it could have expressly done so. The Court interpreted "outside of Iowa" to broadly mean anywhere outside of Iowa. "Interpreting 'outside of Iowa' to mean 'outside of Iowa but not outside the United States' is absurd. We see no reason to differentiate between a tort committed in Minnesota and a tort committed in Canada." *Griffen*, 767 N.W.2d at 637. The Court unequivocally held: "The ITCA expressly allows claims for torts committed outside of Iowa, including foreign countries." *Id.*

2. *Volunteer Immunity; Statute of Limitations and Discovery Rule*

Hook v. Lippolt, 755 N.W.2d 514 (Iowa 2008).

Facts: The plaintiff motorist was injured in a motor vehicle collision with a vehicle driven by a volunteer with the Department of Human Services. The plaintiff initially filed suit against the other driver individually; in the course of discovery, the plaintiff learned the other driver was working as a volunteer for the State at the time of the accident. The plaintiff dismissed her first lawsuit, and then filed an action against the volunteer and the State under the State Tort Claims Act, Iowa Code chapter 669. The defendants filed summary judgment motions, raising immunity and statute of limitations arguments. The district court denied defendants' motions for summary judgment. The Iowa Supreme Court granted the defendants application for interlocutory review.

Holding: The Iowa Supreme Court (6-0, with Ternus authoring and Baker taking no part) reversed and remanded.

Analysis: *Volunteer's Immunity.* The Court held that Iowa Code section 669.24 provides immunity for the volunteer's negligence in causing the collision. The Court also rejected the plaintiff's suggestion that she should be able to maintain a claim against the volunteer because he had automobile liability insurance: "The ability to sue an individual for damages depends not on the individual's purchase of insurance, but on his liability under the law, a liability [the volunteer] does not have." *Hook*, 755 N.W.2d at 521.

Statute of Limitations. The Court also held the plaintiff's claims against the State were not asserted within the time period required by Iowa Code section 669.13. The Court reiterated its prior holdings that the discovery rule is applicable to claims under chapter 669. In the instant case, however, the Court found that the plaintiff waited too long to properly investigate the identity of liable parties: "We think an injured party who knows of her injury and its cause must conduct a reasonable investigation of the nature and extent of her legal rights that includes inquiry into the identity of any vicariously liable parties. An injured party's duty to investigate the identity of persons liable for her injury is not a seriatim process that stops upon discovery of one defendant and arises only when that defendant's liability is questioned." *Id.* at 523. The plaintiff knew she had been injured as of the date of the accident and she knew who caused the injury; therefore, she was on inquiry notice and had a duty to make a reasonable investigation into the parameters of her claim.

Fraudulent Concealment. The Court also rejected the plaintiff's argument that she was the victim of fraudulent concealment by the volunteer as to his status as a volunteer for the State at the time of the accident. There was no evidence that either defendant intended to conceal the volunteer's status or conceal the plaintiff's claim against the State. The plaintiff also suggested the volunteer's insurer and attorney had a duty to investigate the accident; the Court rejected this suggestion, and noted that it knows of no authority that would impose an affirmative duty of disclosure on a tortfeasor prior to commencement of a lawsuit in the absence of any inquiry by the plaintiff.

F. Negligence and Strict Liability Arising from Construction of Home – Economic Loss Doctrine

Lipps v. Hjelmeland Builders, Inc., 760 N.W.2d 209 (Table), No. 07-1410, 2008 WL 4877458 (Iowa Ct. App. Nov. 13, 2008).

Facts: The plaintiff homeowners brought an action against a subcontractor who erected the brick exterior of the home when water entered the home due to subcontractor's alleged negligence. The district court granted the defendants' summary judgment motion on the plaintiffs' tort claims, applying the economic loss doctrine. The plaintiffs appealed.

Holding: The Iowa Court of Appeals (with Eisenhauer authoring) affirmed.

Analysis: "It is a generally recognized principle of law that plaintiffs cannot recover in tort when they have suffered only economic harm. The 'economic loss doctrine' holds that purely economic losses usually result from the breach of contact and should ordinarily be compensable in contract actions, not tort actions." *Lipps*, 2008 WL 4877458 at *1. The appellate court held that the contract remedy was appropriate here because the plaintiffs claimed the subcontractor was negligent in erecting the brick exterior of the house and the water damage was a foreseeable result from the failure of the brick exterior to protect the home from the elements. The plaintiffs argued the economic loss doctrine should not bar a negligence claim against a subcontractor, but the Court of Appeals declined to limit the doctrine in that manner.

NOTE: As of the date of this outline, the plaintiffs' application for further review, filed in December 2008, is still pending before the Iowa Supreme Court.

G. Potpourri of Issues in Motor Vehicle Accident Case

Martin v. Crook, No. 08-1711, 2009 WL 2392938 (Iowa Ct. App. Aug. 6, 2009).

Facts: On Christmas Eve 2004, the Martin family pulled off an icy highway to help two people whose vehicle was stranded in a ditch. David Martin was seriously injured when a Hertz rental car driven by Graham Crook skidded off the highway and struck him. The Martin family filed a negligence action against Crook, and Hertz, under Iowa Code section 321.493, as the owner of the rental

car driven by Crook. Hertz pled the affirmative defense of preemption based on the Graves Amendment to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU")—federal legislation that provides an owner engaged in the business of renting motor vehicles, which is not itself negligent, is not liable under state law by reason of being the owner of the vehicle for harm to persons or property arising out of the operation of the rental vehicle. The district court struck Hertz's preemption defense, stating it would be unconstitutional to apply it to this cause of action because the plaintiffs' cause of action had already accrued when the Graves Amendment was enacted.

At the close the evidence, the district court granted the plaintiffs' motion for directed verdict on the legal excuse and sudden emergency defenses, reasoning that Crook was aware of the icy conditions of the road. The court also refused the defendants' request for jury instructions on those defenses. In addition, the district court denied the defendants' motion for directed verdict on the bystander emotional distress claims brought by Andrea Martin (David's wife) and the three Martin children. The court again rejected Hertz's preemption argument. The jury was given a general negligence instruction, as well as the rules of the road instruction, the vehicle under control instruction, and the vehicle driven on the right half of the road instruction.

The jury returned a defense verdict, finding that Crook was not negligent. The district court denied the plaintiffs' motion for new trial. The plaintiffs appealed from that denial. Hertz cross-appealed on the preemption issue, and both Crook and Hertz urged the appellate court to consider certain arguments in the event the court found a new trial is warranted.

Holding: The Iowa Court of Appeals (with Mansfield authoring) affirmed in part, reversed in part, and remanded. Judge Doyle concurred in part and dissented in part.

Analysis: *Verdict Not Supported by Evidence.* On appeal, the plaintiffs argue the verdict is not supported by the evidence. Since it was undisputed that Crook lost control of his car and veered from a direct course on the road, he violated the rules of the road. The plaintiffs argued he must have a legal excuse to avoid liability for negligence, but because the district court did not allow the legal excuse/sudden emergency defense to go to the jury, no legal excuse existed here. According to the plaintiffs, the jury did not have sufficient evidence to excuse Crook's negligence. The Court of Appeals stated: "Upon consideration, e believe the jury's verdict of no negligence cannot be sustained based upon the instructions *that were actually given to the jury*. In Iowa, violation of one of the statutory rules of the road amounts to negligence per se, absent a legal excuse. Since the district court eliminated the legal excuse defense from the case, there was no basis upon which the jury could have exonerated Crook from a finding of negligence. Accordingly, we believe a new trial should have been ordered." *Martin*, 2009 WL 2392938 at *4 (emphasis in original; citation omitted).

Legal Excuse and Sudden Emergency Instructions. Because the appellate court remanded the case for a new trial, it went on to consider whether the jury should have been instructed on legal excuse and sudden emergency. The

district court did not give the instructions, reasoning that Crook knew of the icy conditions so there was no sudden emergency. The appellate court disagreed. Based on Crook's testimony that he slowed down and took precautions but felt he had to brake suddenly when several cars in front of him lost control and started to swerve on the highway, the court believed "it was for the jury to decide whether Crook's violation of the rules of the road was excused by an unforeseen combination of circumstances, including not just the sheer ice on the road but the behavior of the other vehicles in front of him." *Id.* at *5. The court held that the jury should have been instructed on the legal excuse and sudden emergency defenses, and should be instructed on remand assuming the record regarding Crook's action is similar to what the appellate court reviewed.

Bystander Emotional Distress Claims. The elements of a claim for bystander liability are: (1) the bystander was located near the scene of the accident; (2) the emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; (3) the bystander and victim were husband and wife or related within the second degree of consanguinity or affinity; (4) a reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed; and (5) the emotional distress to the bystander must be serious. The defendants argued that the second and fifth elements were missing as to the claims of Andrea Martin and the Martin children. Andrea Martin was sitting inside the Martin vehicle with the Martin children at the time of the accident. She testified she thought she saw her husband running past their vehicle at the same time she observed in her rearview mirror another vehicle spinning on the interstate. It turned out that what she saw was her husband flying through the air post-collision rather than running past the vehicle. She immediately got out of the Martin vehicle and found her husband lying on the ground, seriously injured, including an exposed skull bone. The Martin children did not see anything until they exited the car after Andrea exited; she quickly sent them back to the car so that they would not see their father's injuries. The appellate court found that Andrea's testimony presented a jury question as to whether she had a sensory and contemporaneous observance of the accident: "Andrea Martin was there; she saw part of the accident occurring; and she saw her husband right after he had been struck by the car. Her failure to immediately 'process' what she was seeing does not defeat her claim as a matter of law." *Id.* at *7. The court also found there was sufficient evidence, by way of Andrea's testimony, as to the fifth element – that she suffered serious emotional distress. Thus, the bystander emotional distress claims of Andrea Martin should be submitted to the jury. As to the Martin children, the appellate court found their emotional distress claims are barred because they did not contemporaneously observe the event and there was no evidence presented that they suffered serious emotional distress.

Federal Preemption of Iowa's Owner Liability Statute. The Graves Amendment to SAFETEA-LU applies to all claims brought on or after August 10, 2005, "without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment." *Id.* at *8 quoting (49 U.S.C. § 30106(c)). The district court believed that it would

violate due process to apply the Graves Amendment retroactively to this case, where the cause of action arose prior to the effective date of the amendment. The appellate court disagreed, as federal legislation is the supreme law of the land. Further, other courts have repeatedly applied the amendment to causes of action that arose prior to August 10, 2005. The appellate court also denied the plaintiffs' commerce clause argument, finding that the Graves Amendment was a proper exercise of Congress's power to regulate activity affecting interstate commerce. Therefore, the appellate court concluded that judgment in favor of Hertz should be affirmed in its entirety based on federal preemption.

Partial Dissent by Judge Doyle. Judge Doyle opined that the specific facts presented do not support an instruction on the sudden emergency category of the legal excuse doctrine. "Crook encountered the everyday hazard of driving on an icy interstate. While Crook was required to take immediate action in response to the cars sliding out of control in front of him, such an event does not qualify as an emergency for purposes of submitting a sudden emergency instruction to the jury." *Id.* at *11. Judge Doyle opined that "Crook should have been prepared for the events that unfolded in front of him." *Id.* Judge Doyle concurred with the remainder of the majority's opinion.

H. Products Liability – Design Defect

Scott v. Dutton-Lainson Co., 765 N.W.2d 607 (Table), No. 08-0365, 2009 WL 398488 (Iowa Ct. App. Feb. 19, 2009)

Facts: The plaintiff, the manager of a boat dealership, was injured when the swivel jack on a boat trailer collapsed when he attempted to move the boat and trailer and the tongue of the trailer landed on his foot. He sued the trailer manufacturer and the trailer jack manufacturer, alleging the jack failed due to defective design and manufacture, and alleging the defendants failed to adequately warn him of the danger. The case proceeded to trial against the trailer jack manufacturer. Pursuant to a motion in limine filed by the defendant, the district court excluded evidence that the defendant modified the pin in its swivel jack after the injury. A defense verdict resulted. The plaintiff appealed.

Holding: The Iowa Court of Appeals (with Sackett authoring) reversed.

Analysis: *Subsequent Remedial Measures.* Relying on the official comments to Iowa Rule of Evidence 5.407, the Iowa Court of Appeals held that the district court abused its discretion in excluding evidence of subsequent modifications in the design of the swivel jack. The design defect case emphasizes a defect in the product rather than any conduct or culpable act by the manufacturer, such that the evidence should not have been excluded under Rule 5.407.

Affecting a Substantial Right. The Court of Appeals also held that exclusion of this evidence is relevant to the fact finder's consideration whether the prior design was defective. The Court held that the exclusion adversely affected the plaintiff and prejudiced his substantial right to a fair trial.

Admission of Party Opponent. The Court of Appeals also agreed with the

plaintiff's contention that the district court erred in excluding evidence that an engineer and officer of the defendant stated that the defendant changed the design of the jack in response to the accident. The court held the testimony fell within Rule 5.801(d)(2) as an admission of a party opponent.

NOTE: The Iowa Supreme Court granted further review, and the case was submitted non-orally on September 1, 2009.

I. Tortious Interference with Contract; Breach of Contract

Kern v. Palmer Coll. of Chiropractic, 757 N.W.2d 651 (Iowa 2008).

Facts: The plaintiff, a discharged college professor, brought a claim for breach of contract against defendant employer college and a claim for tortious interference with contract against three of employer's agents. The plaintiff's termination was based on allegations that he willfully failed to perform the duties of his position and/or willfully performed a duty below acceptable standards, as regards to his duty to submit questions suitable for the national chiropractic board examination and his duty to submit a statement of professional goals. The district court granted summary judgment to defendant college finding as a matter of law that the college had not breached the employment contract. The district court also granted summary judgment to the employer's agents concluding that the plaintiff failed to engender a fact question on his claim that one or more of the individual defendants caused the college to breach the contract. The plaintiff appealed.

Holding: The Iowa Supreme Court (6-0, with Hecht authoring, Cady specially concurring, Appel specially concurring joined by Wiggins, and Baker taking no part) affirmed in part, reversed in part, and remanded.

Analysis: *Breach of Contract.* The plaintiff's employment contract was a "for cause" contract, which set forth the grounds for which the plaintiff could be terminated. The Iowa Supreme Court adopted a rule from the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 895 (Mich. 1980), in which the Michigan court held that the question of whether "cause" for termination actually existed was for the fact-finder to decide. The Court held that summary judgment in favor of the college was not appropriate because the plaintiff had engendered a fact question as to whether he willfully failed to perform his duty to submit proposed national board questions and willfully performed that duty below accepted standards. The Court also found fact questions existed as to whether the plaintiff failed to comply with his duty to submit professional goals.

Tortious Interference with Contract. The Court found summary judgment was inappropriate as to the plaintiff's claims against one of the three agents of the college on his intentional interference with contract claim. The Court noted that the determination of whether the individual defendants' actions in relation to the plaintiff's employment was improper turned on the nature of their conduct, motives, and a balancing of the respective interests of the parties. As to that one defendant (McCarthy), the Court concluded a reasonable fact finder could

determine the defendant fraudulently induced the plaintiff to engage in a course of conduct which would eventually result in the termination of his employment contract. "Interference achieved through conduct that is dishonest, fraudulent, malicious, or otherwise wrongful will support a finding that the interference is improper." *Kern*, 757 N.W.2d at 663. The Court found the plaintiff had raised a genuine issue of fact as to whether McCarthy's conduct was dishonest, and clearly outside the bounds of proper managerial conduct, which is therefore improper.

Special Concurrence by Justice Cady. Justice Cady agreed with the majority opinion that a jury question was engendered so as to warrant a trial, but he disagreed with the majority's adoption of the *Toussaint* rule because, he opines, it strips employers of an aspect of discretion essential to the operation of a business—specifically as to employer's decisions to terminate an employee subject to a good-cause employment contract. Justice Cady supported a "reasonable-employer" standard—that is, the question for the jury is whether the employer was reasonable in deciding the employee's conduct amounted to the grounds of termination. Justice Cady, however, concurred with the majority's opinion as to the claims against the individual defendants.

Special Concurrence by Justice Appel, joined by Justice Wiggins. This special concurrence seems to have been written in response to Justice Cady's special concurrence because Justice Appel opines against the adoption of an "implied-employer-deference" approach.

J. Trademark Infringement

Cmty. State Bank, N.A. v. Cmty. State Bank, 758 N.W.2d 520 (Iowa 2008).

Facts: The plaintiff, a Polk County bank named "Community State Bank, National Association," filed a petition asking the district court to issue a declaratory judgment against the defendant, a bank doing business in Lucas and Warren Counties under the name "Community State Bank," for common law trademark infringement and an injunction preventing the defendant from using the name "Community State Bank." The district court found that the defendant infringed the plaintiff's valid common law trademark and issued an injunction. The Court of Appeals reversed. The Iowa Supreme Court granted further review.

Holding: The Iowa Supreme Court (7-0, with Streit authoring) vacated the decision of the Court of Appeals and affirmed the judgment of the district court.

Analysis: "In order to succeed on a common law trademark infringement claim and obtain injunctive relief, the plaintiff must prove (1) it has a valid trademark, and (2) infringement by the defendant." *Community State Bank*, 758 N.W.2d at 525.

Sufficiently Distinctive: Secondary Meaning. The Court held that the plaintiff has a protectable trademark in the name "Community State Bank." The name "Community State Bank" is a descriptive designation that is protected under trademark law because the name has acquired a secondary meaning, which means the term has become "uniquely associated" with the plaintiff's services.

The plaintiff used the mark continuously for 12 years, spent significant amounts on advertising, had a substantially larger percentage of the market share in Polk County than the defendant, and the results of a consumer survey indicated 90% of respondents identified "Community State Bank" as a brand.

Infringement. The Court also held that the defendant infringed on the plaintiff's trademark. Although the defendant did not intend to pass off its business and services as those of the plaintiff, the defendant's use of "Community State Bank" will cause likelihood of confusion among customers in Polk County. The Court agreed with the district court that the defendant should be permanently enjoined from using the name "Community State Bank" in Polk County.

K. Wrongful Discharge

Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009).

Facts: The plaintiff was the director of a child care facility called Kid University, which was owned by H. Nizam, Inc. Mohsin Hussain was the president of the corporation. The plaintiff became embroiled in a dispute with Hussain regarding the proper child-to-staff ratios at the facility. Hussain wanted to reduce staff levels, but the plaintiff was concerned about compliance with staffing ratios based on state regulations. The plaintiff was fired after she rejected Hussain's proposal that she and her assistant work as staff in the classrooms. The plaintiff brought a wrongful discharge action against the corporation and Hussain individually. She claimed she was terminated because she refused to violate the child-to-staff ratios, in violation of public policy. A jury returned a verdict in favor of the plaintiff against the corporation and officer individually based solely on the tort of wrongful discharge in violation of public policy. The jury also awarded damages for lost wages and past emotional distress. The district court directed a verdict in favor of the corporation on the wrongful discharge claim and reduced the award for emotional distress. The plaintiff appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. The corporation sought further review.

Holding: The Iowa Supreme Court (5-0, with Cady authoring, and Streit and Baker taking no part) affirmed in part, reversed in part, and remanded.

Analysis: *Public Policy.* The Court held that administrative regulations can serve as a source of public policy and support a claim for wrongful discharge when the regulation relates to public health, safety or welfare, and expresses a substantial public policy in a way that furthers a specific legislative expression of policy. Here, the Court recognized that protection of children is a fundamental interest and the legislature delegated to the Department of Human Services the duty to adopt regulations to protect the health, safety and welfare of children. The Court concluded that the administrative regulations regarding child-to-staff ratios for child care facilities constituted a declaration of public policy for purposes of a wrongful discharge claim.

Employee Participation in Protected Activity. The tort of wrongful discharge protects the reporting of an activity that violates public policy, as well as the

refusal of an employee to engage in an activity that violates public policy. The tort is not intended to interfere with legitimate business decisions of an employer, yet staffing a child care facility below levels established by administrative regulations is not a legitimate business concern. The Court concluded there was sufficient evidence the plaintiff was wrongfully discharged because she refused to violate the state requirements.

Individual Liability of Corporate Officer. The purpose of the tort of wrongful discharge is to encourage management to make decisions consistent with public policy and to give employees the freedom to refuse to comply with decisions that are not consistent with public policy. The Court held that the corporate officer could be held individually liable for wrongfully discharging the plaintiff. Here, Hussain was essentially Kid University, and he authorized and directed the decision to terminate the plaintiff. The Court limited its holding as follows: "Thus, we only hold that liability for the tort can extend to individual officers of the corporation who authorized or directed the discharge of an employee for reasons that contravene public policy." *Jasper*, 764 N.W.2d at 777.

Damages. The Court held that Kid University was entitled to a new trial on the issue of emotional distress because the damage award was excessive. The jury awarded $100,000, the district court ordered remittitur finding $20,000 was appropriate. The Iowa Supreme Court found $50,000 to be proper because the discharge was, at best, insensitive, the plaintiff was not allowed to remove her children from the day care facility immediately following her termination, and the plaintiff had some emotional distress following her discharge, but not any more than is common with any job loss. The Court indicated the plaintiff had the option of accepting this reduced amount of damages in order to avoid a new trial. A review of Iowa court records online reveals the plaintiff accepted the $50,000 remittitur for emotional distress damages.

Insurers Recoupment of Defense Costs Incurred Under Reservation of Rights:

A Split Authority

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INSURERS RECOUPMENT OF DEFENSE COSTS INCURRED UNDER RESERVATION OF RIGHTS – A SPLIT OF AUTHORITY

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INTRODUCTION

For better or worse, new ways of looking at legal concepts often seem to originate or gain notoriety in California and migrate eastward. Whether certain changes are aptly characterized as the evolution of the law is sometimes questionable, but if nothing else, give the California bar and bench credit for creativity. This paper will discuss a fairly recent innovation with roots in California law – insurers recoupment of defense costs incurred in the defense of non-covered claims.

Buss v. Superior Court, 65 Cal.Rptr. 366 (Cal. 1997)

In Buss, the prominent owner of the Los Angeles Lakers, Jerry Buss, had terminated several contracts with a sports agency. The agency sued Buss under theories of defamation, breach of contract and numerous other theories. Buss tendered his defense to multiple insurers. All declined to defend, except for Transamerica, which defended under a reservation of rights. Transamerica ultimately expended nearly $1,000,000 defending Buss, of which only $21,000 - $55,000 was directly attributable to defense of the covered defamation claim. Transamerica sought reimbursement for the defense costs incurred in defending the clearly non-covered claims.

The California Supreme Court allowed Transamerica to recoup the attorney fees relating to the defense of claims "not even potentially covered," notwithstanding its broad duty to defend all claims. The Court reasoned that no premium had been paid to defend non-covered claims and that the insurer "did not bargain to bear these costs," 65 Cal.Rptr. at 376, such that the insured would be unjustly enriched by receiving a free defense to clearly non-covered claims. Id. at 377. Accordingly, the Court found an

"implied right of reimbursement" for defense costs incurred in defending claims "not even potentially covered," Id. at 378, noting that an insured does not have a reasonable expectation that non-covered claims would be defended at no cost, as that would constitute a windfall.

It is important to stay mindful that the recoupment of defense costs under Buss is strictly limited to the defense of claims not even potentially covered under the policy. Defense costs incurred defending claims conceivably capable of coverage on their face, but later determined to be not covered, are not recoverable under Buss. Id. at 378-379. Further, an insurer bears the burden to demonstrate by a preponderance of evidence which defense costs are solely attributable to the defense of claims not even potentially covered. Id. Buss requires that such right of reimbursement be reserved. Id. at n. 27. Of course, as a practical matter, it can be very difficult for insurers to clearly distinguish what portion of defense costs were incurred solely in the defense of clearly non-covered claims, as substantial overlap typically exists.

Other jurisdictions

The Buss rule has been re-affirmed in subsequent California decisions. See Scottsdale Ins. Co. v. MC Transp., 36 Cal. 4th 643 (Cal. 2005); Blue Ridge Ins. Co. v. Jacobsen, 25 Cal. 4th 489 (Cal. 2001). Not unexpectedly, the Buss rule has been the subject of substantial scrutiny and criticism in other jurisdictions. Some have adopted it; some have substantially modified it. Iowa has yet to address the concept at the appellate level.

Since Buss, more insurers have included in their reservation of rights letters a caveat to the effect that defense costs relating to the defense of non-covered claims are subject to the insurer's right of reimbursement. See United National Ins. Co. v. SST Fitness Corp., 309 F.3d 914 (6th Cir. 2002); Cincinnati Ins. Co. v. Grand Pointe LLC, 501 F. Supp.2d 1145 (D. Tenn. 2007); Colony Ins. Co. v. G&E Tires & Service, Inc., 777

So.2d 1034 (Fla. Ct. App. 2000). Again, however, even when such right to reimbursement is recognized, it can be very difficult to isolate those defense costs solely related to non-covered claims.

Buss rule adopted

States adopting the Buss rule include **Colorado** (Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1089 (Colo. 1991)); **Connecticut** (Security Ins. Co. of Hartford v. Lumbermans Mut. Cas. Co., 826 A.2d 107, 125 (Conn. 2003)); **Delaware** (Nationwide Mut. Ins. Co. v. Flagg, 789 A.2d 586, 597, Del. Super. Ct. 2001)); **Minnesota** (Knapp v. Commonwealth Land Title Ins. Co. v. National Title Resources Corp., 932 F.Supp. 1169 (D. Minn. 1996)); **New Jersey** (S.L. Indus., Inc. v. American Motorists Ins. Co., 128 N.J. 188, 200 (N.J. 1992)); **New Mexico** (Resure, Inc. v. Chemical Distributors, Inc., 927 F.Supp. 190, 194 (M.D. La. 1996)); **Utah** (Crist v. Insurance Co. of North America, 529 F.Supp. 601, 605 (D. Utah 1982)); **Virginia** (Morrow Corp. v. Harleysville Mut. Ins. Co., 101 F.Supp.2d 422, 429-430 (E.D. Va. 2000)); and **Wisconsin** (Lockwood International, B.V. v. Volm Bag Co., Inc., 273 F.3d 741, 743 (7th Cir 2001)).

Buss rule criticized

Various arguments have been raised against a right of reimbursement. First and foremost is the argument that allowing reimbursement merely on the basis of a reservation of rights effectively constitutes a modification of the policy – that no right to reimbursement can fairly be found to be implied. Theories of equitable subrogation and quasi-contract have been rejected as well. See Texas Association of Counties County Government Risk Management Pool v. Matagorda County, 52 S.W.3d 128 (Tex. 2000) (insurer may only seek reimbursement if it obtains insured's clear and unequivocal consent to insurer's right to do so). See, also, Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., 246 S.W.2d 42 (Tex. 2008).

Buss rule modified

Several states have modified the Buss rule. They include Illinois in General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co., 828 N.E.2d 1092 (Ill. 2005), ruling there is no right to reimbursement for defense costs relating to non-covered claims, absent an express policy provision to that effect. The insurer had purportedly reserved a right to reimbursement in a reservation of rights letter, to which the insured did not reply, but accepted the defense. The insurer prevailed in a declaratory judgment action regarding coverage and the duty to defend. The trial court's ruling that the insurer could seek reimbursement per Buss was upheld by the appellate court, but the Illinois Supreme Court reversed, characterizing such approach as "tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract." 828 N.E.2d at 1102. The following passage at p. 1102 is instructive:

> [I]f an insurance carrier believes no coverage exists, then it should deny its insured a defense at the beginning instead of defending and later attempting to recoup from its insured the costs of defending the underlying action.

In Pennsylvania, in L.A. Weight Loss Centers, Inc. v. Lexington Ins. Co., 2006 Phila.Ct.Com.Pl. Lexis 127 (2006), the court followed the Illinois Supreme Court in Midwest Sporting Goods, Id., requiring an express policy provision allowing reimbursement. Applying Pennsylvania law in the case of Terra Nova Insurance Co. v. 900 Bar, Inc., 887 F.2d 1213 (3d Cir. 1989), the court commented that a rule permitting reimbursement "would be inconsistent with the legal principles that induce an insurer's offer to defend under a reservation of rights." The court emphasized the value of the insurer's right to control the defense and mitigate any future indemnification responsibilities. See, also, American & Foreign Ins. Co. v. Jerry's Sport Center, Inc., 2008 P.A. Super. 1994 (Pa. Super. May 5, 2008).

In Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 108 P.3d 469, 480 (Mont. 2005), the Montana Supreme Court allowed reimbursement only if the insurer clearly reserved such right and the insured does "not object" to such reservation. Inasmuch as an insured would presumably object to such an arrangement (if paying attention), such rule effectively precludes reimbursement.

In the Wyoming case of Shoshore First Bank v. Pacific Employers Ins. Co., 2 P.3d 510 (Wyo. 2000), the court disallowed reimbursement in the absence of an appropriate policy provision allowing it.

Numerous federal court decisions interpreting state law have stopped short of adopting the Buss rule. **Georgia** Transportation Ins. Co. v. Freedom Elecs., Inc., 264 F.Supp.2d 1214 (N.D. Ga. 2003) (policy provision for reimbursement required). **Maryland** Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am., 448 F.3d 252 (4th Cir. 2006) (reimbursement under reservation of rights disallowed; constitutes "backdoor narrowing of the duty to defend.") **Massachusetts** Dash v. Chicago Ins. Co., 2004 WL 1932760 (Mass. Aug. 3, 2004) (insurer responsible for all defense costs). **Missouri** Liberty Mut. Ins. Co. v. FAG Bearings Corp., 153 F.3d 919 (8th Cir. 1998) (no reimbursement because duty to defend extends until determination of no coverage). **Nevada** Capitol Indem. Corp. v. Blazer, 51 F.Supp.2d 1080 (D.Nev. 1999) (reimbursement requires clear agreement between insurer and insured therefor). **Ohio** United National Ins. V. SST Fitness, 309 F.3d 914 (6th Cir. 2002) (reimbursement only available if insured does not object).

Two federal court decisions in Minnesota go different ways. See Knapp v. Common Wealth Land Title Ins. Co., Inc., 932 F.Supp. 1169 (D. Minn. 1996) (reimbursement allowed if clearly reserved); and Employers Mut. Cas. Co. v. Industrial Rubber Prods., Inc., 2006 WL 453207 (D. Minn., Feb. 23, 2006) (reimbursement only if express policy provision allows it).

Iowa law

Again, the concept of insurers recouping defense costs incurred in the defense of not even potentially covered claims has not been addressed by an Iowa appellate court. Nonetheless, a review of some well-established principles under Iowa law is appropriate.

The duty to defend is broader than the duty to indemnify "because it is impossible to determine the basis, if any, upon which the plaintiff will recover until the action is completed." Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 642 (Iowa 1996), quoting First Newton Nat. Bank v. General Cas. Co. of Wisconsin, 426 N.W.2d 618, 630 (Iowa 1988). In United Fire & Casualty v. Shelly Funeral Home, 642 N.W.2d 648, 656-657 (Iowa 2002), the Iowa Supreme Court articulated the duty to defend as follows, quoting Employers Mut., 552 N.W.2d at 641:

> (The duty to defend arises) whenever there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case. In other words, the duty to defend rests solely on whether the petition contains any allegations that arguably or potentially bring the action within the policy coverage. If any claim alleged against the insured can rationally be said to fall within such coverage, the insurer must defend the entire action. In case of doubt as to whether the petition alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured.

Implicit in the above-quoted rule is the notion of a mixed case, wherein some of the claims arguably appear to be covered and some are clearly not covered. Under these circumstances, the insurer clearly has the duty to defend the entire case. It also bears noting that after looking first at the petition for factual allegations which potentially invoke coverage, the court may expand its inquiry to any other admissible and relevant facts in the record which bear upon the coverage issue. Talen v. Employers Mut. Cas. Co., 703 N.W.2d 395 (Iowa 2005); First Realty Ltd. v. Frontier Ins. Co., 378 F.3d 729 (8th Cir. Iowa 2004).

Of course, these fundamental tenets regarding the duty to defend do not directly address the notion of recoupment of defense costs incurred in defending not even potentially covered claims, such as approved in Buss. Such notion was addressed in a recent district court case, Farm Bureau Mutual Insurance Company v. Kreps and Hamburger, Woodbury County District Court Case No. EQCV-135058, a declaratory judgment action involving coverage issues arising in an underlying mold damage case.

In Kreps, Farm Bureau undertook the defense of its insureds (Hamburger) under a reservation of rights, purporting to reserve "the right to recover from you any fees and expenses incurred by the company in this case." The letter contained no place for the insureds to sign and was signed only by a Farm Bureau representative. In the declaratory judgment action, Farm Bureau sought a declaration that (1) it had no duty to defend the underlying action (even though it was) for the reason that the insureds' actions, including failing to fully disclose defects in the home, were intentional and therefore not covered; and (2) if any claims were determined to fall outside the scope of coverage under the policy, i.e. the claim for breach of contract *ex delicto*, Farm Bureau was entitled to recoup its defense costs relative to such claims.

After referencing various well-established rules of contract interpretation and construction, as well as the previously discussed principles regarding the duty to defend, the court found that the circumstances surrounding the subject mold claim constituted an "occurrence" under the policy and created a "clear, unambiguous duty to defend, both at law and under these facts." In doing so, the court rejected the argument that the insureds' actions constituted intentional acts which would void coverage.

Regarding Farm Bureau's request for reimbursement of defense costs incurred in the defense of claims not even potentially covered under the policy, the court observed that it was a case of first impression in Iowa. After a thorough discussion of Buss, its progeny and Iowa law regarding the duty to defend, the court expressly declined to

adopt the Buss rule, concluding that no such right to reimbursement exists under Iowa law. The court emphasized the fundamental rule that an insurer has a duty to defend an entire action if any portion of it is potentially covered. The court also reasoned that when a policy is silent regarding allocation of defense costs between insured and insurer, the law will not imply a right of reimbursement for which the policy does not expressly provide, citing Shoshore v. First Bank v. Pac. Emp. Ins. Co., 2 P.3d 510, 514 (Wyo. 2000).

In support of its decision, the court referenced several policy provisions purporting to promise a full cost-free defense of all claims. "On no less than three separate occasions, Farm Bureau guarantees its insureds if a 'suit for damages' is brought against the 'insured,' we will provide a defense at our expense."

* * * * * *

In addition, we will pay the attorneys we hire to defend you, at our expense.

* * * * * *

We will pay expense costs, whether or not the suit is justified.

The court quoted Shoshone, 2 P.3d at 516:

"[I]n light of the failure of the policy language to provide for allocation, we will not permit the contract to be amended or altered by a reservation of rights letter," stating that, "Since the promise to defend *the suit* is unambiguous, and clearly does not allocate costs between covered and uncovered claims, Farm Bureau may not seek to imply or insert that language now." In a footnote, the court noted that Farm Bureau representatives "admitted that they could have drafted such language initially into the policy, and chose not to do so." The court expressly rejected any "reasonable expectations" argument to support a reimbursement claim, stating that:

> "Here, there are no ambiguities which objectively or reasonably intimate that the insured can or will be liable for the defense costs of claims which are not even potentially

> covered, and the court will not imply such (citations omitted) to the contrary, the policy imparts a manifest promise to defend a *suit*, and does not hedge in that promise with sophistries regarding claims, potentially covered claims, or those claims that are 'not even partially covered.' Therefore, the policy guarantees of a free defense for Hamburgers' suit must be given their legal effect. (Citation omitted).

Finally, the court noted that prior to the issuance of the reservation of rights letter, Farm Bureau never "suggested in any manner" that the insureds might be required to pay defense costs. Accordingly, the court declined to imply a right of reimbursement in contradiction to the otherwise clear promises in the "adhesion contract" it drafted. This observation invites the question of whether or not the Iowa Supreme Court might enforce a policy provision regarding reimbursement for defense costs incurred in the defense of not even potentially covered claims. Regarding the import of a unilateral reservation of rights to that effect, in the absence of a clear policy provision allowing reimbursement, the court would likely employ analysis similar to the district court in Kreps and conclude that an insurer cannot create a right of reimbursement in that manner.

Due to the very questionable viability of a unilateral reservation of rights regarding recoupment of defense costs incurred in defending non-covered claims, insurers seeking to create such a right of reimbursement would be well-advised to include an appropriate provision to that effect in their policies. Whether or not such a provision might be found to be fatally at odds with the broad duty to defend all claims if even one is potentially covered under the policy remains to be seen.

Practical considerations

A potential right to reimbursement for certain defense costs could affect settlement considerations, as an insured would not want to be burdened with a claim for reimbursement following a settlement of "all claims," including both covered and non-covered claims. Insurers and insureds should reach an agreement in this regard before

settlement is reached when any right of reimbursement is being claimed. Insurers would need to be very careful not to lose settlement opportunities which protect an insured from excess liability by getting sidetracked by a dispute with the insured over a reimbursement issue, as doing so could have bad faith implications.

As a practical matter, even if a right to reimbursement is ultimately recognized under Iowa law under certain circumstances, i.e. a properly drafted policy provision prescribing a right of reimbursement, the difficulty of clearly segregating defense costs solely attributable to claims not even potentially covered under the policy would likely cause insurers to forgo any such attempt in many cases. Indeed, the cost associated with obtaining a judicial determination of the coverage issues and the amount of defense costs solely attributable to the defense of clearly non-covered claims would likely approach or exceed the amount of such costs.

Turning off Auto Pilot –

New Ideas in Defending the Most Common Personal Injury Cases

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I. **INTRODUCTION – Our Natural "Auto Pilot"**

A. The most common personal injury cases we defend:

1. Automobile Accidents

2. Premises Liability

B. Our "Auto Pilot"

1. Pleadings

2. Discovery

3. Depositions

4. Motion Practice

5. Trial Practice

6. Jury Selection

C. The Battle to fight against the "Auto Pilot"

1. We need to step back and take a fresh look at our strategies

2. Remember the importance of "The K.I.S.S. Method"

3. Work up every case with an eye on the jury

a. The trend is for insurance companies to try cases – so always be prepared for trial

4. Turning off Auto Pilot by employing New/Fresh Ideas

i. Source of ideas - *A very special thanks to fellow defense counsel and physicians who assisted with excellent ideas!*

ii. This is not meant to be an exhaustive list – idea is to get us thinking, adapting, and changing our perspectives

D. The Importance of keeping an eye out for Plaintiffs' New Trends/ Perspectives

1. Learning what Plaintiffs' attorneys are doing can help develop our own strategies and help us to come up with tactics to respond

II. FRESH IDEAS IN DEFENDING AUTOMOBILE ACCIDENT CASES

A. PLEADINGS

1. Affirmative Defenses

a. ***Failure to Mitigate***

i. Consider using in a case where there is excessive chiropractic treatment.

ii. Example: Plaintiff could stop treatment when he is back to baseline recovery, but did not, i.e. Failed to mitigate damages

2. *Caution: Plaintiffs' Recent Trends in Pleadings:*

b. Automatically including the Underinsured Motorist Carrier right from the start of litigation before they even know the limits.

B. DISCOVERY

1. The fight against "Boilerplate" discovery

2. **Interrogatories and Request for Production**

a. Get to know the Plaintiff – find out about organizations, clubs, gyms, activities.

b. Diaries, Journals, Calendars

i. Even if they don't keep one it is beneficial – because then they have no documents to dispute what the medical records say.

3. **The Internet**

a. The internet is a great resource to investigate a plaintiff

b. Two methods:

i. No cost researching

Examples:

www.google.com , www.bing.com, www.yahoo.com
www.iowacourts.state.ia.us
www.myspace.com
www.facebook.com
www.twitter.com

ii. Background checks (fee charged)

www.intelius.com

Services cost $40.00 - $50.00, but you get addresses, judgments, income, property values, lawsuits etc.

4. **Keep tabs on discovery – request supplementation**

a. It's very important to keep tabs on whether Plaintiff has supplemented discovery. If you request supplementation on damages and Plaintiffs do not comply, you may be able to exclude damage claims that were not disclosed. *Wade v. Grunden*, 2007 Iowa App. LEXIS 1291 (2007).

5. *Caution: Plaintiffs' Recent Trends in Discovery*

a. Request for Admissions

i. Encouraged by ITLA – numerous requests to admit in hopes of establishing case. Plaintiffs try to prove their case through the requests.

ii. Plaintiffs also use Requests for Admissions to establish foundation for medical records and bills.

Plaintiffs are having increased trouble with doctor cooperation so they try and establish foundation for medical bills and records through defendants.

iii. Iowa R. Civ. P. 1.510

"A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 1.503 set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request."

Matter is admitted unless within 30 days after service, or within such shorter or longer time as the court may on

motion allow, the party serves an answer denying the same.

Only 30 requests without leave of court (1.510(1))

- **<u>Ideas to deflect this tactic:</u>**

  Object that the request calls for an admission of a pure legal conclusion.

  "While a request for admission may properly pertain to the application of law to fact, pure legal conclusions or the truth of a legal conclusion are out of bounds". *Aventure Comm. Tech. L.L.C. v. MCI Comm. Servs. Inc.*, 2008 U.S. Dist. LEXIS 70424 (2008).

  Plaintiffs cannot ask you to admit the correctness of their view of the legal significance of a statute or law. *Id.*

- Object on the basis that the request seeks to find information on trial preparation or attorney work product (i.e. strategy of case). Iowa Code 1.503 (3)(2009).

b. Hired Experts to Summarize Medical Opinions

i. Plaintiffs are hiring one doctor to summarize all of the doctor opinions in the case and give live testimony so they don't have to incur the costs of doctor depositions.

C. DEPOSITIONS

1. Plaintiff Depositions:

a. Focus on the Plaintiff – Don't forget to get to know them and how they live their daily life

i. Where have they traveled in the past few years?

ii. Do they own a home? What type of home? Land?

iii. Pets?

iv. Hobbies?

v. Vehicles they own?

vi. Clubs, gyms, organizations?

vii. No issue too small – small stuff is VERY important!

b. Questions about the scene immediately following the accident

i. What was the Plaintiff physically able to do after the accident? Ex. Get out of the car?

ii. Did they call an ambulance/refuse an ambulance?

c. Focus on easy medical questions/issues– the jury will focus on simple medical evidence more than complicated medical testimony

i. How long in hospital – overnight?

ii. Broken bones?

iii. Stitches

iv. Loss of consciousness?

v. Medications?

d. Start to develop timeline of treatment – Medical Summaries

i. Helps to identify any delay in treatment

ii. Helps to determine if story changes to medical providers

iii. Helps to identify "doctor shopping"

2. Doctor Depositions

a. Don't' forget to think like a Workers' Compensation Attorney

i. Inquire into functional impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition

ii. Ask about work restrictions

b. Remember that you want your transcript easy to understand for the jury – have the doctor explain medical terms

c. Tips on Deposing Doctors from Doctors

i. Be on time – remember their time is as valuable as ours

ii. Focus on specific questions on each visit rather than general questions such as "What happened on that visit?" – doctors will simply read to you the record and your time is better spent getting specific questions answered

iii. Does not hurt to do a small amount of medical research prior to the deposition – www.webmd.com; www.pdr.com; www.mayoclinic.com

iv. Don't rush – make sure you understand doctors' opinions and theories – best to ask again then leave with questions unanswered

v. Be prepared – doctors are amazed at how many attorneys come to depositions without a knowledge of the records

vi. Ask to flip through the medical chart at the deposition to ensure you have received all medical records.

3. *Plaintiffs' Recent Trend in Depositions: Videotaping Depositions*

a. Some Plaintiffs' attorneys are videotaping defendants' depositions.

b. Under Iowa R. Civ. P. 1.701(4): "Leave of court is not required to record testimony by non-stenographic means if the deposition is also to be recorded stenographically".

c. Benefits of videotaping a witness:

i. May make them a little nervous / off guard

ii. Could use for strong evidence of impeachment

iii. People may exaggerate less when on tape.

D. MOTION PRACTICE

1. ***Motions in Limine***

a. **Barring damage evidence when counsel is lax on discovery**

A party defending a claim is clearly entitled upon appropriate pretrial request to be informed of the amount of the claim. This includes discovery of the amounts claimed for separate elements of damages. *Wade v. Grunden*, 743 N.W.2d 872, 2007 Iowa App. LEXIS 1291 (2007).

You can move for this in a motion for limine, even if you didn't file a motion to compel. *Id.* at *14.

b. **Evidence about the credibility or truthfulness of a witness**

"Expert testimony expressing an opinion on the credibility or truthfulness of a witness is not admissible". *State v. Allen*, 565 N.W.2d 333, 338 (Iowa 1997).

This is not a new development, but consider using it for a broader range of testimony. Can be used to limit testimony from doctors about whether they believed Plaintiff was in pain, believed he was injured, believed the subjective complaints. *Gray v. See*, 2008 Iowa App. LEXIS 1176 (2008).

c. **Amount of Medical Expenses above and beyond the amounts paid**

You do NOT have to stipulate to amount of medical bills beyond the amounts actually paid.

In *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150 (Iowa 2004) the Court found an "injured plaintiff may recover only the reasonable and necessary costs of medical care". *Id.* The Plaintiff has the burden to prove the reasonable value of the services rendered. *Id.* The reasonable value can be shown through:

(1) Evidence of the amount paid for such services or;

(2) Testimony of a qualified expert witness.

Id. at 156. The amount charged, standing alone, is not evidence of the reasonable and fair value of the services rendered.

d. Warning: Plaintiff New Trend: Focusing on Defendant's Actions after Accident:

Recent case allows evidence of Defendant's actions after an accident to come into evidence. In *Birch v. Juehring*, 2008 Iowa App. LEXIS 441 (2008), the Iowa Court of Appeals found evidence regarding a defendant's failure to remain at the scene of the accident and provide identifying information or render assistance was relevant to show a "consciousness of responsibility" and is admissible.

Warning: Plaintiffs may use this to bar evidence presented on symptom magnification or exaggeration.

E. TRIAL PRACTICE

1. Jury Instructions

a. *Plaintiff's Recent Trend in Jury Instructions: Attacking the "Mere Accident" Instruction*

i. It is a fundamental tenet of tort law that the fact a plaintiff has suffered an injury, without more does not mean the defendant was negligent.

ii. BUT, Plaintiffs are battling to have this instruction thrown out. They argue that it unduly emphasizes a particular theory or otherwise distracts the jury in performing its responsibilities.

iii. This instruction is starting to come under attack in the medical malpractice arena. *See Smith v. Koslow*, 757 N.W.2d 677 (Iowa 2008).

2. Trial Strategies

a. Use a timeline

1. Have witnesses testify to events and show the jury

2. Helps identify gaps in treatment

3. Helps to show if Plaintiff is "doctor shopping"

3. Cross Examination

a. ***Prior Medical Conditions***

b. ***Social Security Disability or Private Disability Benefits:*** The issue of whether a Plaintiff is receiving disability benefits can be approached, as it may affect a Plaintiff's motivation to pursue employment. *Studer v. DHL Express USA Inc.,* 2009 Iowa App. LEXIS 233.

You cannot inquire as to specific amounts of benefits, but the Iowa Court of Appeals found no abuse in discretion for a district court who allowed Defendant to inquire about whether a Plaintiff was receiving social security and private disability insurance, as it may affect his motivation to pursue future employment. *Id.*

III. FRESH IDEAS IN DEFENDING PREMISES LIABILITY CASES

A. PLEADINGS

1. Affirmative Defenses

a Open and Obvious – Use the old standby defense and keep it in mind during litigation. Starting to appear more in summary judgments.

b. Remember there are no longer distinctions in premises liability cases for invitees and licensees.

The Iowa Supreme Court now uses a multifactor approach:

Owners and occupiers have a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors are:

(1) The foreseeability or possibility of harm;
(2) the purpose for which the entrant entered the premises;
(3) The time, manner, and circumstances under which the entrant entered the premises;
(4) The reasonableness of the inspection, repair, or warning;
(5) The opportunity and ease of repair or correction or giving of the warning; and
(6) The burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

Koenig v. Koenig, 766 N.W.2d 635 (Iowa 2009)

B. DISCOVERY

1. Interrogatories/Request for Production

2. Request for Admissions

3. *Caution – Plaintiffs' Recent Trend in Discovery: The Slip and Fall Expert*

a. Experts out there who calculate formulas to determine exactly how a person fell

C. DEPOSITIONS

1. Set the scene before the fall

a. Companions with them?

b. Where were they going?

c. Go step-by-step through lead up to fall

2. Mechanism of Fall

a. Did they fall on the way in or out?

3. Could they see what they fell on?

    a. After they fell could they see it?

2. Distracted?

    a. Plaintiffs use this to their advantage so ask this now

3. Opinions on the place they fell

    a. Employees generally friendly

    b. Premises clean?

    c. No other complaints?

    d. Do you still return to the store?

4. Feelings after the fall

    a. Embarrassment?

        i. Usually we feel embarrassed when we did something wrong or were clumsy

        ii. Could backfire so always try this in depositions

5. Was the Plaintiff being extra careful or cautious when walking on the premises?

        i. Important factor to help establish open and obvious. If they were being extra careful or cautious then you can argue they knew the condition was present.

D. MOTION PRACTICE

1. Motions for Summary Judgment

    a. Open and Obvious

        In *Harper v. Pella Corp.*, 2007 Iowa App. Lexis 832 (2007), the Court determined that the Plaintiff knew the stairs were slippery. He knew he needed to be careful and was trying to be extra careful when descending the stairs. Open and Obvious Rule applied – summary judgment granted for Defendant.

    b. When the Plaintiff does not know what they fell on or how they fell – a motion for summary judgment can be successful

There is a line of cases that provide when a Plaintiff does not have direct knowledge of what caused him or her to fall, they can avoid summary judgment **only if** they can establish the following circumstantial evidence:

1. Force and nature of the fall
2. The mechanics of the fall (i.e. what the Plaintiff's body did in the fall)
3. Testimony of where the fall occurred.
4. Testimony as to the nature of the terrain where the fall occurred.
5. Testimony as to the condition of hands and clothing, i.e. if they show anything to prove how fall occurred.

See Schoemann v. Fareway Stores, Inc., 2001 Iowa App. Lexis 583 (2001); *Randol v. Roe Enterprises, Inc.*, 524 N.W.2d 414 (Iowa 1994); *Perkins v. Wal-Mart Stores, Inc.*, 525 N.W.2d 817 (Iowa 1994).

E. TRIAL PRACTICE

1. Jury Instructions

a. Modify/Tweak the "Mere accident" instruction for greater impact

"Plaintiff's fall does not prove a defect on the [premises]". *Harper v. Pella Corporation*, 2007 Iowa App. LEXIS 832 (2007). The mere fact plaintiff fell and was injured is neither in itself sufficient to establish, nor does it create a presumption that defendant was negligent. *Id.*

2. Potential Trial Themes

3. Trial Tips for Effective Defense of Premises Liability Cases

IV. JURY SELECTION – Auto Pilot Overdrive

- *When I surveyed a group of defense counsel jury selection was the activity that defense counsel are trying the hardest to update old tactics **

A. **Importance of turning off Auto Pilot in Jury Selection**

1. Every case is different – therefore jury selection should change with each case

B. **A Few Fresh Ideas / New Tactics in Jury Selection**

1. Prepare for being in front of a jury

a. Remember you and your client are the center of attention and your goal is to make a favorable and lasting first impression on the jury

b. Have someone assist you with jury selection. This person can be your eyes and ears and help take notes

c. Check jury research for tips on presenting yourself to juries

i. The internet is an excellent tool for finding jury research

ii. Examples of findings from jury research:

- Warm and friendly colors should be worn

- Never wear a double breasted suit – Jurors perceive it as too slick

- Don't wear expensive jewelry – women should take off all rings except wedding ring. Men should wear wedding ring.

- Don't wear earrings that dangle, do not wear a watch

- Make sure and tell your client not to wear new shoes – it is the #1 giveaway that you've told them what to wear

- Make eye contact with jurors and make sure and look at each juror – don't favor one side.

2. Jury Selection begins when the jury enters the courtroom

a. Pay attention to prospective jurors as they enter the room

b. What to look for:

i. How do they carry themselves

ii. What are they wearing?

- Location of coats, belongings

iii. Do they talk to their neighbors?

3. Questioning the Jury

a. Always start with non-threatening questions in order to relax the panel. For example: basic demographic questions and jobs

b. Jurors will remember the first and last things they hear and see. Therefore make sure to start and end your questioning on strong points.

c. Don't ask the same questions in voir dire that are on jury questionnaires – instead follow up with the information you obtain.

d. Never ask a juror more than 3 questions on any one topic. If you don't reach the point you want to get to, thank the juror and move on.

e. The use of "Looping"

    1. When a juror has said something that is extremely helpful to your case you want to go to another juror and say "[Name] you just heard Mrs. Jones say. . . do you agree?".

    2. The more times a jury hears something the more likely they will believe it

f. Resist the "raise your hand" technique

    1. Rather than asking people to raise their hands when posing a general question to your panel, pick one juror to get the ball rolling. After that juror answers, go row by row and find out by a show of hands who agrees or disagrees.

    2. Remember to focus on people who are not raising their hands – you want to talk to them.

V. CONCLUSION

Indemnity

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IMPLIED INDEMNITY: A “TEACHABLE MOMENT”?

INTRODUCTION

The first step most defense lawyers take when they get a new file is to prepare an Answer and make sure they do not overlook any affirmative defenses. The second step, quite often, is to don their plaintiff’s hat and look for some other entity to invite to the party to share the risk. This is routinely done with a third party petition that alleges some sort of contractual obligation or common liability, and prays for “contribution and indemnity”.

On March 6, 2009, Justice Appel delivered the opinion of the Court in the case of *Wells Dairy, Inc. v. American Industrial Refrigeration, Inc.*, 762 N.W.2d 463 (Iowa 2009). Justice Appel began the opinion by stating that the Court is about to “…peer into the abyss of indemnity law” *Wells Dairy* at 467. He then commenced an effort to make the opinion a “teachable moment” by reviewing the history of and attempting to clarify the categories and terminology used in the law of indemnity.

ORIGINS OF INDEMNITY CONCEPT

Indemnity, contribution and subrogation are basically three interrelated common law principles upon which a party, which has satisfied a claim, can seek reimbursement from another party. *State v. Unisys Corporation*, 637 N.W.2nd 142 (Iowa 2001). The essence of each of these “evolved from the most basic legal concept of preventing injustice” and unjust enrichment *Unisys* at 149.

There is, however, a difference between contribution and indemnity. “[C]ontribution contemplates the distribution of loss among joint tortfeasor based on relative fault, whereas indemnity shifts the entire loss to the joint tortfeasor who was actually at fault”. 41 AmJur 2nd, Indemnity, at 417. Further, the right to indemnity remains within the province of contract language or common law whereas the right to contribution is now controlled, in large measure, by statute. Iowa Code §668.5; *Schreier v. Sonderleiter*, 420 N.W.2nd 821, 823 (Iowa 1998); 41 AmJur 2nd, Indemnity, at 417.

In *American Trust & Savings Bank v. United States Fidelity and Guaranty Company*, 339 N.W.2d 188 (Iowa 1989), the Court made it clear that "common liability must be established as a condition of contribution", and more importantly, unequivocally abolished the active-passive analysis in indemnity claims. *American Trust*, at 189-190. The Court reasoned that under the principles of comparative fault, liability – and contribution claims – should be assessed and apportioned according to fault. By contrast, when it comes to the active-passive analysis and indemnity claims, the Court said:

> Indemnity … shifts the entire loss of the passively – negligent party to the actively – negligent party. Additionally, it is difficult to decide what constitutes active negligence versus passive negligence.

American Trust, at 190.

Generally speaking, a party successful on a contribution claim will recover proportionate reimbursement for the amount of the underlying obligation. That, however, does not include the legal expenses incurred in the defense of the underlying claim. See 18 AmJur 2nd, Contribution, at 31.

WELLS DAIRY FACTS

The facts in the *Wells Dairy* case are fairly simple. In 1991, Wells Dairy hired American Industrial Refrigeration (AIR) to design and install a multimillion dollar refrigeration system in an ice cream plant. The contract called for a "total systems engineering and turnkey proposal" including the ammonia refrigeration component. The AIR contract said the system would be code compliant and of "highest quality material and workmanship available" and would include redundant safety systems. The contract also included an extended service agreement and was followed by AIR conducting training sessions on safety at the plant.

Refrigeration Valves and Systems Corporation (RVS) was a supplier of vessels, piping and component parts during the construction of the refrigeration system. RVS's role included the selection of pressure vessels and various valves including the check valve that ultimately,

and catastrophically, failed. The parties disputed whether or not RVS actually had a contractual relationship with Wells Dairy.

In any event, on January 28, 1999, Wells Dairy and Pillsbury entered into a contract whereby Wells Dairy agreed to manufacture certain Haagen-Dazs frozen dessert products to be marketed by Pillsbury. Two months after the contract was signed an explosion and fire occurred at the plant as a result of the catastrophic failure of a check valve in the ammonia refrigeration system. This resulted in the immediate and complete shutdown of the plant.

Pillsbury eventually sued Wells Dairy for breach of contract and negligence. Wells Dairy filed third party actions against AIR and RVS seeking "indemnification and contribution". AIR and RVS moved for summary judgment and the district court granted those motions based on the finding that there was no express agreement to indemnify between the parties. The Supreme Court, per Justice Appel, affirmed in part and reversed in part. Before doing so, Justice Appel took this as an opportunity for a "teachable moment" and as he said, "peer[ed] into the abyss of indemnity law". Although the claims by Wells Dairy against AIR and RVS were for "indemnification and contribution", Justice Appel's analysis appears to be limited to the indemnification claims.

TWO TYPES OF IMPLIED INDEMNITY

Justice Appel began his teaching by outlining the analytical framework for implied indemnity. The basic framework is set out in the first few paragraphs of his discussion as follows:

> Indemnification is a form of restitution, *Iowa Elec. Light & Power Co. v. Gen. Elec. Co.,* 352 N.W.2d 231, 236 (Iowa 1984). Indemnity shifts the entire liability or blame from one legally responsible party to another. *Federated Mut. Implement & Hardware Ins. Co. v. Dunkelberger,* 172 N.W.2d 137, 142 (Iowa 1969), *superseded by statute,* 1971 Iowa Acts ch. 131, § 643, 646 (Iowa 1988). Indemnity is, in short, a redistribution of risk. Nicholas P. Alexander, *Developments in Indemnity Law: Express, Implied Contractual, Tort-Based & Statutory,* 79 Mass. L.-Rev. 50, 51 (1994).

> The nomenclature used by courts for implied indemnity claims can be confusing and is not always used with precision. When an implied obligation to indemnify arises from an existing contractual relationship, it is often said to involve an implied-in-fact obligation, or implied contractual indemnity. See E. Eugene Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale,* 37, Iowa L. Rev. 517, 538 (1952); Dale B. Furnish, *Distributing Tort Liability: Contribution & Indemnity in Iowa,* 52 Iowa L.Rev. 31, 35 (1966). When indemnity arises outside of a contractual setting, it is often referred to as an obligation implied-in-law, or equitable indemnity. *Id.* Sometimes, however, the term implied indemnity is used to include both contractual indemnity and equitable indemnity, which can lead to considerable confusion. *See generally 17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.,* 259 A.D.2d 75, 693 N.Y.S.2d 554 (1999).
>
> For the purposes of clarity in this opinion, we refer to implied contractual indemnity as including indemnity claims (other than express indemnity) arising of contractual relations. We use the term equitable indemnity to refer to distinctly different indemnity claims which arise from the noncontractual legal relationships between the indemnitor and the indemnitee. (Emphasis added).

Wells Dairy, at 469-470.

(A) Implied Contractual Indemnity. This arises from a contractual relationship even if there is no actual indemnification clause in the contract. The Court said the standard for implying contractual indemnity is "generally quite high" and before such an obligation should be implied from a contract "there must be an 'unmistakable intent' to indemnify." *Wells Dairy,* at 470. If the standard is "quite high" and the evidence of intent must be "unmistakable", one wonders if the alleged indemnitee is entitled to a special jury instruction on burden of proof.

Historically, Iowa courts have implied contractual indemnity by finding that the duty to indemnify arises from other "independent duties" expressed in the contract which justify the implication of such a duty, even though it is not actually expressed anywhere in the contract. The Court noted that it has found an implied contractual duty to indemnify where circumstances require that a party to an agreement "ought to act as if it had made such a promise, even though nobody actually thought of it or used words to express it". *Wells Dairy,* at 470.

In support of this proposition, the Court cited *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987). In *Woodruff*, the Court noted that the subcontract was

simply a one page proposal and acceptance which generally said the work would be done according to specifications but was silent on the question of indemnity. *Woodruff*, at 783.

Also, the Court seemed to imply that because the exclusive remedy provisions of the workers compensation statute were implicated, the holding in *Woodruff* should be limited to that context. *Woodruff*, at 784-785. The Court said when the employer is the proposed indemnitor:

> … the question whether an indemnity agreement will be implied under the circumstances of a particular case is a complex one, and its resolution turns on applications of diverse and often competing, interests including public policy, simplicity of administration, fairness, and the underlying philosophy of workers compensation law. (Emphasis supplied).
>
> *Woodruff*, at 785.

In *Woodruff*, the Court said that, in looking at the general law of implied contracts, there are two broad categories. One would be those implied contracts that arise by actual interpretation of the document and the other would be those contracts:

> … that put into promissory language the court's finding that a party to the agreement ought to act as if it had made such a promise, even though nobody actually thought of it or used words to express it. *3 Corbin on Contracts*, § 561, at 279 (1960).
>
> *Woodruff*, at 785.

In *Woodruff*, the Court concluded that the facts of that case did not fall into the first category. *Woodruff,* at 785. The Court then held:

> … in this case, where the proposed indemnitee aided in the creation of the hazard, the law should not imply a right to indemnity from the employer. (Emphasis supplied).
>
> *Woodruff,* at 786.

In other words, the *Woodruff* decision says implied contractual indemnity falls into two general categories, specifically rejects the first category and then specifically holds that there will be no right to indemnity in that case. Yet, in *Wells Dairy*, the Court says it has previously "found an implied contractual duty" under the circumstances described in the second category and cites *Woodruff*. That seems difficult to reconcile.

In any event, in reliance upon the reasoning in *Woodruff,* the *Wells Dairy* Court concluded there was no basis to imply that had the parties thought about it, they would have imposed an indemnity obligation onto AIR. Further, the Court specifically held that a contractual obligation to meet certain safety standards is merely a promise to provide equipment with certain characteristics and does not give rise to an implied indemnity obligation in the event of a subsequent malfunction. In other words, in this instance the Court appears to be practicing what it preaches in terms of implied contractual indemnity by imposing a high standard and insisting upon an unmistakable intent to indemnify and finding there was not such an intent, as a matter of law.

The *Wells Dairy* Court also noted that one seeking implied contractual indemnity need not be "blameless in connection" with the underlying claim. *Wells Dairy*, at 470. This, also, is difficult to reconcile with *Woodruff* because, as previously noted, the *Woodruff* Court specifically held that a proposed indemnitee who "aided in the creation of the hazard" should not benefit from an implied right to indemnity. *Woodruff*, at 786. How can one be entitled to implied contractual indemnity even though they are not blameless yet be barred from seeking indemnity if they "aided in the creation of the hazard"?

The *Wells Dairy* Court also emphasized that implied contractual indemnity cannot arise from ordinary, garden variety, "plain vanilla contracts". *Wells Dairy*, at 470. The Court emphasized that something beyond a routine purchase agreement, service contract, or perhaps even a one page "proposal and acceptance" is necessary to elevate an otherwise silent contract into one that supports an implied contractual indemnity claim. *Wells Dairy*, at 471.

In the *Wells Dairy* case, third party plaintiff asserted that there should be implied contractual indemnity based upon AIR's contractual duty to do inspections and repairs over time and based upon AIR's contractual duty to provide safety devices. The Supreme Court rejected those arguments. The Supreme Court said AIR did not assume an ongoing duty to maintain the equipment and insure its operation and the day-to-day control had been turned back over to the

purchaser. The *Wells Dairy* Court distinguished *McNally & Nimergood v. Neumann-Kiewitt Contractors, Inc.*, 648 N.W.2d 564 (Iowa 2002) because in that case the contractor had maintained exclusive control which was not the case in the Wells Dairy situation.

In *McNally*, Neumann-Kiewitt leased a 150-ton crawler crane from McNally for use in the construction of the Employer's Mutual Casualty Insurance Company building. The relationship between the two was created "through an exchange of their respective form agreements". *McNally*, at 567. McNally sent its forms first and they included an obligation on Neumann-Kiewitt to be responsible for maintenance and repair of damage and an express indemnification clause. McNally signed that agreement but Neumann-Kiewitt did not.

Neumann-Kiewitt responded with its own set of forms. Both McNally and Neumann-Kiewitt signed one of the Neumann-Kiewitt forms and McNally, only, signed more than one. Subsequently, an employee of Neumann-Kiewitt was seriously injured when his arm became pinched between two tower sections of the crane. The injured employee sued both Neumann-Kiewitt and McNally but his claims against Neumann-Kiewitt were dismissed based upon the exclusive remedy under the workers' compensation statute.

The case against McNally went to trial but was settled after four days. The settlement agreement released McNally from its liability but did not release Neumann-Kiewitt. McNally ultimately sued Neumann-Kiewitt claiming both express and implied contractual indemnity. With respect to the claim for express indemnification, the Court held that: "there was no obligation to indemnify McNally if damage was the result of a defect in the crane". *McNally*, at 573. Accordingly, the Supreme Court affirmed the district court's summary judgment in favor of the purported indemnitee, Neumann-Kiewitt.

With respect to implied contractual indemnification, McNally claimed that the duties imposed on Neumann-Kiewitt to maintain and repair the crane and to notify McNally in the event the crane was not in good condition, created an "independent duty" to indemnify. The Court said that these types of duties in written contracts have been recognized as ones that "can give

rise to an implied obligation to indemnify for a loss". *McNally*, at 573. However, "the terms of the implied agreement for indemnification would not include indemnification for the indemnitee's own negligence … absent a clear intent". *McNally*, at 573-74. In other words, McNally was only entitled to indemnification from Neumann-Kiewitt based on a breach of some independent duty by Neumann-Kiewitt and not for any loss or liability resulting from McNally's own negligence.

(B) Equitable Indemnity. With equitable indemnity, the intention of the parties is irrelevant. The law simply imposes indemnity based upon the relationship of the parties and the nature of the underlying claim.

A classic example is vicarious liability. According to the Court, in certain instances, the relationship of the parties is such that "fairness and justice" simply require that one party bear responsibility for the acts of the other. *Wells Dairy*, at 471. Another traditional branch was based upon the, now defunct, distinction between active and passive negligence. This tort-based doctrine became unnecessary and useless in light of the enactment of the Iowa comparative fault act.

A great deal of the ongoing confusion in this area of the law comes from what some courts have embraced as a third branch of equitable indemnity based upon an "independent duty". Although this is sometimes confused with implied contractual indemnity, there is a distinct difference because in this analysis, the intent of the parties does not matter.

Searching for predictability and stability in this branch of the principle will be problematic notwithstanding *Wells Dairy*. The *Wells Dairy* decision notes:

> Because 'independent duty' equitable indemnity cases do <u>not</u> require common liability, they are not, at their core, based upon unjust enrichment. (Emphasis added).

Wells Dairy, at 471-472.

This statement seems to be directly at odds with Justice Cady's observation in 2001 when he described indemnity, contribution and subrogation as "three interrelated common law principles" and then said:

> In essence, these doctrines evolved from the most basic legal concept of preventing injustice. [citation]. Thus, the idea of unjust enrichment is deeply ingrained in our law and is widely applied. [citation]. … [I]t has not only given rise to specific derivative theories, such as contribution and indemnity, but can stand on its own as an open-ended, broad theory of restitution. (Emphasis supplied).

Unisys, at 149-150.

If equitable indemnity based upon "independent duty" does not come from the concept of unjust enrichment, one, naturally, must wonder where it does come from. The *Wells Dairy* answer is that it is:

> … based on notions of fairness based on the nature of the relationship between the indemnitor and the indemnitee and the underlying cause of the injury or damage claimed by the first party plaintiff.

Wells Dairy, at 472.

That does not exactly provide a strong sense of predictability and stability. Even Justice Appel acknowledges that what constitutes this type of independent duty is not always clear. He cites as an example a Vermont case which held "a breach of duty by licensed engineering professionals toward their clients is sufficient to support indemnification". He noted indemnification in this instance is not based upon a contractual relationship but rather upon "a tort involving a special relationship between a licensed professional and a client". The unmistakable implication is that licensed professionals have some heightened responsibility to their clients.

Justice Appel then goes on to say that the Iowa Supreme Court has "recognized equitable indemnity based upon an independent duty" and he cites *Hansen v. Anderson, Wilmarth and VanDerMaaten*, 630 N.W.2d 818, 826 (Iowa 2001). In *Hansen*, buyers of a business, who subsequently lost a lawsuit to the real owners of the business they thought they had purchased, sued their own attorneys alleging negligence in the handling of the transaction and negligence in the handling of the first lawsuit. Those attorneys, in turn, sought indemnity from the lawyer representing the adverse party in the underlying transaction.

Of course, the prevailing, long-standing principle in Iowa is that lawyers, absent some special circumstance such as fraud, collusion, or the existence of a direct and intended third party beneficiary, only have a duty to and, therefore, can only be sued by, their own client. See *Brody v. Ruby,* 267 N.W.2d 902, 906 (Iowa 1978) and *Theisen v. Miller*, 427 N.W.2d 874 (Iowa App. 1988).

The Court in *Hansen* said its analysis was "within the concept of equitable indemnity". The Court went on to quote at length from the Restatement (Third) of the Law Governing Lawyers for the proposition that reckless or intentional misrepresentations by lawyers subjects them to liability even to non-clients. The Court then said:

> We hold that once a lawyer responds to a request for information in an arm's-length transaction and undertakes to give that information, the lawyer has a duty to the lawyer requesting the information to give it truthfully. Such a duty is an independent one imposed for the benefit of a particular person or class of persons. We further hold that a breach of that duty supports a claim of equitable indemnity by the defrauded lawyer against the defrauding lawyer. The district court erred in concluding otherwise.
>
> Public policy favors a duty, running from an attorney representing a party to a commercial transaction, not to make fraudulent misrepresentations to an attorney representing the adverse party in the transaction. As the Restatement notes, '[c]ompliance with those obligations [to not knowingly make false misrepresentations of material law or fact] meets social expectations of honesty and fair dealing and facilitates negotiation and adjudication, which are important professional functions of lawyers.' Restatement (Third) of the Law Governing Lawyers.

Hansen, at 825-26.

The Court then responded to the third party defendant lawyer's fallback contention that indemnity should not be permitted here because it was really nothing more than the old theory of active-passive liability which the Iowa courts had long since abandoned. Notably, the Supreme Court rejected that argument because the indemnity claim against the third party defendant lawyer did not allege negligence but, rather, the intentional tort of fraudulent misrepresentation. The Court concluded there was a viable claim of equitable indemnity against

the third party defendant attorney who allegedly committed fraud based on the breach of the independent duty all parties, especially attorneys, have to be truthful and not fraudulent. See *Hansen,* at 826.

The Iowa Court of Appeals has held the line in *Theisen v. Miller*, 427 N.W.2d 874 (Iowa App. 1988). In *Theisen,* a former owner of real estate, in order to avoid to foreclosure, transferred the property to the mortgage company by warranty deed. The warranty deed and the abstract continuation were handled by an attorney retained by the mortgage company. The attorney allegedly neglected to do searches in the name of the original property owner. It was later discovered that there were encumbrances on the property in the form of tax liens and judgments against the former owner. Unwittingly, the mortgage company conveyed the property to the Secretary of Housing and Urban Development who then conveyed the property to plaintiff.

Plaintiff paid off the liens and sued the original property owner. The original property owner filed a third party claim for indemnification or contribution against the attorney. The case was tried to the court and judgment was rendered against the third party plaintiff and in favor of the third party defendant. The question on appeal was whether the third party defendant attorney owed a duty to the plaintiff. The Court of Appeals recognized the general rule that in the absence of special circumstances such as fraud or collusion, an attorney is liable for professional malpractice to the attorney's client only. The Court of Appeals went on to say:

> In these limited situations the third party, in order to proceed successfully in a legal malpractice action, must be a direct and intended beneficiary of the lawyer's services. [citation]. Where this special relationship between the lawyer and the third-party is lacking, courts refuse to impose liability based on legal malpractice. [citation]. Whether this special relationship exists, i.e., in this case whether Christensen knew or should have foreseen Miller would rely on his continuation of the abstract, is generally a question of fact.

Theisen, at 876.

In *Wells Dairy*, the Supreme Court concluded that Wells Dairy was entitled to pursue its equitable indemnity claim against AIR based on professional duties. Consistent with the Court's analytical framework, the opinion emphasized that professional engineering services fall within the equitable indemnity category of "independent duty" separate and distinct from any contractual obligations. The Supreme Court referenced a federal district court opinion which refused to recognize equitable indemnity based on nothing more than the general duty that every member of society owes to every other member (which is the duty not to do harm through tortious acts) but said AIR's situation was different because

> The duties of a professional engineer … are not the same as general duties owed to everyone by everybody, but are more specific and defined.

Wells Dairy, at 473.

The Court went on to endorse the notion of an equitable indemnity claim based upon UCC warranties. The argument is that implied warranties of fitness for ordinary use and fitness for a particular purpose under the UCC which normally run just from seller to buyer and arise by operation of law, create an independent duty sufficient to support a claim for indemnity. The Court acknowledged a "raging controversy" across the country regarding this issue. The Court said "based on stare decisis" it did not want to disturb the approach adopted in *Peters v. Lyons,* 168 N.W.2d 759 (Iowa 1969), which is the old dog bite resulting from a defective chain that failed case. *Wells,* at 474.

The *Wells Dairy* Court asserts that in the past, equitable indemnity claims based solely on fairness were problematic because of the lack of stability and predictability in the law. *Wells Dairy*, at 472. The Court, however, then goes on to say that "it is not necessary that the proposed indemnitor be liable to the first-party plaintiff in order to establish a claim of indemnity based upon an independent duty" equitable indemnity claim. *Wells Dairy*, at 473. Therefore, the potential pool for third-party defendants has not become any better defined or more predictable.

CONCLUSION

Now at least we should no longer confuse the nomenclature. Phrases such as “common liability” and “active – passive negligence” are no longer useful when alleging implied indemnity.

If you claim a third party defendant should be held to have promised to indemnify your defendant based on an interpretation of language in the contract or an “unmistakable intent” to make such a promise if the parties had thought about it at the time of the contract, then allege implied contractual indemnity or an obligation implied-in-fact.

If you claim the third party defendant has an obligation to indemnify your defendant based simply on the relationship of the parties or a “more specific and defined” duty than the general duty we all owe to one another to do no harm or simply based on “fairness and justice” then allege equitable indemnity or an obligation implied-in-law.

In any event, there is plenty of room for creativity.

Case Law Update III:

Civil Procedure, Juries & Trial,
Insurance,
Judgment & Limitation of Actions

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IOWA CASELAW UPDATE III

Civil Procedure; Court Jurisdiction & Trial; Evidence; Insurance, Judgment & Limitation of Action
2008-2009

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Civil Procedure

Failure to State a Claim

Hart v. Baldwin, 2009 WL 606237 (Iowa App. 2009) (filed Feb. 19, 2009). (*Final decision publication pending)

Facts: Plaintiff is incarcerated at the Iowa State Penitentiary in Fort Madison, Iowa, serving a life sentence. Between March 2005 and October 2008, Plaintiff was incarcerated at the Fort Dodge Correctional Facility in Fort Dodge, Iowa. In January 2008, prison officials promoted Plaintiff from privilege level three to privilege level four. Privilege level four inmates are housed in either Unit F or Unit E. Plaintiff was moved to Unit E though he did not want to be housed in Unit E. Plaintiff appealed his classification through the prison administrative process, but his appeal was denied. Plaintiff then filed a petition for judicial review of the agency action.

The district court granted the motion to dismiss, finding that it lacked subject matter jurisdiction because the respondents had not been served, the named respondents were not proper parties; and the applicant had no entitlement or right to be housed in a particular unit within the prison and was therefore not aggrieved or adversely affected by his promotion to Unit E.

Holding: Plaintiff failed to state a claim upon which relief could be granted.

Analysis: Plaintiff does not have a liberty interest in being confined in any particular unit or under any particular classification. Because Plaintiff has no constitutional or statutory entitlement to be housed in a particular unit, his claim failed as a matter of law.

Motion to Stay

Wilson v. Isle of Capri Casino, 2009 WL 779042 (Iowa App. 2009) (filed March 26, 2009).

Facts: Wilson was employed as a housekeeper at the Isle of Capri Casino. Wilson fell on ice and was injured when she was taking trash out to the casino's trash compactor. Wilson subsequently sought worker's compensation benefits and the casino denied the claim alleging that the Iowa Workers' Compensation Commission lacked jurisdiction because the Federal Jones Act governed the claim. Following an arbitration hearing, a deputy commissioner found that it had jurisdiction and awarded Wilson benefits. This decision was adopted and affirmed by the commission on appeal. The casino then filed a petition for judicial review of the decision and a motion to stay enforcement of the decision pending judicial review. The district court heard oral arguments on the motion to stay and thereafter ruled that it was not warranted. The casino appeals.

Holding: Decision of district court reversed; stay of the judgment granted pending judicial review.

Analysis: The filing of a petition for judicial review does not automatically stay enforcement of a workers' compensation judgment. Iowa Code § 17A.19(5)(a) (2007). After filing a petition for judicial review, a party may file an application for a stay with the district court.

The court is to consider and balance four factors in deciding whether a stay is warranted: (1) the extent to which the applicant is likely to prevail when the court finally disposes of the matter, (2) the extent to which the applicant will suffer irreparable injury if relief is not granted, (3) the extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings, (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

The Iowa Supreme Court concluded the balance of the factors in this case weighed in favor of the casino and it was an abuse of discretion to deny its motion to stay enforcement of the workers' compensation judgment pending judicial review.

Bassman v. Knapp, 2009 WL 1212749 (Iowa App. 2009) (filed May 6, 2009). (*Final decision publication pending)

Facts: Plaintiff filed this action against Defendant asserting claims for fraud, breach of contract, unjust enrichment, and promissory estoppel in a real estate transaction. In support of those claims, Plaintiff, who was d/b/a Bassman Real Estate, alleged he learned about commercial property that was or would soon become available for sale and met with agents at Iowa Realty about the property. Plaintiff's son-in-law, Scott Remsburg, who was one of the real estate agents Plaintiff met with informed Plaintiff that Knapp, a fellow real estate agent at Iowa Realty whom Plaintiff had met with, had another client that might be interested in the property discovered by Plaintiff.

Plaintiff claims that he disclosed details about the property to Remsburg and Knapp only after they signed "Confidentiality/Non Circumvention Agreements" wherein they agreed not to exclude Plaintiff from the transaction by circumventing him and dealing directly with the seller. Plaintiff additionally asserted the parties orally agreed that the three of them would share any real estate commissions on the sale of the building and any commissions on the sale of planned renovated condominium units on an equal 1/3, 1/3, 1/3 basis. Plaintiff alleges that despite the parties' agreements Knapp excluded him from the sale of the property and resulting commissions realized by Knapp.

Knapp filed a motion to stay the proceedings and compel arbitration. He asserted that both he and the Plaintiff were members of the Des Moines Area Association of Realtors (DMAAR) and the National Association of Realtors (NAR). As members of those associations, Knapp contended they had agreed to abide by the Code of Ethics and Standards of Practice

promulgated by NAR and were required to attend arbitration before litigation.

The district court entered an order granting Knapp's motion to stay the proceedings and compel arbitration. Plaintiff appealed.

Holding: The order compelling arbitration and granting Defendant's Motion to Stay was not a final judgment for the purposes of appeal, and therefore not appealable as a matter of right. Further, the Iowa Supreme Court declined to permit an interlocutory appeal. Appeal dismissed; stay of proceedings appropriate.

Analysis: The Iowa Supreme court has formerly held that an order compelling arbitration is not a final judgment appealable as a matter of right because it is not one that finally adjudicates the rights of the parties. Under Iowa Code chapter 679A, such an order does not dispose of the court action, but merely imposes a stay pending the outcome of the arbitration. In addition under that chapter, upon application of a party, the arbitrator's decision may be vacated, modified, corrected, or confirmed by the district court. A judgment modifying, correcting, or confirming the arbitration award is enforceable like any other judgment and may be appealed in the same manner as any other judgment. Furthermore, a party's participation in the arbitration does not prevent it from contesting the arbitrability of the dispute in an appeal of the arbitrator's decision. As such, the parties' rights are not finally adjudicated when arbitration is first ordered; and such a ruling is simply the initial step in obtaining a final adjudication.

The court further held that the interests of justice would not be better served by the consideration of Plaintiff's claims at this stage of the proceedings especially in light of the policy favoring arbitration as a means of settling civil disputes without the expense and delay of litigation.

New Trial

WSH Properties, L.L.C. v. Daniels, 761 N.W.2d 45 (Iowa 2008)(filed Oct. 17, 2008).

Facts: Indian Creek Corporation owned and operated a hog confinement facility on real estate that was sold to WSH Properties, L.L.C., at a tax sale after Indian Creek stopped paying taxes on the property. Curt Daniels, is the sole owner of Indian Creek. After WSH obtained title to the property by tax deed, it brought this replevin action against Daniels and Indian Creek to recover equipment used in hog confinement operation which Daniels had removed from the land, and seeking damages for retention. A jury returned a verdict for WSH. Daniels file a motion for a new trial contending the damage amounts were not supported by the evidence and one other contention. The court conditionally granted the defendant's Motion on the conclusion that the damage amounts were not supported by the evidence and the jury was motivated by a desire to punish the defendants unless plaintiff accepted a remittitur of damages. The court

did not elaborate on the factual basis for its finding of passion other than the excessiveness of the verdict. After plaintiff accepted remittitur of damages, the court then denied the motion for new trial and entered judgment against defendants. Defendants appealed. The Court of Appeals, 723 N.W.2d 449, reversed and remanded. This further review was granted.

Holding: The jury verdict was not so far outside the range of evidence to suggest the jury was motivated by passion and prejudice. There was some evidence of jury's calculations for damages however the jury did use the wrong standard-replacement cost to measure the value of the removed property at issue. Because the jury used the wrong method for their damage calculation, the court could exercise its power to order a remitter rather than ordering a new trial. Reversed portion of the court of appeals' decision reversing the district court's denial of the defendants' motion for new trial, affirmed the court of appeals' decision on the remaining issues, and conditionally affirmed the trial court's denial of the defendants' motion for new trial. If, within fifteen days of the issuance of procedendo, the plaintiff filed with the clerk of the district court a remittitur of all damages in excess of the amount established by the trial court's post trial order, the judgment of the district court would be affirmed. If the plaintiff did not file a remittitur, the district court would need to set the case for a new trial.

Analysis: In view of the evidence and the instructions, the court did not think the jury was so far outside the bounds of the record that its verdict raised a presumption of passion. If the verdict was the result of passion and prejudice it would be appropriate to order a new trial. If, however, the verdict was merely excessive because the figures are not supported by evidence, justice may be effectuated by ordering a remitter of the excess as a condition for avoiding a new trial.

A remittitur may be appropriate when (1) the jury's damage award was not justified by the evidence before it; (2) the jury failed to respond to the evidence; or (3) the wrong measure of damages was applied. Here the jury used the wrong standard-replacement cost-to measure the value of the removed property. The general rule being that the measure of damages for conversion is the fair and reasonable market value of the property at the time of the taking.

Bowers v. Grimley, 763 N.W.2d 276 (Iowa App. 2009) (filed Jan. 22, 2009). (*Final decision publication pending)

Facts: Autum Bowers was hit by a vehicle driven by Anna Grimley. Bowers declined medical treatment at the scene of the accident, but went to the ER with family members hours after the accident complaining of headache and back pain. The left side of Bowers' face was reddened, the bridge of her nose was tender to palpation, and the nurse wrote that Bowers had stated that she felt like her jaw was pushed to the right. The ER doctor was made aware that Bowers had hardware attached to her spine to correct curvature due to scoliosis (pre-existing back injury). Bowers was diagnosed with a minor head injury, cervical strain, and

contusion to the head and right shoulder. Bowers had x-rays and a CT scan performed while in the hospital. X-rays of the spine showed the rods in place. Bowers was given pain relievers while at the ER and was released a few hours after arriving. Bowers was told not to work for two days and to follow up with her own doctor in two days.

10 days after the accident Bowers went to her regular physician and continued to seek medical attention for problems associated with back pain. Eventually a CT scan showed some slight disruption of the contact area between the bone and the upper hook of the rod on the right side.

Bowers subsequently brought suit for an aggravation of her injury involving the movement of a rod in her back. The jury returned a verdict for the plaintiff and awarded her $5,602.79 for past medical expenses but nothing for past pain and suffering. The district court returned the verdict form to the jury indicating it could not accept the verdict in the form presented because the law required that if a Plaintiff was entitled to recover medical expenses, she is also entitled to an award of pain and suffering damages. The jury amended the verdict form and awarded $100 for pain and suffering.

Bowers moved for a new trial, contending the award was inadequate and that the court erred by not including an eggshell plaintiff instruction.

Holding: Motion for new trial was properly denied.

Although the evidence may have justified a higher award, such is not controlling. The district court did not abuse its discretion by denying Bowers' motion for a new trial based on a claim of inadequate damages.

Analysis: The district court has considerable discretion on motions for new trial based upon the ground that the verdict was inadequate. The Iowa Court of Appeals found that the district court did not abuse its discretion by denying Bowers' motion for a new trial based on a claim of inadequate damages stating that the cause and extent of Plaintiff's injuries were clearly disputed and that the jury could reasonably conclude that the accident did not cause the displacement of Plaintiff's hardware. Although the evidence may have justified a higher award, such is not controlling. The court found that by having the jury reconsider its award it corrected the original inconsistency.

Foster v. Schares, 766 N.W.2d 649 (Iowa App. 2009) (filed March 11, 2009).

Facts: Foster was struck as a pedestrian by Schares as she started to cross the street in an area where there were no sidewalks or crosswalks.

Foster subsequently sued Schares and alleged that she suffered from head pain, vision changes, and lightheadedness, as well as rib and hip pain, among other things.

At trial Foster testified that she still had pain in numerous areas of her body. She also testified as to how her injuries affected her daily and work activities. Foster's primary care physician opined that for the rest of Foster's life she would require medical care and treatment and would have pain in her left neck, shoulder, rib cage, hip, thigh, and right ankle areas. It was the doctor's opinion that Foster would probably require pain medications, analgesics, and other painkillers for the rest of her life. Schares presented no conflicting medical testimony. The parties stipulated that Foster's medical bills from the date of her injury were $23,368.86 and that $14,943.54 was the amount actually owed by her for those charges. The parties did not stipulate to causation.

The jury found Foster forty-nine percent at fault and Schares fifty-one percent at fault. The jury awarded Foster $10,000 for past medical expenses and $1500 for past pain and suffering. The jury did not award Foster damages for future medical expense, past loss of use of body, future loss of use of body, future pain and suffering, past lost earnings, or future loss of earning capacity. After making the reduction for comparative fault, the district court entered judgment in favor of Foster in the amount of $5865.

Foster then filed a motion for new trial, asserting various grounds. The district court concluded Foster was entitled to a new trial on the issue of damages only, finding the damages award was not sustained by sufficient evidence. The court explained that the award for present medical expense was less than the awards stipulated by the parties (although causation was not stipulated), but the testimony concerning future medical expense and future pain and suffering was uncontroverted and Foster should have been awarded some amount for past and future loss of use of body.

Schares appealed contending the district court erred in granting Foster a new trial on the issue of damages. Foster cross-appealed contending the district court erred in denying her motion for a new trial on all issues because (1) the jury's finding that she was forty-nine percent at fault was not sustained by sufficient evidence, (2) the district court erred in allowing an alleged profane statement into evidence, and (3) the district court erred in overruling her objections to several jury instructions.

Holding: A new trial was warranted in a negligence action because jury verdict on damages was not supported by the evidence as it did not award damages for future medical expense, and future pain and suffering, despite testimony of the pedestrian's primary care physician that she would require probably require pain medications, analgesics, and other painkillers for the rest of her life. District court affirmed.

Foster's cross-appeal regarding a new trial on all issues was denied. District court affirmed.

Analysis: If a verdict is not sustained by sufficient evidence and the movant's substantial rights have been materially affected, it may be set aside and a new trial granted. Iowa R. Civ. P. 1.1004(6). Because Foster's medical testimony was not contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in the evidence, or contradictory within itself so as to be the subject of rejection by the jury the jury could not arbitrarily, without cause, disregard the medical testimony.

Foster argued that the jury's finding that she was forty-nine percent at fault was not sustained by sufficient evidence. However, the court determined that both parties had a duty to keep a proper lookout and sufficient evidence supported the jury's allocation of fault. Therefore the trial court did not err in denying a new trial on this ground.

Notice

Cooper v. Ventling, 2009 WL 1219324 (Iowa App. 2009) (filed May 6, 2009).

Facts: Cooper filed a petition for declaratory judgment against the Ventlings. The district court ruled on the petition on March 12, 2007. On February 18, 2008, Cooper filed a petition to vacate or modify the judgment. The petition showed copies to Mark Hanson, attorney for the Ventlings. Cooper also obtained an order setting the matter for hearing on April 4, 2008. The order provided that copies of it should be mailed to all parties ten days prior to the hearing. A note on the notice indicates it was sent to Hanson. Hanson, on behalf of Ventlings, filed a pre-answer motion contending the court lacked jurisdiction, and insufficiency of service, among other things, and asked that the petition be dismissed. On April 4, 2008, the district court found it had no jurisdiction as the petition was not filed and served within one year of the ruling that Cooper sought to vacate, and dismissed the petition.

Holding: Notice not provided, case dismissed. Affirmed.

Analysis: There is no evidence that an original notice and petition were served in accordance with rules 1.301 through 1.315 on the Ventlings. Mailing a copy of the petition to the attorney for Ventlings did not confer jurisdiction and did not meet the original notice service requirements of Iowa Rules of Civil Procedure 1.301 through 1.315.

Personal Jurisdiction

Capital Promotions, L.L.C. v. Don King Productions, Inc., 756 N.W.2d 828 (Iowa 2008) (filed September 26, 2008).

Facts: Plaintiff, a boxing promoter with its principal place of business in Iowa that had a promotional rights agreement with a professional boxer who was a Nevada resident, filed an action against defendant, an out-of-state promoter who was also a Nevada resident, alleging intentional

interference with contractual relationship in connection with the boxer's signing of a bout agreement with defendant outside the state while under contract to plaintiff. The alleged tortious acts took place in Nevada and Missouri and were centered on a fight to take place in Missouri. The District Court granted summary judgment to defendant ruling Iowa courts did not have personal jurisdiction over King Productions. Plaintiff appealed. The Court of Appeals affirmed and Supreme Court granted Plaintiff's application for further review.

Holding: Injuries to plaintiff did not arise out of and were not related to defendant's contacts with Iowa so as to permit exercise of specific jurisdiction over defendant. Decision of the court of appeals and the judgment of the district court were affirmed.

Analysis: Plaintiff, a boxing promoter with principal place of business in Iowa, failed to establish that defendant, out-of-state promoter, expressly aimed its tortious activities at Iowa, as necessary for Iowa to have specific jurisdiction over out-of-state defendant in action for intentional interference with plaintiff's contractual relationship with boxer. Boxer had signed a bout agreement with defendant outside the state while under contract to plaintiff. Alleged tortious acts were directed toward boxer and his manager, both Nevada residents, and alleged tortious acts took place in Nevada and Missouri and were centered on a fight to take place in Missouri. The court explained that previous cases which analyzed whether personal jurisdiction existed over a given defendant focused on a five factor test, which while still relevant, no longer provided useful analytical framework for determining personal jurisdiction.

The court determined that two questions should be asked when deciding whether a defendant has established current significant contacts with the forum to support a fining of specific jurisdiction including 1) whether the defendant has "purposefully directed" his activities at residents of the forum and 2) whether the litigation results from alleged injuries that 'arise out of or relate to" such activities. If the requisite contacts are found to exist, the court should then proceed to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice as required by due process. In this case, the only contacts the Defendant had with Iowa were phone calls to various individuals that had no relevancy to the subject matter of the suit.

The court also addressed the "effects test "provided in the U.S. Supreme Court case of *Calder v. Jones* which did require a finding of personal jurisdiction. Under the effects test, a defendant will be found to have availed itself in a manner supporting personal jurisdiction if: 1) the acts of the defendant were intentional; 2) the acts were uniquely or expressly aimed at the forum sate; and 3) the brunt of the harm was suffered in the forum state and the defendant knew the harm was likely to be suffered there. In this case, the evidence did not support a finding that the defendant expressly aimed its tortuous activities at Iowa.

Standing/Real Party in Interest

Frontier Leasing Corp. v. Duff Cunningham Golf Shop, Inc., 763 N.W.2d 276 (Iowa App. 2009) (filed Jan. 22, 2009).

Facts: C & J Vantage Leasing Co., not the Plaintiff named here, sued Defendants alleging a breach of a lease by failing to make the payments required. The defendants, in their Answer served March 28, 2007, denied that Vantage Leasing was the real party in interest and further stated as an affirmative defense that Vantage Leasing was not the real party in interest.

In a ruling filed January 9, 2008, following a hearing on the defendants' motion to dismiss on real party in interest grounds, the district court found that the only named plaintiff was Vantage Leasing, Vantage Leasing had assigned the lease in question to Frontier Leasing Corporation (Frontier) on April 8, 2005, Vantage Leasing had had the ensuing time period to seek to amend its petition or substitute parties but had failed to do so, and that the file contained no application to amend the petition or substitute parties. The court then dismissed the lawsuit. Frontier, never a party to the lawsuit in the district court, filed a "Motion to Reconsider" on January 14, 2008. The defendants resisted the motion and the district court denied the motion on February 15. Frontier served and filed a notice of appeal on February 22, 2008.

Holding: Frontier was never a party to the lawsuit in the district court and did not have legal interest in the suit between Vantage and the defendants. Thus, they lack standing to appeal.

Analysis: The Iowa Supreme Court has held that standing to sue means a party must have sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. This means that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected. Having a legal interest in litigation and being injuriously affected are separate requirements for standing. In short, the focus is on the party, not on the claim. Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing.

Venue

Froman v. Keokuk Health Systems, Inc., 755 N.W.2d 528 (Iowa 2008) (filed August 29, 2008)

Facts: Plaintiffs brought an action against Defendants Keokuk Health Systems, Inc. and Keokuk Health Systems, Inc. d/b/a K.A.M.E. Pharmacy, in the Iowa District Court for Lee County at Fort Madison, a/k/a the northern division of Lee County, alleging that pharmacy negligently filled prescription for medicine. Defendants filed a pre-answer motion under Iowa Rule of Civil Procedure 1.808(1) requesting a change of venue to

the Iowa District Court for Lee County at Keokuk, a/k/a the southern division of Lee County, where the Defendant pharmacy was located, and where the prescription was filled. Defendants contended that venue was proper only in Keokuk because the north and south Lee County divisions of the district court are different counties for venue purposes. The district court denied the motion, concluding venue for this action was proper under the personal injury venue provisions of the Iowa Code, namely section 616.18 (2005), in either the north Lee County or the south Lee County division. Defendants then sought an interlocutory review of the district court's denial of their motion to change venue.

Holding: Each judicial division of Lee County, Iowa, is a separate "county" for purposes of venue. Where the Defendant resided in the south division of Lee County, and where Plaintiffs made no claim that their injuries were suffered elsewhere, venue in the north division of Lee County was not proper.

Analysis: The Supreme Court had to construe what the term "county" meant in Iowa Code section 616.18, the personal injury venue statute which provides that "actions arising out of injuries to a person ... may be brought in the county in which the defendant ... is a resident or in the county in which the injury or damage is sustained." It was undisputed that the Defendants resided in Lee County for venue purposes, however the Defendant contended that the term "county," as used in section 616.18, should be construed to refer to each division in a county with more than one judicial division. In support of its contention, the Defendant relied on a provision within Iowa Code chapter 607A, the code chapter which prescribes procedures for the selection of jurors, which provided in part that "in counties which are divided for judicial purposes, and in which court is held at more than one place, *each division shall be treated as a separate county,* and the grand and petit jurors, selected to serve in the respective courts, shall be drawn from the division of the county in which the court is held and at which the persons are required to serve."

J.*M. Mazzitelli Financing, L.C. v. Whitfield & Eddy, P.C*., 2009 WL 1492325 (Iowa App. 2009) (filed May 6, 2009).

Facts: Plaintiffs filed suit against the defendants claiming legal malpractice in the handling of a bankruptcy, which caused the plaintiffs to suffer damages. The case was initiated in Johnson County, but upon request of the defendants was transferred to Polk County. District court entered judgment in favor of Defendants. Plaintiffs appealed alleging numerous errors, including that the court erred in allowing venue transferred from Johnson to Polk County. Specifically, the Plaintiffs contended that venue was proper in Johnson County because it was brought in the county in which damage was sustained according to Iowa Code § 616.18 (2005).

Holding: Venue was properly transferred to Polk County. Affirmed.

Analysis: "Property" under Iowa Code section 616.18 encompasses both tangible and intangible assets, and because plaintiffs' underlying personal injury action dealt with their damaged property, Plaintiffs asserted that 616.18 was applicable. While the damage may have occurred in Johnson County, Iowa Code section 616.18 was inapplicable in this case because 616.18 only applies when the injury or damage is sustained in a county where none of the defendants reside.

To the contrary, Iowa Code section 616.17 provides that personal actions must be brought in a county in which some of the defendants actually reside. In this case the defendants' place of business was in Des Moines; many triggering events and procedural aspects of the lawsuit occurred in Des Moines; and the prior bankruptcy proceedings took place in the United States Bankruptcy Court for the Southern District of Iowa, located in Polk County. These factors were sufficient to find that change of venue was proper.

Writ of Certiorari

Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. Of Dir., 754 N.W.2d 854 (Iowa 2008) (filed August 08, 2008)

Facts: Taxpayers filed a certiorari action challenging the Des Moines Independent Community school board's decision to close certain schools and reappropriate resources to other needs.

Holding: School district's decision to modify ten-year plan by closing certain schools and reappropriation of resources was not a judicial or quasi-judicial function, and thus taxpayers could not seek review of decision by writ of certiorari.

Analysis: A writ of certiorari is available only when authorized by statute, or when an inferior tribunal, board, or officer is alleged to have exceeded proper jurisdiction or acted illegally while engaged in a judicial or quasi judicial function. Since the school's decision to close certain schools was not a judicial or quasi-judicial function the taxpayers were precluded from seeking review of the board's decision by a writ of certiorari.

Evidence

Admissible Evidence

State v. Schaer, 757 N.W.2d 630 (Iowa 2008) (filed Nov. 21, 2008).

Facts: Defendant and Teresa Bergan had been in a romantic relationship for about four years prior to the events at issue in this case. On June 3, 2004, Bergan spent the day with her stepsister, Sarah Reckner. Between 9 p.m. and 10 p.m. that evening, Reckner dropped off Bergan at the home Bergan shared with the Defendant. Approximately fifteen minutes

later, Reckner received a phone call from her stepsister asking Reckner to pick her up. According to Reckner's trial testimony, her stepsister told her “they had gotten into a fight” and that she had left the house. Reckner picked up her step-sister from a church which was a few blocks away from her step-sisters home and took her to the ER upon seeing her. Police arrived at the hospital and interviewed the victim regarding the nature and source of her injuries. During the victim’s conversations with medical personnel and the police officer, she identified the defendant as her assailant. Defendant was subsequently arrested and charged with domestic abuse assault with intent to cause serious injury and with willful injury causing serious injury. He pled not guilty, and the case proceeded to a jury trial. By the time of trial, the victim had recanted her original statements identifying the defendant as the perpetrator and asserted an unnamed female had assaulted her. Due to this recantation, the State did not call the victim to testify at trial and instead used the testimony of the step-sister, medical officials and the police officer. The jury returned a verdict of guilty. Defendant appealed.

The defendant's appeal was transferred to the court of appeals, where a divided panel determined, with one exception, that his claims were without merit. With respect to the defendant’s challenge to the police officer’s testimony, the court concluded error had not been preserved. This court granted the defendant's application for further review to consider his claims based upon the Confrontation Clause.

Holdings: 1) Victim’s incident-describing statements to her stepsister and to doctor and nurse who treated her at hospital were non-testimonial, and
2) defendant was not prejudiced by any deficiency in defense counsel’s failure to object to trial court’s admission of statement made to police officer by victim that defendant was her assailant.

Therefore, the Iowa Supreme Court concluded that the admission of hearsay testimony by the step-sister and the medical personnel as to the victim’s statements to them did not violate the defendant's right to confront the witnesses against him. The court further concluded that trial counsel failed to preserve error on the admission of testimony by the step-sister and the police officer as to what the victim told the officer, however when considering the claim under an ineffective-assistance-of-counsel analysis, even if the admission of this evidence violated Defendant’s confrontation rights, reversal was not required because the defendant suffered no prejudice from this testimony: it was cumulative to the properly admitted testimony of the step-sister and the medical personnel. Decision of court of appeals vacated, district court affirmed.

Analysis: The statements made to victim’s stepsister and to doctor and nurse who treated her at hospital were non-testimonial because they were made for the purpose of obtaining assistance and medical treatment. These statements were not made under circumstances that would lead and objective person to reasonably believe that they would be available for use at a later trial.

State v. Harper, 2009 WL 277087 (Iowa 2009) (filed Feb. 6, 2009). (*This opinion has not been released for publication in the permanent law reports. Until so released, it is subject to correction, modification, or withdrawal).

Facts: A badly-burned woman was brought to the emergency room. When the attending doctor asked what had happened, she responded, "Sessions Harper raped me, tied me, and set my house on fire." The woman died eighteen days later from the injuries sustained from the burns. At trial, Harper objected to admission of the woman's statements, claiming their admission violated his right to confrontation as guaranteed by the Sixth Amendment. The district court determined the statements were admissible under the forfeiture-by-wrongdoing exception to the Confrontation Clause. Defendant was convicted of first-degree sexual abuse, kidnapping, murder, and arson. Defendant appealed

Holding: Victim's statements to hospital staff that defendant raped her, tied her, and burned her house were admissible under both the excited utterance exception and the dying declaration exception to the hearsay rule. The victim's statements were considered non-testimonial.

Analysis: The district court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception. The rationale behind the excited utterance exception to the hearsay rule is that statements made under the stress of excitement are less likely to involve deception than if made upon reflection or deliberation. To be admissible under the dying declaration exception to the hearsay rule, it must be clear from the circumstances that the declarant's sense of impending death was so certain that he was without hope or expectation of recovery.

The victim made the statements not long after being rescued from her burning home and when she made the statements she was being treated and was still suffering from the startling event. The victim knew death was near. The woman had told a paramedic she wanted to die and she told a hospital staff member that she thought she was going to die.

State v. Harris, 763 N.W.2d 269 (Iowa 2009) (filed March 6, 2009).

Facts: Officer Overton was dispatched to a location where a pedestrian had been struck by a vehicle. Overton arrived at the scene within minutes and observed medical personnel attending to an elderly female victim. Overton, therefore, turned his attention to closing the interstate and securing the scene. Once further assistance arrived, Overton began to gather information from which he determined Harris was the driver of the vehicle that had struck the victim. As he approached the defendant, Overton detected a strong odor of alcohol on the defendant's breath. He also observed Harris's eyes were bloodshot and watery and his speech was slurred. Harris declined Overton's request to perform a field sobriety test. Harris did, however, agree to take a preliminary breath test. The PBT was administered at 7:38 p.m. and the result was .125 percent.

Harris was then examined by medical personnel and upon declining further medical treatment, was placed under arrest. The defendant was transported to the state patrol post where he was allowed to make several phone calls. Harris called his wife and also made attempts to contact an attorney. During this time, Harris was informed by Overton of the implied-consent law. Overton also notified the on-call assistant county attorney who advised the officer to begin preparing a search warrant application for obtaining a blood sample from the defendant.

Overton did not begin working on the search warrant application immediately, but waited until the on-call assistant attorney arrived. At 8:54 p.m., Overton invoked implied consent. Harris refused to give his consent. After further consultation with the assistant attorney, the officer decided to obtain a warrantless blood specimen from the defendant while continuing to work on the warrant application. The blood specimen was drawn by a technician from the medical examiner's office at 9:06 p.m. A warrant was obtained between 10 and 10:30 p.m.

Defendant moved to suppress the result of the blood test because the officer did not have a warrant. The District Court suppressed the blood sample and the test result on the ground the State had failed to establish "the peace officer reasonably believe[d] the officer [was] confronted with an emergency situation in which the delay necessary to obtain a warrant under section 321J.10 threaten[ed] the destruction of the evidence." *See* Iowa Code § 321J.10A(1)(*c*) (2005). The state appealed.

Holding: The police officer did not have a reasonable belief that he was faced with an emergency situation in which the time required to obtain a search warrant threatened the destruction of intoxication evidence. Affirmed.

Analysis: When a traffic accident has resulted in death or in injury reasonably likely to cause death and there are reasonable grounds to believe at least one of the drivers at fault for the accident was intoxicated, Iowa Code section 321J.10A allows for the withdrawal of a specimen of blood for chemical testing over the individual's objection, pursuant to a search warrant. Withdrawal of blood without a warrant is, however, only permitted in certain circumstances. Iowa Code section 321J.10A(1) provides:

Notwithstanding section 321J.10 [requiring a warrant to obtain a blood sample in the absence of consent], if a person is under arrest for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A, and that arrest results from an accident that causes a death or personal injury reasonably likely to cause death, a chemical test of blood may be administered without the consent of the person arrested to determine the amount of alcohol or a controlled substance in that person's blood if all of the following circumstances exist:

a. The peace officer reasonably believes the blood drawn will produce evidence of intoxication.

b. The method used to take the blood sample is reasonable and performed in a reasonable manner by medical personnel under section 321J.11.

c. The peace officer reasonably believes the officer is confronted with an emergency situation in which the delay necessary to obtain a warrant under section 321J.10 threatens the destruction of the evidence.

While Overton was aware that blood-alcohol levels dissipate over time and that this natural dissipation will result in the destruction of evidence, this knowledge alone is not sufficient to conduct a warrantless search. In addition, Overton never asserted that his reason for obtaining the warrantless blood sample was his belief that the evidence would be destroyed.

State v. Mosby, 763 N.W.2d 277 (Iowa App. 2009) (filed Jan. 22, 2009).

Facts: Mosby deposited a $17,000 check, payable to himself, drawn on a business account into a different account at John Deere credit union. John Deere placed a five-day hold on Mosby's account for the large check. The five-day hold expired at noon on September 11, 2004. At 12:01 p.m. on that day, $300 was withdrawn from Mosby's John Deere account at an (ATM) in St. Paul, Minnesota. On that same day, Mosby withdrew $14,000 in cash from a John Deere branch at the University Hy-Vee store in Waterloo. The next day, Mosby withdrew $2,698, leaving a balance of $5 in the account. On September 14, 2004, TCF Bank returned the $17,000 check to John Deere because TCF Bank had closed the Streetainment account. Waterloo police issued a warrant for Mosby's arrest and charged him with first degree theft. Mosby was found guilty. At trial, prior convictions of theft and forgery were presented as evidence. Mosby appealed and argued that the district court erred in admitting this evidence.

Holding: The prior convictions of theft and forgery were permissible.

Analysis: Mosby alleged the convictions were irrelevant to the crime for which he was being prosecuted and were highly prejudicial. This claim of error was reviewed for abuse of discretion.

The Iowa Supreme Court held that evidence of prior bad acts may be admitted where it is relevant to prove some fact or element in issue other than the defendant's general criminal disposition. In this case Harris' prior convictions for theft in the first degree were relevant and could go to the issue of knowledge. The district court weighed the relevant factors in the case, namely whether there was a danger of unfair prejudice which outweighed the probative value of the evidence in this matter pursuant to

Iowa Rule of Evidence 5.403. To make this determination the court had to determine whether the actual need for the evidence in light of the other available evidence, the strength of the evidence showing the prior bad act was committed by the accused, the strength or weakness of the evidence supporting the issues sought to be proven, and the degree to which the jury will probably be roused by the evidence improperly. The district court determined that the probative value of the evidence outweighed the unfair prejudice that may result.

The Iowa Supreme Court affirmed the decision of the district court and noted that permissible objectives for proof include: (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity (5) identity of the person charged with the commission of a crime. In this case, the evidence of Mosby's prior convictions for similar crimes showed his intent and the absence of mistake or accident. Furthermore, the evidence was not unfairly prejudicial because it pertained directly to the issue of knowledge, an element the State was required to prove.

Scott v. Dutton-Lainson Co., 765 N.W.2d 607 (Iowa App. 2009) (filed Feb. 19, 2009).

Facts: Plaintiff, the manager of a boat dealership, was injured when the swivel jack on a boat trailer collapsed as he attempted to move the boat and trailer with the tongue of the trailer landing on his foot. He subsequently sued the trailer manufacturer and the trailer jack manufacturer, alleging among other things that the jack failed due to defects in its design and manufacture.

Before trial, the defendants filed a motion in limine pursuant to Iowa Rule of Evidence 5.104 and Iowa Rule of Civil Procedure 1.431 for a ruling on preliminary questions of admissibility of certain evidence including subsequent remedial measures. The district court sustained a motion in limine and precluded Plaintiff from presenting evidence that the trailer jack manufacturer had modified the pin of the swivel jack following Plaintiff's injury. The court submitted the case to the jury on theories of design defects and failure to warn properly. The court entered judgment for the defendant and dismissed the plaintiff's claim. The jury returned a verdict in favor of the trailer jack manufacturer and Plaintiff appealed, claiming, inter alia, that the trial court improperly precluded the jack modification evidence.

Holding: Rule 5.407 should not act to exclude evidence of subsequent remedial measures in a design defect case. The district court abused its discretion in applying rule 5.407 to exclude evidence of subsequent design changes. The exclusion of such evidence prejudiced the plaintiff's substantial rights. Reversed.

Analysis: The admissibility of subsequent remedial measures is governed by Iowa Rule of Evidence 5.407, which states that:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort or breach of warranty or for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The Iowa Supreme court found that because the design defect emphasized a defect in the product, rather than any conduct or culpable act on behalf of the manufacturer, the trial court should not have used Rule 5.407 to exclude Plaintiff's evidence. The district court erred in excluding the evidence the jack was modified because it was relevant and highly probative. The evidence of a subsequent change in design was relevant to the fact finder's consideration whether the prior design was defective.

*Iowa Rule of Evidence 5.407 is significantly different from its federal counterpart, Federal Rule of Evidence 407.

State v. Williams, 2009 WL 1492866 (Iowa App. 2009) (filed May 29, 2009).

Facts: Jess Williams was convicted for violating pseudoephedrine purchase limitations. During his trial, the court compared the handwritten signatures on the records of pseudoephedrine purchases with three authenticated signatures of Williams. The court concluded all the signatures at issue were executed by Williams. Williams now appeals his conviction and argues that the court erred in admitting into evidence handwriting samples without expert testimony.

Holding Evidence was properly admitted.

Analysis: The applicable legal standard for handwriting comparison provides: "Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person which are proved to be genuine." Iowa Code § 622.25. Therefore, expert testimony was not required. Because Williams requested a bench trial, the court acted as the fact finder rather than a jury. As the fact finder, the court may compare signatures known to be genuine with the signatures on the logbook purchase records.

State v. Reynolds, 765 N.W.2d 283 (Iowa 2009) (filed May 1, 2009).

Facts: Outside of the pool hall in Rock Rapids, Brad Reynolds and Dan Kramer got into a fight. Kramer was injured, and Reynolds was arrested for assault. Before trial, the district court entered an evidentiary ruling allowing the State to introduce evidence that Reynolds had previously threatened and assaulted Kramer. At trial, Kramer testified to eleven past incidents with Reynolds. Before the submission of the case to the jury,

Reynolds requested jury instructions regarding the prior-bad-acts evidence and concerning character and reputation. The court denied Reynolds' request for the instruction on character and gave a modified version of the prior-bad-acts instruction. The jury found Reynolds guilty of assault causing bodily injury. Reynolds appealed, and the court of appeals reversed.

Holding: Danger of unfair prejudice in admitting all eleven incidents of prior bad acts outweighed their probative value and the district court erred in allowing all of them. Reversed.

Analysis: Reynolds' prior threats and assaults towards Kramer were relevant because they revealed his motive on the night in question. Despite this relevance, however, the danger of unfair prejudice in admitting all eleven incidents outweighed their probative value, and therefore, they should not have been admitted.

Jury Instructions- Res Ipsa Loquitur in Medical Malpractice

Banks v. Beckwith, 762 N.W.2d 149 (Iowa 2009) (filed Feb. 27, 2009).

Facts: Beckwith surgically inserted an Infus-A-Port catheter in Banks for the purpose of delivering chemotherapy to his body. It was later discovered that Banks' catheter had fractured, and a piece of it had migrated to Banks' heart. Banks underwent open-heart surgery to remove the fractured piece. The catheter was returned to the manufacturer for testing to determine the cause of the fracture. The manufacturer determined that the catheter was not defective, as the fractured catheter had a rough irregular edge that was most commonly the result of compressive forces associated with improper placement.

At trial, Banks presented expert witness who testified that a catheter does not fracture if properly placed in the subclavian vein and that the failure to do so would be below the accepted standard of practice. Banks could not present any direct evidence that Beckwith had actually improperly placed the catheter. The defendants' expert testified that a catheter could fracture even when it was placed properly in the vein.

At the conclusion of the trial, Banks requested that the court instruct the jury on the doctrine of res ipsa loquitur. The trial court determined that the res ipsa loquitur instruction was not warranted stating that though the evidence in the record was that a fracture of a catheter was a rare occurrence it does not get to the point of the general negligence res ipsa instruction. The case was submitted to the jury only on the issue of the specified negligence of the defendants. The jury found the defendants were not at fault, and judgment was entered in favor of defendants. Banks appealed the trial court's ruling, alleging that the district court erred in failing to instruct the jury on the theory of res ipsa loquitur.

Holding: Patient was entitled to res ipsa loquitur jury instruction.

Analysis: Res ipsa loquitur is a type of circumstantial evidence which allows the jury to infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence. To submit a case on the theory of res ipsa loquitur, the plaintiff must introduce substantial evidence that: (1) the injury was caused by an instrumentality under the exclusive control and management of the defendant, and (2) that the occurrence causing the injury is of such a type that in the ordinary course of things would not have happened if reasonable care had been used. If there is substantial evidence to support both elements, the happening of the injury permits-but does not compel-an inference that the defendant was negligent.

When the doctrine of res ipsa loquitur is used in a medical malpractice case, the plaintiff is relieved of the burden of showing that specific acts of defendant were below accepted medical standards. The plaintiff still must prove negligence, but he or she does so by convincing the jury the injury would not have occurred absent some unspecified but impliedly negligent act.

In res ipsa loquitur cases, a plaintiff is not required to eliminate with certainty all other possible causes or inferences. The plaintiff need only produce evidence from which a reasonable person could say that on the whole it is more likely than not that there was negligence associated with the cause of the event.

Banks introduced substantial evidence that the fracture of a catheter does not happen in the ordinary course of events without negligence.

Verwers v. Rhoades, 2009 WL 1212726 (Iowa App. 2009) (filed May 6, 2009).

Facts: Dr. Philip Kohler and Dr. Joseph Rhoades performed surgery on Verwers. The surgery was to treat Verwers' prostate cancer, and radioactive seeds were implanted through his perineum. During the surgery, a square metal template heated to 270 degrees was used to implant the seeds into Verwers' prostate through long pins. Usually the template was cooled in water before being used on patients. However, it appears during Verwers' surgery the template was not cooled and Verwers suffered second- and third-degree burns in the shape of a square to his rectal perineal area and inner buttocks.

Dr. Kohler and Dr. Rhoades were “co-surgeons” for the operation. Although each claimed the other doctor actually positioned the template to Verwers' skin, the doctors both admitted to holding the template at some point during the surgery. Dr. Kohler testified that he did not feel any heat from the template when he touched the template during the procedure. The doctors both noted that Verwers had a burn after the surgery. As a result of the burn, Verwers endured intense pain for more than four months after the surgery without being able to walk normally, wear ordinary clothing, or clean himself.

Verwers filed this suit, alleging his injuries were a result of specific and general negligence on the part of Dr. Kohler. Verwers intended to rely upon the doctrine of res ipsa loquitur to prove his general negligence claim, but the district court declined to give the res ipsa loquitur jury instruction. The jury returned a verdict in favor of Dr. Kohler on the only submitted claim: specific negligence.

Holding: The district court erred in refusing to give the res ipsa loquitur instruction. Reversed and remanded.

Analysis: Verwers introduced substantial evidence that Dr. Kohler was in control of the instrumentality causing the injury, and that burn injuries to patients do not occur in the ordinary course of events without negligence. Further, there was no direct evidence as to the precise cause of the injury. The district court's refusal to allow the instruction was prejudicial to Verwers.

Required Evidence- Emotional Distress

Doe v. Central Iowa Health System, 2009 WL 1363474 (Iowa 2009) (filed May 15, 2009).

Facts: John Doe, an employee of Central Iowa Health System, attempted suicide and was admitted to a hospital's mental health unit. Doe had friends call and inform his supervisor that he would not be at work because of his hospitalization. Doe's supervisor came to the hospital and visited him in the mental health unit. Doe gave his supervisor permission to tell two of his co-employees that he was in the unit and that they could come visit him. Doe did not tell his co-employees that they were not to disclose his situation or that he was in the mental health unit.

On Doe's first day back at work, he received a phone call from a former employee. This former employee was a sister of a person who worked at Iowa Health. Based on this phone call, Doe had a suspicion that an employee of Iowa Health accessed his records and told this person about his mental health problems. Doe also became suspicious that other people may have known about his hospitalization by the way some employees treated him when he returned to his job.

Doe filed a complaint with the health system privacy officer. The privacy officer investigated the matter and determined that six employees had impermissibly accessed Doe's health records. Each of these employees was penalized. Doe then filed this action against the health system alleging that it unlawfully disclosed his health records and thus violated HIPAA and Iowa state law regarding the disclosure of mental health information and that these violations caused him severe emotional distress. The health system argued that applicable law did not include a private right of action, and that Doe failed to present substantial evidence of emotional distress caused by the co-employees' actions. The jury

found that improper access had occurred, but the Plaintiff did not show that the disclosures caused his mental anguish.

Holding: There was not substantial evidence to support a finding that employee suffered emotional distress caused by employer's unauthorized release of mental health records.

Analysis: Without deciding the issue, the Iowa Supreme Court assumed in this case that Iowa law provides for a private right of action for impermissible disclosure of mental health information, but in order to succeed, Doe was required to prove that the unauthorized access to his medical records caused the emotional distress. The court found that it is not within the knowledge and experience of ordinary lay jurors to determine which aspects of Doe's emotional distress were related to the unauthorized disclosures of his records, and which were related to preexisting factors.

The plaintiff needed expert testimony to prove causation of emotional distress damages and he did not put on any expert testimony regarding his anguish. Unless the causation is so obvious that it is within the common knowledge and experience of a layperson expert testimony was required. The causal relationship between the harassment and the plaintiff's symptoms was not within the common experience of a jury. Without expert testimony relating Doe's condition to the unauthorized disclosures of his records, the jury was left to speculate. Accordingly, substantial evidence did not exist to submit the issue of causation to the jury.

Moore v. Eckman, 762 N.W.2d 459 (Iowa 2009) (filed March 6, 2009).

Facts: Anthony Moore was sitting on the trunk of the car Nicole Eckman was driving. Eckman drove her car forward with Anthony Moore still on the back. Anthony fell off the back of the car resulting in a head injury and ultimately, his death. His mother, Carole Moore, was not at the scene and did not see her son fall off the car. Rather, Carole Moore arrived at the scene immediately after the accident occurred. She found him lying in the street, unattended and seriously injured. She was the first person to arrive at his side and the first person to render aid after the accident.

Plaintiffs Carole and Shawn Moore filed a petition at law against Nicole Eckman, her parents Gregory and Molly Eckman, and Pekin Insurance Company claiming that defendant Nicole Eckman was negligent in the operation of her vehicle and, as a result of her negligence, Anthony Moore sustained a head injury which resulted in his death. Plaintiffs stated claims for negligence, loss of consortium, underinsured motorist coverage, and a bystander claim by Carole Moore for negligent infliction of emotional distress. Pekin was the underinsured motorist carrier.

Pekin filed a motion for partial summary judgment requesting dismissal of Carole Moore's bystander claim. Pekin argued that because Carole

Moore did not witness the accident itself, under Iowa law her claim fails because a sensory and contemporaneous observation of the accident itself is required to support a bystander claim.

The district court issued a ruling denying Pekin's motion. The district court found that there were factual issues precluding summary judgment that should be resolved by a trier of fact. Pekin filed an application for grant of appeal in advance of final judgment and stay of proceedings pending appeal with this court. The Iowa Supreme court granted Pekin's application.

Holding: 1) Family members who do not actually witness the victim's accident are not entitled to emotional distress damages in a bystander liability action. The mother in this case did not observe her son fall from car's trunk and thus could not recover emotional distress damages.

Analysis: Bystander liability allows a claim for emotional distress as a result of an injury to another. In *Barnhill* the Iowa Supreme Court set out the elements of a bystander claim:

(1) The bystander was located near the scene of the accident.

(2) The emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.

(3) The bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity.

(4) A reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed.

(5) The emotional distress to the bystander must be serious.

The criteria laid down in *Barnhill* make it clear that bystander recovery for emotional distress is strictly limited to situations which involve “witnessing peril to a victim,” and which have produced emotional distress from “*sensory* and contemporaneous observance of the accident as contrasted with learning of the accident ... after its occurrence.”

The undisputed facts in this case show that Carole Moore did not observe the accident. Because the contemporaneous observance of the accident is a requirement under Iowa case law the bystander claim should have been dismissed.

Insurance

Coverage for Consortium Claim

Jones v. State Farm Mut. Auto. Ins. Co., 760 N.W.2d 186 (Iowa 2008) (filed Nov. 21, 2008).

Facts: Shawna and Clinton Jones were divorced in 2000. Shawna was awarded primary physical custody of their only child, Skye. Skye lived with Shawna in her home.

On March 11, 2004, Shawna was driving with Skye in the backseat. Shawna turned around to attend to Skye. At that time, Shawna's vehicle crossed the center line and collided with an oncoming vehicle. Shawna was killed in the collision and Skye suffered serious injuries. It was found that Shawna was negligent in the operation of her vehicle and that it was her negligence which caused the collision. As a result of the accident, Skye was hospitalized and required extensive medical treatment. Skye's medical bills totaled $178,721.88.

At the time of the accident, Shawna and Clinton were insured under separate automobile policies of insurance issued by State Farm. Due to a policy exclusion, there was no coverage under the liability section of Shawna's policy for Skye's claims. As a result, by operation of Iowa law, Shawna became an "uninsured motorist," and the uninsured motorist (UM) coverage of Shawna's policy was available for Skye's claims. State Farm paid the $100,000 UM limits on Skye's claim, as well as the available medical payment limit under Shawna's policy of $50,000.

Clinton filed a petition against Shawna's estate seeking to recover damages for the personal injuries sustained by Skye in the collision, as well as for his loss of consortium under Iowa R. Civ. P. 1.206. Clinton also sued State Farm, seeking coverage for his loss-of-consortium claim seeking compensation under Shawna's liability policy and his own uninsured/underinsured motorist coverage. Defendants filed motions for summary judgment on the insurance coverage questions. The district court granted summary judgment in favor of State Farm, ruling that Clinton had no right of recovery for his loss-of-consortium claim under his ex-wife Shawna's liability policy, nor under his own uninsured and underinsured motorist coverage. He appealed.

Holding: Because Shawna was at fault for the accident which caused the parties' daughters injuries, her uninsured motorist coverage was available for the daughter's claims as the policy provided that the insurer would pay damages which the insured became legally liable to pay because of bodily injury to others. Further, a consortium claim consists of damages which an insured is legally liable to pay because of bodily injury to others and because there were no applicable exclusions barring coverage, Plaintiff's consortium claim feel within the coverage provisions of the policy.

Additionally, Plaintiff's own underinsured policy provided coverage for any damages not covered by Shawna's policy.

Analysis: In Iowa, insurance coverage is a contractual matter and is ultimately based on policy provisions. Therefore, insurers may and frequently do limit coverage to only specific claims. Insurance policies are contracts between the insurer and the insured and must be interpreted like other contracts, the object being to ascertain the intent of the parties. The words used should, unless otherwise defined, be given their ordinary meaning to achieve a fair interpretation. Words in an insurance policy are to be applied to subjects that seem most properly related by context and applicability.

A parent's loss-of-consortium claim is addressed by Iowa Rule of Civil Procedure 1.206, which states: "A parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child." The Iowa Supreme Court has previously determined that actions brought under rule 1.206 are not for the injury to the child but for the injury to the parent as a consequence of the injury to the child. Therefore, under Iowa law, Clinton Jones has suffered damages as a result of the injuries sustained by his child, Skye Jones. Therefore, an exclusion barring coverage for injuries sustained by a family member living with the insured had no application.

As far as Plaintiff's own underinsured motorist coverage, his policy was more restrictive than that required by Iowa law, and so the limitation of coverage to bodily injury sustained by him alone, had no effect. See Iowa Code § 516A.1 which does not require the insured to have sustained the bodily injury, instead the statute requires only that there be bodily injury to a person which results in damage to the insured.

Workers' Compensation

Larson Manufacturing Company, Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009) (filed Feb. 13, 2009).

Facts: Julie Thorson began working for Larson Manufacturing Company, Inc. in 1974. For her first 21 years with Larson her job duties evolved, but consistently involved continuous, repetitive movement for 8 hours a day and occasionally required overhead work. Thorson first sought treatment for neck and shoulder pain, believed to be caused by her work activities, in 1986. Dr. Toth diagnosed Thorson with chronic cervical and thoracic spine strain with somatic dysfunction. Further evaluations later showed other issues also relating to her work. Thorson's injuries occurred cumulatively, gradually, and progressively and caused her to be disabled at various times during a six-year period.

Holding: The issues of whether employer was put on notice for claimant's asserted cumulative injury date and whether claimant was entitled to

temporary partial disability (TPD) benefits were not determined in a prior action for purposes of issue preclusion.

Claimant became aware of the nature, seriousness and probable character of her cumulative injuries within the two-year workers' compensation statute of limitations.

Claimant suffered a decrease in her earnings before her cumulative injuries became manifest such that she was entitled to an award of temporary partial disability benefits for such period. In addition, employer was required to pay for only one independent medical examination (IME).

Analysis: The Iowa Supreme Court reaffirmed that the injury does not occur until the injured worker "can no longer work" aka the discovery rule. Therefore, the statute of limitations does not begin to run until the claimant recognized or should have recognized the "nature, seriousness and probable compensable character" of the disability. The Court found that the injured worker knew how serious her condition was and that it was work-related, by April 26, 1996. However, they allowed the Petition as timely, even though it was filed over three years later, on July 28, 1999. The Court also cited the "manifestation" rule in that the date that the injury is "manifested" is not the same as the date that the statute period starts running. The statute does not begin to run until the injured worker knows that the condition is serious and will have a "permanent adverse impact on employment or employability." The Commissioner found that Thorson should have become aware of the permanent nature of the condition on the day that she filed her Petition in July of 1999, even though the condition "manifested" itself in 1996.

Although it can be difficult in a workers' compensation proceeding to identify with precision the date of the cumulative injury, it is of critical importance in the determination of which employers and insurance carriers are at risk, whether notice was within the statutory period, whether statutory amendments were in effect, which wage basis applies, and many others.

Workers' compensation medical benefits statute requires an employer to pay for medical treatment and temporary partial disability benefits upon proof of diminished earnings during periods of temporary incapacity caused by work-related conditions which later manifests into a cumulative injury. The claimant must show substantial evidence of a causal connection.

Smith v. Elick, 763 N.W.2d 277 (Iowa App. 2009) (filed Jan. 22, 2009).

Facts: Kelly Smith worked at Kunkel's Sport Center, Inc. with Todd and Natasha Elick, who were the sole shareholders of Kunkels. For years, the Elicks brought their dogs to work with them, finding that having the dogs at work

was good for business as it created a comfortable, family-oriented environment at the store.

On December 12, 2005, the Elicks brought their Akita dog to work and secured him in the backroom with a leash. Smith entered the backroom to get cookies. The dog attacked her, causing substantial injuries. Smith filed a workers' compensation claim. The workers' compensation insurance carrier for Kunkels paid Smith temporary total disability and medical payment benefits.

Smith filed a petition for damages against the Elicks for strict liability upon the owner of a dog when that dog bites a person. The Elicks moved for summary judgment on the grounds that Smith's exclusive remedy against the Elicks was provided by Workers' Compensation. The district court granted the Elicks' motion for summary judgment. Smith appealed arguing that her strict liability claim falls outside the exclusivity of the Workers' Compensation Act.

Holding: The strict liability claim is dismissed.

Analysis: Workers' compensation is the exclusive remedy against an employer for employees who are injured by a dog bite within the scope of their employment.

Judgment and Limitation of Action

Issue Preclusion

City of Johnston v. Christenson, 2009 WL 1211868 (Iowa App. 2009) (filed April 8, 2009).

Facts: The parties' dispute centers on a 9.7-acre tract of land owned by Christenson in the City of Johnston. In 1998, all of the outbuildings on Christenson's land were destroyed or damaged beyond repair by a severe storm. After the storm, Christenson approached the city's zoning administrator about building a large accessory structure on the portion of his property that he used as pasture to replace the buildings that were destroyed. He proposed constructing a 16,000 square foot structure to be used for storage of feed and supplies, personal property, vehicles, and horses. Christenson filed an application with the board of adjustment for a special exception to exceed the maximum area limitation of 3600 square feet for accessory structures. He additionally requested a variance from the fifteen-foot height restriction. The board ultimately passed a resolution approving the special exception for area and granting a variance for height. The city council thereafter requested the board to reconsider. Christenson argues that the issue has already been litigated.

Holding: The doctrine of issue preclusion does not bar the claim in this case because the issue has not been "actually litigated."

Analysis: Iowa law is clear that issue preclusion requires that the issue was 'actually litigated' in the prior proceeding. The Cities admission regarding the nonconforming use status of Christenson's land in the board of adjustment proceedings did not constitute actual litigation of that issue for the purpose of applying issue preclusion.

City of Johnston v. Christenson, 2009 WL 1211868 (Iowa App. 2009) (filed May 6, 2009).

Facts: The Iowa Court of Appeals filed its opinion in this appeal on April 8, 2009, as indicated above, but subsequently granted the plaintiff-appellant City of Johnston's petition for rehearing. The April 8, 2009 decision was vacated and this opinion replaced it.

On remand, Christenson filed a motion to determine the viability of the district court's rulings on the parties' summary judgment motions in the declaratory judgment proceeding. He asserted, in relevant part, that the doctrine of issue preclusion applied to bar the City from litigating the nonconforming status of Christenson's land because the board approved that use when it granted the special exception and variance for Christenson's proposed accessory building. The district court agreed and entered an order finding the City is "barred by issue preclusion from relitigating the use of the underlying land in this Declaratory Judgment case." The court accordingly vacated its earlier summary judgment ruling and dismissed the City's declaratory judgment action, finding it "may argue the illegality of the Board's action in the Certiorari case."

The City appealed. It claimed the district court on remand erred in applying the doctrine of issue preclusion with respect to the issue of whether the nonconforming status of Christenson's land was eliminated under section 17.04.160(F). It also claimed the district court on remand lacked the jurisdiction or authority to vacate its ruling.

Holding: Christenson did not sustain his burden to establish issue preclusion.

Analysis: The issue was not actually litigated in the board of adjustment proceedings because the City conceded the nonconforming status of the land in arguing that Christenson's proposed structure would be an illegal expansion of that nonconforming use. The court denied Christenson's further attempt to preclude the City from litigating that issue in the declaratory judgment proceedings under the doctrine of judicial estoppel.

Res Judicata

George v. D.W. Zinser Co., 762 N.W.2d 865 (Iowa 2009) (filed March 13, 2009).

Facts: Jeffrey George filed a complaint alleging his employer, D.W. Zinser, violated provisions of IOSHA. The complaint arose out of violations George witnessed while performing lead abatement jobs for D.W. Zinser in September and October 2006. As a result of a subsequent

investigation, D.W. Zinser was cited for eight serious IOSHA violations and assessed penalties on February 8, 2007. On January 24, David Zinser told George he should return the company truck that had been assigned to him and there was no work available for him. On January 29, George met with David Zinser and carried a concealed recording device. On February 1, George had another similar meeting. Although much of the recordings were inaudible, it appeared that David Zinser was not going to give George work because of the IOSHA situation. George's employment with D.W. Zinser was subsequently terminated. The commissioner found that George, along with other employees, were laid off on January 12, which was before George filed his complaint regarding the IOSHA violations. George did not seek judicial review of the commissioner's decision under Iowa Code section 17A.19 (2007). On March 12, while the complaint was still under investigation, George filed a lawsuit in the district court containing the same retaliation claim as well as a claim for unpaid wages. D.W. Zinser filed a pre-answer motion to dismiss, arguing Iowa Code section 88.9(3) provides the exclusive remedy for pursuing retaliation claims under IOSHA, and the doctrine of res judicata barred George from relitigating that issue in district court.

The district court dismissed complaint on res judicata grounds. George appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Appeal was taken.

Holding: As a matter of first impression, former employee, as an individual, could bring claim of retaliatory discharge for reporting state Occupational Safety and Health Act (OSHA) violations. Plaintiff's claim was not precluded by res judicata.

Analysis: The issue of whether a lawsuit for wrongful discharge in violation of the public policy behind IOSHA is capable of being brought and pursued in district court was a case of first impression for the Iowa Supreme Court.

Here, the Iowa Supreme Court noted that the doctrine of res judicata prevents a party from relitigating a claim or issue that has already been determined by a final judgment. The Division, in investigating George's complaint and subsequently dismissing it, was not acting in a judicial capacity. George did not have a full and fair opportunity to present evidence or respond to D.W. Zinser's position. He had little to no control over the agency's investigation. The Division did not hold a hearing on the issue. It only conducted an informal nine-day investigation. The parties were not afforded a full and fair opportunity to litigate the matter in dispute.

Kajal Properties, LLC v. Dakota Title & Escrow Co., 763 N.W.2d 276 (Iowa App. 2009) (filed Jan. 22, 2009).

Facts: The plaintiffs purchased a Ramada Hotel in Omaha, Nebraska and obtained a title insurance commitment from Fidelity National Title

Insurance Company through Dakota Title & Escrow Co. The plaintiffs later discovered that there were three unreleased mortgages on the hotel that had not been shown on the title insurance commitment. The mortgages had been paid but not released. As a result of these liens, the plaintiffs allege they have been monetarily damaged.

Kajal and other plaintiffs filed suit in California state court against several defendants, including Fidelity and Dakota Title. The present case was filed while the California action was pending. In December 2006, Kajal and Desai also filed suit against Fidelity in U.S. District in Nebraska with the same causes of action as the California litigation. The federal court, referring to the California litigation and applying the doctrine of res judicata, dismissed the suit.

In the California litigation, Dakota Title was dismissed from the case for lack of personal jurisdiction. The plaintiffs voluntarily dismissed with prejudice all their claims against Fidelity except for the breach of contract claim. Summary judgment was granted in favor of Fidelity on that claim and it was dismissed with prejudice.

The plaintiffs brought this tort action against Dakota Title and Aistrope in Iowa. This was the first time Aistrope had been named as a defendant. Dakota Title and Aistrope filed a cross-petition against Fidelity, seeking indemnity and asserting that any liability on their part was Fidelity's responsibility as they acted within the scope of their agency.

Fidelity filed a motion for summary judgment, contending res judicata barred the parties from re-asserting the claims. Dakota Title and Aistrope then filed motions for summary judgment, arguing that if res judicata applied to the claims against Fidelity, the doctrine also barred the plaintiffs from asserting the claims against them. The district court granted Dakota Title and Aistrope's motions for summary judgment and dismissed.

Holding: Res judicata applies, summary judgment in favor of Dakota Title and Aistrope.

Analysis: A claim cannot be split or tried piecemeal. Thus, a party must try all issues growing out of the claim at one time and not in separate actions. The district court found the claims the plaintiffs brought against Fidelity in California arose out of the same primary rights as their claims in the current case. It further found that under California law, a dismissal with prejudice is an adjudication on the merits. The court found final judgment on the merits as to Fidelity was conclusive as to the rights of not only Fidelity, but also its privies/agents.

Statute of Limitations/Statute of Repose

State ex rel. Claypool v. Evans, 757 N.W. 2d 166 (Iowa 2008) (filed October 24, 2008).

Facts: In August 1999, Jeff Frank and his wife purchased a condo at Blue Jay Ridge Condominiums in Coralville. The development area included seven buildings, each having four units on the ground floor. Frank suffered from osteoarthritis and progressive degeneration of the joints in his hips and knees. This condition forced him to use a cane, crutches, and a walker depending upon the current state of his symptoms and he was advised that he would need a wheelchair in the future. The design and construction of the condominium development included obstructed sidewalks that caused Frank difficulty accessing his unit from the parking area. About two to three months after moving in, Frank complained to the builder/designer about the obstructed sidewalks, but his complaints were ignored, so Frank's accessibility problem continued for the duration of his occupancy.

On April 8, 2002, he filed a complaint with the Iowa Civil Rights Commission against West Winds Management Company, Wendell Miller, an employee of West Winds Management Company, Blue Jay Ridge Condominium Owners Association, and Michael Evans, alleging the construction and design of the condominium development blocked access to his unit in violation of the Iowa Civil Rights Act. West Winds managed the condominium development. On November 6, 2003, the commission received a report describing Blue Jay Ridge as highly inaccessible. In July 2003, prior to the time the commission received the report, Frank moved out of the development.

Frank elected not to file his own lawsuit, but chose to have the commission file a civil rights petition on his behalf under Iowa Code section 216.17A(1)(*a*) (2003). On December 10, 2004, in a proceeding separate from Frank's, Alicia Claypool, the Iowa Civil Rights Commissioner, filed a complaint on behalf of the commission pursuant to Iowa Code section 216.15(1).

On November 28, 2005, the attorney general filed separate actions on behalf of Frank and Claypool. Both petitions alleged the defendants discriminated in the sale or made housing unavailable under Iowa Code section 216.8A(3)(*a*)(1), (*c*)(3), discriminated in terms, conditions or privileges of sale and also in providing services or facilities according to section 216.8A (3)(*b*)(1), (*c*)(3), and failed to design and construct the dwelling in compliance with accessibility and adaptability features according to section 216.8A (3)(*c*)(3). The State filed Frank's action based on the discriminatory sale of the unit to him, while the State filed Claypool's action based on the discriminatory sale of the condominium units to the public.

Defendants filed a MSJ. The district court combined the cases for a hearing on the MSJ. The District Court granted summary judgment to all defendants who had filed a MSJ on the basis that the State's claim was time-barred by the two-year statute of limitations for civil rights actions, because a civil rights complaint must be filed with the commission within 180 days of the discriminatory practice and Frank purchased his unit

more than 180 days prior to the filing of his complaint with the commission and more than two years prior to the attorney general filing the petition in the district court on his behalf.

Holding: Alleged discriminatory practice had occurred and was terminated, such that statutes of limitations began to run, on dates that units designed and constructed to be inaccessible to a person with disabilities were sold. Decision of district court affirmed.

Analysis: The Iowa Civil Rights Act contains two statute of limitations. One requires a person to file a claim within one hundred eighty days after the alleged discriminatory or unfair practice occurred (see Iowa Code § 216.15(12) and the other requires a person to file a civil action in district court no later than two years after the occurrence of the termination of an alleged discriminatory housing or real estate practice (see Iowa Code § 216.16A(2). A discriminatory or unfair practice in the sale of a housing unit under Iowa Code § 216.8A(3), which prohibits the sale of inaccessible housing to persons with disabilities, is complete at the time of sale. Therefore, no continuing violations theory is available to extend the statute of limitations once sales are complete.

Wilkins v. Marshalltown Medical and Surgical Center, 758 N.W.2d 232 (Iowa 2008) (filed Dec. 5, 2008).

Facts: Plaintiff Jerald Wilkins was seen in the ER at Marshalltown Medical and Surgical Center (MMSC) on September 23, 2001 by Dr. Lance Van Gundy. Because Wilkins complained of a variety of symptoms, Van Gundy requested a chest x-ray and urged follow up at the University of Iowa Hospitals and Clinics (UIHC). The next day, Dr. Kraig Kirkpatrick, a radiologist, compared Wilkins' x-ray with one taken five years ago and found a “diffuse increase in the density of a midthoracic vertebral body.” Kirkpatrick wrote in his report that a common cause of such change would be prostate cancer. Dr. Mitchell Erickson approved the report and it was made part of Wilkins’ file. Wilkins subsequently went back to the ER complaining of worsening symptoms, but nothing was mentioned by any physician regarding Kirkpatrick's report. Wilkins was transferred to UIHC that same day for follow-up studies, but Kirkpatrick’s report was not included in the medical records forwarded to UIHC. Wilkins was subsequently discharged from UIHC two days later without any symptomatic complaints.

On February 27, 2002, Wilkins again presented to the MMSC ER and was diagnosed with a urinary tract infection. Over the next several months, Wilkins was seen in the ER numerous times for low back pain and received prescriptions for pain relief. Wilkins was eventually brought back to the ER by ambulance on August 14, 2002 when he was informed that doctors suspected prostate cancer.

On February 27, 2004, Wilkins sued MMSC and several of the ER physicians alleging negligent medical care from February 27, 2002

onward. Plaintiff subsequently amended his complaint to add McFarland Clinic, P.C. as a co-defendant.

All defendants moved for summary judgment. MMSC additionally asserted that it had no legal responsibility for the actions of the ER physicians as they were employees of McFarland and not the hospital.

The district court granted summary judgment to defendants on statute of limitation grounds and plaintiff appealed. Wilkins' wife was subsequently substituted as plaintiff after Wilkins' death.

Holdings: 1) The two-year limitations period began to run when patient was properly diagnosed with prostate cancer, and therefore his claim is not time barred and 2) fact issue remained as to whether medical center was vicariously liable for the negligence of emergency room doctors on a theory of apparent authority or ostensible agency.

Analysis: The outcome of this case is controlled decision in *Rock v. Warhank,* 757 N.W.2d 670 (Iowa 2008). In *Rock,* the Iowa Supreme Court held that in a medical misdiagnosis case involving cancer, the earliest possible triggering date for the statute of limitations under Iowa Code section 614.1(9) is when the patient is properly diagnosed with cancer. In this case, Wilkins was not informed that he had cancer until sometime after August 14, 2002. That date was well within two years of the commencement of the present action and therefore Plaintiff's claim was not barred as a matter of law by the governing statute of limitations.

Addressing plaintiff's argument that MMSC was vicariously liable for any negligence through the doctrine of "ostensible" agency (otherwise known as apparent authority), the Iowa Supreme court noted that the actual status of the agent was immaterial. Thus, the mere fact that the emergency room doctors were not MMSC employees is not dispositive. The court concluded that although the record did not demonstrate that MMSC ever expressly held out the ER doctors as employees, and in fact showed that the individual physicians were not employees of the hospital, Wilkins had put forth circumstantial evidence from which an agency relationship could be inferred.

Thus, under the facts of this case, the Iowa Supreme court concluded that a reasonable jury could find that MMSC was vicariously liable for the negligence of the ER doctors on a theory of apparent authority or ostensible agency.

St. Paul's Evangelical Lutheran Church v. City of Webster City, 2009 WL 1651058 (Iowa 2009) (filed June 12, 2009).

Facts: St. Paul's Evangelical Lutheran Church was built in 1953 in Webster City. The construction included a gravity-flow sewer connection to the city's sanitary sewer line. In 1978, the City of Webster City began a multi-million dollar project to upgrade its public water main system. During the

installation of a water main on St. Paul's property, the City's contractor severed St. Paul's sewer line because it was on the same plane as the water main. In reconnecting the line, the contractor used a five- or six-foot piece of corrugated tubing, instead of cast iron pipe or clay tile, which was the wrong material, and re-routed the line around the water main. The change in material and the way the line was reconnected interfered with the gravity flow of the sewer line. Cutting and reconnecting the sewer line was not part of the improvements being made by the City, i.e., it was not a project to improve the sewer connection.

In June 2005, the sewer line backed up, causing $30,000 in damage to the church and the church then initiated this lawsuit against the city. The city countered, asserting the statute of repose pursuant to Iowa Code 614.1(11) applied which bars lawsuits relating to improvements to real property when fifteen years have elapsed. The motion was denied and a verdict was entered in favor of St. Paul's. The City filed a motion for judgment notwithstanding the verdict. The district court granted the motion determining the faulty reconnection of St. Paul's sewer line was a part of the overall improvement project, although the jury had found that the repair was not an improvement to real property. Plaintiff appealed.

Holding: An improvement to real property is a permanent addition to or betterment of real property that enhances its capital value and is designed to make the property more useful or valuable, as distinguished from ordinary repairs. The negligent repair of the sanitary sewer was not an improvement to real property that would bring it within the ambit of the statute of repose.

Analysis: The Iowa Supreme Court identified four factors that define an improvement to real property:

1) a permanent addition to or betterment of real property,
2) that enhances its capital value,
3) involving the expenditure of labor or money,
4) that is designed to make the property more valuable or useful as distinguished from ordinary repairs.

Replacing the original rigid lines with corrugated pipe only satisfied two of these considerations because it was permanent and involved the expenditure of labor and money but did nothing to enhance the value of the property and was an ordinary repair. An improvement to real property is distinguished from an ordinary repair. During the course of the project, the sewer line was severed. The work on the sewer line was not to improve it, but rather to repair damage resulting from the water main project.

Rolf v. Nationwide Mut. Ins. Co., 2009 WL 605650 (Iowa App. 2009) (filed Feb. 19, 2009).

Facts: Rolf was injured in an accident while riding as a passenger on a motorcycle driven by Adam McCarty. At the time of the accident, Rolf and her husband, John, were insured under an automobile insurance policy issued by Nationwide, which included UIM coverage. One condition of coverage under the policy's UIM provisions was any suit against Nationwide under the Underinsured Motorists Coverage would be barred unless commenced within two years after the date of the accident.

Rolf received workers' compensation benefits for her injuries because the motorcycle accident occurred while she was en route to a mandatory company picnic. But by the spring of 2006, Rolf realized those benefits would not fully compensate her for the injuries she sustained in the accident. She then consulted an attorney in June 2006 about filing a personal injury action against McCarty. Around July 3, 2006, Rolf's attorney learned McCarty's automobile insurance policy contained a liability limit of $25,000. He advised Rolf to file a UIM claim against her own insurance company, but Rolf was reluctant to do so because she was concerned her insurance company would either drop them from coverage or significantly raise their premium rates. Rolf consequently filed suit against McCarty only on July 24, 2006.

In September 2006, Rolf changed her mind and decided to proceed with a UIM claim against her insurer, whom she believed to be Allied Insurance Company (Allied). She amended her petition on September 19, 2006, to add a UIM claim against Allied. Rolf was later informed the proper defendant in the suit was Nationwide, and she amended her petition to reflect that fact in January 2007. Rolf settled her personal injury claim against McCarty in May 2007 and dismissed him as a defendant in the action.

Nationwide thereafter filed a motion for summary judgment, contending that any claim brought by Rolf for UIM coverage was barred because it was not brought within two years of the accident as required by Rolf's insurance policy. Rolf resisted, arguing her UIM claim against Nationwide did not accrue until she discovered that McCarty's liability limit was $25,000. Following a hearing, the district court entered an order denying Nationwide's motion for summary judgment. The court agreed with Rolf and determined there was a “genuine issue of material fact regarding whether the contractual policy limitation is reasonable and enforceable.” Nationwide filed an application for an interlocutory review which was granted.

Holding: The claim is barred by the 2 year statute of limitations in the contract. A UIM carrier may contract around the 10 year statute of limitations.

Analysis: Although the state statutory limitations period for contractual claims against an insurer for UIM benefits was ten years, the insurer was allowed to reasonably reduce the period for filing suit to two years. *See* Iowa Code § 614.1(5) (2005) (requiring actions founded upon written contracts to be brought within ten years). Under general contract law, it is clear that the parties to an insurance policy may agree to a modification of statutory time limitations.

Under the discovery rule, the statute of limitations does not begin to run until the injured person has actual or imputed knowledge of all the elements of the cause of action. With respect to imputed knowledge, the Iowa Supreme court has stated that a "person is charged with knowing *on the date of the accident* what a reasonable investigation would have disclosed." The limitations period thus begins when a claimant has knowledge sufficient to put that person on inquiry notice. An injured party has a duty to "undertake a reasonably diligent investigation of the nature and extent of her legal rights to recover for an injury."

Here, although Rolf did not discover that McCarty was underinsured until early July 2006, a reasonable investigation following the motorcycle accident on July 29, 2004, would have disclosed that fact to her much earlier. Once Rolf decided to sue McCarty, she was able to learn within approximately two weeks of her attorney's inquiry that McCarty's insurance policy contained a liability limit of $25,000. She then chose not to immediately sue her insurer.

Forrester v. Aspen Athletic Clubs, L.L.C., 2009 WL 605924 (Iowa App. 2009) (filed Feb. 9, 2009).

Facts: Forrester joined an Aspen Athletic Clubs facility. He signed a membership agreement with the club that contained a release of liability clause. Shortly after Forrester joined the club, he tripped over an electrical box as he was walking from one part of the facility to another. Forrester filed suit against Aspen and others identified as "Designer D, Installer I, and Manufacturer M." The district court granted summary judgment in favor of Aspen based on the release.

After the statute of limitations expired, Forrester amended his petition to include Safari II, L.L.C., the Hansen Company, Inc., Savage-Ver Ploeg & Associates, Inc., and Paradise Flooring. Safari, Hansen, and Savage filed motions for summary judgment, all of which were granted. Forrester appealed.

Holding: The case is barred by the statute of limitations.

Analysis: The statute of limitations for injury to a person is two years. The original petition was filed on December 7, 2006, which was within the two-year limitations period. The petition, however, did not identify Hansen. It only identified Aspen and "Designer D, Installer I, and Manufacturer M."

Hansen was identified on July 6, 2007, more than two years after the claimed injury.

Forrester specifically argued that the combination of his attorney's signature on the petition, the effect given to that signature by another provision, Iowa Code section 619.19, and the designation in the original petition of the obviously fictitious "Manufacturer M" constituted the certification that the manufacturer was not yet identifiable. The district court rejected this argument, stating "Iowa Code § 619.19 does not provide support for Forrester's argument that his legal counsel's signature on the original petition certifies that the manufacturer was unknown after reasonable inquiry. Forrester's original petition did not state that Designer D, Installer I, and Manufacturer M were substituted names for entities that were not yet identifiable. Accordingly, Iowa Code section 613.18(3) did not remove this case from the two-year statute of limitations bar.

Davis v. R & D Driftwood, Inc., 2009 WL 606477 (Iowa App. 2009) (filed Feb. 19, 2009).

Facts: On September 1, 2005, Michael Davis was a patron at The Driftwood Lounge in Keokuk, Iowa. While in the establishment, Davis was assaulted and stabbed multiple times by Percy Whitt, another patron in The Driftwood Lounge. Davis alleged Whitt was served alcoholic beverages by The Driftwood Lounge to the extent that the employees of the establishment knew or should have known Whitt was intoxicated. He alleged that as a result of the assault, he suffered injuries and damages.

On January 13, 2006, Davis served a notice via certified mail to The Driftwood Lounge's insurance carrier of his intention to bring a dram shop action against The Driftwood Lounge pursuant to Iowa Code section 123.92 (2005). Davis then filed his dram shop suit on September 12, 2007. The suit was filed more than two years from the date of the incident, but less than two years from the date of service of the notice.

The Driftwood Lounge raised the statute of limitations defense in its answer and later filed a motion for summary judgment asserting Davis's suit was barred because the suit was not filed within two years of the incident. In his resistance, Davis argued the time to sue began to accrue from the notice date, not the date of injury, and that his suit was therefore timely filed.

Holding: Davis's suit was filed within two years of the date of notice. Therefore, it was timely filed and not barred by the statute of limitations. In Iowa Dram Shop Cases, the statute of limitations begins to run when notice is sent to the bar/tavern, not when the accident or injury happens.

Analysis: Our dram shop statute does not contain any statute of limitations provisions. We therefore look to the general statute of limitations of actions set forth in Iowa Code chapter 614. The legislature mandated

that no right exists to institute or maintain a dram shop action until timely notice is given, it therefore followed that the action does not accrue until timely notice is given.

Sant Amour v. Hermanson, 2009 WL 778107 (Iowa App. 2009) (filed March 26, 2009).

Facts: In May of 1998, Schary Sant Amour suddenly developed tinnitus and a complete loss of hearing in her left ear. She saw Dr. Hermanson for these problems. He believed the problems were either caused by a virus or were idiopathic. He prescribed a steroid. The steroid helped the hearing loss, but the tinnitus remained. In November of 1998, Sant Amour again consulted Dr. Hermanson for intermittent hearing fluctuations and continued tinnitus. He believed she had suffered from a virus, but that the cause could be idiopathic. In July of 2005, Sant Amour experienced a sudden loss of hearing. She was seen by a nurse practitioner who made a referral to a specialist. The specialist diagnosed Sant Amour with a brain tumor in July of 2005. Sant Amour pled that Dr. Hermanson was negligent in his care and treatment of her. The defendants argue that Sant Amour claims the act causing her injury occurred in 1998. Defendant filed a MSJ claiming that both the two-year statute of limitations and the six-year statute of repose applied and as such, Plaintiff's claims were time barred.

The district court determined the act or occurrence alleged in the petition occurred in May of 1998. It did not view Sant Amour's 2000 and 2002 routine physical exams as continuing treatment of the 1998 hearing problems. It concluded both the two-year statute of limitations and the six-year statute of repose applied. Accordingly, it granted defendant's motion for summary judgment and dismissed the case. Plaintiff appealed and contended the court erred in granting summary judgment because (1) a genuine issue of material fact exists concerning the date Schary Sant Amour knew or should have known of her brain tumor, and (2) the court did not apply the continuous treatment or continuum of negligent treatment doctrine to the facts of this case.

Holding: The court erred in granting summary judgment, based on the statute of repose. The doctor had seen Plaintiff several times for exams over a period of several years, and some of the exams, in which the doctor failed to diagnose the patient's brain tumor, fell within the six-year statute of repose. Only those claims for the exams that occurred more than six years before the filing of the suit should have been dismissed. Grant of summary judgment based on two-year statute of limitations also reversed because genuine issues of material fact exist.

Analysis: Iowa law distinguishes between statutes of limitations and statutes of repose. Statutes of repose are different from statutes of limitation, although they have comparable effects. A statute of limitations bars, after a certain period of time, the right to prosecute an accrued cause of action.

By contrast, a statute of repose "terminates any right of action after a specified time has elapsed, regardless of whether or not there has as yet been an injury."

A statute of repose period begins to run from the occurrence of some event other than the event of an injury that gives rise to a cause of action and, therefore, bars a cause of action before the injury occurs. Under a statute of repose, therefore, the mere passage of time can prevent a legal right from ever arising.

Iowa Code section 614.1(9) (2005) provides:

9. Malpractice.

a. Except as provided in paragraph "b", those founded on injuries to the person or wrongful death against any physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care, within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action, whichever of the dates occurs first, *but in no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death* unless a foreign object unintentionally left in the body caused the injury or death.

The statute sets limits on medical malpractice actions and includes both a statute of limitations and a statute of repose. The emphasized statutory language quoted sets a six-year time limit for commencing an action that runs from "the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death." Iowa Code § 614.1(9)(a). The focus is not on the claimed injury, but rather on "the act or omission or occurrence" and does not require that a claim have accrued or that an injury have been discovered.

This case is an example of a plaintiff alleging multiple acts or omissions or occurrences that constituted negligent care and treatment. This is not, however, related to the "continuous treatment" or "continuum of negligent treatment" doctrines that may act to toll the statute of *limitations.* A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.

If the treatment by the doctor is a continuing course and the patient's disease or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated, unless during the course of treatment the patient

learns or should reasonably have learned of the harm, in which case the statute runs from the time of knowledge, actual or constructive.

Reading v. Peterson, 2009 WL 779421 (Iowa App. 2009) (filed March 26, 2009).

Facts: On January 20, 2003, the Readings, who are New Jersey residents, were visiting a Sandals Resort in Jamaica. Helen Reading was sitting in a beach chair. A flag football game took place in which another guest, William Peterson, was participating. During the course of the game Peterson collided into Helen, causing injuries to her. The Readings tried to ascertain the name of the guest who had collided with Helen, making inquiries of the resort manager and a nurse, but Sandals steadfastly refused to reveal this information. Sandals had obtained an incident report dated January 20, 2003, and signed by Peterson. Thus, Sandals was at all times aware of Peterson's identity.

On January 10, 2005, not having learned Peterson's identity, the Readings sued Sandals and various "John Does" in New Jersey state court. Sandals' counsel refused informal requests to identify the person who had collided with Helen Reading, but eventually Sandals answered an interrogatory and thereby disclosed Peterson's identity and hometown. On June 6, 2006, the Readings moved to amend their New Jersey complaint to add Peterson as a defendant. On November 20, 2006, the Readings also filed a petition against Peterson in the Iowa District Court for Tama County.

Initially, Peterson moved to dismiss this petition based on the statute of limitations. The district court denied the motion, and Peterson sought an interlocutory appeal. Peterson's application was denied by the Supreme Court without prejudice to his right to assert the statute of limitations issue in subsequent district court proceedings. Thereafter, at the close of discovery, Peterson filed a motion for summary judgment based on the statute of limitations. The district court denied that motion as well. This time, Peterson's application for interlocutory appeal was granted by the Supreme Court.

Holding: Summary judgment granted in favor of Peterson.

Analysis: The summary judgment record does show that Sandals was not responsive to the Readings' requests for Peterson's identity. However, Sandals was not Peterson or Peterson's employer. The Iowa Supreme Court held that Sandals' refusal to identify Peterson could not be attributed to Peterson, even assuming (without deciding) that a mere refusal to provide identifying information can serve as the basis for an estoppel that would toll the running of the statute of limitations.

Jurisdiction

Bohi v. Martin, 763 N.W.2d 277 (Iowa App. 2009) (filed Jan. 22, 2009).

Facts: Jacob Bohi was charged with failure to maintain or use a seatbelt. After Bohi notified the prosecution that he had a medical exemption, the prosecutor moved to dismiss the charge. The magistrate entered an order of dismissal but ordered Bohi to pay court costs of $50. The order was served on Bohi on the same day.

Bohi filed a petition for writ of certiorari in the Iowa District Court, claiming that the magistrate illegally taxed court costs to him. Following a hearing, the district court concluded the petition for writ of certiorari should be denied. Bohi appealed.

Holding: This court does not have jurisdiction to consider the case because the petition was untimely. Remanded with instruction to dismiss the petition.

Analysis: The record discloses a jurisdictional issue. Under Iowa Rule of Civil Procedure 1.1402(3), the petition must be "filed within 30 days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally." The petition for writ of certiorari was filed a full 122 days after the order being challenged. The petition, therefore, was untimely.

A petition for writ of certiorari untimely filed deprives the reviewing court of subject matter jurisdiction. Subject matter jurisdiction can be challenged at any time, even by appellate courts.

In re Guardianship of A.B.G., Jr., 2009 WL 779500 (Iowa App. 2009) (filed March 26, 2009).

Facts: Tara and Anthony are the parents to the two children in question. Yvonne and Andrew (Anthony's aunt and uncle) filed a petition seeking to be appointed as guardians for A.J. and A.G. The district court entered an order authorizing service on Tara by publication and mailing to her last known address, and appointed a guardian ad litem for the children. The court entered an order finding that notice to Tara had been accomplished by mailing and by proof of publication provided to the court and appointed Yvonne and Andrew as guardians of A.J. and A.G. Yvonne filed a petition requesting the State of Iowa to collect child support from Tara. Tara sent a letter to the Winneshiek County Clerk of Court attempting to challenge the guardianship. She argued the district court did not have jurisdiction of her person because she was not provided sufficient notice of the guardianship proceeding. At the outset of the trial, the court summarily overruled Tara's motion to dismiss as untimely but allowed her to amend her earlier motion to allege lack of jurisdiction as a ground of defense to the guardianship petition. The district court entered a ruling granting Tara's motion to intervene, terminating the guardianship and ordering the children returned to their parents. On appeal the guardians claim the

district court erred in concluding that because Iowa was not the “home state” of the children at the commencement of the guardianship proceeding, Iowa could not exercise jurisdiction over the guardianship of the children.

Holding: The Iowa district court did have subject matter jurisdiction.

Analysis: The Iowa Supreme Court held that neither Iowa nor Missouri qualified as the children's “home state.” Since no state was the children's home state, Iowa had jurisdiction to modify physical care.

In re K.M., 2009 WL 1212755 (Iowa App. 2009) (filed May 6, 2009).

Facts: In November 2005, the State of Iowa applied to have Karen's children temporarily removed from her custody based on information that she physically abused and neglected them. The children were temporarily removed but were returned to Karen's custody within a few days. The State filed child-in-need-of-assistance petitions and a request to have the children placed in foster care on the ground that Karen was not progressing with issues that precipitated State intervention. The court initially ordered that custody remain with Karen but subsequently ordered the children placed in Iowa foster care.

In July 2007, Karen applied for a modification of a prior dispositional order. She noted that she and her children had lived in Illinois before moving to Iowa, her mother still lived in Illinois, a home study had been completed of her mother's Illinois home and the author of the home study recommended the children's placement with their grandmother. The district court initially ruled that the Illinois counterpart to the Iowa Department of Human Services had been involved with the family before their move to Iowa, Karen had returned to Illinois, and it would be appropriate to transfer jurisdiction to Illinois. The court later reconsidered its order and ruled that jurisdiction would remain with the Iowa court.

The State of Iowa ultimately petitioned to terminate Karen's parental rights to the children. Karen moved to dismiss the action based on lack of subject matter jurisdiction and personal jurisdiction. The district court overruled the motion. Karen filed a rule 1.904(2) motion to enlarge the court's findings and conclusions, which the district court also denied. Following an evidentiary hearing on the termination petition, the court terminated Karen's parental rights to the two children. That ruling was filed on December 17, 2008. Karen filed a second rule 1.904(2) motion which was identical to her first motion. The court denied the motion on January 6, 2009, and stated that all issues raised in the Mother's current Motion had already been ruled upon, so that those issues need not be addressed in the Court's Findings and Conclusions in the Termination of Parental Rights decision.

Karen filed a notice of appeal on January 14, 2009. The notice stated she

was appealing from the “order terminating the parent-child relationship or dismissing a petition to terminate the parent-child relationship entered pursuant to Iowa Code section 232.117 on the 17th day of December, 2008.

Holding: Iowa has jurisdiction through continued temporary emergency jurisdiction.

Analysis: A notice of appeal from a final order or judgment entered in Iowa code chapter 232 termination-of-parental-rights or child-in-need-of-assistance proceedings must be filed within 15 days after the filing of the order or judgment. However, if a motion is timely filed under Iowa R. Civ. P. 1.904(2) or Iowa R. Civ. P. 1.1007, the notice of appeal must be filed within 15 days after the filing of the ruling on such motion.

Based on this rule, Karen had fifteen days from December 17, 2008, to file a notice of appeal if she did not file a rule 1.904(2) motion. Because she filed a rule 1.904(2) motion, she elected to avail herself of the exception authorizing an extension of the appeal deadline. Her notice of appeal was filed within fifteen days of the court's denial of her second rule 1.904(2) motion, but not within fifteen days of the termination ruling.

While the file-stamp dates of the pertinent filings would suggest Karen's appeal was timely, the State contends we must look beyond those dates to the substance of Karen's second rule 1.904(2) motion to determine whether that motion properly extended the appeal deadline. In the State's view, the second motion was in fact a “rehash” of Karen's first rule 1.904(2) motion and, for that reason, could not be used to extend the deadline.

The Iowa Supreme Court has held that successive and repetitive rule 1.904(2) motions will not toll appeal deadlines. A rule 1.904(2) motion filed by a party following a denial of the party's prior rule 1.904(2) motion is improper and cannot extend the time for appeal if the judgment remained unchanged following the first motion. Although Karen filed two Rule 1.904(2) motions, one was before the termination hearing and one was after. Because the district court did not mention the jurisdictional issue in its final termination ruling, we conclude Karen's second motion was simply an effort to ensure that the jurisdictional issue was preserved for review. Under the unique facts of this case, the court concluded that Karen's second rule 1.904(2) motion extended the time for filing a notice of appeal and the notice of appeal was timely.

In reaching this conclusion, the Court also noted the fact that Karen's appeal potentially raised a question relating to the district court's subject matter jurisdiction, which can be raised at any time.

The record disclosed that an action was filed in Illinois to address the relationship between the mother and her boys, but this action was dismissed before the Iowa child-in-need-of-assistance action was

commenced, Based on this record, we conclude Iowa's initial child-custody determination remained in effect and became the final determination, Iowa became the children's home state, and the Iowa district court had continuing jurisdiction to issue orders in the CINA proceeding and in the subsequent termination proceeding.

Advanced Techniques for Cross-Examination Using the Chapter Method

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The Advanced Techniques of Cross Examination

8:45	**THE 4 PRINCIPLES OF ADVANCED TRIAL ADVOCACY** • The lawyer as story teller • Replacing advocacy with teaching • Using anxiety to compel honesty • An advanced system of Cross-Examination **THE POWER OF LEADING QUESTIONS** • Forming questions to achieve control • Training witnesses to say "yes" • Becoming the teacher of the case **CONTROLLING WITNESSES ONE FACT AT A TIME** • Shaping jurors' perceptions of the facts • Using simplicity to block escape • Confronting the evasive question
10:00	**BREAK**
10:15	**QUESTIONS AND ANSWERS** **GOAL-ORIENTED QUESTIONING SEQUENCES** • The best structure to prove your facts • Staying on a roll without objection • The 3 psychological phases of the evading witness **THE CHAPTER METHOD CROSS-EXAMINATION** • Breaking cases into understandable stories • Recognizing events valuable for Cross-Examination • Effect of Chapter Method on the opponent's case
12:15	**LUNCH**

1:30	**PAGE PREPARATION OF CROSS-EXAMINATION** • Creating flexibility within the written cross • Preparation for instant impeachment • The easy method to track direct examination **THE SCIENCE OF SEQUENCING CROSS-EXAMINATION** • Using your Chapters to stay focused • Keeping the witness off balance and more honest • 15 Techniques for sequencing chapters
3:00	**BREAK**
3:15	**QUESTIONS AND ANSWERS** **LOOPS** • Techniques to give emphasis to your key facts • Making hostile witnesses adopt your description • Beating witnesses with their own words **CONTROLLING THE RUNAWAY WITNESS** • 20 Methods of controlling the non-responsive witness • Psychological principals that establish control • Phrasing questions to block escape
5:00	**ADJOURN**

Cross-Examination: Science and Techniques

*Today's lecture will loosely draw on the chapters below in **BOLD***

Philosophy and Overview of the Science of Cross-Examination

Adapted from their book

Cross Examination: Science and Techniques 2nd Edition

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Chapter 1:
Philosophy and Overview of Cross-Examination

SYNOPSIS

Sections in bold are included in handout in whole or in part

NOTES

SELECTED AND EDITED PORTIONS OF CHAPTER 1 – "PHILOSOPHY AND OVERVIEW OF THE SCIENCE OF CROSS-EXAMINATION"

§ 1.3 Cross-Examination: The Science, not the Art (Book page 1-3)

"Science" is historically a term seldom applied to the task of cross-examination. Francis Wellman, in the most widely-read book on cross-examination (*The Art of Cross-Examination*, Macmillan Company, 1903; republished in 1936), continuously refers to cross-examination as an "art." The preface cautions: "Nor have I attempted to treat the subject (of cross-examination) in any scientific, elaborate or exhaustive way; but merely to make some suggestions upon the art of cross-examination. . . ."

The problem with thinking of cross-examination as an art is that the term is deceivingly inaccurate. Moreover, if cross-examination is an art, it stands to reason that it would be very difficult to teach its techniques. After all, a student can be taught art appreciation but she can hardly be taught how to be an artist. "Art" may be pleasing to those who prefer to think of themselves as courtroom artists, or to those whose egos require that they separate themselves from mere mortal lawyers. When applied to the task of cross-examination, "art" is misleading. Referring to cross-examination as an art conveys the erroneous message that some trial lawyers have the talent to cross-examine while others don't. It assumes cross-examination has no rules or fixed reference points. It cannot be taught or learned, but only viewed in wonderment and awe. A master of the "art" of cross-examination spins marvelous tales, befuddles the witness, and miraculously emerges with incredibly damaging omissions. Supposedly, this is performed in mysterious ways that mere lawyers cannot possibly comprehend, let alone learn.

This book wholly and flatly rejects such narrow and self-congratulatory thinking. Good cross-examination is the work of a studied legal technician skilled in the methods of witness examination. There are facts to be introduced, points to be made, theories to be supported, and opponent theories to be undermined. All of these things are accomplished through questions that introduce facts. Thorough preparation, mastery of technique, and execution of a solid plan produce more courtroom victories than all the flash, glitz, and strokes of supposed courtroom brilliance combined.

Cross-examination is a science. It has firmly established rules, guidelines, identifiable techniques, and definable methods, all acting to increase the crossexaminer's ability to prevail. The elements of successful cross-examination can be described, practiced, and learned. Willing trial lawyers can acquire and develop those skills.

Certainly, all cross-examiners experience occasions when the cross-examination goes beautifully. The best-prepared attorneys frequently make cross-examination appear easy, or at least easier. But it is preparation supported by scientific principles of cross-examination that paves an easier path through the cross-examination of an adverse witness.

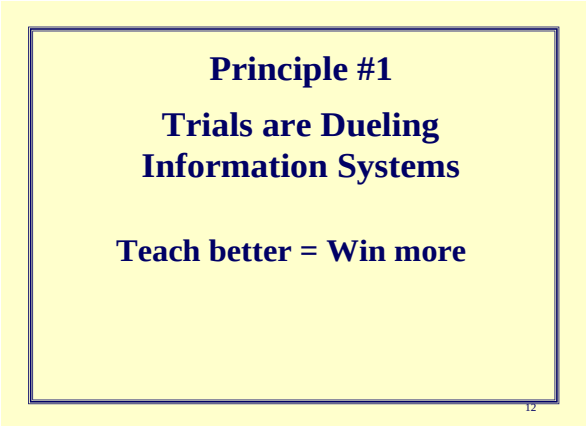
NOTES

§ 1.5 Rethinking the Goals of Modern Cross-Examination (Book page 1-5)

Cross-examination has historically been viewed as an effort in damage control. Too much time and teaching has reinforced the notion that cross-examination is a dangerous thing to be forgone or sharply limited. As a result, the process of cross-examination has been viewed as combat. Past techniques were geared for battles with the witness. They were premised on the notion that a witness called by the opponent is only to be beaten down or minimized, and seldom to be gainfully employed as a provider of constructive information for the cross-examiner's theory of the case. It has been drummed into all trial lawyers that every witness called by the opponent is predisposed to obstruct the cross-examination by interruption, denial, and confusion. As a result of such teaching, too many lawyers believe developing the truth through cross-examination is too arduous. It is better to wait for the friendly witness who can be taken through a direct examination.

Certainly there are elements of attack within some cross-examinations. But more fundamentally, cross-examination is an opportunity to elicit favorable facts as opposed to simply attacking unfavorable testimony. The modern advocate must condition herself to expose and develop the truth of the case through witnesses called by the opponent

Cross-examination is how an advocate shows a witness's direct testimony is out of context, exaggerated, or simply false. More than that, cross-examination is a unique opportunity to build the cross-examiner's theory of the case and to insert helpful facts into the story. This relieves the cross-examiner of the burden of building a case solely through the cross-examiner's witnesses and client.



NOTES

Principle #2

Stories Imprint Information Into Memory

14

Principle #3

Anxiety Impedes the Processing of Information

1. You: lower
2. Jury: lower
3. Witness: higher

Following a System Minimizes Your Anxiety and Maximizes Performance

15

The Only Three Rules of Cross-Examination

Adapted from their book

Cross Examination: Science and Techniques 2nd Edition

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Chapter 8:
The Only Three Rules of Cross-Examination

SYNOPSIS

Sections in Bold are included in the handout in whole or in part

NOTES

SELECTED AND EDITED PORTIONS OF CHAPTER 8 – "THE ONLY THREE RULES OF CROSS-EXAMINATION"

§ 8.1 "Great" Cross-Examination: A Misleading Term (Book page 8-3)

The application of techniques discussed in this chapter will dramatically elevate the ability of the cross-examiner to obtain favorable admissions, provide support for the theory of the case, and minimize the ability of the witness to take the cross-examination into undesirable areas.

The cross-examiner must strive for the consistency of success that comes from preparation advanced by sound technique. Success in cross-examination is an imprecise determination, but can be summarized as the accomplishment of the factual goals set out by the cross-examiner. Few cross-examinations accomplish every goal, but with the sound application of techniques, the advocate can expect to accomplish far more of her goals than would have been accomplished without the application of the science and techniques of cross-examination.

Just as the physicians' creed begins: "First, do no harm," the cross-examiner's creed must be: "First, do no harm to your client's case on cross-examination." There is an element of risk-taking in every cross-examination. Sound application of techniques can reduce the risks of cross-examination, but never extinguish the risks. One of the hallmarks of great cross-examination is the systematic application of techniques employed to establish the greatest amount of helpful information while minimizing the risks inherent in cross-examination.

The conventional wisdom is that if a witness has done no damage to the cross-examiner's case, a lawyer might elect to forgo asking questions. If no questions are asked, certainly the witness can score no additional points. However, even in circumstances where no damage has been done, it may be that the witness could testify to several additional facts that aid the cross-examiner's case (see Chapter 11, *Sequences of Cross-Examination*). Thus, even the witness who has done no damage may need to be cross-examined. In any event, the skillful cross-examiner views every witness as an opportunity to introduce testimony that supports the advocate's theory of the case. Simultaneously the cross-examiner seeks to employ techniques designed to minimize the opportunities for the witness to enhance his previous testimony or to open up new areas that will damage the cross-examiner's positions.

§ 8.2 Great Cross-Examination Teaches (Book page 8-4)

Cross-examination is not an exercise based on emotion, presence, and oratory. It is not the cross-examiner showing the witness and all of those who observe, (but primarily the witness) that the cross-examiner is smarter, quicker, louder, more demonstrative, or more fearsome. It is about teaching the cross-examiner's theory of the case to the fact finder.

Cross-examinations are not about a performance by an advocate, but rather the teaching of facts that are critical to the cross-examiner's theory

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of the case.

Lawyers who believe that cross-examinations are intellectual endeavors rebel against the idea of teaching. They want it to be a contest of egos. However, the jury does not vote on which lawyer "looks good" or which lawyer performed eloquently. Rather the jury is called upon to vote on a theory of the case. When the lawyer realizes that a cross-examination teaches the cross-examiner's theory of the case, pressure is reduced. The focus is shifted from the cross-examiner's ego to the cross-examiner's ability to convey to the listeners the logic behind the cross-examiner's theory of the case. Once the focus is shifted from the cross-examiner as lawyer to cross-examiner as teacher, the focus becomes conveying understandable presentations that guide the fact finder in real time.

Problem:

Open ended questions seek facts, but don't provide facts.

Solution:

Leading Questions = Answers
Answers = Facts
Facts = Learning

§ 8.3 Cross-Examiners Control of Themselves (Book page 8-4)

The system propounded in this text is not based on oratory, flamboyance, demonstrative abilities, or acting skills. Rather, it is based on simple rules designed to teach the fact finder the theory of the case well. It is also designed to teach the witness that disruption of the orderly introduction of facts to the jury will receive a negative reaction. Further, it will teach that the witness complying with the orderly presentation of facts to the jury will receive positive feedback. The sanctions will be that the witness is forced to verify the truthful facts sought to be established by the cross-examiner. This process may require endurance and pain by the witness but it will happen. On the other hand, the witness who honestly admits facts that help the cross-examiner's or hurt the opponent's theory of the case will be rewarded by the cross-examiner moving on to new facts and not punishing the witness for failure to admit desired facts.

§ 8.7 Relationship of Cross-Examination to Anxiety and Confidence (Book page 8-7)

Each cross-examiner performs better when her confidence is higher. When a cross-examiner is confident, the words come easier. When she is confident, the thoughts come quicker. When she is confident, the goal

appears obtainable.

Anxiety impedes the processing of information. Anxiety destroys confidence. Anxiety undermines confidence. Anxiety leads to frustration, anger, embarrassment and fear. This goes for witnesses too.

With the three rules of cross-examination and other techniques in this text, the cross-examiner's confidence can remain at a high point while the confidence of the witness is eroded and replaced with anxiety. The three rules are designed to keep the lawyer's confidence at a high level while keeping the anxiety level of the witness at a high level. Said a different way, the rules are designed to keep the lawyer's confidence high and her anxiety low, while keeping the anxiety of the witness high and his confidence low.

The relationship between the witness and the cross-examiner is an inverse ratio. When the cross-examiner's confidence is high, the witness' confidence is low. When the cross-examiner's anxiety is high, the witness's anxiety is low. When a witness's anxiety is high and his confidence is low, he is less likely to carefully select words to explain his position. He is less likely to offer additional information to explain his position. He is less likely to volunteer new testimony. Ultimately the witness is less likely to tailor his testimony, whether in the obvious form of "lying" or in the less obvious form of carefully orchestrating his testimony to fit into the theory of the opponent's case.

§ 8.8 Real Time Learning in Cross-Examination (Book page 8-8)

The three rules are designed to permit the fact finder to learn the cross-examiner's theory of the case and to understand effective attacks upon the opponent's theory of the case in real time. Real time is defined as being the instant when the questions and answers are spoken in trial. The opposite of real time is to suggest that the jury will only understand the significance of a question and answer in the closing argument, or worse, in the jury room. The jury must understand the significance of the questions and answers at the time of trial. It is only through the building of these facts, one at a time, that the fact finder can appreciate the significance of the testimony and the relationship of that testimony to other testimony that has come before this witness and will come after this witness.

The jurors must be able to say to themselves, "I understand why the lawyer is asking this question and I understand the significance of the admission." Juries vote for what they understand.

§ 8.10 The Historical Context of the Only Three Rules of Cross-Examination (Book page 8-9)

This chapter sets out the foundation methods of obtaining control of the witness question by question. There are only three rules. That is something that can be remembered even in the middle of a cross-

examination. The rules are all positive. Something that leads the cross-examiner to understand the rule before it is violated and the damage is done. Finally, the rules apply to every type of case, whether jury trial, a judge trial, an arbitration panel, or mediation. The rules apply in civil cases, criminal cases, administrative cases, and domestic relations cases. Consequently, because the rules have universal application, the rules afford the cross-examiner a predictability of result in any kind of setting. Because the rules provide predictable responses, results can be replicated. The cross-examiner is no longer required to learn a new system of cross-examination when venturing into a different factual setting. The rules are: (1) leading questions only, (2) one new fact per question, and (3) a logical progression to one specific goal.

§ 8.11 Rule 1: Leading Questions Only (Book page 8-9)

The Federal Rules of Evidence and the rules of evidence of all states, permit leading questions on cross-examination (Fed. Rules Evid. Rule 611 (c); 28 U.S.C.A.). Simultaneously, the right to use leading questions is almost wholly denied the direct examiner. This is the fundamental distinguishing factor of cross-examination. It is the critical advantage given the cross-examiner that must always be pressed.

Despite this incredible opportunity, many lawyers do not take advantage of this rule and insist on asking open-ended questions. This is unnecessary at best and foolhardy at worst. A skillful lawyer must never forfeit the enormous advantage offered by the use of leading questions.

The “leading questions only” technique means that, in trial, the cross-examiner must endeavor to consistently phrase questions that are leading. No matter what the reason or rationale, a non-leading question introduces far greater dimensions of risk and occasions far less control than a question that is strictly leading.

One of the greatest risks occasioned by the use of open-ended questions is not the answer that may be given to that question. The answer may be perfectly acceptable to the cross-examiner. However, by asking the open-ended question the cross-examiner has failed to consistently train the witness to give short answers to leading questions and not to volunteer information. By teaching inconsistently, with every open-ended question the cross-examiner sows the seeds for later problems in the cross-examination. As will be discussed, cross-examiner must teach a consistent lesson to the witness: The cross-examiner will pose the question and the witness may verify or deny the suggested fact. The consistency of teaching through the repetitive form of the leading question is fundamental to the goal of witness control.

§ 8.12 Leading Questions Allow the Cross-Examiner to Become the Teacher (Book page 8-10)

If the lawyer is to teach the case the lawyer must demonstrate that she understands the case. The leading question positions the cross-examiner as the teacher, while the open-ended question positions the cross-examiner as a student. Through the open-ended question it is the witness

who becomes the teacher. The open-ended question focuses courtroom attention on the witness. The leading question focuses attention on the cross-examiner. The cross-examiner seeks that attention not for ego gratification, but for purposes of efficiently teaching the facts of the case. The cross-examiner/teacher using leading questions places the cross-examiner in control of the flow of information. The leading question also allows the cross-examiner to select the topics to be discussed within the cross-examination. These topics will be referred to throughout the book as the chapters of cross-examination.

§ 8.13 Use Short Declarative Questions (Book page 8-10)

Leading questions are often defined as questions that suggest the answer. This is too broad a definition. True leading questions do not merely suggest the answer; they *declare* the answer.

Leading Questions = Answers

- How do you feel about drinking?
- Do you like to drink?
- You like to drink?
- You drink ⊘
  You like it ⊘

§ 8.14 Declarative Questions Give Understanding to the Jury (Book page 8-11)

Juries and judges understand when a leading question is put in a declarative style. The fact proposed is immediately understandable. It is learnable in real time.

Problem:
Open ended questions seek facts, but do not provide facts.

Solution:
Leading Questions = Answers
Answers = Facts
Facts = Learning

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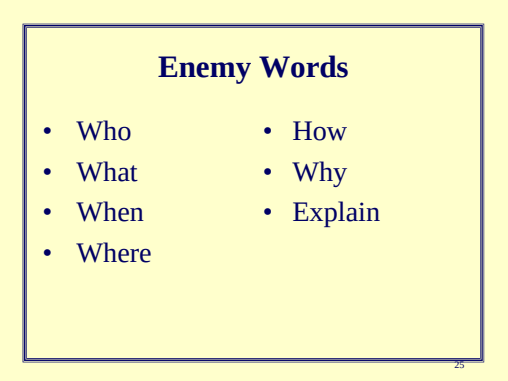
§ 8.17 Avoid Enemy Words that Give Control to the Witness (Book page 8-14)

The adept cross-examiner *never* uses questions that begin with the following:



These words create the polar opposite of closed-ended questions. These words invite uncontrolled, unpredictable, and perhaps unending answers. These words *invite the witness to seize the action*, to become the focal point of the courtroom. They take the jury's mind off the fact the cross-examiner is trying to develop and allow the witness to insert a mishmash of facts, opinions, and stories designed to focus the jury on the issues the witness thinks are most important.

Cross-examiners are not journalists looking to present both sides of a story. Cross-examiners are not interested in having the witness explain everything that the witness wishes to explain. Cross-examiners strive to highlight those portions of the witness's testimony that are helpful to the cross-examiner's theory of the case.

There are those who maintain that they are so skillful that they can pose open-ended questions, the answers to which will always be of assistance. These lawyers are fond of saying, "I didn't care how she answered," or "There were no possible answers that could hurt me." In response, those lawyers have only eliminated the answers they have thought of. None of us are so omniscient that we can confidently state that we have eliminated every possible negative answer. There are truly bad answers and non-responsive answers awaiting the open-ended question. Why take that unnecessary chance? This applies to the most experienced trial lawyer as well as the novice. No one outgrows this advice.

§ 8.22 Word Selection (Book page 8-17)

One of the most important benefits of the leading question permits the cross-examiner to select the words to describe the events to be discussed in the question. Most witnesses do not carefully consider their words nor carefully select words to describe what they are testifying. Normally, just as in everyday life, the witness offers the best word they can think of at the time. This may help the opponent's theory of the case or may be neutral. The one predictable statement that could be made is that the word will not

be selected to consciously help the cross-examiner's theory of the case.

By use of a leading question, the cross-examiner controls the word selection and may more descriptively and vividly describe that which has occurred.

Compare the following two questions:

1) You saw a man lying on the side of the road?
2) You saw a man hurled from the car?

The first question describes with some precision a potential plaintiff in a personal injury suit. But when compared with the more descriptive word "hurled" in the second question, the first question is colorless.

Use Vivid Words to Tell Stories

You saw a man lying on the side of the road?

vs.

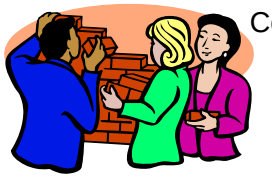
- You saw a man **hurled** from the car?
- From the VW Bug you **smashed** into?
- His body was lying in a **heap**?
- On the **shoulder** of the road?
- In the **dirt**?
- **Unconscious**?

§ 8.24 Rule 2: One New Fact per Question (Book page 8-19)

Cross-examiners need acceptable conclusions supported by facts to work successfully. They need to add only one new fact per question. This is a critical component in the quest for witness control. By placing only a single new fact before a witness, the witness's ability to evade is dramatically diminished. Simultaneously, the ability of the fact finder to comprehend the significance of the fact at issue is greatly enhanced.

§ 8.25 A Time-Honored Method to Teach the Fact Finder (Book page 8-19)

Your Building of Facts Persuades and Convinces



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Dr. Seuss, in his classic work *Hop on Pop*, repeatedly used the smallest component, a single word, and expanded it only so far as necessary to create a simple sentence:

Hop
Pop
We like to hop.
We like to hop on top of Pop.
Stop. You must not hop on Pop.

This teaching method is exactly that necessary to "teach" the witness to answer only "yes." The jury best learns a case this way, too. Three questions are offered as an example:

1) You threw the ball?
2) The ball was red?
3) You threw the red ball to Sue?

The initial question discusses one fact. Each succeeding question contains one additional or new fact to be added to the body of facts established by previous questions.

By this method, the scope of the fact at issue is sharply controlled. As a result of the tight control over the scope of the question, the permissible scope of the witness's answer is tightly controlled.

§ 8.33 Avoiding the Compound Question Avoids Objections (Book page 8-25)

This method of asking only one fact per question also assists in meeting objections. As discussed, when the cross-examiner asks only one fact per question, she avoids having to interpret the meaning of a "no" answer. Similarly, when avoiding compound questions, counsel sidesteps multi-tiered objections that include objections to the form of the question, thus allowing counsel to better meet any forthcoming objection.

One New Fact per Question Solves Problems

- No objection
- Certainty as to answer
- Easier impeachment
- Better juror comprehension

§ 8.37 Facts, Not Conclusions, Persuade (Book page 8-28)

The second rule of one fact per question tightly controls the witness. The

witness has before him but a single new fact. It is hard for the witness to express confusion or be evasive. Moreover the jury is more easily educated by this technique of factual presentation. Because the facts are so detailed and because the facts are presented one at a time, the jury will reach the conclusion to which the facts inevitably point. The jury will embrace the same logical conclusion suggested by the cross-examiner.

One might say, the technique of one fact per question is akin to planting acorns in a jury box, not oak trees. Remember it is the lawyer, not the jury, who is intimately familiar with the facts. The jury must be slowly and carefully be brought to the conclusion sought by the advocate. It is far safer to let the jury reach its own conclusion based on the facts rather than demanding that conclusion from a hostile witness. The structure of one fact per question meticulously builds the picture so that the jury reaches the cross-examiner's desired conclusion, even though the conclusion itself may never be put to the witness. See chapter 9, *The Chapter Method of Cross-Examination* and chapter 10, *Page Preparation of Cross-Examination*.

§ 8.45 Word Selection Made Easier by Envisioning The Event
(Book page 8-35)

While presenting one fact per question, the cross-examiner must make certain that the words used are adequate to create the desired case scenario. There is a technique to aid the cross-examiner in selecting the descriptive words that can make the picture clearer and the facts more vivid. If the cross-examiner will form a mental image of what she is seeking to describe, and then present that mental image through leading questions, the result is a series of leading questions of finer texture. The cross-examiner wishes the fact finder to see the picture, so it would only stand to reason that the cross-examiner must first see that picture.

The cross-examiner must strive to use descriptive words to describe accurately the facts questioned upon. The descriptive words will come naturally to mind when the cross-examiner will look into her own head to see the event.

§ 8.46 Labeling
(Book page 8-35)

In this age where more and more information is floods our senses daily, jurors and judges find it difficult to remember names and events. Word selection is critical in labeling all major witnesses, all major pieces of evidence, and all major events within the theory of the cross-examiner's case. In the example above, Jim is labeled "the big boy" and Dave is labeled the "little boy". The action is labeled a "beating" (beat on). These are fair, reasonable descriptions of what happened that vividly illustrate the cross-examiner's theory of the case. For more on labeling, see chapter 26, *Loops, Double Loops, and Spontaneous Loops*.

§ 8.47 Rule 3: Break Cross-Examination Into a Series of Logical Progressions to Each Specific Goal
(Book page 8-35)

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Cross-examination of a witness is not a monolithic exercise. Instead, the cross-examination of any witness is a series of goal-oriented exercises. The third technique of the only three rules of cross-examination is to break the cross-examination into separate and definable goals.

Each section of cross-examination must have a specific goal. It must be so specific and so clear that the cross-examiner, if asked at any time without notice (as judges are inclined to do), can identify the factual point she is seeking to make. Another way of envisioning this is to view cross-examination as a series of pictures that must be painted.

There are two reasons for developing specific factual goals. First, it is easier for the jury to follow any line of questioning if it clearly and logically progresses to a specific goal. An organized presentation that is broken down into several individual points invites attention. Even a reluctant listener can focus attention when there is clear sense of organization and defined points being made by the speaker.

The second value in breaking cross-examination into individual factual goals, is that it allows the judge to know where the cross-examiner is proceeding so that she will permit the cross-examiner to continue. Long gone is the age when a trial was a civic event. Trials are now statistics. Judges want cross-examiners to "move it along." There is undoubtedly a general right to cross-examine witnesses. But that is insufficient. There must be a reason to cross-examine the witness. Before rising to cross-examine, the advocate must have firmly in mind the individual goals of that cross-examination.

Each specific goal within a cross-examination should either assist the cross-examiner in building her theory of the case, or assist the cross-examiner in undermining the opponent's period of the case. It is unnecessary and unwise to pursue factual goals that do not impact the contrasting theories of the case.

Chapters Accomplish Goals

1. Group related facts
2. Use leading questions
3. The grouping establishes the goal
   a. Build your theory or hurt their theory
   b. Leading to a belief about credibility

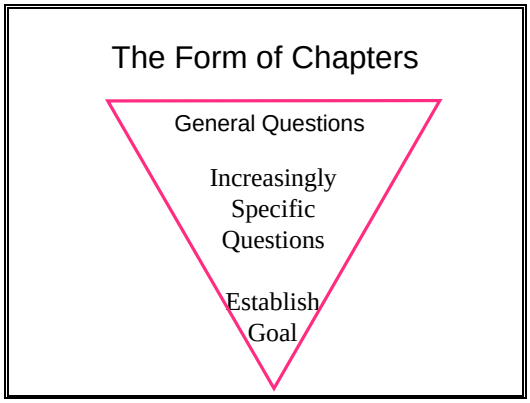
§ 8.48 From The Very General to Very Specific Goals (Book page 8-37)

A logical progression dictates that the issue to be developed must proceed from the very general to the specific goal. Think of it as a funnel. The

general questions funnel the witness to specifics.

Witnesses will find it easier to agree to general issue questioning before they are brought to specifics. This is true particularly when specific facts will be harmful to the witness. The witness will not respond in a monosyllable manner to the question unless that entire issue has been developed from the general to the specific.

A witness is unlikely to admit at the onset of cross-examination that he is a chronic liar. However, a series of facts may well establish that the witness can understand why people would lie, has been in situations where a lie benefited the witness, and has lied in those situations. The cross-examiner should start out generally and proceed slowly and methodically, one fact at a time, to the specific goal of establishing that the witness is a “liar.” The cross-examiner is advised to recall that “liar” is a conclusion, and one that the witness is unlikely to adopt. That is not the goal of the cross-examination chapter. The goal is to provide the fact finder with sufficient facts by which they may infer that the witness is a liar. The technique, as always, is to provide facts to the witness through leading questions making it more likely that the witness will give truthful “yes” answers. The cross-examiner should strive to score the points factually, leaving it up to the fact finder to draw the appropriate inference.



§ 8.52 The More Difficult the Witness, The More General The Chapter Must Start (Book page 8-40)

By proceeding from the general to the specific one fact at a time, the cross-examiner is putting the witness in the dilemma of answering general questions before the witness knows where the general questions will lead to specifically. More experienced witnesses, professional witnesses, and expert witnesses are more adept at realizing where the specifics factual goals may lie when a general question is introduced. Consequently, that witness will begin to fight the cross-examiner intentionally at the very beginning of general questions.

There is a technique to disarm this type of witness. It is to start more generally.

§ 8.54 The “Yes” Answer is the Most Understood Response (Book page 8-41)

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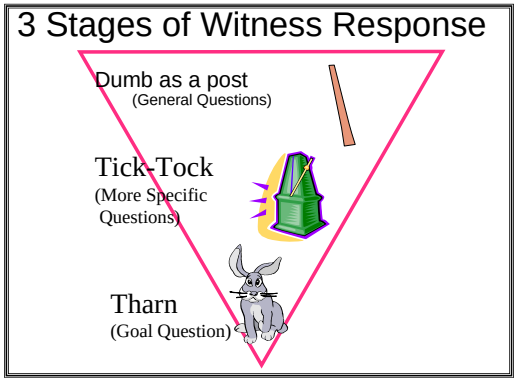
The techniques discussed in the only three rules of cross-examination are designed to produce a great many “yes” answers. When the cross-examiner has placed a fact before the witness and the jury through a leading question, the “yes” answer efficiently allows the fact finder to understand what has been proven. The short leading question followed by the short verification is the best teaching method. All answers other than “yes” require more concentration and risk more misunderstanding. That is not to say that in order to be successful the cross-examiner must always get a “yes” response. As will be discussed there are other ways of making important points even when a witness denies the leading question.



§ 8.62 The Three Rules—Building Blocks for Advanced Techniques (Book page 8-48)

It cannot be stressed enough that these three rules are the basic building blocks for all future advanced techniques. If the lawyer can perform the three building block techniques in every question, she can advance to the more artistic techniques. Each new technique builds upon the solid foundational techniques of : (1) leading questions only; (2) one new fact per question; and (3) building toward a specific goal.

The Chapter Method of Cross-Examination

Adapted from their book

Cross Examination: Science and Techniques 2nd Edition

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Chapter 9:
The Chapter Method of Cross-Examination

SYNOPSIS

Sections in Bold are included in the handout in whole or in part

NOTES

SELECTED AND EDITED PORTIONS OF CHAPTER 9 – "THE CHAPTER METHOD OF CROSS-EXAMINATION"

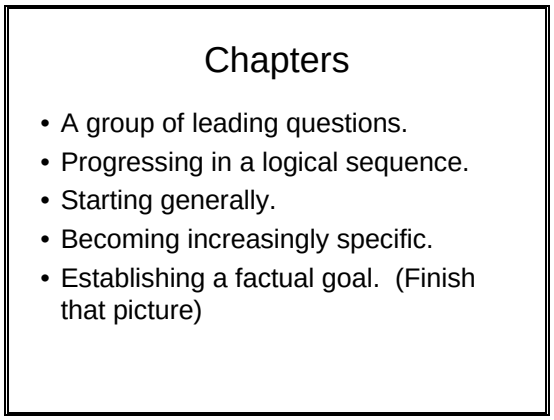
§ 9.1 The Chapter Method Defined (Book page 9-2)

There is a structure to the materials gathered and the questions asked within any cross-examination. The term "chapter method" is meant to reinforce the understanding that the cross-examination of any witness is not a flowing discussion with a single unifying purpose. Instead the advocate must think of the cross-examination of any witness as a series of small discussions (chapters) on individual topics of importance to the cross-examiner. Cross-examination in the chapter method seldom flows. Instead it moves from topic to topic, not necessarily in chronological order. It virtually never covers everything a witness might know about the case. Chapters sometimes relate to each other. Sometimes the transition from one chapter to another chapter amounts to an abrupt jump to a completely separate area of the case. What can be said is that there is a beginning and an end to each chapter. The beginning and the end of each chapter are largely mapped out before the cross-examination begins. The chapters are designed to maximize the good evidence available. As a result, chapters do not trail off. They end crisply. A chapter that has not accomplished its purpose using the best facts available is not likely to get better through additional questions. If the best evidence didn't work, the second best evidence or the unknown evidence is likely to produce worse results.

A trial is a book of information. The individual witness examinations are themselves large accumulations of information. (Parts of the books.) The individual topics within the cross-examinations are the chapters of the book. Each chapter has a designed purpose or goal. The jurors can understand the purpose of each chapter as the cross-examiner assembles related facts into one logical sequence, designed to paint one picture. The chapter method is the polar opposite of the freewheeling style of cross-examination. The chapter method of cross-examination is designed as the optimum teaching model in an adversary system. An advocate working without benefit of the chapter method of cross-examination can establish many important facts, but does so in no particular order. As a result, the jurors must reassemble the facts in order to understand the points being made by the cross-examiner.

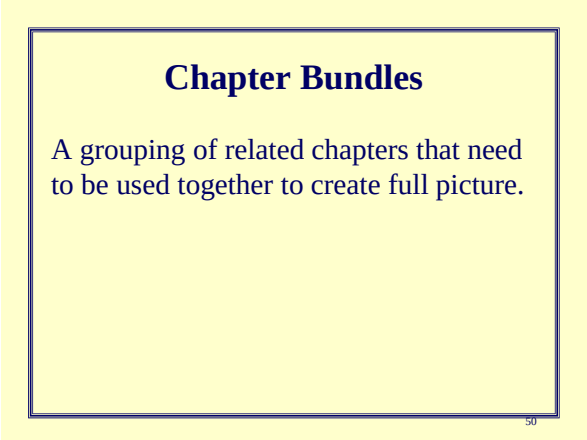
§ 9.2 Chapter Defined (Book page 9-3)

Cross-examination is a series of goal-oriented exercises. Each of these individual exercises is a cluster of related facts grouped to establish one particular point useful to the questioning party. The chapters of cross-examination are each composed of a series of goal-focused, leading questions. Any one topic of cross-examination will be presented through one or more chapters of cross-examination.



§ 9.3 The Definition of a Chapter Bundle (Book page 9-3)

A chapter bundle is a grouping of related chapters that need to be used together in order to create a full picture of a topic. A single topic within a cross-examination may well require several chapters. For instance, in a civil suit alleging that a customized computer software program was defective and therefore need not be paid for, the topic of whether the software was defective may require a great many chapters each focusing on one of the various alleged defects within the program. In addition there would almost certainly be one or more chapters detailing the consequences of each of those defects.



§ 9.5 The Chapter Method Gives the Cross-Examiner Witness Control (Book page 9-5)

Not every part of the opponent's story is capable or deserving of attack. There are parts of the direct examination that potentially help the cross-examiner, and there are parts that cannot successfully be disputed. There are other parts of the direct examination that simply do not matter. It is critical that the cross-examiner work from a method that ensures only the topics of importance to the cross-examiner will be discusses.

The chapter method is fundamental to the process of witness control. The

witness was called by the opponent. If left to pick his own topics for discussion, the witness is likely to take the jury into areas calculated to help the opponent. On the other hand, far greater witness control would be established by a method of offering leading questions only. By grouping questions into narrow fields of inquiry selected by the cross-examiner, the result is far greater control over matters discussed by the witness.

The chapter method recognizes that the cross-examiner is not going to attack or retell the entire story of the direct examination. The cross-examiner is going to attack, introduce, or highlight only portions of it. She will undoubtedly agree with many facts testified to on direct examination. As to these facts, she may choose to offer no cross-examination. In some instances, some cross-examination will occur as to agreed facts, not to weaken a factual assertion but to highlight these agreeable facts. That is done in order to put those admitted facts into context and show the fact finder that those facts have greater significance than given by the opponent. In such instances, the purpose of cross-examination is not to cast doubt upon such facts, but to make sure that these facts indeed come to the attention of the jurors, so that they can appreciate the significance of those facts in an alternative context—the context created in cross-examination.

Often there are a whole series of questions asked in direct examination that will go unchallenged for a different reason. They simply have no significance to the cross-examiner's theory of the case. The tendency in all direct examinations, both civil and criminal, is to "tell a story." As a result, direct examinations tend to cover much more material than is truly useful or at issue in the case. The skillful cross-examiner will let most of these facts go without comment, as most of these facts assist neither side. But the cross-examiner should still listen for "spontaneous loops" and theme phrases (see chapter 2, *Developing a Theory of the Case* and chapter 26, *Loops, Double Loops, and Spontaneous Loops*).

Modern cross-examination uses the chapter method to both attack the opponent's theory of the case and to support the advocate's theory of the case. Too much of the literature of the field has focused on cross-examination as a destructive device whose only purpose is primarily to attack the direct examination testimony. This is an old-fashioned and overly defensive view of cross-examination. Indeed there are chapters of cross-examinations solely destructive in nature. They are intended to harm the credibility of the opponent's case. It is entirely appropriate to build chapters that expose inconsistencies. As always, this is a selective process. The cross-examiner does not invite open-ended testimony of the witness, but requires the witness to admit or discuss particular facts that are selected by the cross-examiner.

§ 9.7 A Chief Advantage of the Chapter Method: Better Use of the Available Facts (Book page 9-6)

There are distinct advantages to adopting the chapter method of cross-examination. Chief among them is that the chapter method encourages a disciplined approach to the understanding and use of facts. It is a system of organization and presentation that will work in every type of case, every type of personality, and in every trial venue whether it is a jury trial, a court

trial, or arbitration. The chapter method encourages the lawyer to conduct more exhaustive analyses of the available facts. There is a difference between knowledge of the facts and an analysis of the facts. A lawyer can know the facts without ever having completed an analysis of the facts. An analysis suggests that the facts have been compared one to the other, have been reorganized, and have been grouped in logical packages, so that different or stronger conclusions may be drawn from those same, otherwise innocuous, facts.

A more systematic analysis of the available facts will permit the lawyer to sort the facts in support of a particular proposition into bundles or groupings of related facts. These bundles of related facts (chapters) permit the jury to enjoy a real-time understanding of the significance of facts to the cross-examiner's theory of the case. As a bonus, the chapter method of cross-examination gives counsel the freedom to quickly and easily order and reorder the sequences of the cross-examination (see chapter 11, *Sequences of Cross-Examination*). The chapter method gives topical and emotional control over the cross-examination to the cross-examining party, rather than to the witness. It permits a lawyer to engage in cross-examining hostile witnesses in areas (chapters) of the lawyer's choosing, while avoiding and eliminating opportunities for the witness to maneuver the cross-examination into areas (chapters) of the witness's choosing.

§ 9.8 Purpose of a Chapter (Book page 9-6)

The purpose of drafting a chapter is to use the best available admissible evidence to push a jury toward the recognition of a well-defined, fact-specific goal. A chapter is performed to establish one goal or complete one picture. In the process of establishing the goal, the lawyer often establishes many subsidiary points. The cross-examiner is trying to communicate an image. A series of leading questions puts before the jury many facts, each one contributing to the intended image or goal. While seeking to establish a goal or paint a picture of an event, the advocate may simultaneously affect the credibility of a witness. For example the process of impeachment by inconsistent statement establishes the goal of demonstrating that the prior statement of the witness was more believable. Simultaneously by establishing that the witness has previously testified in a manner inconsistent with their current testimony, the advocate has scored a subsidiary goal of diminishing the credibility of the witness.

A chapter is composed of a logical sequence of questions designed to reduce the lawyer's risk while increasing the comprehension and impact of the evidence. A logical sequence of leading questions within a chapter requires that the lawyer move the jury and the witness through a progression of related facts. It is the job of the cross-examiner to compile the facts that relate to each other so that the jury is not burdened with the responsibility of assembling the facts established by the cross-examination chapter. The goal fact is not necessarily the culmination of all the supporting facts but simply the last fact in the logical sequence of facts on a point. The important concept is that each chapter is an organized sequence of leading questions designed to put into a context the significance of the goal of that chapter. The facts of a chapter are its context. They are the details that flesh out the desired picture.

§ 9.9 Breaking Cases into Understandable Parts (Book page 9-7)

"Divide each problem into as many parts as possible; that each part being more easily conceived, the whole may be more intelligible."
Descartes, *Discourse on Method* (1637).

An entire case contains an enormous amount of information. No judge or jury can learn the entire case at once. Even a simple case is made out of an enormous number of separate parts, which have come together to create the issues and events in dispute. The chapter method allows the trial lawyer to divide even the most complex case into individual parts such that the jury can understand those smaller parts and thereby gain an understanding of the entirety of the case.

§ 9.10 The Development of Chapters: The Process (Book page 9-9)

After the lawyer has broken down the major components of a case into smaller parts, the lawyer should be in a position to recognize facts, groups of facts, and parts that may be suitable for examination. These will need to be studied at their chapter level. A quick method of recognizing potential chapters is to use a part process.

1. Divide the case into its important scenarios. A single scenario may be composed of many events.

2. Divide the important scenarios into their component events. A single good event may contain many good issues.

3. Analyze the component events for issues of assistance. A single good issue may require more than one chapter.

§ 9.11 The Most Important Topics Ordinarily Deserve the Most Detailed Presentations (Book page 9-10)

The cross-examiner will soon find that the most important topics or areas within a case ordinarily require more than one chapter in order to create the several pictures or establish the several goals within that topic or area. Within each chapter are the leading questions, which minutely form the picture or establish the goal. The most important topics will ordinarily require the most detailed factual presentations.

This may seem like it will take a long time to accomplish, but a chapter could be less than a dozen facts. The facts are put into leading questions so the process of establishing a single chapter may only amount to a minute or two of courtroom time. The pictures created by such a detailed presentation in areas important to the theory of the case are truly quite stunning. Too often the backhanded compliment to a good cross-examiner is: "Sure it went well. You had great facts." In reality the compliment should be: "Sure it went well. You made excellent use of the facts you had."

§ 9.13 Possible Chapters of Cross-Examination Deserve Preparation, Even Though They May Later be Dropped (Book page 9-11)

After the lawyer begins developing her potential chapters of cross-examination, she will often reserve judgment on some chapters initially thought to be useful. Perhaps the potential chapters do not bear directly enough on the theory of the case or perhaps they are too tangential to be of assistance. Perhaps further investigation needs to be done to discover facts that, if added to the area under study, would make the chapters in this area useful in cross-examination.

As the lawyer begins a deeper study of the facts, she will inevitably find topics that she originally passed over that she now recognizes as useful. Fear not, as nothing that has been done so far in cross-examination preparation is permanent. The addition or deletion of areas of cross-examination is still easily accomplished.

§ 9.14 Events or Areas Versus Chapters (Book page 9-12)

Bear in mind that identifying the events of a case is not the equivalent of identifying the chapters of cross-examination. Creating a list of the events of a case does not create the chapter for cross-examination, as this broad breakdown is still far too large to be studied carefully. A list of the events of a case may well suggest possible areas for cross-examination but the lawyer must find within these events the chapters that require detailed exploration before the jury.

In surveying the events of a case, the lawyer is looking for facts that can be used to build her theory of the case. Simultaneously the lawyer is looking for weaknesses or in the opponent's theory of the case, i.e., any suggestion that further inquiry is merited. Such weaknesses represent overall concepts of cross-examination and are not in themselves a cross-examination. For instance, on first reading the narrative of Barbie and Ken, the lawyer may well recognize the implausibility of the central feature of Barbie's story: Because her child was starving, she decided to turn to prostitution. Yet the mother has family in the city and knows people who live in the multi-unit apartment building. The explanation causes the lawyer to realize she needs to cross-examine in this general area, although the exact form of chapters of the cross-examination is undetermined.

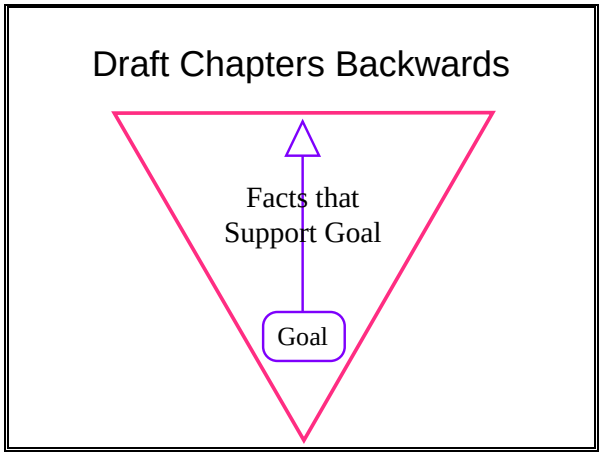
§ 9.19 Chapter Size (Book page 9-16)

How big is a chapter? A chapter is only as big as the number of good facts available to accomplish a single goal. Cross-examiners must train themselves to think in greater detail. In court the lawyer can always back up to a more general presentation, but it is very difficult to start with only a very skeletal notion of a chapter and develop the appropriate leading detailed questions at the podium. Within an event there is often more than one point of importance. When there is more than one goal that can be obtained through discussion of an event or topic, it is likely that there is

more than one chapter that needs to be considered for cross-examination. It is impossible to decide how far to break down a part or topic of the case until the lawyer understands how many favorable facts are contained in that part. In addition, it is impossible to decide how far to break down a topic of the case until she understands the importance of that topic to the competing theories of the case.

§ 9.20 Draft Chapters Backwards (Book page 9-17)

A helpful way to approach the development of chapters is to engage in a four-step process designed to efficiently move the advocate from chapter concept to chapter completion. It is easy to think of the process in this way: draft chapters backwards. Below is a diagram of the process followed by a description of the four steps:



One: Identify any one single factual goal to be achieved in the course of the cross-examination that is congruent with the theory of the case.

Two: Review cross-examination preparation materials for all facts that lead toward acceptance of that single factual goal.

Three: Draft a single chapter that covers those facts, leading to the factual goal as set out.

Four: If, while in the course of drafting a chapter an additional worthwhile goal is identified, separate that goal and its supporting material into its own chapter.

§ 9.21 The Building of a Chapter, Step One: Select a Specific Factual Goal (Book page 9-19)

Select a single factual goal to be achieved in the course of the cross-examination that is within the theory of the line of questioning.

Central to the concept of the chapter method of cross-examination is the recognition that each individual factual goal must be proven separately, even though it may have a very close relationship to similar goals. For

instance, if it is important to show the robber had no facial scars, then that individual topic has its own chapter and is written up separately from all other chapters dealing with other aspects of the robber's description. In a non-chapter system, the lawyer would be tempted to approach the podium with a piece of paper or note card that says something like:

Description
blue jeans
facial scars
height
body build

Working from such a poorly organized and abbreviated set of notes, the lawyer is likely to cross-examine on these issues generally, but the lawyer would do so with decreased opportunity to clearly establish her goals. Lack of chapter preparation increases the risk that the trial lawyer will not recall all of the preliminary facts that make the goal less objectionable, more persuasive, and more believable. When the lawyer minimally asks the preliminary questions required to set up the goal, she increases the risk that she will fail to include all the useful information available or that the witness will give an unanticipated or unfocused answer that she is unprepared to impeach immediately.

§ 9.26 Give Each Chapter a Title (Book page 9-27)

Each chapter concerns itself with one factual goal. The materials collected for chapters are not miscellaneous, but facts related to each other. The chapter stands for a logical proposition. That proposition is the title of that chapter. Chapter titles create a very organized method of preparing not only cross-examination, but opening statements and closing arguments as well. Because the cross-examiner has identified all of the chapters that are favorable to her theory of the case, she can use the same topics in closing argument. Chapter headings also assist the cross-examiner in jury voir dire.

§ 9.27 The Building of a Chapter, Step Two (Book page 9-27)

Review cross-examination preparation materials for all facts that lead toward acceptance of the single factual goal of each chapter.

This stage is dependent upon material discussed in chapters 5, 6, 7, and 8—all of which discuss preparation systems. This may seem to pose a chicken and egg dilemma. Can discovery material be sorted into useful categories before goals of cross-examination have been decided upon or are goals to be determined after preparation materials have been surveyed? The answer is that the first reading of discovery, coupled with a client interview, yields a generalized theory of the case. This initial concept of a theory of the case suggests the most obvious goals and these goals in turn generate the initial search for cross-examination preparation materials. Then, as the attorney begins to sort the discovery into factual groupings in support of identified goals, more potential goals will be recognized. This in turn generates additional groupings of preparation materials.

NOTES

§ 9.30 The Building of a Chapter, Step Three: Accumulating the Facts in Support of the Goal (Book page 9-29)

The most efficient way to construct a chapter is to envision the single factual goal or the picture the cross-examiner is to paint and gather the facts to support that goal. In the chapter method of cross-examination, the cross-examiner needs to draft a single chapter that covers those facts leading to each individual factual goal.

Chapter: Publications
Q: You placed everything you published in your resume?
Q: You are particularly proud of your articles?
Q: Publishing and article shows where your interests lie?
Q: Doing research in that area helps develop your expertise in that area?
Q: From 1996 to 2004, you have published nine articles?
Q: Every one of your articles was about hospital administration?
Q: In fact, all of your articles were about hospital administration in a tax-supported institution?
Q: Your articles are all about this single narrow administrative issue?
Q: None of your articles addressed psychiatric diagnosis?

§ 9.32 Chapters are About Facts Not About Conclusions (Book page 9-32)

If the cross-examiner wishes the witness to establish a fact, it is not sufficient just to ask the witness for the goal in the form of a conclusion. If the cross-examiner wishes to show that the defendant owed a fiduciary duty to the plaintiff, it is largely ineffective to merely ask the hostile witness, “Isn’t it true that you owed a fiduciary duty to my client?” Asking conclusions is a poor substitute for proving facts. If a fiduciary duty exists, it exists because factually the elements of a fiduciary duty can be proved through chapters of cross-examination. The proof of fiduciary duty would require a chapter bundle, each chapter designed to factually support one of the legal elements of fiduciary duty. It may be that the witness on the stand can only testify to two of the five elements. That witness would then only be taken through those two chapters. The other chapters designed to factually prove the elements of a fiduciary duty would be reserved for other witnesses who are in a position to respond to those leading questions.

§ 9.33 One Question is Never a Chapter (Book page 9-32)

Facts must be established in sufficient context so that a jury will accept the goal-fact as having been proved. A single leading question can never fully create a dependable context. A group of facts can create context. A group of facts can create a believable picture.

It is never enough just to receive a favorable answer to a goal fact question. The goal must be supported with the strongest available factual details. The factual details that support the proposition give the jurors the strongest basis to accept the inference suggested by a chapter (see

chapter 10, *Page Preparation of Cross-Examination*).

§ 9.34 Separate Chapter—Separate Development (Book page 9-33)

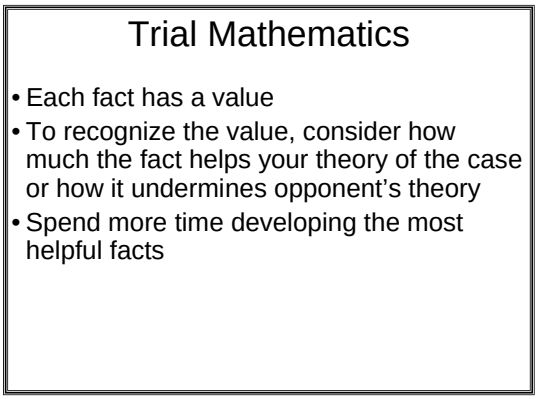
In the course of negating, highlighting, or creating a goal-fact, the lawyer must almost always first establish many subsidiary or supporting facts. For instance, a simple goal of establishing that a witness saw a blue car requires not simply the question, "You saw the blue car?" Example:

Q: You were standing on the street corner?
A: Yes.
Q: It was daylight?
A: Yes.
Q: You saw a car?
A: Yes.
Q: It caught your attention at that moment?
A: Yes.
Q: The car was blue?
A: Yes.

This group of leading questions requires the witness to admit all four facts so as to more firmly establish the goal-fact that the witness saw a blue car. This method of questioning is discussed at length in chapter 8, *The Only Three Rules of Cross-Examination*. The short introductory questions are designed to flesh out the context for the goal fact. Having introduced the supporting material, the lawyer has more firmly established the accuracy of the fact that the car was indeed blue.

§ 9.36 The Building of a Chapter, Step Four: If, While Drafting a Chapter, an Additional Goal is Identified, Separate That Goal and its Supporting Material Into its Own Chapter (Book page 9-35)

By reading the foregoing material, it is obvious that chapters are developed by breaking events or issues into smaller goals that become identified as chapters. When is any subject sufficiently broken down? The answer is mathematical, but the mathematical equation is an expression of the theory of the case.



An example of the application of this formula will undoubtedly assist. In an earlier example the cross-examiner needed to establish that the opposing party was in deep financial trouble in the spring of 2001. If the establishment of that financial crisis would have a great impact on the competing theories of the case, then the available material demonstrating that financial crisis is deserving of a multi-chapter presentation. That portion of the cross-examination is deserving of great time and attention. A bank loan requiring periodic payments would get its own chapter. A missed payment in that time frame would deserve its own chapter. The forced sale of the witness's assets at distress prices would deserve its own chapter. If there are more individual items or events that can assist the cross-examiner in proving or portraying the financial crisis in the spring of 2001, then the cross-examiner needs to develop more chapters that use those facts.

If a bank loan entered into by the witness years before has some bearing on the financial plight of the witness in 2001, then that bank loan deserves a chapter of cross-examination as well. But if a bank loan entered into years before has no bearing on the financial plight of the witness, then that loan deserves no mention. Even if that loan was defaulted on 10 years ago, if that fact or event has no relevance to an issue in this case, then it is undeserving of time on cross-examination. If, on the other hand, the witness were to testify on direct examination or on cross-examination that he had excellent credit and had never defaulted on a loan, then a "default" chapter would suddenly be of relevance.

§ 9.38 How to Avoid Spending Time on Unproductive Chapters (Book page 9-36)

Can the lawyer break the evidence down too far and into too much detailed information? Yes the breakdown can become too small. What is deserving of the greatest attention is the evidence that has the greatest impact on the theory of the case. A chapter having no bearing on the opposing theories of the case has no business being done at all. If an event happened on Wednesday, or it happened on December 9, but the day or date have nothing to do with the contrasting theories of the case, there is no reason to discussed those facts and certainly no reason to develop a chapter concerning the day or date.

Page Preparation of Cross-Examination

Adapted from their book

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Chapter 10:
Page Preparation of Cross-Examination

SYNOPSIS

Sections in Bold are included in the handout in whole or in part

NOTES

SELECTED AND EDITED PORTIONS OF CHAPTER 10 – "PAGE PREPARATION OF CROSS-EXAMINATION"

§ 10.1 One Chapter = One Page (Book page 10-2)

A chapter is a sequence of questions designed to establish a goal. It therefore makes sense that each chapter of cross-examination be composed separately from every other chapter. The chapter method of cross-examination is weakened by drafting multiple chapters on a single page. The best form of preparation for chapter method cross-examination is to devote one page to each chapter.

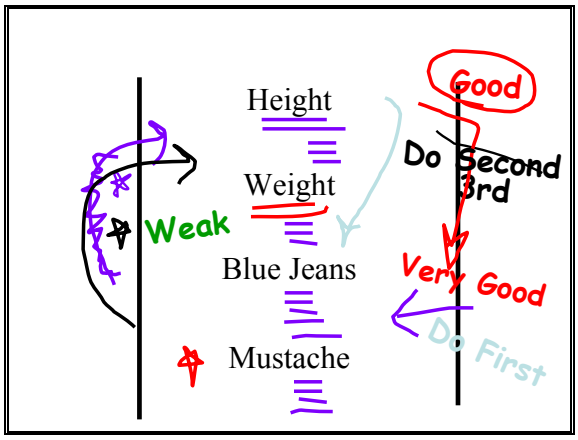
By drafting no more than one chapter per page, the lawyer encourages herself to fill out the chapter with all the facts necessary to put the goal into its context. The lawyer pushes herself to fully develop the important facts in each chapter. Sometimes the sheer embarrassment of looking at a half-empty sheet of paper drives the lawyer to think of other facts that might enhance the chapter. When a chapter runs more than one page, the lawyer is often forced to recognize that she really has multiple chapters that are being unprofitably combined.

A corollary to the rule that each chapter deserves its own page is that no chapter should require two pages. Undoubtedly there will be occasions when a topic requires multiple chapters (a chapter bundle). But when the strong facts consume more than one page it is very likely that the material would be better presented as two separate chapters with two smaller goals. Another practical problem with having a chapter longer than a page or placing two chapters on a page is that in the heat of a courtroom battle, it is easy to forget the follow-up questions on a second page.

§ 10.2 Multiple Chapters on One Page: A Recipe for Confusion (Book page 10-3)

When two chapters are placed on one page and the lawyer attempts to integrate the direct examination, exhibits, and other "happenings" at trial, the page becomes a series of arrows, scratched-out directions, a list of priorities and stage notes that are indecipherable. This becomes confusing and frustrating at trial:

NOTES



§ 10.3 Prepared Pages of Cross-Examination: It's the Show, Not the Safety Net (Book page 10-5)

The page preparation of cross-examination ensures that the lawyer will move toward a single goal at a time and that she will present to the fact finder the best facts on that topic. Again, without a prepared page of cross-examination the lawyer is more likely to ask the goal questions without filling in all the available supporting facts. In addition individual page preparation is the best technique of ensuring that the lawyer will complete a selected goal before moving to another goal.

Less-than-fully prepared cross-examinations overlook facts. Questions not asked are the equivalent of facts thrown away and arguments squandered. Inevitably, even the best-prepared lawyers will forget to write some things and ask some things in trial. This is the penalty all lawyers pay for being human. The lawyer does not need to add to that list of errors and omissions those things that the lawyer could have cured through thorough preparation of a script for each chapter of cross-examination.

§ 10.5 The Three Critical Questions That Must be Instantly Answerable by the Cross-Examiner (Book page 10-6)

Cross-examination is mentally and physically exhausting affair. And that's on a good day. There are a lot of decisions to be made during the cross-examination. In the midst of all of the stress, the advocate is trying to guide a hostile witness through a large quantity of facts with the intent of proving several very important goals. What is most needed is a cross-examination system and set of techniques that allows the cross-examiner to remain focused and in control of the cross-examination regardless of the situation. At any moment in the cross-examination the cross-examiner must be able to answer the three fundamental questions of cross-examination:

1. Where am I?
2. Where am I going?
3. How am I going to get there?

Each of these critical questions will now be examined. The techniques of page preparation of cross-examination will answer each question fully.

First: Where am I? Cross-examination is a series of goal-oriented exercises. At any point in the cross-examination the advocate needs to be able to immediately determine what goal she is developing. “Where am I?” represents that moment when the cross-examiner either shifts focus to a new chapter or loses focus due to some distraction. Because the cross-examination does not necessarily proceed in chronological order, and because the cross-examiner ordinarily wishes to avoid certain topics, cross-examinations are not a stream of consciousness event (see chapter 11, *Sequences of Cross-Examination*). The cross-examiner has planned the chapters that she wishes to cover and placed them into persuasive sequences. The cross-examiner does not have the time, energy, or need to memorize either the chapters or the sequences in which they should be used. Instead, every chapter will carry its title at the top of the page. Each chapter will be confined to only one page. Two chapters will never appear on the same page. In order to answer the question, “Where am I in this cross-examination?” the cross-examiner need only glance at the top of the page and she will be instantly oriented to the subject she for cross-examination.

Next: “Where am I going?” This question is shorthand for the goal the cross-examiner is seeking in the chapter. It identifies the goal. Often the goal is signified by the title at the top of the page, such as “Pullman had no background in insurance” or “the formula in the software is taken directly from the IRS code.” But the question “where am I going” also signifies that there is an ending point.

Finally: How am I going to get there? This is an extremely difficult question for the unprepared cross-examiner to answer. It is the failure to have an answer to this question that causes cross-examination to meander and to open up areas that are harmful to the cross-examiner. But through the technique of page preparation the cross-examiner knows at any moment exactly how she intends to get the information called for by this chapter. The facts to be adduced are listed on the page itself. No matter how stressful the courtroom environment is, the cross-examiner need only look down to remind herself of the leading questions to be asked and to follow that script to its completion. Of course there is room to change questions, add facts, drop questions that seem unnecessary, and customize the chapter based on the circumstances. But these changes in judgments become so much easier because the cross-examiner has a firm starting point or outline of how to conduct this chapter of cross-examination.

Armed with the chapters of cross-examination and using the page preparation techniques in this chapter, the cross-examiner can instantly answer the three questions: Where am I? Where am I going? How do I get there? The cross-examiner will therefore always feel grounded. Knowing the answers to these questions allows the cross-examiner to think about more important issues, like those that can only be decided as the cross-examination occurs. A lawyer who feels grounded at the podium is a lawyer in control of the case.

§ 10.7 Form of the Columns on the Page (Book page 10-8)

When it comes to drafting the page of facts or outline of questions within

certain parameters to be discussed, the choice is up to the individual. As a starting technique it is advantageous to divide each page into three unequal columns: One wide column for the questions or outline of the questions to be asked, a second narrow column for the source of the answer, if known, and a third column for tactical comments, notes on use of exhibits, stage directions, quotes from direct examination, and quotes from prior cross-examination.

In setting up the page, the cross-examiner should choose the order of columns that feels best. After experimentation, one or the other method will seem more natural. One method uses the column on the left side of the page for the source, the larger middle column is used for the questions or outline of questions for cross-examination, and the column on the right hand of the page is reserved for tactical comments and quotes. See method 1, below.

An alternative page format uses the column on the left side of the page for tactics, a narrow middle column for sourcing, and the right hand column for the cross-examination questions or outline of questions. See method 2, below.

Lawyers are encouraged to use either format or any other format with which they are comfortable.

Four samples of alternative page layouts

Page Layout Method #1

Bennet, M.D.:

History of C-Section

		(direct/tactics)
Dep 52:8	You were aware of her previous C-Section?	"I had taken a full medical history Intro Ex 19 History Notes Nurse Trujillo verifies

Page Layout Method #2

Bennet, M.D.:

(Direct/Tactics)	History of C-Section	(Source)
"I had taken a full medical history Intro Ex 19 History Notes	You were aware of her previous C-Section?	Dep 52:8

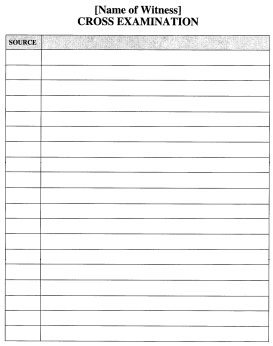
NOTES

Page Layout Method #3

Bennet, M.D.:

History of C-Section	Direct/Tactics
You were aware of her previous C-Section (52:8)	"I had taken a full medical history Intro Ex 19 History Notes

Page Layout Method #4


[Name of Witness]
CROSS EXAMINATION

SOURCE	

§ 10.8 Leading Questions Format (Book page 10-9)

Each cross-examination chapter is a series of leading questions. The importance of preparing cross-examination as a series of leading questions cannot be overemphasized (see chapter 8, *The Only Three Rules of Cross- Examination*). A page of cross-examination questions is a page of answers. Hence, what the lawyer is really drafting is not a series of questions, but factual statements or facts the lawyer wishes to establish. It is the lawyer's desire that the witness agree with these factual statements. In addition, the lawyer has many techniques that damage a witness who answers other than with a "yes" (see chapter 19, *Controlling the Runaway Witness*, chapter 26, *Loops, Double Loops, and Spontaneous Loops*, and chapter 16, *Eight Steps of Impeachment by Inconsistent Statement*).

Below is an example of the questions column in a single chapter in a multi-chapter cross-examination where the general theory of the case is misidentification. This chapter concerns itself only with the witness's (victim's) version of the height of the robber:

NOTES

One Chapter in a Multi-Chapter Cross-Examination

Witness: Wes Martin

Height

	You were face to face with the robber.	"I was no more than 3 feet from him."
S HRG 78:3	Standing directly across the counter from him.	
P.Rpt. p2T	Robbery took several minutes.	"We were standing in front of each other and I had to look up."
	Looked the man up and down.	
≈ PH 36:21	Noticed you had to look up at him.	
S HRG 79:4	You are 6' tall yourself.	
PH 36:12 S HRG 22:5	You found yourself looking up at a man taller than you.	

§ 10.9 Safely Asking Questions to Which the Answer is Not Known (Book page 10-12)

Cross-examiners ask leading questions on cross-examination. The advocate's ability to teach the case is built around the use of leading questions in cross-examination. Witness control is predicated upon the use of leading questions. The historic maxim of cross-examination is: "Never ask a question to which you do not know the answer." But this rule is both misunderstood and misapplied.

The misunderstanding comes from too narrow an application of the term "know the answer." This shorthand phrase implies that the cross-examiner must have proof that the witness has previously admitted this fact or be armed with a witness or exhibit capable of impeaching the witness should she deny the leading question fact. This limitation on cross-examination is so restrictive and so negative in connotation that, as to some critical issues, the cross-examiner is left with little or nothing to ask. This is not a rule that can be used if it is interpreted so narrowly.

If the cross-examiner has carefully proceeded within a chapter from the general to the specific, many leading questions can be asked to which the only logical answer will have been learned by the cross-examiner by the time the question to which the answer is not known is asked. The third rule of the only three rules is that questions should follow the logical sequence to a specific goal. If the cross-examiner constructs a series of questions so that the answer to any one question is logically deducible from the previously admitted facts, then the witness must either answer the question with a logical "yes." Or he risks deny the leading question and providing an illogical answer. Illogical answers harm the witness's credibility. Furthermore, logical fact finders are incapable of confidently picturing the illogical response. In other words, while the witness is free to answer illogically, the minds of the fact finders will continue to process information logically. Any fact or series of facts that logically leads to another fact will cause the fact finder to picture the logical answer.

§ 10.10 "Sourcing the Answer"

(Book page 10-14)

"Sourcing" is the process of finding and entering the designation of where, within the materials, a particular answer can be found. Knowing the answer, and knowing where the answer can be documented, is the highest plateau of witness control. When the lawyer knows and can document the answer to a leading question, she erases any fear that the witness will successfully deny the leading question, plead a lack of memory, or substitute a different answer. While witnesses can still attempt all of these evasions, they are unlikely to do so because of the high degree of control the lawyer has gained through use of this technique. Furthermore, they cannot successfully engage in these evasions because the lawyer is now prepared to impeach on anything other than the answer "yes."

This physical preparation for the possibility of impeachment represents a quantum leap in control of the witness. The lawyer's ability to prepare at this high level is derived from the cross-examination preparation systems discussed in chapters 5, 6, and 7.

The result of this process of "sourcing the answer" is that the lawyer is now instantly prepared for an impeachment by inconsistent statement. The lawyer has literally prepared for the worst-case scenario. If the witness were to say to a leading question, "No, I wouldn't agree with that," or "Gee, I don't think that's correct," or "I cannot recall," the lawyer is immediately prepared to impeach. The source notes in the source column tell the lawyer where, within even the largest file, the lawyer can find that precise answer.

Simultaneously the immediate impeachment of the witness schools him in the risks of denying a leading question. This preparation technique establishes and reinforces credibility with judges as they instantly recognize that the cross-examiner is well prepared.

In addition judges grant more leeway for additional impeachments once they recognize that a witness has been successfully impeached (see generally chapter 11, *Sequences of Cross-Examination*). Finally, immediate impeachments by inconsistent statement strike fear in the heart of opponents. They are weaponless in this battle. A correctly handled impeachment offers no valid objection. The opponent completely understands that the cross-examiner is not troubled by evasive answers, but in fact uses the opportunity to both establish the fact desired and to impeach the witness. The opponent becomes far less confident that his witness can answer the redirect examination questions without tripping and thereby opening up other opportunities for impeachment by inconsistent statement. This realization impacts the willingness of the opponent to engage his witness in any redirect examination.

The preparation technique of sourcing the fact allows the lawyer to avoid the anxiety of the unexpected answer. The lawyer no longer fears the loss of the goal itself or loss of momentum.

§ 10.21 Keying in Exhibits as a Tactical Reminder (Book page 10-27)

Another use of the notes or tactics column is to key in exhibits. It may be

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that the cross-examination can benefit from showing a witness a particular exhibit. It may be that a particular exhibit must be introduced through this witness. It may be that an exhibit can be impeached or explained through this witness. In all of these events, this tactics column can be used to remind the cross-examiner of the exhibit to be introduced or discussed.

The chapter below is designed to impeach a portion of the story of a high school student who claims to have had multiple consensual sexual experiences with her principal. The school janitor has been called by the prosecution to establish seeing the two together at school long after classes were over. This cross-examination chapter is designed to impeach the girl's story that the sex acts took place in certain locked rooms. Note the use of the tactics column to key in a useful exhibit.

Chart 10

Goal: Show inconsistencies between testimony and physical evidence

	HEAD CUSTODIAN SHAW	
SOURCE	DOORS	NOTES
	You are the head custodian at Fitzmunkers Middle. You were in the late 1990 and early 91. Familiar with work that was done on doors and locks over the last few years. Back in late 1990 the lock on the office nurse's bathroom door didn't work. That was because back in 1989 the lock on the door to the main office didn't work but the nurse's bathroom lock did so they were switched. You personally saw to it that the lock was switched. To do this, you created a work order.	
	More important to be able to keep office looked than the bathroom.	Introduce work order — EX.11
	Aware that it was common for the principal and the office staff to use the bathroom in the health office. So they were all aware that the lock didn't work.	
4-2	You had a conversation with Mr. Hardin when he first became principal in fall of 1990 about the locks.	
4-2	Remember telling him that lock on bathroom in health office didn't work.	

	You are also familiar with the lock on the door to the principal's office. It requires a key. Can only be locked from the outside. No button or keyhole on the inside.	

While the introduction of an exhibit often forms its own chapter, once an exhibit is in evidence, discussions concerning it require a stage note within a chapter prompting the lawyer on when and how to make use of the exhibit.

Chart 11

Example: Page Preparation of Cross Keying in an Exhibit

Ms. Farr	The Lighter	
Preliminary Hearing 12-7:25	When you got back to your apartment you noticed your lighter was missing.	
PH 167:4	That night or the next morning you discussed it being missing with Midge.	
PH 167:15	It was the lighter you had used to light a cigarette when you got into the van.	
	It was a metal lighter.	Show her ex _____
	In fact, this is your lighter.	
PH 167:9	You realized it was in the van—that it had spilled from your purse.	
PH 167:19	You believed that your prints were on it.	
PH 167:22	And that your prints on that lighter were going to lead the police to you.	

Similarly, there are times that the lawyer marks an item for identification, but it may not be introduced. For instance, items may be shown to a witness for purposes of impeachment or as demonstrative evidence. The court may ask that the item be marked for identification so that the record is complete. That same item, whether it is a transcript containing an inconsistent statement, a record used to refresh the witness's recollection, or any other type of document that is not going to be introduced, is still a prop that needs to be set in place. This tactics column is the appropriate place to keep notes concerning such exhibits and props.

The chapter below is prepared as part of the impeachment on a "snitch" witness. It deals with several exhibits that may be shown to the witness in telling the story of a prior fraud committed by this witness. Hopefully, the snitch will admit the truth of the leading question, but should he hesitate, the appropriate exhibit is keyed in, ready for use.

Chart 12

Example: A Chapter of Cross-Examination Keyed with Exhibits for Identification Purposes

Mark Nautiluss (Snitch)	**SUBJECT – THE INSURANCE FRAUD GETTING THE LOAN**	
Cooling GJ 5:22	9/18/82 you went to Peoples' Bank and asked for a $50,000 loan	see Cooling GJ 5:22 GJ Ex 17 loan app. ID
Cooling GJ 5:23 PH 154:17	You said you need $ to purchase over road tractor/trailer for your coal loading business	
	They made you a $55,000 loan	GJ Ex 18: loan 11/9/82 pkg p1 ID # GJ Ex 18: loan pkg p7 ID #
	The money was to purchase a new Kenworth Tractor and some cash for operating expenses.	GJ Ex 18: loan pkg p3 ID #
Cooling GJ 10:1	The bank wanted to inspect the 1982 Kenworth, but you said your dealer had not received it yet.	
Cooling GJ 10:10	So, bank gave you one ck for $48,000 to Tumbleweed Ent. for 1982 Kenworth.	GJ Ex 19: Bank ck ID #
Cooling GJ 10:16	And bank gave you a ck for $7,000 for operating expenses.	GJ Ex 20: Bank ck ID #

Sometimes the note in the tactics column is not about an exhibit to be used during the cross-examination or an item to be marked for identification when shown to the witness, but is a reminder to counsel of the existence of a piece of evidence that will contradict what the witness is saying. The lawyer may want to key in the note about the exhibit just as a reminder that the lawyer is setting the witness up for impeachment through either the previous or upcoming use of that exhibit.

By way of example, examine a case involving a witness who allegedly murdered the defendant's business partner so that the defendant might recover some insurance. One of the chapters of the cross-examination involves the witness's description of where he stood as he stabbed the victim lying in his bed. While preparing the witness statement charts, it was noted that the alleged hit man's description of the homicide did not match the coroner's report and photographs, either in the number of stab wounds, or in the place where the assailant must have been standing in order to inflict the stab wounds.

The witness is not going to be confronted with these differences. To do so would only point up the inconsistency to the witness and perhaps allow the witness to give a credible explanation. Part of the theory of the case is that the alleged hit man is not the hit man at all, but is covering up for a far bigger conspiracy not involving the defendant. Therefore, a chapter that demonstrates the alleged hit man's unfamiliarity with the homicidal act is a benefit to the lawyer. The lawyer has prepared that cross-examination chapter from the witness statement or criss cross chart. To track this process, see chapter 7, *Cross-Examination Preparation System 3: Witness Statement Charts*.

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Chart 13

	The Stabbing	
GJ 12/11/81 p36	You were standing by his left side.	
DA	You held the knife in your fist so that the sharp edge was facing toward you.	(demonstrate with rubber knife)
GJ 12/11/81 p 36 DA 12/9/81 p 33	The first time you stabbed him was on the right side.	
GJ 12/11/81 p 36	You believe it entered his right lung.	
GJ 12/11/81 p 34 DA 12/9/81 p 36	You raised up the knife and plunged it in full length.	
DA St 12/9/81 p 31 GJ 12/11/81 p 36	You stabbed him 3 times.	Pres EX _____ , _____, _____, photos of deceased 5 stab wounds all made by person at his head
GJ 12/11/81	From side to side — across his body	Pros Wit Dr. Toll (Coroner) Make sure details of wounds in Ev. during cross of Dr. Toll Chapters: # of wounds Direction of wounds Where assailant prob standing

§ 10.23 Customary Order of Questions Within a Chapter (Book page 10-33)

The most frequent purpose of a chapter of cross-examination is to introduce or highlight a particular fact or to create a vivid picture of a particular moment or event. Although establishment of this goal-fact or picture may often serve to impeach the witness, a chapter that introduces or highlights a fact that impeaches a witness takes a form different from that of a chapter devoted to impeachment by inconsistent statement. The form of a chapter designed to impeach by inconsistent statement will be discussed separately (see chapter 16, *Eight Steps to Impeachment by Inconsistent Statement*).

The introduction or highlighting of a fact through cross-examination can best be accomplished through an ordering of questions that begins with the general area of questioning within the chapter, and moves to the specific. It is ordinarily envisioned as an inverted triangle:

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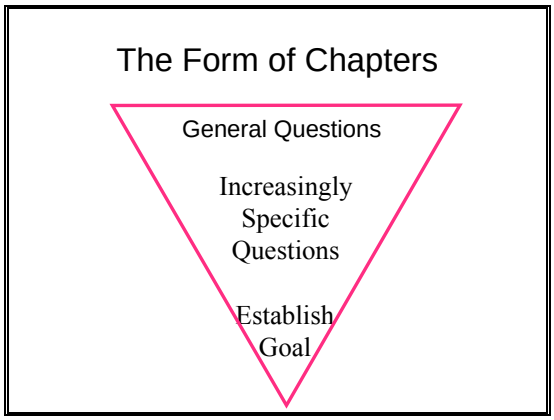

When it is said that a chapter begins with the general and moves to the specific, it is meant that the chapter begins with a series of questions that establishes the broad nature of the topic and then, through a series of leading questions, pulls the witness down an ever-narrowing path until, at the conclusion of the chapter, the witness answers the specific question that proves the goal.

Sequences of Cross-Examination

Adapted from their book

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Chapter 11:
Sequences of Cross-Examination

SYNOPSIS

Chapter 11:
Sequences of Cross-Examination

Sections in Bold are included in the handout in whole or part

NOTES

SELECTED AND EDITED PORTIONS OF CHAPTER 11 – "SEQUENCES OF CROSS-EXAMINATION"

§ 11.01 The Strategy of Sequencing Cross-Examination Chapters (Book page 11-3)

One of the great benefits derived from the preparation of cross-examination in the chapter method is the ability to order and reorder the chapters into sequences selected by the cross-examiner. Advocates too often ignore the virtues of planning the order of cross-examination. As a result, many cross-examinations are approached in a random sequence or in the lock-step sequencing produced by a purely chronological approach. In order to derive the greatest benefit from the chapter method of cross-examination, it is helpful to perform the chapters of cross-examination using a strategy. There are many persuasive sequences possible and there is never one best sequence. The strategy of sequencing a cross-examination is built upon the notion that the same chapters of cross-examination performed in a more persuasive order produce better results. The cross-examination can be enhanced by the order in which its parts are presented.

The science and techniques of sequencing the chapters of cross-examination are built around the notion that the most important issues to be exploited are unlikely to have occurred chronologically. For instance, if chronological order were used in cross-examination, impeachment chapters would be performed as they occur within the chronological sequence of the story. By the time the best impeachments occur, the jury may well have already decided the witness is credible.

If, on the other hand, the chapters of the cross-examination are placed in an order selected by the advocate, the cross-examiner can choose to perform the strongest impeaching chapters early in the cross-examination, and thereby diminish the credibility of the witness at an earlier point within the cross-examination. The value of such a sequencing technique is that jurors are most attentive and are most disposed to critically examine the credibility of the witness at the beginning of a cross-examination. All damage done to the credibility of the witness through early chapters of cross-examination may well carry over through the remainder of the cross-examination. In other words, by lowering the credibility of the witness at an early point in the cross-examination, the advocate derives benefits throughout the cross-examination. In fact, when the advocate runs into hostile answers in later chapters, the jury is likely more skeptical of the answers as a result of the impeaching chapters that have already been performed. This is but a single example of the benefits to be gained by sequencing the chapters of cross-examination in the most persuasive order.

The strategy of sequencing a cross-examination is integrally tied to the concept that the cross-examining party, through the use of planned sequences, can cause a jury to pay greater attention to certain facts. This strategy also can keep a hostile witness off balance and more efficiently attack a witness's credibility or demonstrate motive, interest and bias. The cross-examiner can use sequences to establish greater control of the witness and thereby diminish the risk that the witness will answer non-

responsively in more difficult areas of cross-examination.

The techniques of placing chapters into planned sequences of cross-examination uses psychological principles, including primacy and recency and the Skinnerian principle that behavior is molded by consequences.

§ 11.05 Relationship of Sequencing to the Chapter Method (Book page 11-5)

Placing chapters in any strategic sequence is another method of exercising control over the witness and the courtroom. The chapter method of cross-examination, accomplished through page preparation of cross-examination, is the foundation that makes possible the sequencing of cross-examination. Therefore, creating powerful sequences of chapters is a technique that belongs only to the prepared lawyer in employing the chapter method of cross-examination preparation. See chapter 9, *The Chapter Method of Cross- Examination* and chapter 10, *Page Preparation of Cross-Examination.*

The chapter method of cross-examination discussed the necessity of building a series of goal-oriented chapters, each designed to establish one particular factual goal useful to the cross-examining party. Having divided the cross-examination materials into chapters, written each chapter individually and placed one chapter only on each page (see chapter 10, *Page Preparation of Cross-Examination*), there is now a system ideally suited to the task of placing cross-examination materials into selected sequences. Because each of the chapters has been individually prepared, there is flexibility to position chapters in the order judged to be most effective. The lawyer is no longer tied to a chronological presentation. The lawyer may take up issues in whichever sequence seems most likely to generate the emotions she wishes the jurors to feel when hearing the facts. By abandoning a purely chronological approach to cross-examination the advocate can save material to craft a strong attack both early and late in the cross-examination. Risky material can be interspersed with strong material that has the effect of lowering the risk that a witness will answer not responsively. In general, the cross-examiner can take advantage of the preparation to keep the witness off stride while simultaneously keeping the jury's attention and interest.

§ 11.06 Do Not Repeat or Follow the Direct Examination Sequences (Book page 11-6)

A cross-examiner who adheres to an old fashioned format of taking a few notes made during direct examination is likely to cross-examine in whatever order the notes were written. This random assortment of notes leaves to chance the impact created by cross-examination.

§ 11.09 The Chapter Method Creates Flexibility (Book page 11-7)

In advance of trial, the cross-examiner may write a chapter that appears quite useful, only to find that the chapter has lost its viability after a particularly good explanation is given in direct examination. Under such circumstances, the individual chapter can simply be pulled out of the stack

of chapters and set aside. There is no need for crossing out and interlineations with arrows and numbers, all of which will only serve to confuse the lawyer during trial.

The converse is equally true: The lawyer may write a chapter in the office hoping that something will occur in the trial that will allow the advocate to use the facts in that chapter. Perhaps it is an impeachment that seems collateral. However, an answer of a witness during trial may well make that prepared chapter not only admissible, but also extremely valuable. Having written the chapter, the cross-examiner can insert that chapter into the cross-examination at the time and place desired.

§ 11.12 Begin the Cross-Examination with the Chapters Previously Selected as the Opening Sequence (Book page 11-9)

The doctrine of primacy is critical to the selection of an opening sequence of chapters. Cross-examiners strive, above all else, to have an impact in the opening moment of a cross-examination. To this end, counsel has selected truly meaningful chapters. This could be a chapter or chapter bundle that strongly supports the advocate's theory of the case or that demonstrably weakens the foundation of the opponent's theory of the case. The chapter may demonstrate a clear bias or perhaps unmask a full-blooded lie. Many of the guidelines of the sequencing of the cross-examination address the need to score factual points early in the cross-examination with simple, comprehensible, and undeniably admissible facts. A cardinal rule must be that one must not abandon the well-thought out opening sequence of cross-examination in favor of some recently hatched idea.

Regardless of the reason, this is almost certainly an erroneous strategy. If the cross-examiner indeed has a well-prepared chapter, that chapter can be taken up at its appropriate time within the sequence of the cross-examination. The appropriate time to use the prepared chapter is when it was planned for. That has not changed because the opponent has concluded their direct examination in this same area. If the cross-examiner is responding out of emotion or she is trying to one up the opponent by proving the cross-examiner's ability to successfully take on this subject matter, the cross-examiner is now giving in to ego. The best course of conduct is to proceed with the cross-examination as planned. Even if the sequences of cross-examination deserve some adjustment, that adjustment should be made during a recess. Decisions as to sequence made on the fly are seldom as sound as the strategy that was calculated in the calm before trial. The cross-examiner should begin the cross-examination with the sequence of chapters that the cross-examiner planned to use before becoming agitated by the direct examination. The advocate must be reassured by the knowledge that she will eventually get to those prepared chapters that effectively confront the testimony that produced the emotional response.

§ 11.14 Do not use Chronological Order in Confrontational Cross-Examinations (Book page 11-11)

Chronological order is the preferred device for the storyteller who has the task of explaining the entire picture. That is generally the direct examiner's role. The cross-examiner is not interested in the entire story, but only in selected portions of the story. In addition, the cross-examiner may be interested in presenting parts of the story that were entirely omitted by the direct examiner. Even as a method of direct examination, chronological order has its weaknesses. As a method of sequencing cross-examinations, it is decidedly deficient and can prove quite harmful. Confrontational cross-examinations depend upon the lawyer's ability to draw out of the witness admissions that he would prefer not to give. In some instances, the cross-examiner can anticipate that the witness is going to flatly deny the leading question. But in other cases, the witness may try to explain his answer in such a way as to harm the examining lawyer's theory of the case.

§ 11.15 Damages of Chronological Order (Book page 11-11)

The use of chronological order has several side effects, none of which are desired by the cross-examiner. When cross-examination is done in chronological order, there is a tendency to get into areas that there was no intention of cross-examining on at all. This happens because the questioner is tempted to or falls into the "what happened next" mode of examination. Even if the questioner avoids this crutch, the witness often does not. The chronological sequence of cross-examination encourages the witness to volunteer "what happened next." Remember, cross-examination is performed only on chapters selected by the cross-examiner, not the witness.

§ 11.16 Avoid Using Chronological Order in Informational Cross-Examinations (Book page 11-12)

There may be an occasion when the chronological approach to informational cross-examination is appropriate, but it would only be on those occasions where a witness is purely informational. A witness is purely informational when the witness knows a limited number of facts, and as to each and every fact he will readily admit the fact. For example, an eyewitness may have seen only one thing, one part of an event, or only heard one short conversation. A police officer may have had but a single role: to guard a crime scene so that no one entered. Such narrow witnesses are rare. If everything the witness had to say had been helpful to the cross-examiner, the opponent, in all likelihood, would not have called the witness in the first instance.

More often, a cross-examination will have only portions that are informational; cross-examinations will tend to be a blend of information and confrontation. Even when a witness knows and will freely admit many facts of assistance to the cross-examiner, normally the witness knows some harmful facts as well. By avoiding chronological order, even in

informational cross-examinations, the cross-examiner better controls the witness and denies the witness the easy opportunity to insert undesired information unrelated to the chapters of cross-examination selected by the advocate.

In an informational cross-examination, the cross-examiner must order the sequence of chapters so as to begin with a very important fact and to end with a very important fact. Regardless of the form of the cross-examination, to proceed in chronological order is to make the cross-examination less interesting than it might be and, simultaneously, run the risk that some areas that were not intended to be opened up will be discussed because either the lawyer or the witness moved into a "what happened next" mode.

§ 11.18 Integrate the Theme Early and Often (Book page 11-14)

The importance of developing a theme is discussed at length in chapter 2, *Developing a Theory of the Case*. Having decided upon a theme during pre-trial preparation, begin ingraining that theme in the jury's mind as early as possible. One or more chapters of the cross-examination should contain the theme phrase or its variants. One of these chapters should be performed early in the cross-examination, preferably near the very beginning of the cross-examination.

By performing a theme chapter at the very onset of the cross-examination, the advocate leads the jury to more vividly recall that portion of the cross-examination. The early use of a theme chapter sets a tone for the entire cross-examination to come, which in turn sets a tone for the overall case (see chapter 12, *Employing Primacy and Recency*).

The advocate should ingrain the theory of the case and theme into chapters of cross-examination frequently if possible. In a personal injury action, if the goal of the cross-examination is to discredit the defendant's "independent medical examination", the lawyer might cross-examine over a series of chapters in which the defense doctor formed some objective sign of injury consistent with the diagnosis made by plaintiff's expert. The theme line could be: "Dr. Cohen found spasms in the neck muscles and you looked; and you now cannot agree. . . ." Or when speaking of the plaintiff's complaints: "She tells us her arm tingles and you are not surprised. . . ." By repeating these phrases throughout the cross-examination, each time linked to an appropriate and admitted fact, the theme of the cross-examination will be fully ingrained in the minds of the jurors.

§ 11.19 When Attacking Credibility—Attack Very Early in the Cross-Examination (Book page 11-15)

In general, when attacking credibility, the attack should begin early in the cross-examination so as to destroy the impression of credibility before the witness has an opportunity to bolster his own credibility. The more time a witness has to develop his credibility, the more effort and material will be required in cross-examination to reverse the jury's initial impression.

If the theory of the case involves showing that a witness is mistaken, demonstrating the mistake or change of stories begins to undermine the credibility at once. Human fallibility leads to mistakes. The cross-examiner should show the fallibility of this witness by pointing out changes of story, demonstrating that parts of the witness's story are inconsistent with physical facts, or by proving that the witness contradicts the story of another witness or exhibit. In this way, the initial impression formed by the jury is that this witness is mistaken or at least that the witness's story is to be doubted in as much as the initial cross-examination has substantiated multiple mistakes or contradictions in their story.

§ 11.20 Show Bias, Interest, or Motive Early in the Cross-Examination (Book page 11-17)

When a witness has a pronounced bias or motive for testifying, it is best to reveal it early in the cross-examination. Again, by revealing bias, interest, or motive to the jury in the opening statement, the advocate preconditions the jury to disbelieve or withhold judgment about belief during the direct examination. The jury will factor in the demonstrated bias throughout the cross-examination.

There are other advantages to be gained by the early use of chapters that demonstrate a motive, interest, or bias of the witness. A witness whose motive, interest, or bias is exposed is likely to become even more nervous concerning his own testimony. The response of the witness to revelation of his motive, interest, or bias varies from witness to witness but may include the following:

> The witness may become defensive in his answers, trying overly hard to justify the testimony he is giving.
>
> The witness may become self-doubting and hold back on damaging information in hopes of being perceived as less biased.
>
> The witness may become argumentative or overly aggressive in reaction to the attack on his motives, interest, or bias and thereby offer up even more evidence of his bias.

§ 11.21 When Numerous Impeaching Chapters are Available, Take the Cleanest Impeachment First (Book page 11-17)

Impeachments occupy a special importance in cross-examination. A fact admitted by an opposing witness carries more weight than a fact testified to by the lawyer's own witness. This is true because the jury well knows that the witness would not give up the fact willingly, since his motivation runs contrary to the lawyer's theory. A fact eventually admitted over protest is given even more weight by the jurors, as is a fact admitted by a witness called by the opposition, which the witness in some way worked to hide or deny. This is as true in civil cases as in criminal cases. A fact that is admitted by an opponent or a person aligned with an opponent, has greater credibility than the same material testified to by the cross-examiner's witnesses. Jurors believe some witnesses will shade the truth,

but they do not believe that witnesses will shade the truth to hurt their own cause.

An impeaching chapter may itself be the opening chapter of cross-examination. An impeaching chapter may set up the theme or need to go first to establish motive, interest, or bias. However, when several impeaching chapters are available, there are some guidelines to help put the impeaching chapters into a sequence likely to have the greatest impact on the witness and the jurors.

§ 11.23 Perform the Most Relevant Impeachment Before Using Less Relevant Impeaching Chapters (Book page 11-19)

When several impeaching chapters are available, it is best to lead with those impeachments that most directly bear on the theory of the case. Lead with the most relevant evidence before using evidence that is less relevant to the theory of the case. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (Federal Rules of Evidence, Rule 401).

“Relevancy,” as the Federal Rules uses the term, means a great deal more than that = the classical definition. The most relevant material in a cross-examination is the concedingly admissible material of greatest import to the cross-examiner’s theory of the case. In applying this guideline, the issue facing the cross-examiner is not “can it come in?” but, among all the things that are admissible, which impeachment most benefits the theory of the case? It is in that special sense that the term “relevant” is used in this guideline.

This guideline is in accordance with the guideline of primacy. Furthermore, by leading what will become several chapters of impeachment with the most relevant impeachment, the cross-examiner more effectively begins the destruction of the credibility of the witness, thereby proving to the judge and the jury that there are flaws in the story of the witness and that cross-examining counsel has the evidence to expose those flaws. The effect of lesser impeachments is heightened by the fact that they follow one or more very relevant chapters of impeachment. Then, when the cross-examiner moves into less relevant impeachments (impeachments on more collateral matters), such chapters are less likely to draw objection and more likely to keep the jurors’ attention, since the lawyer has previously demonstrated the factual weaknesses in the testimony of this witness. In addition, a witness who has been successfully impeached on undeniably material matters is fair game for other impeachments increasingly farther a field.

§ 11.24 Regardless of Importance, use Clearly Admissible Chapters of Impeachment Before Attempting Impeachments That Might be Ruled Inadmissible (Book page 11-20)

When numerous impeaching chapters are available, first use those chapters of impeachment that are undeniably admissible. In this way,

cross-examining counsel generates momentum for the cross-examination by leading with evidence that does not provoke an objection. By using clearly admissible chapters of impeachment first, the impeaching evidence rolls in to begin the damage of the witness. By scoring with chapters that crisply and fairly impeach the witness, the lawyer makes the witness's credibility subject to further attacks, and thereby psychologically broadens the bounds of admissibility. The witness who has been successfully impeached on several items is more vulnerable to attack when the lawyer reaches chapters at the edge of admissibility. Given that judges have broad discretion at the edges of relevancy, solid impeachments lay the groundwork to show the judge that the cross-examiner is prepared to further impeach, and that the witness is worthy of further impeachment. Once the witness has been impeached several times, the judge is encouraged to rule the witness fair game for additional impeachment. Judges are less protective of witnesses whose credibility has already been fairly called into question.

§ 11.25 Use the Most Easily Conducted Impeachment Before Attempting Complex Impeachments (Book page 11-20)

Where several chapters of impeachment are available or where more than one impeaching sequence is directly relevant and clearly admissible, the cross-examiner benefits from using the most easily conducted chapters of impeachment first. In this way, counsel can cleanly impeach very early in the cross-examination. The goal of witness control is furthered.

Some impeachments, though relevant and admissible, are cumbersome. The story may be difficult to tell, the significance of the answer may be unclear without further elaboration, or the impeachment may only have meaning when considered in conjunction with testimony not yet introduced. For any of these reasons, some chapters of impeachment are simply more difficult to perform than others. In such instances, it is advantageous to begin with impeachment that can be cleanly performed. In this way, the witness is immediately put on notice that the cross-examiner is able to impeach easily.

§ 11.27 Disperse Solid Impeachments (Book page 11-21)

When several impeachments are available in transcripts or other documents, it is ordinarily advantageous to intersperse such solid impeaching chapters throughout the cross-examination. In order to appreciate the significance of this technique, the cross-examiner must bear in mind the effect of impeachment on the witness. Quite often, the witness does not see the impeachment coming. The witness may not recall his prior testimony. The witness may not realize he is at odds with an exhibit or with another witness.

A witness who has been impeached will modify his behavior to lessen the chances that he will again be impeached. By disbursing impeachments throughout the cross-examination, the witness is unsure which leading question, or which chapter may be the foundation for the next impeachment. Before denying a leading question the witness must weigh the likelihood of impeachment. This is a very difficult process for

most witnesses and the difficulties are compounded by the speed at which facts are placed before the witness through use of the only three rules of cross-examination.

§ 11.28 Disperse Impeachments Using Documents (Paper is Power) (Book page 11-22)

Every successful impeachment results in a sanction against the witness. But there is special power in an impeachment based upon a document. In this regard, the power of transcripts must first be understood. Impeachment through an inconsistent statement documented in a transcript of the witness's testimony is relatively quick, safe, and powerful. The witness has said something today that is at odds with their documented former answer. The witness will have an extremely difficult time denying the accuracy of the transcript. Furthermore, the laying of the foundation for use of the transcript can itself be a powerful sequence of questions. Throughout that sequence, there is no room for an unresponsive answer. A lawyer can move confidently through foundation and into impeachment, score the point, and move on. As a result of these characteristics, such sure-fire and effective chapters should be interspersed so that they can be used to back up more risky areas.

§ 11.30 Cross-Examine on Collateral Issues Once the Opportunity Arises, Rather Than at a Fixed Point in the Cross-Examination Sequence (Book page 11-23)

There are some chapters and topics that counsel would love to cross-examine on, but that may be ruled collateral by a judge. A ruling that a topic is "collateral" often is made because the court does not appreciate the tie between the objected to chapter and an issue within the case. In order to increase the ability to cross-examine in these areas and to avoid objection by an opponent or overcome the objection if made, the cross-examiner must look at these areas of cross-examination as targets of opportunity. The target of opportunity is an area upon which the lawyer would cross-examine *if* the witness offers an opening. However, when preparing the cross-examination it may appear that the area is risky or not factually ripe for impeachment. In such a situation, the cross-examiner does not begin the cross-examination with the fixed intent to cross-examine in this chapter, but plans to cross-examine upon it only if the witness offers some answer (often a non-responsive answer) that touches upon the target area.

Then, using the witness's response as an entry, the cross-examiner can move into the prepared chapter that was not sequenced.

It is neither necessary nor appropriate to fix these chapters within the sequence of cross-examination. Instead, the lawyer should have them ready, waiting for the witness to give some answer, which promotes their admissibility. While it is indeed the witness that creates the opportunity to change our sequence, this is not an exception to guidelines that suggest a lawyer be hesitant to change a sequence based upon the answer of a witness. The lawyer chooses when to change the sequence by watching for opportunities and taking on new chapters only after doing everything

possible to minimize the risks.

§ 11.31 Develop Risky Areas Only After Establishing Control of the Witness Through Safe Chapters (Book page 11-25)

To some extent, the application of each rule of the only three rules, aided by the page preparation of cross-examination, represent significant steps toward establishing control over the witness. The proper application of preparation and techniques for forming the questions and the chapters has the inescapable effect of driving home to the witness the fact that the cross-examining party is thoroughly prepared on the facts, capable of punishing any erroneous, evasive, or inconsistent answer, and that no objection can stop the cross-examination.

It is essential that by the time the risky area is hit upon, the witness has already painfully learned the apparent futility of disputing the truth of the leading question. Through such a sequence, where chapter after chapter of safe material is first performed, and where the safe material within a risky chapter is first performed, the cross-examining attorney has lowered the risk that a witness will unfairly deny the truth as stated in the leading question.

§ 11.37 Never Lead or Conclude a Cross-Examination With a Risky Chapter (Book page 11-30)

The many dangers of impeaching in risky areas have been discussed. Methods of decreasing the risk have been discussed. However, the skillful cross-examiner, understanding the dangers and having done what she can to decrease the risks, must still abide by another guideline: Do not attempt to begin or conclude a cross-examination with a risky chapter.

No matter how strong a start or finish this risky chapter would be, it is not worth the risk. If used to lead the cross, this encounter will set the tone for the entire cross to come. If the witness “wins” on this first encounter, he will discover the benefits of being combative and will, therefore, revert to a combative posture throughout the cross-examination. Worse, the jury immediately sees the fallibility of cross-examining counsel—hence the cross-examiner’s credibility is immediately and perhaps irretrievably lost.

§ 11.40 Never Let a Witness Force a Change in Sequence (Book page 11-33)

Prior to trial, when all the lawyer’s powers of concentration are focused, the lawyer has placed the chapters into what is believed to be the most persuasive sequence. Now, in the heat of trial, during direct or cross-examination, the witness has said some truly angering or new things or seems to be volunteering all kinds of openings that fit very nicely with written chapters that counsel had intended to perform at some later time. There is a natural tendency to jump from what was planned to what the witness is now talking out of a desire to show the witness that counsel is prepared in that area and can one-up the witness. The cross-examiner must resist the temptation and stick to the chapter sequence the lawyer

has prepared, while observing the following guidelines (see chapter 30, *Recognizing and Controlling Bait*).

§ 11.41 Cross-Examining Counsel May, For Good Reason, Change a Sequence (Book page 11-34)

Sometimes, through no action of the witness, the lawyer may come to the conclusion during the cross-examination that a change of sequence is in order. It may happen that a new answer has been given in direct examination that promotes the value of a previously planned chapter. Under such circumstances it is both acceptable and safe to reorder the chapters before standing up to cross-examine. This thoughtful decision, made prior to commencing the cross-examination, ordinarily leads to better results than a spontaneous decision to reorder the chapters made during the actual cross-examination.

In the midst of cross-examination there are more things that can go wrong than can go right through a reordering of chapters. Have faith. If the chapters are left in the sequence in which they were planned, the cross-examiner will inevitably get to all of the material eventually and will get to the material in an order that in calmer times seemed to make good sense.

§ 11.44 Keep a Safe Chapter to use When the Witness has Enjoyed a Moment of Success (Book page 11-36)

Throughout the cross-examination, counsel attempts to reduce risk and establish control over the witness. Nonetheless, it must be acknowledged that there are some chapters that are risky. As a result, there are some chapters that are not going to go as well as planned. In such circumstances it is understandable that the cross-examiner feels a momentary diminution of control and the witness feels a greater willingness to combat the cross-examiner. In such circumstances it is wise to have a backup, a chapter that is predictably safe and easy to accomplish. This chapter can be thought of as a “cork.”

The cork chapter is set aside for use when the unexpected occurs—when the witness scores in a way the cross-examiner might not have foreseen and when the cross-examiner needs a moment to get themselves and the witness back under control. The cork is dependable. It scores its planned goal and gives the cross-examiner the needed time and the positive momentum necessary to move safely back into the planned chapter sequences.

§ 11.46 Close Cross-Examinations With a Theme Chapter (Book page 11-37)

As discussed in chapter 12, *Employing Primacy and Recency*, cross-examining counsel should strive to close the cross-examination with a chapter that makes a firm imprint on the jurors. The cross-examiner should save a chapter of importance and impact to close her cross-examination. A chapter that again makes use of factual material to repeat the theme is one possible method of the ending a cross-examination.

§ 11.47 Close the Cross-Examination Using the Chapter or Chapters Written as the Closing Sequence (Book page 11-37)

The cross-examiner will have found some group of chapters in which she has great faith. Based upon thorough preparation, she believes the evidence to be solid, safe, and powerful. For these same very good reasons, the cross-examiner has selected the concluding chapter or group of chapters. As counsel moves toward the conclusion of the cross-examination, she emotionally imagines how great it will be to end on a high note.

While this is true, the cross-examiner should stick with predictably solid chapters, rather than take chances with some riskier chapters that could result in a bigger impact or none at all. The risk is too high and the return too low to justify abandoning the well-thought-out concluding chapters in favor of the new, “inspired” chapters.

§ 11.48 End With a Power Chapter (Book page 11-38)

No risks should be run in the final chapter of a cross-examination. It is important that the cross-examination of a witness went well. It is unnecessary and unlikely that the cross-examination will end spectacularly. That should not be the goal of the advocate. What is important is to end the cross-examination crisply. The conclusion of a cross-examination is not the time to take chances. The cross-examiner does not want to end her cross-examination with a fight concerning the admissibility of a statement.

Similarly, the final chapter of cross-examination should be evidence that will not draw any other type of objection. The last chapter does not deserve a special tone of voice simply because it is the last chapter. Such a dramatic change in tone often produces the objection “argumentative.” If a court were to rule the last chapter inadmissible, either in whole or in part, the advocate has suffered a self-inflicted wound. It would have been better to have run that risk at an earlier point in the cross-examination so that if the chapter were ruled inadmissible, there would be recovery time through other strong chapters.

Loops, Double Loops, and Spontaneous Loops

Adapted from their book

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Chapter 26:
Loops, Double Loops, and Spontaneous Loops

SYNOPSIS

Sections in Bold are included in the handout in whole or part

NOTES

SELECTED AND EDITED PORTIONS OF CHAPTER 26 – "LOOPS, DOUBLE LOOPS, AND SPONTANEOUS LOOPS"

§ 26.01 Loops as a Flag-Planting Device (Book page 26-2)

The cross-examiner needs a variety of techniques that ethically and appropriately enable the advocate to call the jury's attention to a particular fact. While it is hoped that jurors will hear all the answers, the reality is that some answers matter more than others. There are those facts of such importance that they deserve highlighting. In essence, the lawyer wishes to "plant a flag" on that fact. Any trial technique designed to highlight a particular fact, whether the technique involves voice, movement, demonstrative aid, or oratorical device, is a flag-planting device. The techniques of looping, in all its various forms, are flag-planting techniques designed to call additional attention to a fact of importance.

§ 26.05 Simple Loop Formula (Book page 26-3)

Definition:
1) Through a leading question establish the desired fact or phrase;
2) Use the fact or phrase established within the body of the next question, but without re-asking the fact; and
3) Connect the looped fact or phrase with a question that contains an undisputed fact. Attach the looped fact to a safe fact in the second question.

§ 26.12 The Technique of Looping to Label (Book page 26-8)

The technique of looping to label is a simple and natural way of assisting people's memory in the courtroom environment. Looping labels can be used in any case, in any cross-examination, and in any questioning. Looping assists the memory anytime there is a need to label a fact, a witness, or a particular exhibit. The technique is simple: Find a descriptive but fair label that is consistent with the cross-examiner's theory. Use that label in place of the name of the witness, or the number of the exhibit, or the date of the event. Use the label consistently throughout trial so that both jurors and witnesses can easily equate the label with the person, event, or exhibit. In a self-defense case:

NOTES

Loop

- You saw several boys.
- One of the boys had a stick in his hand.
- That boy was quivering (1. Establish)
- The quivering boy said, (2. Loop) "Where's John?" (3. To Safety)
- You said, "If you are looking for trouble, you've found it."
- And the quivering boy (4. Re-Loop) looked back at you but said nothing. (5. To Safety)

§ 26.13 Loops to Label Exhibits (Book page 26-8)

Trials have become more complicated. It seems every trial has hundreds of exhibits. Particularly in commercial litigation, the exhibits frequently number in the hundreds and often in the thousands. The most conscientious judge or jury cannot keep the exhibits straight. The lawyers who have dealt with the case for months and years before trial have a most difficult time keeping up with exhibits. Why is there a reasonable expectation that judges or juries could possibly do so?

Looping helps to label exhibits and eliminates the necessity of the judge or jury to memorize the exhibit number. Everyone begins to refer to the exhibit by the label loop. It is chosen to be consistent with the cross-examiner's theory.

§ 26.21 Double Loops Technique (Book page 26-15)

Simple loops can be quickly mastered. Once they are, it takes only minimal additional effort to learn the double loop technique. Double looping is a technique that can be used for two distinct purposes. The first, and the most frequently employed purpose is its use to juxtapose two inconsistent concepts (see chapter 24, *Juxtaposition*). That is, contrasting two dissimilar or inconsistent facts in a single question to promote a desired jury reaction. Two facts are pushed together to show the lack of logic inherent in a witness trying to verify both facts.

The second common purpose of the double loop technique is to use two or more looped facts in combinations to heighten an image and produce a result that will be much more memorable and more closely linked than the two facts alone.

NOTES

§ 26.22 Double Loop Formula
(Book page 26-16)

1) Establish first desired significant fact.
2) Establish second desired significant fact.
3) Loop both facts together in a third question and later questions.
4) Always tie the double loop to a "safe" undisputed fact.

§ 26.23 Double Loop for Contrast
(Book page 26-16)

Double Loops can Highlight Difference

Step 1: Establish Fact 1:

- Eddie is 6' 1" .

Step 2: Establish Fact 2:

- George is 5' 7" .

Step 3: Loop both facts:

- 6' 1" Eddie was hitting 5' 7" George.

§ 26.25 Use of the Double Loop to Juxtapose Inconsistent Facts
(Book page 26-17)

In an impeaching cross-examination, assume the witness has said something that is accepted as true. However, if examined in juxtaposition to other facts, the story casts doubt upon the original assertion. The witness has told a story or fact, often in direct examination, which in isolation appears reasonable, but when examined in context with other testimony of the witness, appears to be untruthful and illogical. In such cases, it is helpful to permit the witness to establish the first fact and later in cross-examination to perform a double loop that juxtaposes the first assertion and shows it to be implausible.

The double loop technique to juxtapose inconsistent facts is at the heart of the following example from a commercial case:
Q: You have told us that you were unaware of any facts that caused you any concerns about the financial health of this company?
Q: You knew the company had twice been downgraded by the rating services?
Q: You know the company had lost money for three consecutive years?
Q: This double downgraded, money-losing company caused you no concern?

NOTES

§ 26.32 Spontaneous Loops
(Book page 26-23)

All of the loops shown thus far have been written and executed according to the cross-examiner's script. They were prepared pre-trial. There is nothing spontaneous about them, although simple and double loops sound spontaneous to the witness and the jury. These loops were planned; the lawyer carefully selected the words.

However, one of the most enjoyable and effective uses of looping occurs when a witness gives an unexpected answer, which has in it a wonderfully helpful fact that substantially advances the lawyer's theory of the case. The critical difference between spontaneous loops and simple or double loops is that the witness chooses the words.

In a pure spontaneous loop, it is the witness who has made that word choice in front of this jury and judge. The witness will never be able to disclaim that word choice, no matter how ill conceived or regrettable that word choice is. The spontaneous loop is based on the phrase that has escaped the lips of the witness. Forever in this trial, the witness will be charged with the responsibility of uttering it.

§ 26.35 Definition of Spontaneous Loop Technique
(Book page 26-24)

1) Listen. Any answer other than a "yes" or "no" may offer an opportunity for the cross-examiner. Listen with the cross-examiner's theory of the case in mind.
2) Lift. Extract any useful word or phrase from the answer.
3) Loop. Use the helpful factor phrase in the body of the next question.
4) Tie the spontaneous loop to a safe, undisputed fact.

Compare the definition for spontaneous loop with the definition of a simple loop. There is but one difference. The cross-examiner must listen for the spontaneous loop. All other steps to the spontaneous loop are identical to the simple loop.

§ 26.38 Spontaneous Loops to Silence the Witness
(Book page 26-25)

Spontaneous loops silence the unresponsive or out of control witness (see chapter 19, *Controlling the Runaway Witness*). Spontaneous loops eventually threaten the witness so much that the witness will refuse to volunteer in any matter. Through spontaneous loops, the cross-examiner exercises control over the witness by punishing the non-responsive answer.

§ 26.39 Spontaneous Loops—Selecting Power Words
(Book page 26-26)

Spontaneous loops of helpful facts volunteered by the witness, or facts that can be turned to the advantage of the cross-examiner, should always be utilized.

NOTES

Do not loop power words that are detrimental to the cross-examiner's theory of the case, themes, or theme phrases. As seemingly obvious as this may appear, in the heat of the battle, the cross-examiner must instantaneously differentiate between helpful and unhelpful power words in light of her theory. The cross-examiner cannot simply listen for a power word and then spontaneously loop it. It is extremely important to listen to the witness carefully in order to effectively employ the spontaneous loop technique. It is even more important to analyze the power words heard in light of the cross-examiner's theory of the case.

Spontaneous Loop

Q: When Ed came through the door, he was silent?
A: Yes, he just came barreling through the door and drilled the guy.
Q: The guy he drilled was Brian?
A: Yeah.
Q: When Ed barreled through the door and drilled Brian, Brian hadn't said a word?
A: Not that I heard.

Spontaneous Loop

Q: You smashed into Tony on his motorcycle?
A: I didn't know what I hit – I just heard a thud and the sound of metal smashing metal.
Q: The sound of metal smashing metal was you crashing into something?
A: Well, yes.

Q: What you crashed into was a man?
A: I thought so.
Q: A man who now lay in the street?
A: Yes, apparently so.
Q: It was apparent because you saw the man spread out in the street?
A: Yes.
Q: It was apparent because . . .

Controlling the Runaway Witness

Adapted from their book

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Chapter 19:
Controlling the Runaway Witness

SYNOPSIS

Sections in Bold are included in the handout in whole or part

NOTES

SELECTED AND EDITED PORTIONS OF CHAPTER 19 – "CONTROLLING THE RUNAWAY WITNESS"

§ 19.01 The Fear
(Book page 19-3)

The question calls for a yes or no answer. The witness is entitled to give either answer. Instead, the witness responds with a narrative. The answer may be long or short. The answer may contain words that amount to "yes" or "no," or the answer may entirely evade the question being asked. In all of these events, the cross-examiner is confronted with a "runaway witness."

The chief problem of a "runaway witness" is his effect on the ability of the cross-examiner to paint the precise picture in each chapter goal. The more wordy the answer, the more the picture may be distorted or muddied by the inclusion of unnecessary information. The runaway witness is attempting to take over, if even for a moment, as the guide to the facts. The cross-examiner will ordinarily want to extinguish this behavior as it is the cross-examiner who is best able to communicate the most important facts to the jury.

The runaway witness ranks as one of the greatest fears of the cross-examiner. However, one of the greatest opportunities to the cross-examiner is when the witness is unresponsive. An unresponsive or runaway witness often appears without notice, and sometimes when least expected. That is part of the fear. The fear expands because once the runaway witness surfaces the lawyer is enmeshed in a battle to retain control of the cross-examination. Thoughts of opportunity are not present as the unprepared cross-examiner struggles to regain control.

§ 19.02 Definition of the Runaway Witness
(Book page 19-3)

A runaway witness is any witness who is unresponsive to the question put on cross-examination. This unresponsiveness may take many forms. The witness can answer the question on cross, but in such a way as to make the answer unintelligible. The witness can refuse to answer the question put on cross and answer a different question. The witness can answer generally the question on cross, but include many other answers to questions not asked. The witness can volunteer prejudicial information to dramatic effect. The witness (particularly the expert or professional witness) can object to the question posed and in some instances rule on his own objection, without ever answering the question.

Example:
Q: Professor, you never measured the circumference of the aluminum alloy tube?
A: I didn't consider it to be relevant. In fact, I don't consider it relevant now. I am sure that it is not relevant. What I did was . . .

NOTES

§ 19.04 These Techniques Create Drama in the Courtroom so the Lawyer Does not Have to Speak or Act Loudly (Book page 19-5)

None of the techniques for controlling a runaway witness require or encourage the use of loud, argumentative, or offensive language. Grandiose gestures are discouraged. These techniques are designed to eliminate the feeling that such conduct is necessary.

Though some of these techniques allow for a voice that is different than the tone used in previous questions, each of the techniques can be delivered in any conversational voice. The techniques may be accompanied by a change of position in the courtroom, or a gesture, but such physical components of a particular technique rely less on confrontational body language and movement, and more on the change of tone or posture itself. All these techniques can be accomplished with a slower rather than faster rhythm in the questioning, though again, there may be occasions when the cross-examiner will change the rhythm as a method of enhancing a particular technique. The important thing to remember is this: The techniques so solidly confront the unresponsive witness, that the cross-examiner need not raise her voice, move with aggressive or confrontational gestures, or speak faster.

§ 19.06 Behavior is Molded by Consequences (Book page 19-7)

Remember psychology 101 from college? Remember the maze that the little white rats were placed in? The rats learned that if they performed well they were rewarded with a food pellet, but if they performed poorly they received no reward or worse, negative feedback. This was the concept of the Skinner box introduced by psychologist B.F. Skinner. The concept remains true for all thinking organisms.

What is an acceptable means of rewarding the short, direct answer to a leading question? When the witness is responding with simple direct answers (preferably yes), rewards include a gentle encouraging nod of the head, a pleasant teaching voice and most important, efficient movement to the next question, the next subject matter, and the next chapter. Do not create an impediment to the “yes” answer. If the witness has agreed with the fact suggested by the cross-examiner, the witness has earned a reward. A change to a harsher tone of voice, a negative gesture, or a follow-up question that suggests that “yes” is a foolish, illogical, or undesirable answer, all serve to sanction the witness for agreeing with the cross-examiner. The cross-examiner would not punish her coworkers, her children, or her pets for doing what she wanted them to do. For the same reason she cannot afford to punish a witness for answering “yes.”

On the other hand, when the witness becomes a runaway witness by using unresponsive answers, volunteering information, or by a myriad of other evasive devices, sanctions must be applied. The techniques that are discussed in this chapter apply those sanctions. Some of the sanctions are severe by courtroom standards. Some are more gentle and encouraging. With this said, let there be no misunderstanding: They are all negative stimuli. The techniques for controlling the runaway witness all employ

negative feedback as a means of extinguishing unwanted behavior.

§ 19.08 Techniques That Don't Work (Book page 19-8)

[1] "Just Answer 'Yes' or 'No"'

Television, movies, and, unfortunately, some trial skill programs in law school have encouraged trial lawyers to fall back on the command, "Just answer my question 'yes' or 'no,"' as a method of controlling the runaway witness. This is *not* a valid controlling technique. First, most judges will not permit the lawyer to do that. They will inform the witness that they may explain their answer, even at length, if necessary.

More importantly, a lawyer's resort to using oratorical blunt force signals to the jury that the cross-examiner is not playing fair. The lack of choice given the witness suggests to the jury that the lawyer is trying to "trick" the witness. Non-lawyers resent this heavy-handed attempt to straitjacket the witness. To them it appears that the lawyer is attempting to "put words in the witness' mouth." A lawyer resorting to this method lowers both her personal credibility and the credibility of the leading question as an appropriate teaching device.

[2] Asking the Judge for Help

[a] Court-Offered Help

In frustration, some cross-examiners will ask the judge to order the witness to "just answer 'yes' or 'no."' Asking the judge to help in this way is an impractical way to control a runaway witness. Few judges are predisposed to favor trial lawyers over witnesses. The judge figures, correctly, that since the lawyer was the one who lost control, the lawyer should be the one to suffer the consequences. If the cross-examiner asks for help, the judge is likely to say something to make a bad situation worse. At best the cross-examiner will get, "I will permit the witness to give a full and complete explanation if the witness thinks that explanation is necessary for a complete answer." Who needs that help?

Of course, if the court offers help, the lawyer should certainly accept it. Should the court spontaneously instruct the witness to answer, the cross-examiner should accept the power of the bench. When the court voluntarily gets involved in the effort to control the runaway witness, the witness has hurt his credibility, which tells the jury that this lawyer is being fair in her questioning. Permit the court to volunteer; do not seek its assistance. The best way to accept the help of the power of the bench is to remain silent (see chapter 21, *Creation and Uses of Silence*). Do not restate the question unless prompted by the judge to do so, or the witness must admit that he does not know the question by asking for the question again. If the witness has to admit that he does not know the question, the witness admits to all (judge, jury, opposing counsel, and to the cross-examiner) that the witness was not listening to the question and was going to answer whatever question the witness chose to answer.

[b] "The Deal"

The Deal originates when the cross-examiner, early in the examination, suggesting to the witness that the cross-examiner will ask fair questions that need only a "yes" or "no" answer. In exchange for this type of questioning the cross-examiner advises the witness that yes or no answers will prove sufficient. "I am going to ask you a series of questions, each of which can be answered with a yes or no answer. If I do that, will you please provide me with a yes or no answer?"

The Deal is not a suggested method of controlling the witness. It is offered up by a lawyer who fears that somewhere down the road she will lose control of the witness. It is an attempt to control the runaway witness before the witness has run. The Deal sends all the wrong messages to the fact finders in the trial and to the opponent, who is made aware that the lawyer believes she will have trouble with the examination. Most importantly, the signal is sent to the witness that the lawyer fears this kind of conduct. If the witness is not friendly to the cross-examiner's cause, wouldn't the witness cause as much difficulty as possible by using this request against the lawyer?

§ 19.09 A General Technique That Assists all Other Techniques: Keep Eye Contact (Book page 19-11)

When cross-examining a difficult witness, always maintain eye contact. Avoiding eye contact is interpreted as weakness. Life experiences verify this both in and out of the courtroom. People who will not make eye contact are uncomfortable and less than forthright. People who will not make eye contact are often afraid. If the cross-examining lawyer suspects the witness will become non-responsive or runaway in their answers, the lawyer must keep her eyes fixed on the witness when asking questions and when receiving answers. By directing the lawyer's full attention to the witness's eyes, she serves nonverbal notice that she will not put up with any nonsense or permit deviation from the question-and-answer approach she has been following. Control the runaway witness's eyes until the witness is off the stand.

Of course, the trial lawyer must sometimes divert her eyes from the witness to look at notes and observe exhibits, charts, overheads, or other demonstrative aids. There techniques enable the cross-examiner to divert her attention while maintaining psychological control of the witness. The cross-examiner may take her eyes off of the witness after the answer has been given and before the next question is asked, or in limited circumstances even while the next question is being asked. In other words, the cross-examiner may put a question to the witness, receive an answer to that question, and then divert attention to a new task such as putting up an exhibit, or consulting notes. Because there is no question pending, there is no permission for the witness to speak. Eye contact should be maintained from the conclusion of the cross-examiner's question through the entire answer of the witness. When there is an interruption of eye contact between questions, cross-examiner should reestablish eye contact before posing the next question.

NOTES

§ 19.13 Pre-trial Motion In Limine (Book page 19-13)

There are witnesses (particularly expert and professional witnesses) who become so schooled in trial work that every answer is unresponsive. Every unresponsive answer is intentional and malicious. The ability to evade, and to insert harmful material is one of the reasons opposing counsel has hired them.

After confronting this type of witness at a deposition (and preferably a videotaped deposition), trial counsel may file a pre-trial motion in limine requesting the court to rule prior to trial that the witness shall be responsive to questions on cross-examination and not volunteer non-responsive information. This motion is best made using specific excerpts from transcripts and excerpts from videotaped depositions to illustrate the misconduct.

§ 19.16 Ask, Repeat, Repeat (Book page 19-15)

The lawyer has asked a fair, clear question, in its simplest form, using commonly-understood words. The answer can only be "yes." In order to avoid giving the cross-examiner an answer, the witness has sidestepped with a non-answer.

Without taking her from the witness, the lawyer simply asks the question again, in exactly the same words and tone of voice and articulating each word. The pace of the question is slightly slower. If the witness is foolish as to again ignore the obvious "yes," the trial lawyer can slowly lean slightly forward without taking her eyes off the witness. The next step is to repeat the identical brief, simply constructed question, but even more slowly.

The successively slower repetition of the *identical words and tone* emphasizes to the witness, the court, and, most importantly, the jury that the witness is refusing to answer a short, straightforward, easily answered question. The forward body motion emphasizes that all are waiting for a response. Even the most evasive witness has great difficulty in evading the third posing of the question.

§ 19.17 Reversal, or Ask, Repeat, Reverse (Book page 19-16)

This technique of repeat and reverse is a variant of the first technique. The lawyer asks the question. She then asks the identical question, but slightly slower and leaning forward. This gives the witness two opportunities to tell the truth before the lawyer reverses the question in the third asking.

The technique of ask, repeat, reverse, is one of the most effective methods of controlling an expert witness. This is particularly true when the expert has reports, operative notes, letters, or any other type of documents. Because the document or fact, whatever it may be, will not go away, this technique is particularly effective.

NOTES

§ 19.20 Full Formal Name
(Book page 19-18)

A previously compliant witness has for the first time run away with an answer. This witness has thus far appeared to be trying to answer fairly. Jurors can sense the witness's apparent candor, so the lawyer has to rein in the witness without incurring the jury's hostility. Anything that changes the customary tone of questioning serves as a mild rebuke to the witness**.** The cross-examiner need not use a harsh tone or angry gesture to remind a witness of their obligation to answer the question. The use of the witness's full formal name represents a change in the style of the questioning and thereby provides a sanction.

§ 19.22 "Sir" or "Ma'am"
(Book page 19-20)

Once the formal name has been used, it is seldom necessary to use it again, even if the examination is a quite lengthy one. Simply starting the question with "sir" or "ma'am," as the case may be, will immediately bring back in line the unresponsive, but nonmalicious witness. Just as there is no down side risk for using the "full formal name" technique, there is no down side risk of objection or proper interruption to this technique. What would the objection be? "Objection, the cross-examiner is being polite." Use the "sir" or ma'am" at the beginning of the question for maximum effect.

§ 19.23 Shorten the Question
(Book page 19-20)

Even when the cross-examiner is properly implementing the three rules of cross-examination (see chapter 8, *The Only Three Rules of Cross-Examination*), questions can be shortened to highlight the malicious non-responsive nature of the witness. The cross-examiner is using a leading question. She only has one fact in the question and the question is in logical order. Nonetheless, the witness refuses to responsively answer the question. In this circumstance, continue to eliminate words from the question until the witness is left with only the key word of the question.

§ 19.26 Polite Interruption
(Book page 19-21)

The question is put to the witness. The witness becomes unresponsive. The witness's unresponsive answer would lead to a mistrial.

While ordinarily the cross-examiner should never verbally interrupt a witness, this is the exception to the rule. The cross-examiner must weigh the damage of a possible mistrial against an objection by the opponent.

Once the cross-examiner has decided that a polite interruption must be made, the interruption must be made quickly and before the harm that would result in a mistrial can be accomplished by the witness. The cross-examiner would then immediately address the court (preferably before the objection is even made) and ask to approach the bench with opposing counsel to explain the reason for the interruption.

NOTES

§ 19.28 The Hand
(Book page 19-22)

A witness begins to answer the question with a long unresponsive answer. The lawyer simply holds up her hand like a traffic officer's stop signal. It sounds odd, but it works. Try it at a cocktail party on someone you don't like. (While it will stop the conversation, it will not improve the relationship.)

§ 19.29 The Shaken Finger: Child Witnesses
(Book page 19-23)

When the witness begins to answer the question unresponsively and at length, the lawyer simply slowly shakes her index finger back and forth as she would at a naughty child. That simple gesture, with other appropriate body language to support it, makes the witness feel guilty. This technique works most appropriately when other techniques (particularly, the hand) have been employed earlier in the cross-examination. Now, when the witness continues to demonstrate that they have not learned the lesson of responding to the question asked, the shaken finger (naughty witness!) is appropriate.

§ 19.34 Objection: Non-Responsive Answer
(Book page 19-25)

The cross-examining lawyer has only one legal objection that can be used as a technique to control the runaway witness. The objection is stated as follows: "Objection, non-responsive answer." The objection that the witness is being non-responsive in her answer calls upon the court to become involved in enforcing the rules of witness examination.

It is, in a sense, inviting the court to assist in controlling the witness. Therefore, the cross-examiner should only use this objection when many other techniques have been used but have been unsuccessful in controlling the witness.

There are two substantial risks to this technique. First, once invited to participate in the cross-examination, the court may continue to be actively involved in the cross-examination. This is never a good thing. Too often the judge may see this objection as an invitation to referee the cross-examination on a question-by-question basis. The risk is that all continuity will be lost. This risk is substantial and must be weighed heavily by the cross-examiner when considering using this technique.

The second down side risk that the trial lawyer must weigh before using this technique is the likely response by the court. For this technique to work, the judge: (a) must be listening; (b) must know the rule of evidence; (c) must know that the objection belongs to the cross-examiner; and, (d) must be willing to enforce the rule. Weigh these factors carefully before the use of this technique.

§ 19.35 The Court Reporter
(Book page 19-26)

While the judge is certainly the highest-ranking member of the courtroom staff, the jury views all court personnel as holding power. All members of

the judge's staff are seen as "official" and are treated by the jury with special respect. Most importantly, the courtroom staff is seen as neutral. It is significant when it is perceived by the jury that they are using their power to aid one side or the other.

The technique: Having asked the witness a leading question and having received a rambling monologue, the lawyer may turn to the court reporter and ask, "Please may I have my question read back to the witness?" All action in the courtroom will halt as the reporter slowly articulates each word of the stenographic record.

§ 19.37 Use of a Blackboard (Book page 19-27)

Quite often the courtroom is equipped with a blackboard, white board, or other large writing surface. The blackboard can serve in much the same way as having the court reporter read the question back. If a witness is consistently unresponsive, and the question is short and to the point (see chapter 8, *The Only Three Rules of Cross-Examination*), the cross-examiner may simply write the question on the board during or after hearing the unresponsive answer. When faced with the written question, the witness often will stop the unresponsive answer. Even if the witness does not stop the unresponsive answer, he will recognize that he must eventually respond to the question.

§ 19.39 Use of a Poster (Book page 19-28)

If a blackboard is effective, the poster is not only effective but also intimidating to the witness and the opponent. The poster further demonstrates to the jury and the judge the cross-examiner's thorough and complete and preparation for the trial.

Trial counsel knows the heart of her cross-examination. Trial lawyers are often quite able to predict at which point in certain cross-examinations certain witnesses will rebel or try to evade answering the critical questions. This is particularly true when dealing with expert witnesses. If the big question can be predicted, and the non-responsive answer is foreshadowed through discovery or pre-trial hearings, then an appropriate poster can be developed before trial. If there is no discovery, careful listening to direct examination questions can develop the material for the poster. The poster can be drawn during a recess. Then, when the predicted evasion comes to the big, critical question, cross-examining counsel can prop the poster on the desk. The critical leading question is already written on the poster in the identical language. This becomes a written form of the repeat technique.

§ 19.40 "That Didn't Answer My Question, Did It?" (Book page 19-29)

This technique is confrontational. It is best reserved for use against an expert or professional witness. The jury must sanction this confrontation before it is used. The witness must have repeatedly refused, deliberately and maliciously, to answer straightforward questions.

Under any of the scenarios, the witness is taught to respond to the precise question asked.

§ 19.41 "My Question Was . . ." (Book page 19-29)

This manner of controlling is less confrontational than the preceding technique. It has the same effect, particularly when used after the prior technique that is so confrontational.

The jury is reminded that the question was not answered. They are reminded of the very specific wording of your question. In that sense, this technique is much like a verbal blackboard and to the same effect. If analyzed, this technique is the "repeat" technique with a point on it. It is not as aggressive as "that does not answer my question, does it?" technique, but more aggressive than the simple "repeat" technique.

An additional benefit of this technique is that it points out to the jury the precise question that the witness is evading. Because of this, it is best to use this technique in situations where the cross-examiner is to draw additional attention to the factual assertion contained within the question. The jury receives a better understanding of the importance of the fact at issue, while the witness is sanctioned for the non-responsive or runaway answer.

§ 19.42 "Then Your Answer Is Yes" (Book page 19-30)

This technique is easily understood by jurors. It can be used with any witness, whether that witness is a willfully non-responsive witness or just cannot help answering at length. The cross-examiner's tone can be adjusted depending on the circumstances. At the heart of this technique is the cross-examiner's ability to hear what amounts to "yes" hidden within a longer answer.

This is best delivered after a long answer, without moving or taking your eyes from the witness's eyes and with a slight, helpful smile. Usually the affirmative response is quickly forthcoming.

§ 19.43 If the Truthful Answer Is "Yes," Will You Say "Yes?" (Book page 19-31)

This is a variation of the technique just described. It should be reserved for the obstinate witness, particularly one being discredited. This technique should be employed when non-responsive answers are repeatedly given to very short, simple questions to which no witness contests that the fair answer is "yes." After a series of long, non-responsive answers, the cross-examiner can ask, "If the truthful answer is 'yes,' will you say 'yes"'? Obviously, the witness has to answer "yes" to the question.

Immediately follow by repeating the identical question that received the non-responsive answer. The witness will answer with a simple "yes."

NOTES

§ 19.44 Story Times Three (Book page 19-32)

Some witnesses seem unstoppable. They have been coached to tell a story, and they are going to tell their stories—usually dramatic and harmful stories calculated to destroy the advocate's case. This sort of witness will tell this story as often as possible and seems to have the uncanny ability to recognize the worst possible moments. Only in these dire circumstances is the following technique appropriate. Try multiple techniques first before reverting to this technique, because this is a technique of last resort at trial.

This technique is best used at deposition. There is no jury to be poisoned. No judge to interrupt. By requesting repeated recitations of the "story", all the emotion of the witness and the "story" is drained away. Control for individual questions that follow become much better.

§ 19.45 Elimination: Use of This Technique at Trial (Book page 19-33)

This technique is particularly valuable to teach the witness before trial that it is painful, embarrassing, and even humiliating to be a runaway witness. It signals the axiom: "We can do this the easy way or the hard way, but we will do it." The technique comes in two forms. When used at a deposition the technique of elimination is longer and more time-consuming. When used in trial, the technique requires questioning that is more to the point. After experiencing the form at a deposition, few witnesses look forward to the trial form.

The question is asked, and the witness gives a non-responsive answer. The cross-examiner begins eliminating other possible factual variations. At some point during the process, the witness will offer to give the "yes" that was warranted by the original question asked. Do not let the witness off the hook. Continue with this technique until the witness insists on giving the response that you first requested.

Deposition Training
This is an excellent technique to train the witness in depositions (where objections do not stop the technique) not to be unresponsive. With the latitude given at depositions, the painful technique of elimination can be used to its full extent, and the witness recognizes that it is an unpleasant experience to be avoided in front of twelve perfect strangers at a jury trial.

§ 19.46 Spontaneous Loops (Book page 19-35)

A loop is the repetition of a key phrase (see chapter 26, *Loops, Double Loops, and Spontaneous Loops*). A spontaneous loop is a repetition of all or part of an unexpectedly good but unresponsive answer. This type of loop is called spontaneous because it happened without the trial lawyer expecting it. More often than not the cross-examiner will use a simple word or phrase from a long answer that the witness has volunteered (see chapter 26, *Loops, Double Loops, and Spontaneous Loops*).

NOTES

Whether the witness is a college professor with a doctorate in microbiology or a ruthless government informant trained in the art of lying, her non-responsive answer is likely to include words or phrases that the cross-examiner can use to discredit her. This is why the cross-examiner must listen to the entire answer carefully. Within it are often nuggets of golden opportunities.

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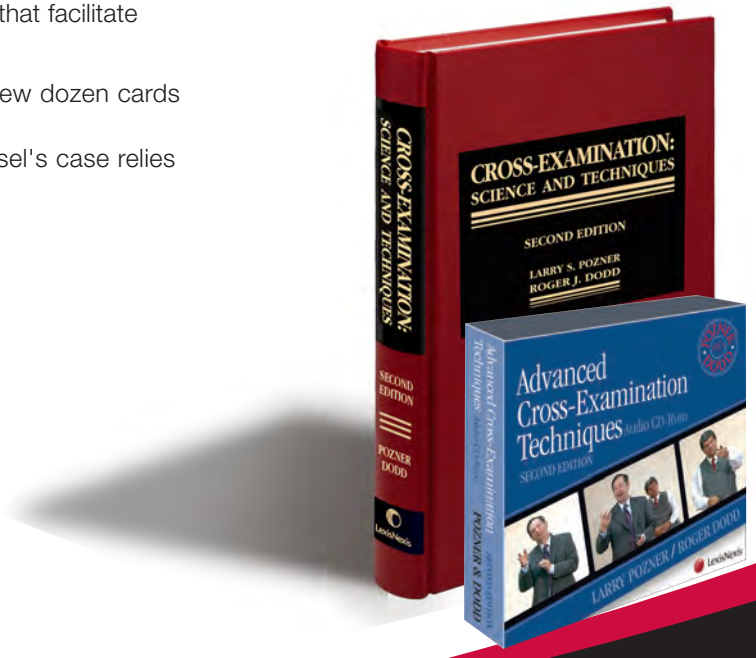

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