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PAST PRESIDENTS

*Edward F. Seitzinger, 1964 – 1965
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*Dudley J. Weible, 1970 – 1971
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*Ralph W. Gearhart, 1974 – 1975
*Robert V.P. Waterman, 1975 – 1976
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*Albert D. Vasey (Hon.), 1983
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*Craig D. Warner, 1989 – 1990
Alan E. Fredregill, 1990 – 1991
David L. Hammer, 1991 – 1992
John B. Grier, 1992 – 1993
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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
Megan M. Antenucci, 2008 – 2009

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* Edward F. Seitzinger, President

* D.J. Fairgrave, Vice President

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* Edward J. Kelly

*Paul D. Wilson

* Deceased

EDWARD F. SEITZINGER 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	1999	J. Michael Weston
1990	Richard J. Sapp	2000	Sharon Soorholtz Greer
1991	Eugene B. Marlett	2001	James Pugh
1992	Herbert S. Selby	2002	Michael Thrall
*1992	Edward F. Seitzinger	2003	Brent Ruther
1993	DeWayne E. Stroud	2004	Michael Thrall
1994	Marion L. Beatty	2005	Christine Conover
1995	Robert D. Houghton	2006	Megan M. Antenucci
1996	Mark. L. Tripp	2007	Michael Thrall
1997	David L. Phipps	2008	Noel K. McKibben
1998	Gregory M. Lederer	2009	Martha L. Shaff

*First Special Edition "Eddie" Award

NEW MEMBERS

Please welcome the following new member admitted to the Iowa Defense Counsel Association from September 2009 – August 2009.

Jamie L. Cox, Council Bluffs, IA

Davin C. Curtiss, Dubuque, IA 52001

Allison Doherty, Des Moines, IA 50309

Michael D. Ensley, Des Moines, IA 50309

Christopher C. Fry, Dubuque, IA 52001

Susan Hess, Dubuque, IA 52004-1808

Amos Emmannel Hill, Des Moines, IA 50309-4195

Thomas Joensen, Des Moines, IA 50309

Ryan G. Koopmans, Des Moines, IA 50309

Mark S. Lagomarcino, Des Moines, IA 50309

Jodie Clark McDougal, Des Moines, IA 50309

Timothy M. Morrison, Omaha, NE 68102

J. Scott Paul, Omaha, NE 68102

Jennifer E. Rinden, Cedar Rapids, IA 52406

Ian J. Russell, Davenport, IA 52801

Benjamin J. Samuelson, Moline, IL 61266

Robert N. Stewart, Sioux City, IA 51101

William Kevin Stoos, Sioux City, IA 51104

Joseph D. Thornton, Council Bluffs, IA 51502

Andrew F. Van Der Maaten, Decorah, IA 52101-0450

Courtney J. Vernon, West Des Moines, IA 50266

2009 – 2010 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: Amanda Richards
Betty, Neuman & McMahon, P.L.C.
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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
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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: Stephen J. Powell
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Commercial Litigation
Monitor current developments in the area of commercial litigation and act as resource for the Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues.

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

2009 – 2010 STANDING COMMITTEES

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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100 Court Avenue Suite 600
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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
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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: Michael P. Jacobs
Rawlings, Nieland, Killinger, Ellwanger, Jacobs, Mohrhauser, Nelson & Early LLP
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E-mail: mjacobs@rawlingsnieland.com

2009 – 2010 STANDING COMMITTEES

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.
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Fax: (319) 366-1917
E-mail: cconover@simmonsperrine.com

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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
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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.
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E-mail: hdelanoi@amfam.com

2009 – 2010 STANDING COMMITTEES

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
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317 Sixth Avenue, Suite 1200
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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.
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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: Randall Willman
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222 South Linn Street
Iowa City, IA 52244
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Rules
Monitor activities of ISBA and supreme court rules committees and monitor changes in Rule of Civil Procedure, recommend positions of IDCA on proposed rule changes.

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2009 – 2010 STANDING COMMITTEES

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: Gale E. Juhl
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Email: GJuhl@fbfs.com

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
Des Moines, IA 50309
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Fax: (515) 286-1743
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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: John H. Moorlach
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Richard Calkins, Calkins Mediation Services & Training, West Des Moines, IA
Dean Richard M. Calkins attended Dartmouth College and Northwestern University Law School, where he received his Bachelor of Arts degree in 1953 and his Doctor of Jurisprudence in 1959. In the latter institution, he was on the Law Review Board and graduated Order of the Coif. From 1959-1961 he was law clerk to Judge Elmer J. Schnackenberg, 7th Circuit Court of Appeals in Chicago. In 1961, he joined the Chicago law firm of Chadwell, Keck, Kayser, Ruggles and McLaren, where he became a partner. In 1969 he was a founding partner of Burditt and Calkins in Chicago. In 1980, Dean Calkins was appointed dean of the Drake University Law School where he served until 1988. Since then he has been an adjunct professor while practicing as a partner in the Zarley, McKee, Thomte, Voorhees & Sease law firm (1988-1993). In 1993, he established his own law firm practicing primarily antitrust law. In 1995 he went into the full-time practice of mediation and arbitration. Since 1996 he has trained both law students and lawyers in mediation. He has published three books: Antitrust Guidelines For The Business Executive, Dow Jones-Irwin 1981; Mediation: A Quest For Peace, Illinois State Bar Association 2005, and Lane & Calkins Mediation Practice Guide, Aspen Publishers, and numerous law review articles. Dean Calkins has been president of the American Academy of ADR Attorneys, the American Mock Trial Association, International Academy of Dispute Resolution, and the Blackstone Inn of Court.

Judge Larry J. Eisenhauer, Iowa Court of Appeals
Judge Eisenhauer, Ankeny, was appointed to the Court of Appeals in 2001. He was born in Emporia, Kansas, and received his undergraduate degree from Emporia State University in 1968. He then served in the United States Army for two years before attending Drake University Law School. After graduating in 1974, he practiced law privately and served as a juvenile referee from 1985 - 1993. He was appointed to the district court bench in 1994 and served as district court judge until his appointment to the court of appeals. Judge Eisenhauer is a member of the Polk County and Iowa State Bar Associations the National Council of Juvenile and Family Court Judges.

Scott M. Erdman, Packer Engineering, Naperville, IL
Scott Erdman is responsible for consultation in areas of failure analysis, accident investigation and reconstruction, design review and analysis, materials evaluation and application, and the analysis and testing of mechanical systems. Specific areas of expertise include accident analysis, vehicle component analysis, building plumbing/sprinkler system's analysis, mechanical testing of large scale construction supplies, examination of failed wire ropes and slings, and metal fracture analysis.

Stephanie Frazier Stacy, Baylor, Evnen, Curtiss, Grimit & Witt LLP, Lincoln, NE
Stephanie Frazier Stacy is a partner with Baylor, Evnen, Curtiss, Grimit & Witt LLP in Lincoln, Nebraska, where her trial practice focuses on defense of personal injury and wrongful death claims, and litigation of insurance coverage disputes with an emphasis on claims of bad faith. Ms. Stacy serves as a consultant on issues of Medicare compliance, and speaks frequently on developing best practices for managing Medicare in personal injury cases. She is a member of DRI's Medicare Secondary Payer Task Force, as well as the Medicare Advisory Recovery Coalition, and has authored several publications on Medicare compliance, including the recently-released "DRI Defense Practitioner's Guide to Medicare Secondary Payer Issues." Ms. Stacy is the current President of the Nebraska Defense Counsel Association, and is a member of the International Association of Defense Counsel (IADC), the American Board of Trial Attorneys (ABOTA), is a fellow in the Litigation Counsel of America, a fellow in the Nebraska State Bar Foundation, and serves as an adjunct professor at the University of Nebraska College of Law, teaching Trial Advocacy and Pre-trial Litigation.

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.

Tony James, Bradshaw Law Firm, Des Moines, IA
Tony James is an attorney with the Bradshaw Law Firm's Litigation and Insurance Law Groups. He graduated from Drake University in December of 2008 and was admitted to practice in April of 2009. Prior to attending law school, Tony worked as a manager for Wells Fargo.

SPEAKER BIOGRAPHIES

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.

Paul Mellor, Success Links, Richmond, VA
Paul Mellor is President of Success Links, a memory training company dedicated to helping people improve their lives by improving their memory power. A finalist in the 2008 USA Memory Championship, Paul offers valuable systems and solutions on how to strengthen memory. He has presented his popular seminars to car dealers and court reporters; sheriffs and salespeople; furniture reps and fitness instructors; hospital staffs and home builders; politicians and postal workers; lawyers and lay people. Paul's skills have benefited business professionals, senior citizens and school children. Paul has written extensively on memory improvement, conducts seminars throughout the nation and believes that everyone can build their brain power.

LaVerne Morris, MPS, TrialGraphix, Chicago, IL
La Verne Morris is a jury consultant with Kroll Ontrack/TrialGraphix, an international company providing litigation consulting and technology-driven services including electronic discovery, investigations, jury consulting, graphics and presentations to corporations, law firms and government agencies. With over 15 years of experience in quantitative and qualitative research, research design, large and small group analysis and thematic strategy, Ms. Morris is an expert in developing and conducting jury research including focus groups, trial simulations and juror profiling. She works closely with clients to develop ways to incorporate research findings into trial strategies and tactics. Her extensive knowledge of jury decision-making behavior is more than theoretical; Ms. Morris spends a substantial portion of her consulting practice in the courtroom, working directly with trial teams on jury selection and trial monitoring. She is also an expert in shadow juries and is regularly called upon to conduct witness communication training, witness preparation sessions and jury selection. Prior to joining Kroll Ontrack/TrialGraphix, Ms. Morris worked as a political consultant, conducting political polling, focus groups and public opinion research. In this capacity, she provided research-based political strategy to candidates seeking local, state and national offices. She also served as a consultant to numerous social issue campaigns and referenda, political action committees and think tanks. Ms. Morris earned her Masters of Political Studies in political management from The Graduate School of Political Management, George Washington University in Washington, D.C. where she was also named a Sloan Scholar. She received her *Artium Baccalaureus* in politics from Mount Holyoke College in South Hadley, Mass. Ms. Morris is a member of the American Society of Trial Consultants.

Charles A. Ogborn, Packer Engineering, Naperville, IL
Charles Ogborn is responsible for providing engineering and technical assistance in the areas of failure analysis, accident reconstruction and industrial testing. He is involved in the areas of mechanical processes, developing test protocols, and fire investigations. Current activities include site inspections, setup up and conducting laboratory testing, including instrumentation and operating automated test equipment.

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.

SPEAKER BIOGRAPHIES

Doug Richmond, Aon Global Professions Practice, Chicago, IL
Doug Richmond is Senior Vice President in the Global Professions Practice of Aon Risk Services. Aon's Global Professions Practice is the world's largest broker of insurance for law firms. Doug consults with Aon's 200+ large law firm clients on professional responsibility and liability issues. Before joining Aon in Chicago, Doug was a partner with Armstrong Teasdale LLP in Kansas City, Missouri (1989-2004), where he had a national trial and appellate practice. In his time at Armstrong Teasdale, he tried a number of major cases (40+ as first chair) and was often engaged to handle appeals of cases tried by other lawyers. In 1998, he was named the nation's top defense lawyer in an insurance industry poll as reported in the publications *Inside Litigation* and *Of Counsel*. He is a member of the American Law Institute (ALI), American Board of Trial Advocates (ABOTA), International Association of Defense Counsel (IADC), and Federation of Defense and Corporate Counsel (FDCC). Doug has also been selected to *The Best Lawyers in America* in the areas of legal malpractice, personal injury litigation, and railroad law. In 2003, the Euromoney Legal Media Group named him as one of the nation's top insurance and reinsurance lawyers. Doug is the co-author of a leading treatise, *Understanding Insurance Law* (4th ed. 2007), and an editor of the three-volume *New Appleman Insurance Law Practice Guide.* He is the lead author of a new book, *Professional Responsibility in Litigation,* slated for publication by the ABA in 2010. He has also published roughly 50 articles in university law reviews, and many more articles in other scholarly and professional journals. Doug teaches Legal Ethics at the Northwestern University School of Law. He previously taught Trial Advocacy and Insurance Law at the University of Kansas School of Law, and Insurance Law and a seminar on Damages at the University of Missouri School of Law. In addition, Doug is a regular NITA faculty member, teaching both deposition and trial skills. Doug earned his J.D. at the University of Kansas, an M. Ed. from the University of Nebraska, and his B.S. from Fort Hays State University.

Jennifer Rinden, Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, IA
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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
2009-2010

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DAMAGES

Botsko v. Davenport Civil Rights Commission, et. al., 774 N.W.2d 841 (Iowa 2009)(November)

Facts: Employee filed a harassment complaint against her employer, Dentist. An administrative law judge issued a proposed decision in favor of Dentist. The Davenport Civil Rights Commission reviewed the matter and determined that Dentist's conduct was "based on sex" and unwelcomed. The commission awarded Employee $5,000.00 in emotional distress damages, $20,000 in compensatory damages, and attorneys' fees of $30,000.00. Dentist filed a petition for judicial review.

Dentist argued, among other things, the award of attorneys' fees was not authorized by statute and was thus improper. The district court upheld the commission's decision, the court of appeals affirmed, and the Iowa Supreme Court granted further review.

Holding: The district court's affirmation of the grant of attorneys' fees is reversed. An award of attorneys' fees must be expressly provided in a statute or a written contract. A local ordinance that is meant to execute the policies within the Iowa Civil Rights Act, which allows for an award of attorneys' fees, cannot be interpreted to allow attorney's fees by implication. Without an express grant within the local ordinance, attorneys' fees are not recoverable.

Discussion: Dentist argued that the Davenport Municipal Code did not specifically authorize the award of attorneys' fees, but instead provided only that parties may be represented by counsel in proceedings before the commission "at their own expense." Employee argued that "at their own expense" does not restrict fee-shifting as a form of relief. Also, Employee pointed out that the Davenport ordinance provides a means for executing the policies within the Iowa Civil Rights Act, wherein a party may be awarded "reasonable attorney fees." Iowa Code § 216.15(8)(*a*)(8). Therefore, a similar fee-shifting provision should be implied as part of the local ordinance.

The Iowa Supreme Court disagreed with Employee. Attorneys' fees are a derogation of the common law and they "are generally not recoverable as damages in the absence of a statute or a provision in a written contract." Such statutory authorization must be expressed and "must come clearly within the terms of the statute." The Court's approach to attorneys' fees is stringent. Attorneys' fees may not be awarded by implication. Iowa Code section 216.9 authorizes a city to adopt its own civil rights ordinance. The question is whether the Davenport ordinance contained an express provision clearly authorizing an award of attorneys' fees. The local ordinance here failed to meet this test. While the ordinance provides a means for executing the policies within the Iowa Civil Rights Act, such generalized language is not a substitute for language expressly authorizing the payment of attorneys' fees to the prevailing party.

Royal Indemnity Co. v. Factory Mutual Ins. Co., 2010 WL 2331052 (Iowa 2010)

Facts: This case arose out of a February 2001 warehouse fire that destroyed property stored there by Deere & Company and a contract for services between Deere and Factory Mutual. Factory Mutual was Deere's sole commercial insurance provider until 1997, when Deere sought to broaden its insurance coverage. Royal Indemnity Company became Deere's primary insurer, and Factory Mutual provided excess coverage above $200 million. In 2000, Deere began the process of consolidating its storage facilities from seven Quad Cities warehouses to one centralized facility. When Deere found a facility, it asked Factory Mutual to evaluate the facility to determine the fire protection system was appropriate. Factory Mutual provided such services under a separate payment-for-services contract and fee unrelated to Deere's insurance policy premiums. After reviewing the facility, Factory Mutual prepared a report, which contained specifics of the sprinkler system as well as recommendations for altering the system. Factory Mutual also provided Deere with a list outlining recommendations to bring the fire system up to Factory Mutual standards. Deere used the list in negotiating with the facility.

Less than a year after Deere leased a portion of the warehouse and moved its product into the facility, a fire broke out and destroyed Deere's product. Royal Indemnity paid Deere over $70 million under its policy to Deere for property loss and became subrogated to Deere's claim. An action was brought against several defendants, including Factory Mutual. At no time was the cause of the fire determined. A jury returned a verdict in favor of Royal Indemnity in the amount of $39 million and Factory Mutual appealed. With regard to damages, Factory Mutual argued that the damages sustained were not in the contemplation of the parties.

Holding: Damages for breach of contract must be within the contemplation of the parties, and there must be a nexus between the breach and damages. Here, because there was no evidence that Factory Mutual's inspection was a cause of Deere's fire loss, Factory Mutual could not have contemplated it would be liable. Further, evidence of disproportionate fees to liability exposure mitigate against a finding that an alleged breaching party contemplated the purported damages.

Discussion: To succeed on a breach of contract claim, a party must prove that the damages resulted from the breach and were in contemplation of the parties. The Court must scrutinize the terms of the contract to determine whether the damages were within the contemplation of the parties. The nature and terms of the contract necessarily dictate the damages recoverable. The damages must have been foreseeable or have been contemplated by the parties when the parties entered into the agreement. Also, the damages must have some nexus with the breach; i.e. the damages recoverable for a breach are limited to losses actually suffered by reason of the breach and must related to the nature and purpose of the contract. To determine what damages may have been in contemplation of the parties, the Court may also look at the compensation paid by the claimant for the contract. An extreme disproportion between the loss and the price charged suggests that the price was not

intended to cover the risk of such liability. An exception to this general rule exists, however, where there is a loss "as a result of special circumstances, beyond the ordinary course of events that the party in breach had reason to know."

Here, Royal argued that but for Factory Mutual's breach, Deere would not have moved into the warehouse and would not have suffered fire damage. Deere claimed it relied upon Factory Mutual's loss-prevention-inspection services and advice whether to move its product into the facility. The Court held that it was not in contemplation of the parties that Factory Mutual would be called upon to answer for any fire loss. There was no proof that any deficiency that would have been revealed by an adequate inspection caused the fire. Had the cause of the fire been tied to the inspection, the requisite nexus between breach and loss would have been established, and the damages would have been in contemplation of the parties. Further, Deere's inspection cost $3000, and Factory Mutual clearly did not contemplate a total guarantee of over $30 million for such a fee.

Van Sickle Construction Co. v. Wachovia Comm. Mort., Inc., 783 N.W.2d 684 (Iowa 2010)

Facts: In 2003, Wachovia foreclosed a mortgage against commercial real estate owned by Debtors. After a sheriff's sale of the property left a significant deficiency judgment, Wachovia levied on personal property owned by Debtors, including two semi-tractors. Days before a scheduled sheriff's sale of the personal property, Wachovia and Debtors agreed to conduct a public auction instead. An agent for Wachovia announced that the auction company would "guarantee the titles" of the semi-tractors. Van Sickle purchased the semi-tractors at auction and assumed he would receive the titles within a few weeks to a month after the auction. He received title to one of the vehicles without incident, but the other title transfer became complicated.

The county treasurer declined to transfer title because title had already been transferred by Debtor to another recently-formed corporation after the sheriff had levied on the semi-tractor but before the auction had taken place. Wachovia filed a motion for contempt against Debtors, which was granted. Wachovia then had to file a motion to effect transfer of the title, which was granted. Nearly five months after the sale, Van Sickle finally received title to the second semi-tractor. Van Sickle sued Wachovia, alleging fraudulent and negligent misrepresentation and claiming damages for economic losses and punitive damages. A jury awarded Van Sickle actual damages of $27,000 and punitive damages of $250,000. Wachovia appealed, arguing that the loss claimed by Van Sickle was a purely economic loss. The Court of Appeals reversed the district court and the Iowa Supreme Court granted further review.

Holding: The economic loss doctrine normally precludes purely economic damages in torts. However, the tort of negligent misrepresentation is, and always has been, an economic tort allowing for the recovery of purely economic damages. The economic loss doctrine will not be applied in negligent misrepresentation

cases because doing so would essentially eliminate the tort. Wachovia's motion notwithstanding the verdict at trial was properly denied.

Discussion: When negligent misrepresentation only interferes with intangible economic losses, courts have developed restrictive rules of recovery. A person who negligently supplies false information is liable for "pecuniary loss caused to [others] by their justifiable reliance upon the information." Restatement (Second) of Torts § 552(1). Iowa cases reveal that economic losses have been awarded by Iowa courts for negligent misrepresentation. However, the Iowa Supreme Court has never considered whether the economic loss doctrine applies in such cases. The Court concluded that the economic loss doctrine provides no bar to the recovery of economic losses caused by a negligent misrepresentation.

The economic loss doctrine is a generally recognized principle of law that plaintiffs cannot recover in tort when they have suffered only economic harm. The rationale is that purely economic losses usually result from the breach of a contract. The doctrine was conceived to prevent litigants with contract claims from litigating them inappropriately as tort claims. However, the tort of negligent misrepresentation has always been an economic tort allowing for the recovery of purely economic damages. Application of the economic loss doctrine in negligent misrepresentation cases would essentially eliminate the tort.

Nevadacare, Inc. v. Department of Human Services, 783 N.W.2d 459 (Iowa 2010)

Facts: Beginning in 1998, NevadaCare entered into a series of contracts with DHS in which NevadaCare agreed to provide managed health care services for enrollees in Iowa's Medicaid program. In consideration for providing its services, DHS agreed to pay NevadaCare monthly capitation payments for each Medicaid enrollee enrolled with NevadaCare. The relationship lasted until February 1, 2005, via five separate contracts. According to the Iowa Administrative Code, capitation rates were required to be actuarially determined for the beginning of each new fiscal year. Each contract required DHS to calculate the capitation rates it would pay NevadaCare. Consequently, each new contract contained an addendum consisting of a report describing the actuarial work performed to calculate the capitation rates for the applicable contract. Before entering each contract, NevadaCare had the opportunity to review the entire contract and decide whether to enter into the agreement. NevadaCare never employed its own actuaries to review the accuracy of the rates.

In 2004, NevadaCare began to believe DHS was not properly setting the capitation rates and requested information about DHS's rate-setting practices. DHS did not comply with NevadaCare's requests for information and filed an action alleging DHS had violated contracts by setting improper capitation rates. Specifically, NevadaCare claimed DHS did not calculate the capitation rates on an actuarially sound basis. The district court held a bench trial and concluded DHS did not breach the contracts since both parties performed pursuant to the specific capitation rates contained within the contracts. The

district court denied NevadaCare's motion to enlarge the district court's findings and ruling. Then, the district court gave the parties an opportunity to present any claims for attorney fees and expenses. DHS claimed each contract contained provisions entitling DHS to attorney fees and litigation costs. DHS requested the district court to award fees of just under $3 million dollars. NevadaCare resisted the application for attorneys' fees, arguing the contracts contained only indemnification provisions and not explicit fee-shifting provisions. The District Court granted DHS's application for fees and NevadaCare appealed.

Holding: Parties to a contact cannot use indemnification clauses to shift attorney fees between the parties unless the language of the clause shows an intent to clearly and unambiguously shift the fees. Here, the indemnification clause did not clearly show such an intent. The district court's grant of attorney fees based on the indemnification clause alone was reversed.

Discussion: The Iowa Supreme Court considered whether an indemnification provision applies to claims between the parties to the agreement, such that a liable party is responsible for attorney fees, or only to third-party claims. As a general rule, unless authorized by statute or contract, an award of attorney fees is not allowed. NevadaCare argued the indemnification provisions contained in several of the contracts did not entitle DHS to recover attorney fees; instead, the indemnification provisions only provided for the recovery of attorney fees and costs incurred in connection with third-party claims. DHS argued the attorney fees were properly awarded by the district court under the indemnification provisions in the contract.

The Court recognized a split of authority on this issue. Some jurisdictions have held attorney fees are recoverable under a general indemnity provision. For example, a Ninth Circuit court found the plain meaning of "indemnity" is not to compensate for losses caused by third parties, but merely to compensate for losses in general. Other jurisdictions have held indemnification provisions do not authorize attorney fees with regard to claims between the parties to the agreement because such provisions only apply to third-party claims. For example, a Utah court held the use of the word "defend" in the indemnification provision indicates the parties intent for the provision only to apply to third-party claims. The Court announced Iowa law is that indemnification clauses that use the terms "indemnify" and "hold harmless" indicate an intent by the parties to protect a party from claims made by third parties rather than those brought by a party to the contract. Therefore, a party to a contract cannot use an indemnity clause to shift attorney fees between the parties unless the language of the clause shows an intent to clearly and unambiguously shift the fees.

The indemnification clause at issue here, "Any breach of this Contract," did not clearly and unambiguously show an intent by the parties to shift the attorney fees incurred in a breach of contract action between the parties. Further, the explicit fee-shifting provision in one of the contracts between the parties supported a finding that the parties did not intend for the indemnity provision to shift attorney fees between the parties.

EMPLOYMENT

Ballalatak v. All Iowa Agriculture Ass'n., 781 N.W.2d 272 (Iowa 2010)

Facts: Supervisor worked at Hawkeye Downs as security supervisor. In September 2006, two security employees were injured in a work-related vehicular accident. The injured employees met with the General Manager of Hawkeye Downs to discuss their injuries and possible workers' compensation claims. Eventually, the employees became concerned that their claims would not be covered by workers' compensation. Supervisor called General Manager to relay the employees' concerns. Supervisor mentioned to General Manager that the employees could hire a lawyer to protect their interests. General Manager, out of frustration, responded "make sure they spell my name right." General Manager contended that Supervisor was "agitated, insubordinate, and inappropriately questioned General Manager about employees' personal information" during the phone call. During the same call, General Manager fired Supervisor. Supervisor claimed he was terminated because he inquired into whether the company was fulfilling its workers' compensation obligations. General Manager claimed Supervisor was fired for insubordination. Supervisor brought suit against Hawkeye Downs alleging tortuous discharge against public policy. The District Court held that Supervisor failed to state a claim because no public policy protects supervisors or co-employees from termination for aiding injured employees in claiming workers' compensation benefits. Supervisor appealed.

Holding: The Court held that Iowa public policy found in workers' compensation statutes strongly protects injured employees, but does not extend to co-workers or supervisors who express concerns regarding whether the injured employees will be properly compensated. Thus, a supervisor who claimed he was wrongfully terminated because he advocated for the injured employees failed to state a claim for which relief could be granted.

Discussion: Generally, an employer may fire an at-will employee at any time. However, under certain circumstances, Iowa courts recognize claims for wrongful termination when such employment is terminated for reasons contrary to public policy. Thus, the tort of wrongful discharge exists as a narrow exception to the general at-will rule. Such claims must be based on a "well-recognized and defined public policy of the state." Supervisor argued the public policy interest in allowing employees to pursue their workers' compensation rights should be extended to supervisors who advocate on behalf of or help those whom they supervise to receive such benefits. The Court recognized the public policy protection for employees who exercise their own statutory rights. The Court also recognized that internal whistle-blowing may be protected in certain circumstances, such as in the context of IOSHA. Here however, the Court refuses to infer that legislation in other specific areas extends to the workers' compensation code. Also, public policy cannot be derived from internal employment policies or agreements. Supervisor was unable to direct the court to any Iowa law which clearly expresses protection for Supervisor's actions. Therefore, the Court held Iowa public policy found in workers' compensation statutes strongly protects injured employees, but does

not extend to co-workers or supervisors who express concerns whether the injured employees will be properly compensated. Finally, Supervisor argued that he was fired because he told General Manager that the injured employees may contact an attorney. The Court held that Supervisor was not the injured employees' representative and had no authority to assert their right to consult an attorney.

Clay County, Iowa v. Public Employment Relations Board et. al., 784 N.W.2d 1 (Iowa 2010).

Facts: Sikora was a full-time equipment operator for Clay County. In addition to his full time job, Sikora worked for the Clay County Fair Board, performing maintenance on the gravel streets and racetrack area using equipment rented or loaned to the fair by the county. The other crewmembers maintaining the fairgrounds consisted of two other full-time county employees. In 2003, Sikora and another crew member met with the manager of the fair to request a raise for the crew. Sikora was eventually terminated by the County for allegedly stating he could not continue to operate the county equipment for the fair unless he received the same salary he received while working for the County. The union filed a prohibited practice complaint with the board against the County. The complaint alleged the county had illegally terminated Sikora for engaging in "union activities and other concerted activities for mutual aid and [protection] not prohibited by law." The administrative law judge found Sikora was wrongfully terminated and ordered the County to reinstate Sikora. The County appealed to the board, which agreed, though for different reasons. The County filed a petition for judicial review of the board's final decision. The District Court affirmed the board's decision and the County appealed.

Holding: Wage negotiations with a private employer by a government employee are not protected activities under the Public Employment Relations Act (PERA). The purpose of the Act is to promote harmonious and co-operative relationships between government and its employees. Thus, the termination of the County employee for such wage negotiations was not actionable.

Discussion: The issue on appeal was whether the board correctly found that Sikora's conduct in negotiating wages for himself and others with a nonpublic employer was a protected activity falling within the scope of the Public Employment Relations Act (PERA). The law provides that public employees have the right to "engage in concerted activities for the purpose of collective bargaining or other mutual aid…" Iowa Code § 20.8(3). The Court noted that the National Labor Relations Act (NLRA) has not been limited to bargaining activity directed at the employee's own employer. Federal courts have held that the protection of the NLRA extends to protected activities outside the direct employer-employee relationship. However, the Court distinguishes between the NLRA and PERA. The NLRA's purpose is to eliminate obstructions to the free flow of commerce, whereas the PERA is to "promote harmonious and co-operative relationships between government and its employees." Iowa Code § 20.1(1). Therefore, the protected activities under the PERA are not directed to any employer, but rather are directed towards the government as the employer. Allowing a public employee to negotiate a contract for nonpublic

employees does not achieve the stated public policy. It may do just the opposite. If a public employee negotiates favorable terms of employee with a nonpublic employer, the terms of the nonpublic employment may be such as to cause the public employee to leave public employment or become dissatisfied with the terms of employment with the public employer. Accordingly, the Court finds the scope of coverage of the PERA does not protect Sikora's activity in negotiating wages for himself and other employees with a nonpublic employee such as the county fair.

Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010)

Facts: Gregory worked for Jeld-Wen, Inc. d/b/a Doorcraft of Iowa ("Doorcraft") in 1999. In 2000, Gregory experienced bilateral upper extremity dysfunction. She underwent a right carpal tunnel surgery and then a left carpal tunnel surgery. The procedures left Gregory with a two percent functional impairment of her left hand and a six percent functional impairment of her right hand. In spring and summer of 2001, Gregory underwent bilateral surgeries intended to treat pain in her shoulders. Her surgeon opined she had a ten percent impairment of her right arm and a ten percent impairment of her left arm. Gregory sustained a new injury in 2002 while working at Doorcraft. A door end-rail fell, fracturing her foot. She was treated for persistent pain in the injured foot and in her right leg.

Gregory filed a petition with the Iowa Workers' Compensation Commissioner on July 6, 2004, seeking compensation from Doorcraft for the injury to her right foot. The petition also asserted Gregory was entitled to benefits from the Second Injury Fund, alleging the 2000 injury to her left hand constituted a first qualifying injury and the 2002 injury to her right foot constituted a second qualifying injury. The commissioner denied Gregory's claim against Fund, concluding the 2000 injury did not constitute a first qualifying injury under Iowa Code section 85.64 because the resulting functional limitations "clearly extended beyond the bilateral arms and into the whole body." Therefore, the commission determined the 2000 resulted in permanent disability to Gregory's hands, arms, and shoulders for which compensation was calculated as an injury to the body as a whole under Iowa Code section 85.34(2)(*u*). Gregory sought judicial review and the district court affirmed the commissioner's decision.

Holding: Iowa Code section 85.65 is interpreted to permit a loss of an enumerated member to qualify as a first injury for purposes of the Fund's liability notwithstanding the fact the injury was combined with disability to one or more unscheduled body parts for purposes of compensation under section 85.34(2)(u).

Discussion: The Iowa Supreme Court sought to determine whether Gregory's 2000 injury qualified as a first injury under Iowa Code section 85.64 such that the she would be eligible for compensation by the Fund as a result of her 2002 injury. The Court began its analysis with a review of the history of the Fund. Currently, the Fund is implicated in a workers' compensation claim when an employee suffers successive qualifying injuries. The purpose of the Fund is to

encourage employment of disabled persons "by making the current employer responsible only for the disability the current employer causes." Gregory's entitlement to benefits from the Fund is dependent upon proof of the following propositions: (1) she sustained a permanent disability to a hand, arm, foot, leg, or eye (a first qualifying injury); (2) she subsequently sustained a permanent disability to another member through a work-related injury (a second qualifying injury); and (3) the permanent disability resulting from the first and second injuries exceeds the compensable value of the "previously lost member."

The Fund contended the statute means a first qualifying loss must be confined to a body part enumerated in the statute. Gregory contended the statute must be viewed more broadly and should include any disability to an enumerated body part whether or not it coexists with one or more disabilities simultaneously sustained in other enumerated or unenumerated body parts. The Court found the statute is ambiguous and proceeded to interpret it. The Court determined liability of the Fund expressly turns on the part(s) of the body permanently injured in successive injuries. Here, Gregory clearly sustained a partial permanent loss of at least two enumerated members in successive injuries. A first qualifying injury can occur simultaneously with an injury to another member. Therefore, Gregory's 2000 left hand injury qualifies as a first injury under section 85.64 and is not affected by the fact that the incident also caused bilateral shoulder impairment and was therefore compensated as an unscheduled injury.

Lewis v. Civil Service Comm'n of the City of Ames, 776 N.W.2d 859 (Iowa 2010)

Facts: Employee was employed in the public works department, street operations division, of the City of Ames as a maintenance worker. He had worked at the public works department for eighteen years. In June 2006, Employee was arrested for operating while intoxicated and his driver's license was suspended. Employee told the director of the public works department about his OWI and later informed the director his license would be suspended for six months. Maintenance workers are required to have class "A" or "B" commercial driver's license. Employee's superiors met to determine whether and how Employee should be disciplined. Eventually, the public works department alerted Employee in writing that the city was planning to terminate his employment. Employee appealed his termination to the City of Ames Civil Service Commission. The commission upheld the termination. On appeal to the district court, the termination was overturned as "arbitrary." The court of appeals affirmed the district court and the commission sought further review by the Iowa Supreme Court.

Holding: The Court held Employee's termination was warranted under Iowa Code sections 400.18 and 400.19 for failure to maintain required credentials. Civil service employees may only be terminated for neglect of duty, disobedience, misconduct, of failure to properly perform the person's duties. They may not be terminated arbitrarily.

Discussion: The Iowa Supreme Court sought to determine, *de novo*, whether Employee's termination was warranted. Iowa Code chapter 400 controls civil service employment. That chapter provides that civil service employees cannot be terminated arbitrarily. A terminated employee may appeal a civil service commission decision to the district court, which may proceed by "trial de novo." Throughout the trial court and appellate court proceedings, the commission has the burden of showing that the discharge was statutorily permissible, and the Court gives no weight to or presumption in favor of the commission's determination.

It is improper for a civil service employee to be fired for reasons other than those found in sections 400:18 and 400:19: neglect of duty, disobedience, misconduct, or failure to properly perform the person's duties. The legislature did not define these terms. The Court may look to the department's own rules and prescribed code of conduct as well as existing precedent for guidance in determining whether an employee's actions fall within these categories. Additionally, a lack of standard policy may be probative. Here, Employee was terminated for failing to maintain credentials – the driver's license needed to perform his job. City policy provided "failure to maintain required credentials shall be considered grounds for termination of employment." Further, city policy provided that an employee who does not maintain a required credential "shall be terminated" where the activity requiring a credential is the "core defining function of the job." Employee's supervisors testified they decided to terminate Employee because they concluded maintenance of a driver's license was a "core defining function" of his job and therefore, termination was the appropriate response to Employee's failure to maintain a license. The city also relied on the job description of maintenance worker, which emphasizes the driving involved in the position.

Employee argued the city could have accommodated his license revocation without terminating his employment and therefore his termination was arbitrary. He also argued the city could have continued to employ him during his license suspension. However, the Court found the city's termination of Lewis was warranted. "Give [Employee's] inability to perform the job requirement of driving and his failure to maintain the necessary credential required by city policy, even though only temporarily, his termination was warranted."

Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010)

Facts: Renda worked as a receiving and discharge clerk while an inmate at the Mt. Pleasant Correctional Facility. The position was the most respected and highest paid job within the prison. Shortly after she started working in the receiving and discharge department, an Officer began making romantic overtures toward her. At one point, Officer forced Renda to forge a property receipt to cover up the fact that he had given her a CD. Officer threatened to have Renda transferred to another facility if she reported his conduct to authorities. After several months, Renda was approached by an investigator regarding Officer's inappropriate behavior. Renda refused to talk to the investigator and was punished by being placed in solitary confinement for nine

days. After getting out of solitary confinement, she returned to her job but was fired a few days later on "trumped up charges." Eventually, Renda cooperated with the investigation and was found 100% credible. Despite the results of the investigation, Renda became depressed and lost her satisfactory inmate status. She felt ostracized and was later denied a job in the recreation department because of the forged receipt incident.

Renda filed a complaint with the Iowa Civil Rights Commission. She claimed she was discriminated against on the basis of her sex and that she was retaliated against in the areas of employment and housing. The Iowa Civil Rights Commission closed her complained because the Commission felt her complaint did not allege a "discriminatory practice" as defined by Iowa Code chapter 216. Specifically, the Iowa Civil Rights Commission determined that an inmate is not considered an employee and a prison is not considered a dwelling under the Act. Renda sought judicial review.

Holding: The legislature has broadly defined "employee" and the Court found no intent to exclude inmates from protection against discrimination in employment within the prison. The Court further found that whether an inmate is an "employee" should be based on a consideration of various factors, including the voluntariness of the position, whether the inmate went through an application process, and the nature and extent of similarities between the circumstances of the inmate's job in the prison and jobs outside the penal context.

Discussion: The Iowa Supreme Court was called upon to decide whether the Iowa Civil Rights Commission erred when it determined an inmate is not an "employee" for the purposes of the Iowa Civil Rights Act. The Act prohibits discrimination based on sex in employment. An "employee" is defined broadly as "any person employed by an employer," and "employer" is defined to include "the state of Iowa, or any other political subdivision, board, commission, department, institution…" Several categories of employers and employees are exempted from the discrimination prohibitions, but no explicit exception exists for inmates of correctional facilities. Inmates are not mentioned in the statute at all. Given the breath of the definitions of "employee" and "employer" the Court begins its analysis with the premise that inmates may be considered employees unless some compelling reason exists to convince the Court that the legislature meant to exclude them despite using such expansive language.

The Iowa Civil Rights Commission argued that the legislature intended to exclude inmates from the definition of "employee," citing several Iowa statutes, such as Iowa Code chapter 904. Chapter 904 provides that inmates should be required to work and the director may pay the inmate an "allowance" at his discretion, and that an employed inmate through the work-release program is not an agent, employee, or servant of the department of corrections (for the purposes of workers' compensation). The Court found this chapter is not determinative of the issue, and that the focus of chapter 904 are pay-related, and the provisions explaining that an inmate employed through the work release program is not an employee of the state is inconsistent with a conclusion that an inmate employed by the prison inside the prison is an

employee for the purposes of the Act. Chapter 904 has no bearing whether Renda may have been an employee of the prison.

The Court concluded that the legislature did not intend to exclude inmates from protection against discrimination in employment within the prison. The Court cautioned, however, that its conclusion does not meant that all work performed by an inmate will constitute employment. "The determination of whether an inmate is an employee will need to be reached on case-by-case basis with various factors, including the voluntariness of the position, whether the inmate went through an application process, and the nature and extent of similarities between the circumstances of the inmate's job in prison and jobs outside the penal context." With this analysis in mind, the Court remanded the case to determine whether Renda was an "employee."

CONSTITUTIONAL

Brandon v. Iowa District Court for Henry County, 2010 WL 2712692 (Iowa 2010)

Facts: Inmate Brandon brought a post conviction relief action challenging a determination by the Iowa Department of Corrections (IDOC) that he was ineligible to accrue earned-time credits after he was removed from the Sex Offender Treatment Program (SOTP). The IDOC action was based on a 2005 amendment to Iowa Code section 903A.2, which provides an inmate required to participate in SOTP loses his eligibility for a reduction in sentence if he fails to participate. Brandon claimed the statute did not apply to him because his crimes were committed before the amendment was enacted, and if the amendment did apply to him, it was a violation of the prohibition against ex post facto laws under the Iowa and United States Constitutions. He also asserted a due process claim, arguing the procedure used by the IDOC in determining he should be removed from the treatment program was constitutionally inadequate in affording him due process under the factors set out in *Wolff v. McDonnell*. The district court rejected Brandon's claims.

Holding: The Iowa Supreme Court affirmed the district court's finding that the 2005 amendment to Iowa Code section 903A.2 was not an ex post facto law because it merely clarified the law and did not change or create new law. Also, Brandon's procedural due process rights were not violated because he was given notice of the reasons for his removal from the SOTP and was adjudged by a neutral fact finder.

Discussion: The 2005 amendment did not change the existing law, but merely clarified it, thus negating Brandon's argument that the legislature intended the amendment to be applied prospectively to inmates whose crimes occurred after the July 1, 2005 effective date of the statute. Regarding the due process claim, Brandon contended he was entitled to advance written notice, a written statement of the reasons relied upon for his removal from the SOTP, and a hearing before a neutral fact finder. Based on the evidence, the Court found it was clear Brandon was advised that a determination regarding his eligibility to return to treatment groups and full participation in SOTP would be made by a date certain. Also, Brandon was adequately advised of the reasons for his

removal from treatment when he corresponded with the assistant warden about such reasons. Finally, the Court rejected Brandon's claim that the director of the treatment program was not a neutral fact finder. There was no evidence the treatment director was personally involved in the incidents for which the counselors recommended Brandon's removal from treatment.

McDonald v. Chicago, 30 S.Ct. 3020 (2010)

Facts: Chicago and the village of Oak Park, Illinois, had laws effectively banning handgun possession by almost all private citizens. After the United States Supreme Court's decision in *District of Columbia v. Heller*, which struck down a D.C. law that banned the possession of handguns in the home, the petitioners sought a declaration that Chicago's ban violated the Second and Fourteenth Amendments.

Holding: The Second Amendment right to keep and bear arms is incorporated against the States.

Discussion: Petitioners argued that the right to keep and bear arms is protected by the Privileges and Immunities Clause of the Fourteenth Amendment. Also, they argued that the Second Amendment right to keep and bear arms is incorporated by the Fourteenth Amendment's Due Process Clause.

The standard used in selective incorporation of the Bill of Rights is whether a particular Bill of Rights protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice. The Court has held that almost all of the Bill of Rights' guarantees met the requirements for protection under the Due Process Clause. The question here was whether the right to keep and bear arms is fundamental to the Nation's scheme of ordered liberty, or whether it is "deeply rooted in the Nation's history and tradition." The Court decided the Second Amendment is incorporated by the Fourteenth Amendment and should apply against the states.

The right to keep and bear arms is a deeply rooted and fundamental. Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and individual self-defense is the "central component" of the Second Amendment right. Because the need for defense of self, family, and property is most acute in the home, the *Heller* court found that the right applied to handguns because they are the most preferred firearm in the nation to keep and use for protection. The opinion also affirmed that certain restrictions on firearms, such as use near a school or by the mentally ill, are permissible.

State v. Tripp, 776 N.W.2d 855 (Iowa 2010)

Facts: On July 19, 2007, Tripp was charged with sexual abuse in the third degree in violation of Iowa Code section 709.4(2)(c)(4) for performing a sex act with a person fifteen years of age. At the time, Tripp was twenty years old. Tripp pled guilty and was sentenced to an indeterminate term of incarceration not to

exceed ten years. Tripp's incarceration was suspended, and he was placed on supervised probation for a period of five years. He had to register on the Iowa sex offender registry. Additionally, because Tripp was convicted of a sexual offense the court imposed the special sentence under Iowa Code section 903B.1 providing for the imposition of lifetime parole. Tripp appealed, alleging the statute imposing the special sentence was unconstitutional because it was cruel and unusual punishment.

Holding: The Court determined that, because the terms and length of Tripp's parole had not yet been determined by an administrator, Tripp's cruel and unusual punishment challenge to Iowa Code section 903B.1 was not ripe for adjudication. The Court refused to analyze Tripp's special sentence without the benefit of any conditions that may be placed on him in the future.

Discussion: Defendant Tripp argued that the imposition of a lifetime parole sentence for the crime of third-degree sexual abuse constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution, and article I, section 17 of the Iowa Constitution. The Court first considered whether Tripp's claim was ripe for adjudication. As of the time of his appeal, Tripp's sentence was suspended, and he was on probation, not parole. Parole is a lenient form of punishment that monitors a person's activities to ensure the person is complying with the law. The imposition of lifetime parole is not tantamount to a sentence of life imprisonment. The Court noted the extent of additional punishment for a violation of conditions of parole, if any, was speculative and would only be realized if Tripp violated the terms of his parole (again, a state of facts which has not occurred). Also, the special sentence is not necessarily for life. Section 903B.1 provides for the possibility of release from parole under chapter 906 if the parole board determines the offender is "able and willing to fulfill the obligations of a law-abiding citizen without further supervision." To analyze Tripp's sentence at the time of appeal, the Court found it must assume Tripp will serve lifetime parole, when in reality Tripp may be released from parole at any time. The Court would also be analyzing the sentence without the benefit of any conditions that may be placed on him in the future – decisions that had not yet been made.

The Court determined Tripp's claim was not ripe for review. A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative. The ripeness doctrine is intended to prevent courts from "entangling themselves in abstract disagreements…" Until the length of Tripp's parole and the extent of his supervision are determined, Tripp's challenge is not ripe.

State v. Bogan, 774 N.W.2d 676 (Iowa 2009)

Facts: Bogan, a 14 year-old high school student in the Quad Cities, was suspected of murdering a young woman during a drive-by shooting on the evening of August 16, 2006. A few days after the shooting, two Davenport detectives went to Bogan's school in Rock Island to obtain his fingerprints and interview him. A school liaison and the principal had already pulled Bogan out of class

and placed him in the school office, where he waited for the detectives. Bogan was taken to the nurse's office for the interview. He was not given a Miranda warning before questioning. The detectives proceeded to ask Bogan about the homicide, including details about his whereabouts that evening. Eventually, Bogan made statements that were at odds with other witnesses' testimony. The police arrested Bogan for the shooting. A jury convicted Bogan of first-degree murder. Bogan appealed, alleging that the district court should have suppressed statements he made to the Davenport detectives because they did not give him a Miranda warning prior to being interrogated. Specifically, the issue was whether Bogan was in custody during the questioning at the school.

Holding: Bogan was entitled to a Miranda warning when he was escorted to a school office by armed police officers and interviewed involuntarily. A Miranda warning is required when a suspect is interrogated in custody. A reasonable person in Bogan's situation would have understood his situation to be one of custody. Because the police violated the Miranda rule, Bogan's statements should have been suppressed at trial.

Discussion: Constitutional claims of a Miranda violation are reviewed de novo. The Court makes an independent evaluation of the totality of the circumstances, while deferring to the district court's findings of fact due to that court's opportunity to assess credibility. The Miranda requirement is to inform a suspect of his or her rights, and is more than a "mere procedural nicety or legal technicality." A suspect is in custody if the suspect's freedom of action is curtailed to a degree associated with formal arrest. The question is whether a reasonable person in the defendant's position would have understood his situation to be one of custody. A four factor test is used to determine whether Bogan was in custody: (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of his guilt; and (4) whether the defendant is free to leave the place of questioning. The Court determined that Bogan was in custody and should have been given a Miranda warning. He was escorted to the school office and did not voluntarily speak with police. Also, several of the officers were armed and remained at the only exit to the school's inner office during the interrogation. Bogan was never told he could leave. Therefore, a reasonable person in Bogan's position would have understood the situation to be one of custody. Any statements made by Bogan should have been inadmissible at trial.

War Eagle Village Apts. v. Plummer, 775 N.W.2d 714 (Iowa 2009)(November)

Facts: Plummer was a tenant at the War Eagles Village apartment complex. In July 2006, Plummer was unable to pay her rent and became delinquent. A warrant of removal was issued. The property manager at War Eagle testified she mailed Plummer notice that procedures to terminate her lease would commence in three days if rent was not paid. Plummer claimed she never received the notice and did not pay the delinquent rent. War Eagle commenced an action for forcible entry and detainer ("FED") under Iowa Code chapter 646, requesting possession of the apartment. An original notice was

mailed to Plummer by certified mail. No attempt at personal service on Plummer was ever made. When Plummer failed to appear at the hearing, a default judgment was entered and she was ordered to vacate the premises. Plummer appealed the default judgment and requested an evidentiary hearing, claiming she had not had an opportunity to present evidence regarding the constitutional inadequacies of the certified mail notice. At the evidentiary hearing, it was established that the post office made no to-the-door attempt to deliver the certified letter and Plummer received the post office's notice after the proceedings commenced. The district court affirmed the judgment for possession finding that Iowa Code section 562A.29A(2) did not violate Due Process or Equal Protection. Plummer filed a request for discretionary review, which was granted by the Iowa Supreme Court. The issue was whether Plummer's procedural due process was violated because personal service was not required by Iowa's residential tenants laws.

Holding: Iowa Code section 562A.29A is held unconstitutional in effect and on its face. A tenant's right to continued residence in their home is a significant interest in property such that they are entitled to procedural due process. The requirement that service of notice of an FED proceeding is completed upon mailing by certified mail violates the tenant's procedural due process. Notice must be reasonably calculated to apprise a tenant of such a FED proceeding.

Discussion: Despite the requirement in Iowa Code section 648.5 that requires personal service of FED petitions, Iowa Code section 562A.29A, regarding residential tenants, provides service may be completed upon the tenant by personal service or certified mail. Service is required to be made upon a defendant-tenant not less than three days prior to a FED hearing. Notice is deemed received by the tenant when it is mailed, whether or not the tenant receives the notice or signs a receipt for the notice. The Iowa Supreme Court sought to determine the constitutionality of this statutory scheme.

Due Process. When an individual's property interests are at stake, that person is entitled to adequate notice and a reasonable opportunity to be heard. The United States Supreme Court has recognized that in FED actions tenants are deprived of a significant interest in property; "indeed, of the right to continued residence in their homes" triggering due process protections. The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose whether to appear, contest, etc. Thus, any notice should be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. The statutory scheme here – notice complete upon mailing – is not reasonably calculated to give tenants adequate notice of hearings at which their continued occupancy of the premises will be determined. "This scheme gives the illusion, but not the reality, of due process." Even if a tenant receives the notice prior to the hearing, the tenant is unlikely to receive it in time to meaningfully participate in the hearing. Iowa Code section 562A.29A(2) is unconstitutional in effect and on its face.

Botsko v. Davenport Civil Rights Commission, et. al., 774 N.W.2d 841 (Iowa 2009)(November)

Facts: Employee filed a harassment complaint against her employer, Dentist. An administrative law judge issued a proposed decision in favor of Dentist. The Davenport Civil Rights Commission reviewed the matter and determined that Dentist's conduct was "based on sex" and unwelcomed. The commission awarded Employee $5,000.00 in emotional distress damages, $20,000 in compensatory damages, and attorneys' fees of $30,000.00. Dentist filed a petition for judicial review.

Dentist argued, among other things, that his procedural due process was violated with the executive director of the commission assisted the Employee at the hearing and then proceeded to advise the commission regarding the proper disposition of the case. The executive director was involved in the investigation process. Also, the executive director allegedly advocated for Employee at the administrative hearing by introducing several exhibits into the record, sitting at counsel table with Employee's attorney, and engaging in off-the-record consultations with Employee's attorney. The case found its way to the Iowa Court of Appeals where the commission's decision against Dentist was affirmed. The Iowa Supreme Court granted further review.

Holding: Where an agency member advocated on behalf of the complainant and was also involved in the adjudication process, there was an appearance of fundamental unfairness. In such scenario, the risk of injecting bias into the adjudicatory process created a violation of procedural due process. The executive director's advocacy was of a sufficient nature to preclude her later participation in the adjudicatory process in the case under the due process clauses of the state and federal constitution.

Discussion: A party in an administrative proceeding is entitled to procedural due process, which involves at least a "fair trial in a fair tribunal." In administrative settings, the burden of persuasion regarding bias is must more difficult because there is a combination of investigative and adjudicative functions. When a party challenges on procedural due process grounds the combination of investigative and adjudicative processes within an agency, he must overcome a presumption of honesty and integrity in those serving as adjudicators. The mere fact that investigative and adjudicative functions are combined within one agency does not give rise to a due process violation. Such combinations are the very nature of the administrative process before an agency. Therefore, absent actual bias, there was no violation of due process here simply because the executive director had some involvement in the investigation and later participated in the deliberations.

A more serious problem is posed, however, where the same person within an agency performs both prosecutorial and adjudicative roles. When an agency member becomes involved in the plaintiffs' litigation strategy or assumes a personal commitment to a particular result, he or she becomes an adversary with the "will to win." Leading secondary authority commentators have suggested that one may not regain objectivity once he or she has the "will to

win" a particular result. In such a case, the probability of actual bias is too high to allow the member to also participate in the adjudicative process.

Here, the fact that the executive director entered exhibits did not trouble the Court. Such actions simply set the stage for the proceeding and are the kind of marginal participation in the administrative process that do not give rise to the "will to win." The Court was troubled that the executive director sat at counsel table with complainant and conferred with counsel. The executive director was engaged in advocacy, which was sufficient to preclude her later participation in the adjudicatory process. The combination of advocacy and adjudicative functions has the appearance of fundamental unfairness in the administrative process. Because of the risk of injecting bias into the adjudicatory process, Dentist was not required to show actual prejudice. The decision of the commission against Dentist was vacated. The Court suggested the commission may avoid the due process violation by submitting the case to a disinterested quorum of current commission members.

CONTRACT

Margeson v. Artis, 776 N.W.2d 652 (Iowa 2009)(December)

Facts: Sellers entered into a contract to sell a weight-loss franchise business called "Inches-A-Weigh" to Buyer. The parties memorialized their agreement in an "Asset Purchase Agreement" executed October 1, 2004. The purchase price was $125,000, payable at the time of closing. The parties subsequently executed a second document entitled "Sales Agreement Addendum" on October 7, 2004. The addendum set the purchase price at $155,000, with $135,000 payable at closing. Buyer intended to pay with $125,000 from a bank, and $10,000 cash. The remaining portion of the purchase price was to be paid to the Sellers in monthly installments. The parties successfully closed the agreement on October 18, 2004, but ran into some disputes following the closing. Buyer stopped payment on one of the personal checks delivered at the time of closing and stopped making the monthly payments in March 2005.

Sellers filed a lawsuit for breach of the addendum, and eventually moved for summary judgment. Buyer asserted the addendum was unenforceable because it was not supported by consideration and that genuine issues of material fact existed over the interpretation of the original contract and the addendum. The district court found: the addendum was supported by consideration, Buyer was stopped to enforce the original agreement, and Buyer waived the legal requirement for the addendum to be supported by consideration. It granted summary judgment to Sellers. The Court of Appeals affirmed the ruling and the Iowa Supreme Court granted further review.

Holding: The addendum agreement was not supported by consideration. Modification of an agreement requires new consideration. A mere promise of additional compensation for the same performance is invalid for want of sufficient consideration. Here, new financing terms in the addendum applied to the additional $30,000 purchase price and not to the price provided in the original agreement.

Discussion: A valid contract consists of an offer, acceptance, and consideration. Consideration is an essential part of contract law and the traditional notion that contract law exists to enforce mutual bargains, not gratuitous promises. Consideration ensures the promise sought to be enforced was bargained for and given in exchange for a reciprocal promise or an act. A promise is supported by consideration in one of two ways: First, consideration exists if the promisee, in exchange for a promise by the promisor, does or promises to do something the promisee has no legal obligation to do. Second, consideration exists if the promisee refrains, or promises to refrain, from doings something the promisee has a legal right to do. Generally, it is presumed a written and signed agreement is supported by consideration. A party asserting a lack-of-consideration defense has the burden to establish the defense.

Generally, a promise to perform a pre-existing duty does not constitute consideration. New consideration is necessary to support a contract modification. The law of contracts is not concerned with the actual value of the consideration, only that some new consideration exists. The critical inquiry is whether the promisee at least promises to give up something.

Sellers sought to enforce the promise by Buyer to purchase the business for $155,000 as provided in the addendum. Sellers argued three additional terms in the addendum constituted consideration for the modification – a financing plan, flexibility of payments, and the ability to re-negotiate payment terms. However, additional terms in a modification agreement, alone, do not constitute new consideration for the modification. New financing terms can constitute sufficient consideration to support a modification, but they need to apply to the pre-existing obligations under the original agreement. Here, the new financing terms pertained only to the promise made by Buyer to pay the additional $30,000. The terms did not establish that Sellers promised to do something they were not otherwise already obligated to do. New consideration would have been found if the financing terms applied to part or all of the original purchase price of $125,000. Therefore, the modification here was nothing more than a unilateral price hike. The rule is that "a promise of additional performance for the same compensation or to pay additional compensation for the same performance is invalid for want of sufficient consideration." Finally, Sellers are unable to prevail on an estoppel theory (Buyer showed up at closing and paid the money by check and made monthly payments thereafter) because Sellers could not show detrimental reliance.

NevadaCare, Inc. v. Department of Human Services, 783 N.W.2d 459 (Iowa 2010)

Facts: Beginning in 1998, NevadaCare entered into a series of contracts with DHS in which NevadaCare agreed to provide managed health care services for enrollees in Iowa's Medicaid program. In consideration for providing its services, DHS agreed to pay NevadaCare monthly capitation payments for each Medicaid enrollee enrolled with NevadaCare. The relationship lasted until February 1, 2005, via five separate contracts. According to the Iowa Administrative Code, capitation rates were required to be actuarially

determined for the beginning of each new fiscal year. Each contract required DHS to calculate the capitation rates it would pay NevadaCare. Consequently, each new contract contained an addendum consisting of a report describing the actuarial work performed to calculate the capitation rates for the applicable contract. Before entering each contract, NevadaCare had the opportunity to review the entire contract and decide whether to enter into the agreement. NevadaCare never employed its own actuaries to review the accuracy of the rates.

In 2004, NevadaCare began to believe DHS was not properly setting the capitation rates and requested information about DHS's rate-setting practices. DHS did not comply with NevadaCare's requests for information and filed an action alleging DHS had violated contracts by setting improper capitation rates. Specifically, NevadaCare claimed DHS did not calculate the capitation rates on an actuarially sound basis. The district court held a bench trial and concluded DHS did not breach the contracts since both parties performed pursuant to the specific capitation rates contained within the contracts. The district court denied NevadaCare's motion to enlarge the district court's findings and ruling. Then, the district court gave the parties an opportunity to present any claims for attorney fees and expenses. DHS claimed each contract contained provisions entitling DHS to attorney fees and litigation costs. DHS requested the district court to award fees of just under $3 million dollars. NevadaCare resisted the application for attorneys' fees, arguing the contracts contained only indemnification provisions and not explicit fee-shifting provisions. The District Court granted DHS's application for fees and NevadaCare appealed.

Holding: Contract interpretation is most importantly about the intent of the parties at the time of the agreement. The most important evidence of the parties' intentions is the words of the contract. Here, district court's ruling that NevadaCare failed to present evidence that DHS breached the contracts was supported by substantial evidence. The intent of the parties' was that capitation rates should be calculated on an actuarially sound basis. The rates were so based.

Discussion: The Supreme Court was called upon to determine whether the district court properly interpreted the contracts; specifically, whether the contracts required DHS to calculate the capitation rates on an actuarially sound basis. Before its substantive analysis, the Court encouraged the district courts not to adopt verbatim proposed findings of fact and conclusions of law prepared by counsel for one of the parties (as the district court did here). First, the Court reviewed basics of contract interpretation. The determination of the intent of the parties at the time they entered into the contract is the cardinal rule of interpretation. If the principal purpose of the parties is ascertainable from the words and other conduct of the parties in light of all circumstances, the Court gives the words and conduct great weight when interpreting the contract. The most important evidence of the parties' intentions is the words of the contract.

The Court found that the contracts required capitation rates to be set on an actuarially sound basis. All the contracts contained language that indicated the capitation rates were to be computed on an actuarially sound basis. Also, both federal and state law requires capitation rates to be computed on an

actuarially sound basis. Both parties understood any contract must comply with the applicable law for setting capitation rates.

The Court also reviewed whether the district court properly found that NevadaCare failed to carry its burden of proof that the rates contained in the contracts were not actuarially sound. The Court reviewed the record to determine whether substantial evidence supported the ruling. At trial, both parties had consulting actuaries to provide opinions regarding the DHS capitation rates and methods. It was determined that methodology errors may have resulted in DHS paying approximately $6 million more than it should have to NevadaCare. Based on the testimony of the experts regarding the methodology errors, substantial evidence supported a finding that the capitation rates were not calculated on an actuarially sound basis in one respect. However, the breach did not entitled NevadaCare to recover damages because NevadaCare suffered no damages. Finally, substantial evidence supported the district court's finding the DHS capitation rates and methods were based on an actuarially sound basis in all other respects.

COMMERCIAL

Frontier Leasing Corp. v. Links Engineering, LLC, 781 N.W.2d 772 (Iowa 2010)

Facts: This case involves an action to collect damages upon the default of an equipment lease for a beverage cart to be used on a golf course. Links Engineering and C & J Leasing Corporation entered into an equipment lease, which Frontier Leasing Corporation claimed had been assigned to it. Frontier brought suit for Links' default and moved for summary judgment. In its resistance, Links argued: (1) that Frontier was not the real party in interest, and (2) that the person signing on behalf of Links had no authority to do so. With regard to authority, Frontier contended that an employee of Links – a golf professional hired to run the day-today operations of the golf course – lacked the authority to bind the corporation in financing matters including leasing. The district court granted summary judgment in favor of Frontier. It found that the Links employee had actual and apparent authority to enter into the lease, thereby binding Links to the transaction. Links appealed and the Court of Appeals did not specifically address the authority issue. The Iowa Supreme Court granted further review.

Holding: The Iowa Supreme Court reversed the district court's grant of summary judgment in favor of Frontier, holding genuine questions of material fact existed about whether the Links employee had actual or apparent authority to bind Links. A agency relationship may be created through an agent's actual or apparent authority to act on behalf of the principal.

Discussion: The Iowa Supreme Court considered whether a genuine issue of material fact existed regarding the Links' employee's lack of actual or apparent authority. An agency relationship can be established through the agent's actual or apparent authority to act on behalf of the principal. Actual authority examines the principal's communications to the agent. Apparent authority is authority

the principal has knowingly permitted or held the agent out as possessing. Apparent authority focuses on the principal's communications to the third party.

A principal may also be liable under the doctrines of estoppels and ratification. Under the doctrine of estoppel, the principal is liable if he (1) causes a third party to believe an agent has the authority to act, or (2) has notice that a third party believes an agent has the authority and does not take steps to notify the third party of the lack of authority. Based on the principles of ratification, a principal may be liable when he knowingly accepts the benefits of a transaction entered into by one of his agents.

Here, the district court based its ruling that the Links employee had actual and apparent authority on an affidavit submitted by the director and owner of Links, Owner. Owner stated in his affidavit that the employee was in charge of the day-to-day operations of the golf course, and that Owner was aware of the existence of the beverage cart and did not avow the transaction. However, the district court failed to consider Owner's entire affidavit in the context of the summary judgment scope of review, requiring all inferences to be drawn in Links' favor. Specifically, Owner stated that employee was not authorized to enter into financing agreements, especially given the lease's hefty amount of $19,000. Also, Owner stated it is known in the golf industry that PGA golf professionals manage the day-to-day operations of a golf course, and vendors know they do not have authority to enter into the type of leasing agreement at issue here. The affidavit further refutes estoppel and ratification. Because reasonable minds could differ from the record as to whether employee had authority to bind Links to the equipment lease, the Court reversed the district court's grant of summary judgment.

C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC, 2010 WL 2629824 (Iowa 2010)

Facts: Golf Course entered into an "Equipment Lease Agreement" which obligated Golf Course to pay $628 in monthly payments to Leasing Corporation, to lease two beverage carts. Golf Course also entered into an agreement with Advertiser that required Advertiser to pay $628 per month to Golf Course in exchange for Golf Course placing Advertiser's advertising on the beverage carts. Therefore, the intended result was a "net-zero" for Golf Course because it was obligated to pay the same amount monthly to Leasing Corporation that it would receive from Advertiser. As part of the transaction, Leasing Company purchased the beverage carts from Advertiser and leased them to Golf Course. The agreement between Leasing Corporation and Golf Course contained a hell-or-high-water clause which stated the obligations were absolute, unconditional, and not subject to cancellation or setoff for any reason. After six months, Advertiser stopped making advertising payments to Golf Course, and Golf Course in turn stopped making monthly payments to Leasing Corporation. Leasing Corporation filed suit against Golf Course. Golf Course filed an answer asserting the affirmative defense of fraud in the inducement and a counterclaim of fraudulent misrepresentation, alleging that Advertiser was acting as an agent for Leasing Corporation.

The district court granted Leasing Corporation's motion for summary judgment. Golf Course appealed, arguing (1) the transaction should be considered a secured transaction instead of a finance lease; (2) there is a genuine issue of material fact regarding whether an agency relationship existed between Leasing Corporation and Golf Course, which would allow Golf Course's fraud in the inducement to proceed; and (3) the close-connection doctrine prevents Leasing Corporation from enforcing the lease.

Holding: The Iowa Supreme Court reversed the district court's grant of summary judgment to Leasing Corporation. The Court found genuine issues of material fact regarding Advertiser's apparent authority to act as an agent on behalf of Leasing Corporation. The Court refused to consider the merits of Golf Course's argument that the transaction should be considered a secured transaction instead of a finance lease because Golf Course failed to preserve the issue. The Court also refused to adopt the "close-connection" doctrine.

Discussion: *Finance Lease v. Sale with Security Interest*. Golf Course argued the transaction should have been considered an agreement creating a security interest. Leasing Corporation contended the transaction was properly considered a finance lease. A "finance lease" involves three parties – the lessee/business, the finance lessor, and the equipment supplier. A security interest is an interest in personal property or fixtures which secures payment or performance of an obligation. Because the definition of a lease excludes agreements that create a security interest, a court must first turn to the definition of security interest. Iowa Code section 554.1201(37)(*b*) creates a two-part test to identify a security interest. If the two-part test is satisfied, the agreement is a security interest and cannot be a lease or a finance lease. An agreement which does not meet the two-part test may still be considered a transaction which creates a security interest based on the specific facts of the argument.

The Court did not reach the issue of whether the agreement between Golf Course and Leasing Corporation was a finance lease or a sale with a security interest because Golf Course did not preserve the issue on appeal, and Golf Course failed to state why the distinction would require that summary judgment be vacated in this case.

Agency. Golf Course argued Advertiser was actually an agent for Leasing Corporation and therefore Golf Course should be able to pursue its defense of fraud in the inducement and its counterclaim of fraudulent misrepresentation against Leasing Corporation. Golf Course complained that the transaction was misrepresented by employees of Advertiser and Golf Course was therefore induced to enter into the agreement. Defenses to contract formation, such as fraud in the inducement, may be asserted even where a part has agreed to a hell-or-high water clause or a waiver-of-defenses provision. It is undisputed actual authority does not exist here. For apparent authority to exist, the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority. Golf Course relied on several facts to support the alleged agency relationship, such as that Leasing Corporation allowed Advertiser to place Advertiser's own logo

at the top of the lease. Leasing Corporation adduced the affidavit of its CEO, who stated Leasing Corporation was in no way affiliated with Advertiser, and the agreement itself states no agency relationship existed. The Court determined there was circumstantial evidence that Advertiser created the paperwork used in the transaction. Despite the express statements disavowing the agency relationship in the contracts, Golf Course raised a genuine issue of material fact that allows the question to go to a fact finder.

Close-Connection Doctrine. Golf Course argued the Court should adopt the "close-connection" doctrine. The doctrine provides that "a transferee does not take an instrument in good faith when the transferee is so closely connected with the transferor that the transferee may be charged with knowledge of an infirmity in the underlying transaction." Golf Course contended the doctrine should be extended to the finance leasing context in an attempt to prevent the parties from using finance lessor status to perpetrate fraud. The Court refused to address whether it would adopt the close-connection doctrine because Golf Course framed its summary judgment resistance on the issue of agency and not on the issue of the close-connection doctrine.

Bank of the West v. Kline, 782 N.W.2d 453 (Iowa 2010)

Facts: Acme Land Company, LLC delivered an executed a construction mortgage in favor of Commercial Federal Bank (CFB) that encumbered real property in Dallas County, Iowa. In exchange, Acme executed a promissory note in the initial sum of five million dollars. To secure the note, several married couples executed an unlimited commercial guaranty of all of the obligations Acme owed to CFB. Each guaranty obligated the guarantor for any and all of Acme's debt to CFB. Thereafter, CFB became merged into Bank of the West (Bank), which acquired the debt at issue herein. Acme defaulted on the promissory note when it failed to repay the loan.

Bank filed a mortgage foreclosure petition and suit on guaranties against Acme and the individuals. One of the wives, Christine, answered the petition and alleged as an affirmative defense that the Equal Credit Opportunity Act barred Bank's claims against her. She also asserted her alleged ECOA violation as a counterclaim. Specifically, Christine alleged that Bank obtained her unlimited commercial guaranty solely because she was the spouse of another guaranty and not because other parties obligated to the bank were not sufficiently creditworthy to satisfy Acme's obligations. In other words, Christine (and eventually another guaranty, Phyllis) claimed Bank discriminated against her on the basis of her marital status in violation of the ECOA, rendering her guaranty void and unenforceable. Bank argued Christine could not raise an ECOA violation claim because she did not qualify as "applicants" under the ECOA.

The parties filed cross-motions for summary judgment. The district court ruled that Christine was an "applicant" and the ECOA violation could be used as an affirmative defense. After the district court clarified its ruling, it was determined Christine's motion for summary judgment was granted and Bank's

petition against Christine was dismissed. Bank appealed the dismissal of Christine.

Holding: An ECOA violation may be used by a guarantor as an affirmative defense, even after the statute of limitations for offensive claims for ECOA violations has run. The Court allows an ECOA violation as an affirmative defense because Iowa law precludes enforcement of illegal contracts. Here, there was sufficient evidence in the record that Bank violated the ECOA and the Court affirmed the district court's grant of summary judgment to Christine.

Discussion: The issues for the Court were (1) whether Christine could assert an ECOA claim and/or affirmative defense; i.e. whether she was an "applicant;" (2) whether Christine could assert an ECOA violation as an affirmative defense to void their guaranties even after the statute of limitations for an offensive claim under the ECOA had run; and (3) whether there remained disputed material facts as to whether Bank violated the ECOA.

First, the Court determined that Christine was an "applicant." The amended federal regulations define "applicant" as "any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of debt." The primary purpose of the amendment was to "give guarantors and similar parties standing to seek legal remedies when a violation occurs…"

Second, the Court determined that Christine could assert an ECOA claim as an affirmative defense, even after the statute of limitation had run. The Court recognized a split of authority among federal and state jurisdictions on this issue. The basic positions among the disagreeing camps are as follows: (a) A debtor can only assert an ECOA violation as a counterclaim because the language of the ECOA does not expressly or implicitly afford relief by way of affirmative defense; (b) A debtor can assert an ECOA violation as an affirmative defense in the nature of recoupment – the doctrine of "recoupment" allows a defendant to 'defend' against a claim by asserting the defendant's own claim against the plaintiff growing out of the same transaction; (c) A debtor can assert an ECOA violation as an affirmative defense based on the defense of illegality – that a contract in violation of a statute is void and unenforceable.

The district court allowed Christine's ECOA affirmative defense because her unlimited personal guaranty arose out of an illegal act and enforcement would be contrary to public policy. Contracts made in contravention of a statute are void. The ECOA was enacted in response to discrimination against credit applicants on the basis of sex or marital status, which were unrelated to creditworthiness. Bank violated the ECOA when it forced Christine to sign the guaranty solely because she was a spouse of another guaranty. The Court cited several other reasons to allow Christine to use the Bank's violations of the ECOA as affirmative defenses: (1) the threat of courts releasing guarantors from liability on guaranties obtained in violation of the ECOA will strongly deter discriminatory practices; (2) equity should forbid creditors from benefiting from their discriminatory practices in violation of the ECOA; and (3) allowing a guarantor to assert the ECOA violation as an affirmative defense

best protects the victims of credit discrimination. Finally, the Court noted "Congress did not intend for lenders to avoid the consequences of the ECOA by the mere passage of time." Bank never presented any affidavits showing a genuine issue of material fact existed as to the issue of creditworthiness. Therefore, the Court affirmed the district court's grant of summary judgment to Christine.

Van Sloun v. Agans Bros., Inc., 778 N.W.2d 174 (Iowa 2010)

Facts: Agans Brothers ("Landlord"), entered into a commercial lease with Superior Staffing ("Tenant") in 1997. The lease provided that any assignment of the lease or subletting of the premises, without the Landlord's written permission, shall make the rental for the balance of the lease term due and payable at once. Also, the written permission to sublet was not to be "unreasonably withheld." In April 2005, Tenant informed Landlord of its intent to purchase office space and to sublet the premises it was renting from Landlord. Tenant understood that, while Landlord could not unreasonably withhold consent, valid reasons for refusing consent could exist. After several months of futile efforts to obtain a new tenant, Tenant met with a woman who wanted to run an Indian grocery store as a subtenant ("Subtenant"). The food preparation would require altering the premises to install kitchen equipment. A representative of Tenant met with Landlord to discuss the sublease. Apparently Landlord was willing to consent to the sublease but needed more information. Tenant then told Subtenant that Landlord was not willing to rent her the space but recommended she consider renting a different property owned by Landlord. She agreed.

One month after Landlord refused to consent to the sublease, Tenant relinquished the space to Landlord and moved into its own office space. Tenant ceased paying rent to Landlord at that time. Landlord was unable to find a replacement tenant for many months. Tenant filed a declaratory judgment petition seeking a determination that its obligations under the lease were discharged because Landlord unreasonably withheld its consent to the sublease. Landlord counterclaimed, seeking contract damages for Tenant's failure to pay rent and attorney fees. The district court found that Landlord's consent was reasonably withheld. Tenant appealed.

Holding: In its first time addressing the issue of reasonableness of withholding consent in a lease provision, the Court affirmed the district court's decision that Landlord's consent was reasonably withheld. To determine the reasonableness of a commercial landlord's refusal to sublet, several facts may be considered.

Discussion: The Court endeavored to determine whether the district court properly found that Landlord reasonably withheld consent. The Court's goal in interpreting a lease is to ascertain the meaning and intention of the parties. The clause "shall not be unreasonably withheld" is not ambiguous. Therefore, the lease interpretation and its legal effect are questions of law for the court. The Court had not previously addressed the issue of reasonableness in a lease provision.

The proper standard for assessing the reasonableness of a commercial landlord's refusal to sublet is that of a "reasonably prudent person." To that end, "arbitrary considerations of personal taste, convenience, or sensibility are not proper criteria for withholding consent under such a lease provision." The question of whether a landlord's refusal is unreasonable is one of fact. In making the determination, various factors should be considered, including, but not limited to: (1) the financial responsibility of the proposed assignees, (2) the original tenant's failure to comply with the lease conditions, (3) the original tenant's failure to indicate a willingness to remain obligated on the lease, (4) the legality of the proposed use and need for alteration of the premises, and (5) the nature of the existing use and the proposed use by the new tenant.

Tenant claimed the district court erred in its determination that Landlord's refusal was reasonable. Specifically, Tenant claimed other factors relating to the financial viability of the proposed new tenant and Tenant's guarantee of the rent are the only factors that should be considered. The Court recognized those factors may be considered, but do not trump the factors the district court found determinative, especially with regard to alterations to the property and uses of the property. Tenant also claimed the district court's findings of fact were not supported by substantial evidence. However, on appeal in a law action the Court is bound by factual findings on the credibility of witnesses. The district court found Landlord's testimony regarding concerns about Subtenants' proposed changes and uses was credible.

Financial Bank v. Estate of Boesen, 2010 WL 2757375 (Iowa App. Ct. 2010)

Facts: Edward Boesen delivered to Freedom Financial Bank ("Bank") an "Open-End Real Estate Mortgage" with a future advance clause that indicated it secured credit of $290,000 and was senior to indebtedness to other creditors holding subsequently recorded or filed mortgages or liens. The mortgage further showed it was a purchase money mortgage. It was signed by Boesen and allegedly signed by his wife, Maureen. Boesen died intestate less than a year after the warranty deed was recorded with the Polk County Recorder.

An estate was opened for Boesen. The note securing Bank's mortgage was in default. Bank sued the estate and Boesen's wife to foreclose the mortgage, electing foreclosure without redemption. All parties filed motions for summary judgments and resistances to the same. The Boesen Estate contended the property was subject to the debts and charges of the estate. The district court determined the mortgage to be a purchase money mortgage under Iowa Code section 654.12B and determined that Maureen's interest was "any other right, title [or] interest … arising … through, or under" Boesen. The court rejected Maureen's argument that she took the property free of Bank's lien. In February 2009, the district court entered a decree foreclosing the mortgage and entered judgment in favor of Bank in the amount of $228,056 plus interest. Boesen's estate appealed from the order on summary judgment.

Holding: Where the decedent's ability to purchase property was contingent on the execution of the purchase money mortgage, the decedent's wife and Estate could not take the property free of the purchase money mortgage.

Discussion: The Court of Appeals considered whether the mortgage was a purchase money mortgage, making it superior to Maureen's rights under Iowa Code section 633.211 and any rights of the estate. The Estate and Maureen contended the mortgage was not a purchase money mortgage for two reasons: (1) Maureen's rights did not arise "either directly or indirectly by, through, or under the purchaser" pursuant to Iowa Code section 654.12B; (2) the conflict between her statutory rights and the purchase money mortgage should be resolved in favor of her statutory rights. The Court found the mortgage provided that it was a purchase money mortgage. The note it secured was for purchase money and the initial funds advanced by Bank were used to purchase the real estate. The purchase money mortgage met he definition of a lien based on a contract made by Boesen. The Court held Bank should prevail because the mortgage and the deed were in essence a single transaction. Also, the purchase money mortgage was properly recorded less than a minute after the deed conveying the property to Boesen.

GOVERNMENT

Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010)

Facts: Renda worked as a receiving and discharge clerk while an inmate at the Mt. Pleasant Correctional Facility. The position was the most respected and highest paid job within the prison. Shortly after she started working in the receiving and discharge department, an Officer began making romantic overtures toward her. At one point, Officer forced Renda to forge a property receipt to cover up the fact that he had given her a CD. Officer threatened to have Renda transferred to another facility if she reported his conduct to authorities. After several months, Renda was approached by an investigator regarding Officer's inappropriate behavior. Renda refused to talk to the investigator and was punished by being placed in solitary confinement for nine days. After getting out of solitary confinement, she returned to her job but was fired a few days later on "trumped up charges." Eventually, Renda cooperated with the investigation and was found 100% credible. Despite the results of the investigation, Renda became depressed and lost her satisfactory inmate status. She felt ostracized and was later denied a job in the recreation department because of the forged receipt incident.

Renda filed a complaint with the Iowa Civil Rights Commission. She claimed she was discriminated against on the basis of her sex and that she was retaliated against in the areas of employment and housing. The Iowa Civil Rights Commission closed her complained because the Commission felt her complaint did not allege a "discriminatory practice" as defined by Iowa Code chapter 216. Specifically, the Iowa Civil Rights Commission determined that an inmate is not considered an employee and a prison is not considered a dwelling under the Act. Renda sought judicial review. The Iowa Supreme

Court was faced with the issue of if and when an agency may interpret statutory terms, such as "employee" and "dwelling."

Holding: A state agency may interpret a statute only when the statute explicitly states it has the power to do so, or when the agency has clearly been vested with the authority to interpret the statute based on review of the context of the statutory provisions, the purpose of the statute, and other practical considerations. When a state agency has not clearly been vested with the authority to interpret a statute, the Court is free to substitute its judgment for that of the agency. Here, the Iowa Civil Rights Commission had not been clearly vested with the authority to interpret the terms "employee" and "dwelling."

Discussion: The Court considered the proper judicial review of an agency decision. When an agency has been clearly vested with the authority to interpret a statute, the Court must defer to the agency's interpretation and may only reverse if the interpretation is irrational, illogical, or wholly unjustifiable. When an agency has not been clearly vested with the authority to interpret a statute, the Court is free to substitute its judgment for that of the agency. Here, the the Court examined whether the interpretation of the specific terms "employee" and "dwelling" had been clearly vested in the discretion of the Iowa Civil Rights Commission.

In its opinion, the Court discussed relevant principles of agencies' authority. Because the legislature does not usually specifically address in the legislation the extent to which an agency is authorized to interpret a statute, the Court's analysis is focused on the statutory provisions at issues, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency. It is conceivable that the legislature intended an agency to interpret certain provisions of a statute, but not others. Further, a mere grant of rulemaking authority does not necessarily give an agency the authority to interpret *all* statutory language. For example, the Court noted that while the Iowa Finance Authority had been given "all of the general powers needed to carry out its purposes and duties…" and the authority t adopt rules "necessary for the implementation of the title guaranty program," the agency did not have the authority to interpret the terms "hardship" and "public interest." Each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes.

An examination of Iowa case law on this issue has created guidelines to inform the court's analysis. First, when the statutory provision being interpreted is a substantive term within the special expertise of the agency, the agency is vested with the authority to interpret the provision(s). Second, when the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing, the agency generally has not been vested with interpretive power. Third, when a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, the agency generally has not been vested with interpretive power.

Here, the Court is not convinced the legislature intended to vest the Iowa Civil Rights Commission with authority to interpret "employee" and "dwelling." Both terms have specialized legal meaning and are widely used in areas of law other than civil rights. It is also noted the parties relied on definitions of these terms from various other substantive areas of law. Therefore, the Court would not give deference to the agency's interpretation and instead substituted its judgment to that of the Commission if the Commission made an error of law.

Botsko v. Davenport Civil Rights Commission, et. al., 774 N.W.2d 841 (Iowa 2009)(November)

Facts: Employee filed a harassment complaint against her employer, Dentist. An administrative law judge issued a proposed decision in favor of Dentist. The Davenport Civil Rights Commission reviewed the matter and determined that Dentist's conduct was "based on sex" and unwelcomed. The commission awarded Employee $5,000.00 in emotional distress damages, $20,000 in compensatory damages, and attorneys' fees of $30,000.00. Dentist filed a petition for judicial review.

Dentist argued, among other things, that his procedural due process was violated with the executive director of the commission assisted the Employee at the hearing and then proceeded to advise the commission regarding the proper disposition of the case. The executive director was involved in the investigation process. Also, the executive director allegedly advocated for Employee at the administrative hearing by introducing several exhibits into the record, sitting at counsel table with Employee's attorney, and engaging in off-the-record consultations with Employee's attorney. The case found its way to the Iowa Court of Appeals where the commission's decision against Dentist was affirmed. The Iowa Supreme Court granted further review.

Holding: Where an agency member advocated on behalf of the complainant and was also involved in the adjudication process, there was an appearance of fundamental unfairness. In such scenario, the risk of injecting bias into the adjudicatory process created a violation of procedural due process. The executive director's advocacy was of a sufficient nature to preclude her later participation in the adjudicatory process in the case under the due process clauses of the state and federal constitution.

Discussion: A party in an administrative proceeding is entitled to procedural due process, which involves at least a "fair trial in a fair tribunal." In administrative settings, the burden of persuasion regarding bias is must more difficult because there is a combination of investigative and adjudicative functions. When a party challenges on procedural due process grounds the combination of investigative and adjudicative processes within an agency, he must overcome a presumption of honesty and integrity in those serving as adjudicators. The mere fact that investigative and adjudicative functions are combined within one agency does not give rise to a due process violation. Such combinations are the very nature of the administrative process before an agency. Therefore, absent actual bias, there was no violation of due process here

simply because the executive director had some involvement in the investigation and later participated in the deliberations.

A more serious problem is posed, however, where the same person within an agency performs both prosecutorial and adjudicative roles. When an agency member becomes involved in the plaintiffs' litigation strategy or assumes a personal commitment to a particular result, he or she becomes an adversary with the "will to win." Leading secondary authority commentators have suggested that one may not regain objectivity once he or she has the "will to win" a particular result. In such a case, the probability of actual bias is too high to allow the member to also participate in the adjudicative process.

Here, the fact that the executive director entered exhibits did not trouble the Court. Such actions simply set the stage for the proceeding and are the kind of marginal participation in the administrative process that do not give rise to the "will to win." The Court was troubled that the executive director sat at counsel table with complainant and conferred with counsel. The executive director was engaged in advocacy, which was sufficient to preclude her later participation in the adjudicatory process. The combination of advocacy and adjudicative functions has the appearance of fundamental unfairness in the administrative process. Because of the risk of injecting bias into the adjudicatory process, Dentist was not required to show actual prejudice. The decision of the commission against Dentist was vacated. The Court suggested the commission may avoid the due process violation by submitting the case to a disinterested quorum of current commission members.

Lewis v. Civil Service Comm'n of the City of Ames, 776 N.W.2d 859 (Iowa 2010)

Facts: Employee was employed in the public works department, street operations division, of the City of Ames as a maintenance worker. He had worked at the public works department for eighteen years. In June 2006, Employee was arrested for operating while intoxicated and his driver's license was suspended. Employee told the director of the public works department about his OWI and later informed the director his license would be suspended for six months. Maintenance workers are required to have class "A" or "B" commercial driver's license. Employee's superiors met to determine whether and how Employee should be disciplined. Eventually, the public works department alerted Employee in writing that the city was planning to terminate his employment. Employee appealed his termination to the City of Ames Civil Service Commission. The commission upheld the termination. On appeal to the district court, the termination was overturned as "arbitrary." The court of appeals affirmed the district court and the commission sought further review by the Iowa Supreme Court.

Holding: The Court held Employee's termination was warranted under Iowa Code sections 400.18 and 400.19 for failure to maintain required credentials. Civil service employees may only be terminated for neglect of duty, disobedience, misconduct, of failure to properly perform the person's duties. They may not be terminated arbitrarily.

Discussion: The Iowa Supreme Court sought to determine, de novo, whether Employee's termination was warranted. Iowa Code chapter 400 controls civil service employment. That chapter provides that civil service employees cannot be terminated arbitrarily. A terminated employee may appeal a civil service commission decision to the district court, which may proceed by "trial de novo." Throughout the trial court and appellate court proceedings, the commission has the burden of showing that the discharge was statutorily permissible, and the Court gives no weight to or presumption in favor of the commission's determination.

It is improper for a civil service employee to be fired for reasons other than those found in sections 400:18 and 400:19: neglect of duty, disobedience, misconduct, or failure to properly perform the person's duties. The legislature did not define these terms. The Court may look to the department's own rules and prescribed code of conduct as well as existing precedent for guidance in determining whether an employee's actions fall within these categories. Additionally, a lack of standard policy may be probative. Here, Employee was terminated for failing to maintain credentials – the driver's license needed to perform his job. City policy provided "failure to maintain required credentials shall be considered grounds for termination of employment." Further, city policy provided that an employee who does not maintain a required credential "shall be terminated" where the activity requiring a credential is the "core defining function of the job." Employee's supervisors testified they decided to terminate Employee because they concluded maintenance of a driver's license was a "core defining function" of his job and therefore, termination was the appropriate response to Employee's failure to maintain a license. The city also relied on the job description of maintenance worker, which emphasizes the driving involved in the position.

Employee argued the city could have accommodated his license revocation without terminating his employment and therefore his termination was arbitrary. He also argued the city could have continued to employ him during his license suspension. However, the Court found the city's termination of Lewis was warranted. "Give [Employee's] inability to perform the job requirement of driving and his failure to maintain the necessary credential required by city policy, even though only temporarily, his termination was warranted."

Pants on Fire:

False Statements and Testimony

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I. INTRODUCTION

Perjury is a perplexing professional responsibility subject. This is especially true where a client testifies falsely. On one hand, perjury is a crime and it is therefore wrong for lawyers to suborn or even tolerate it. Lawyers' duty to represent clients diligently certainly does not extend to offering false testimony. Perjured testimony threatens the fair administration of justice and seriously undermines the rule of law. False testimony that does not qualify as the crime of perjury may have the same effects. On the other hand, it is not lawyers' role to determine the truth—that is courts' and jurors' role. For that matter, how are lawyers supposed to know what the "truth" is when presented with conflicting witness testimony and disputed issues of fact?

Certainly, even the most inexperienced lawyers knows that they should not elicit false testimony, but seemingly straightforward rules sometimes become complex in practice. Indeed, the problem of client perjury is often described as creating a professional responsibility "trilemma"[1] for lawyers because of the three competing obligations that lawyers must balance: (1) the requirement that lawyers learn as much as possible about clients' cases in order to provide competent and diligent representation, and, in the criminal context, effective assistance; (2) the duty of confidentiality, which is intended to encourage clients to trust their lawyers and to be candid with them; and (3) the duty of candor to the tribunal. The perjury trilemma is especially acute in criminal cases because defendants' constitutional rights commonly influence lawyers' professional obligations. For example, it is clear that criminal defendants have a constitutional right to testify at their trials, yet the same authorities that establish defendants' constitutional

[1] Prof. Monroe H. Freedman coined the term "trilemma" in a seminal law review article on client perjury over forty years ago. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

right to testify indicate that defendants have no right to testify falsely. This creates severe ethical tensions for criminal defense lawyers who believe that their clients intend to testify falsely. Even in civil litigation, it may be exceedingly difficult for lawyers to fulfill all three duties.

The professional responsibility challenges attending false testimony are not limited to clients. Lawyers cannot allow, assist or counsel witnesses to testify falsely. Our professional responsibility regime generally elevates lawyers' duty of candor to a tribunal over the duties of competence and diligence, and, at least in those jurisdictions that have adopted the Model Rules of Professional Conduct, over the duty of confidentiality owed to clients.

II. LAWYERS' DUTY OF CANDOR AND THE PROBLEM OF FALSE TESTIMONY

The Model Rules of Professional Conduct address false testimony both prospectively and retrospectively. In other words, what are lawyers' obligations preceding depositions, hearings or trials where clients or witnesses indicate their intention to testify falsely, and what are lawyers' duties when confronted by real-time or actual perjury, as where clients or witnesses unexpectedly lie in depositions or during trial?

A. Applicable Rules of Professional Conduct

The problem of false testimony is principally governed by Model Rules 3.3 and 3.4, entitled "Candor Toward the Tribunal" and "Fairness to Opposing Party and Counsel," respectively. Both rules obviously concern lawyers' roles as advocates. Model Rule 3.3 provides in pertinent part:

> (a) A lawyer shall not knowingly:
>
> * * *
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has

> offered material evidence and the lawyer knows of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.[2]

Similarly, Model Rule 3.4(b) provides that a lawyer shall not "counsel or assist a witness to testify falsely."[3] If lawyers cannot offer unexpected false testimony and must, in fact, disclose clients' and witnesses' perjury in accordance with Rule 3.3, then it follows that they may not falsify testimony themselves or allow or encourage witnesses to testify falsely. This is true even where the witness concocts the false testimony and the lawyer goes along.[4] Moreover, a lawyer violates Rule 3.4(b) simply by advising or counseling a witness to testify falsely—the witness does not have to actually testify falsely to perfect the violation.[5] Although Rule 3.4(b) rule refers only to *witnesses*, it applies equally to cases in which lawyers assist or counsel *clients* to testify falsely.[6] The terms are not exclusive; clients may be witnesses, after all.

Rule 3.4(b) concerns most commonly surface in connection with lawyers' preparation of witnesses to testify, often described as witness "coaching." Although lawyers clearly cannot in

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[2] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) & (b) (2009).

[3] *Id.* R. 3.4(b).

[4] *In re* Foley, 787 N.E.2d 561, 569 (Mass. 2003).

[5] *Id.* at 569-70.

[6] *See, e.g.*, *In re* Storment, 873 S.W.2d 227, 228-30 (Mo. 1994) (disbarring lawyer who counseled client to lie in custody proceeding); *In re* Feld's Case, 815 A.2d 383, 389 (N.H. 2002) (suspending lawyer over client's false testimony).

their preparatory efforts coerce, induce, or persuade witnesses to testify falsely, it should be clear that there is nothing unethical about lawyers helping witnesses articulate, phrase, rephrase, shape or polish truthful testimony. Lawyers may rehearse testimony with witnesses and suggest word choices.[7] In a criminal case, for example, the Wyoming Supreme Court was unbothered by a defense lawyer's instruction to his client to describe the client's use of a knife to "cut" rather than "stab" the victim.[8] Moreover, lawyers are permitted to discuss facts with witnesses, as well as the application of law to facts. Lawyers are not required to passively accept witnesses' characterizations or recollections of events or information. Lawyers may discuss with witnesses other evidence or testimony that has been or will be offered. Indeed, lawyers may attempt to persuade witnesses, "even aggressively," that the witnesses' versions of certain fact situations are inaccurate or incomplete.[9] Lawyers are therefore entitled to implicitly alter what a witness would have said absent a discussion with the lawyer, so long as the witness' testimony remains truthful. On the other side of the coin, witnesses are entitled to reject lawyers' suggested word choices and urged factual analyses or interpretations. Lawyers must respect witnesses' right to disagree and defer to witnesses who insist that they cannot truthfully testify in the fashion or manner the lawyer advocates. In any event, courts acknowledge that lawyers are obligated to prepare witnesses to testify.[10] This obligation is generally expressed as an aspect of lawyers' related duties of competence and diligence.

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[7] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b (2000).

[8] Haworth v. State, 840 P.2d 912, 914 (Wyo. 1992).

[9] Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993).

[10] Odone v. Croda Int'l PLC., 170 F.R.D. 66, 69 (D.D.C. 1997); State v. McCormick, 259 S.E.2d 880, 882 (N.C. 1979), *superseded by rule as stated in* State v. Squire, 364 S.E.2d 354, 357 (N.C. 1988) (discussing superseding rule on the introduction of character evidence).

Courts consider Rule 3.3 and 3.4(b) violations to be extremely serious because knowingly offering false testimony is antithetical to lawyers' oaths and to the legal profession's ideals.[11] A lawyer may be found to have violated either rule even where the false testimony did not affect the outcome of the proceedings.[12] The fact that the false testimony was immaterial may mitigate any sanction to be imposed, and perhaps even prevent the imposition of any sanction whatsoever, but it does not erase the violation.

Although it is not apparent from the text of either Model Rule 3.3(a)(3) or Model Rule 3.4(b), both rules sometimes do allow lawyers to elicit false testimony from witnesses so long as that testimony is not intended to mislead the trier of fact. This is consistent with the general recognition that lawyers may offer false evidence for the purpose of establishing its falsity.[13] In the testimonial context, for example, a lawyer might elicit false testimony from an opposing witness for the purpose of later demonstrating its falsity to discredit the witness.[14] Requiring premature disclosure could in some circumstances allow the witness to explain away the false testimony or reframe it to make it seem plausible.[15] Effective cross-examination may pivot on this exact tactic.

Furthermore, the fact that a client or witness may testify falsely on one subject does not preclude a lawyer from offering the client's or witness' testimony altogether. For example, a lawyer who knows that a witness will testify falsely on Subject *A* may nonetheless call the

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[11] *In re* Disciplinary Action Against McDonald, 609 N.W.2d 418, 427 (N.D. 2000).

[12] *Id.*

[13] MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 5 (2009) ("A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.").

[14] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. e (2000).

[15] *Id.*

witness to testify truthfully about Subject *B* without violating Rules 3.3(a)(3), 3.3(b), or 3.4(b).[16] Certainly, the lawyer cannot question the witness with respect to Subject *A*.

Importantly, Model Rules 3.3(a)(3) and 3.4(b) refer to false testimony—not perjury. The crime of perjury typically requires that the subject testimony be (1) willfully false; (2) material to the outcome of the matter; and (3) not earlier discoverable through reasonable diligence. Rules 3.3(a)(3) and 3.4(b) plainly incorporate different elements. Thus, and by way of example, a lawyer may be held to violate Rules 3.3(a)(3) or 3.4(b) even when a client's false testimony is not material to the outcome of the matter.[17] A lawyer may be held to have violated these rules even though the witness was never criminally charged or convicted in connection with the false testimony.

Unlike perjured testimony, which must be willfully false, testimony may be false for purposes of Rules 3.3(a)(3) and 3.4(b) even if the witness is mistaken rather than lying.[18] This application may strike some lawyers as odd, because both rules—and especially Rule 3.4(b)—seem to focus on deliberately false testimony rather than innocently mistaken testimony. But a statement's falsity under either rule does not depend on whether it is morally objectionable. In this context as others, a statement is false if it is contrary to fact, incorrect, or groundless; falsity does not depend upon or require dishonesty or intent to mislead. And because even innocent

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[16] *See, e.g.*, State v. Pendleton, 759 N.W.2d 900, 908-09 (Minn. 2009) (recognizing that prosecution could call a witness to testify on an issue on which he was believed to testify truthfully and narrowly limit questioning to that issue while not questioning the witness on other issues on which he might testify falsely).

[17] *See, e.g., In re* Feld's Case, 815 A.2d 383, 388 (N.H. 2002) (involving Rule 3.4(b)).

[18] *See* N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 837, at 4 (2010) (contrasting DR 7-102(B)(1) of the former New York Code of Professional Responsibility, "which required a 'fraud' to have been perpetrated," with Rule 3.3(a)(3) and stating that "Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered") (footnote omitted).

misstatements may affect a court's decision or the course of litigation, preventing and correcting mistaken testimony is an important goal. When evaluating falsity under Model Rules 3.3(a)(3) and 3.4(b), then, a witness' state of mind is irrelevant; it is the lawyer's knowledge that counts. Fortunately for lawyers, this broad interpretation of falsity remains reasonably bounded. For witnesses' testimony to be false under Model Rules 3.3(a)(3) and 3.4(b), it must be objectively erroneous or untrue; the fact that two witnesses disagree on perceived affairs or events, for example, does not render either witness' testimony false. Additionally, a witness' testimony may change by virtue of new information learned between the first time the witness testified and the second, as where a witness is first deposed and later testifies at trial, or where a witness testifies in multiple proceedings. The fact that the witness testifies differently the second time as a result of the new information does not render either round of testimony false under these rules.[19]

In obvious contrast, Model Rule 3.3(b) specifically refers to "criminal or fraudulent conduct."[20] As a result, Rule 3.3(b) applies only where a witness intends to commit perjury or testify falsely with intent to deceive or actually does so. While well-meaning but mistaken testimony by a witness may have a negative effect on a case, and capable advocates will attempt to prevent or correct inaccurate testimony, such errors do not implicate the lawyers' duties under Rule 3.3(b).

Finally, it is critical to recognize that Model Rule 3.3 speaks of tribunals and adjudicative proceedings rather than courts, and Rule 3.4 is silent as to the forum. Thus, while reported cases on false testimony typically arise out of court proceedings, lawyers' duties are not so limited.

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[19] *See, e.g.*, Shade v. Great Lakes Dredge & Dock Co., 72 F. Supp. 2d 518, 524 (E.D. Pa. 1999) (involving witness who testified to one set of facts in his own case and to another in a co-worker's subsequent trial; the witness learned new information about the injury-causing piece of machinery between the time of his trial and his co-worker's trial).

[20] MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2009).

Lawyers must not offer false testimony, cannot counsel or assist witnesses to testify falsely, and must correct material false testimony offered by clients and their witnesses in arbitrations and other types of judicial and quasi-judicial proceedings.[21] Lawyers' duties apply to false testimony given in depositions, just as they do to false testimony presented before a tribunal.[22] This should come as no surprise, since deposition testimony is commonly offered as evidence in support of dispositive motions and at trial.

B. The Duration of the Obligation

Under Model Rule 3.3(c), lawyers' duties under Rules 3.3(a)(3) and (b) "continue to the conclusion of [a] proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."[23] Model Rule 3.3(c) performs the key function of establishing an ending point for lawyers' duty of candor. The rule recognizes that lawyers cannot be forever required to ensure the integrity of their clients and witnesses.[24] Unfortunately, the conclusion of a proceeding is not necessarily self-evident.

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[21] *See, e.g.*, Kan. Bar Ass'n, Prof'l Ethics Advisory Comm., Legal Ethics Op. No. 98-1 (1998) (discussing duty to remedy client's materially false testimony in a workers' compensation proceeding).

[22] Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Crary, 245 N.W.2d 298, 305 (Iowa 1976) (discussing the conduct of a lawyer who permitted his client to perjure herself at her deposition and explaining why lawyers cannot permit false testimony in any context); N.Y. County Lawyers' Ass'n, Comm. on Prof'l Ethics, Formal Op. No. 741, at 3-5 (2010) [hereinafter NYCLA Formal Op. No. 741] (discussing false testimony at depositions and remediation thereof); R.I. Sup. Ct. Ethics Advisory Panel Op. 91-76 (1991) (referring to false deposition testimony by a client's employee).

[23] MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (2009).

[24] *Id.* R. 3.3 cmt. 13 ("A practical time limit on the obligation to rectify false evidence or false statements . . . has to be established.").

A lawyer's discharge by a client or withdrawal from a representation does not conclude a proceeding, regardless of whether the discharge or withdrawal relates to the false testimony at issue.[25] In such a case, disclosing the false testimony to successor counsel may be a reasonable remedial measure.[26] Nor can a proceeding be said to conclude only when the time to move to reopen or vacate the judgment has expired. Although a motion to relieve a party from a final judgment typically must be made within one year of the judgment's date or entry, jurisdictions often impose no deadline for seeking relief from a judgment procured through fraud on a court. As a result, a lawyer would have a perpetual duty to rectify a client fraud, which, as Rule 3.3(c) recognizes, is unworkable.

Generally, a proceeding is concluded either when (1) the judgment has been affirmed on appeal; or (2) the time for all parties to appeal has run, including the time for petitioning for a writ of certiorari.[27] In a criminal case, a judgment of acquittal concludes the proceeding because the prohibition against double jeopardy prevents the government from retrying the defendant for substantially the same offense. When criminal defendants are convicted and wish to appeal, the term "appeal" should be confined to direct appeals and not be expanded to include collateral attacks on convictions, such as writs of habeas corpus. To hold otherwise would unreasonably extend lawyers' obligations, since defendants who allege that they were wrongfully convicted may pursue extraordinary relief long after any time to appeal has run. In the administrative realm, a proceeding should be deemed to be concluded after the administrative process is

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[25] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. h (2000).

[26] *Id.*

[27] Holden v. Blevins, 837 A.2d 1053, 1057 (Md. Ct. Spec. App. 2003); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 13 (2009) (stating that a proceeding has been concluded when a final judgment has been affirmed on appeal or the time for review has passed).

exhausted and (a) the time for a permissible judicial challenge to the administrative decision by any party has expired; or (b) the administrative decision has been judicially upheld.

Unlike Model Rules 3.3(a)(3) and (b), Model Rule 3.4(b) does not specify a duration for a lawyer's duty not to counsel or assist a witness to testify falsely. There is no reason to do so. A lawyer who counsels or assists a witness to testify falsely violates Rule 3.4(b) immediately upon offering the advice or providing the assistance. A lawyer who counsels or assists a witness to testify falsely violates the rule even if the witness never testifies or, despite the lawyer's improper advice or assistance, testifies truthfully. Lawyers who experience a change of heart and attempt to remedy false testimony that they have induced or orchestrated may mitigate any professional discipline that might be imposed, but there is no curing a Rule 3.4(b) violation.[28] Furthermore, lawyers who counsel or assist witnesses to testify falsely still have a duty to remedy that false testimony under Rules 3.3(a)(3) and (b), which, of course, have durational bounds.

C. Candor Trumps Confidentiality

The law assigns high values both to lawyers' duty of candor to tribunals and to lawyers' duty of confidentiality to clients. Model Rule 3.3(c) makes clear that lawyers' duty to remedy false testimony by clients and by witnesses they call exists even if compliance with this duty will require them to disclose information otherwise protected by Rule 1.6.[29] Rule 1.6 is the general rule on confidentiality and, with a few exceptions, prevents lawyers from revealing information

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[28] *See, e.g.*, Office of Disciplinary Counsel v. Valentino, 730 A.2d 479, 483 (Pa. 1999).

[29] MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (2009); *see, e.g.*, United States v. Allen, No. 06-40056-01-SAC, 2008 WL 2622872, at *3 (D. Kan. July 1, 2008) (expressing this view in connection with motion to withdraw by criminal defense counsel).

relating to clients' representations. Lawyers' duties with respect to false testimony are consistent with their duty of candor in other contexts. For example, it is generally accepted in jurisdictions adopting the Model Rules approach that lawyers' duty of candor to the tribunal under Rule 3.3(a)(1)[30] and their duty of candor as officers of the court trump their duty of confidentiality to clients.[31]

It is worth recognizing, however, that not all jurisdictions elevate lawyers' duty of candor to the tribunal over their duty of confidentiality to clients to the extent the Model Rules do. In some jurisdictions, a lawyer who knows that a client intends to testify falsely or has done so and cannot persuade the client to rectify the situation must simply withdraw from the representation without revealing the client's misconduct.[32] The most that lawyers can say to the court is that their withdrawal is required, or is required by rules of professional conduct. The lesson for lawyers is obvious: check the case law, ethics opinions, and rules in a jurisdiction before deciding whether and how to reveal false testimony.

Even in jurisdictions adhering tightly to the Model Rules approach, lawyers should, to the extent reasonably possible, attempt to prevent or rectify false testimony without revealing information relating to the client's representation. If lawyers must disclose information otherwise protected by Rule 1.6 to prevent or remedy false testimony, they should be careful to limit those disclosures to only that information necessary to fulfill their duty of candor. Lawyers

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[30] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2009) (stating that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

[31] Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063, 1067 (7th Cir. 2000); *In re* Potts, 158 P.3d 418, 424 (Mont. 2007).

[32] *See, e.g.*, N.D. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2006); TENN. RULES OF PROF'L CONDUCT R. 3.3(f) (2009).

should preserve as much of their clients' confidentiality as practicable. In some cases, it may be appropriate to seek protective orders or similar safeguards in connection with the disclosure.

In re Mack[33] is an interesting civil case involving false testimony by a client revealed well after the fact and the interplay between a lawyer's duties of candor and confidentiality. In that case, John Mack represented K.G. in a declaratory judgment action against State Farm Mutual Automobile Insurance Co. arising out of an accident in which K.G.'s daughter was injured. State Farm had denied coverage for the accident based on K.G.'s non-payment of her June 15, 1990 premium. Mack attached to the complaint in the declaratory judgment action a copy of a renewal notice bearing a handwritten note indicating that the premium had been paid on June 13, 1990 by check number 8440, and a cancelled check bearing the same date made out to State Farm in the amount of the disputed premium. The cancelled check indicated that it had been charged to K.G.'s account in late July 1990.

State Farm deposed K.G. in October 1990. She testified that her brother-in-law had mailed the check to State Farm on June 13.[34] She further testified that she made the note on the premium notice and that she and her family did not maintain an accurate check register or even write checks in sequence. In response to a direct question, K.G. denied mailing the check after her daughter's accident.[35] In May or June 1991, however, K.G. confessed to Mack that she had lied in her deposition.[36] K.G. explained to Mack that she had written the check a few days after her daughter's accident and placed the envelope containing the check in a inconspicuous spot in

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[33] 519 N.W.2d 900 (Minn. 1994).

[34] *Id.* at 901.

[35] *Id.*

[36] *Id.*

a post office, trusting that someone would eventually find and mail it, and that she could deflect blame for her late payment onto the postal service.

Mack would later contend that he told K.G. that she should reveal her deception should her case go to trial, but, until then, she could continue her lawsuit and "simply 'rely on her right to remain silent.'"[37] K.G. would eventually testify that Mack never told her to reveal her false testimony and a disciplinary referee would reach the same conclusion. Mack certainly did not reveal K.G.'s false testimony to the court. In any event, K.G. repeated her false testimony on direct examination at trial but revealed the fraud on cross-examination (Mack did not try the case because he had been suspended on unrelated charges in the interim) and State Farm won the case. K.G. was then prosecuted for perjury, but the state dismissed her criminal case during trial when it became clear that K.G. had tried to set the record straight with Mack.[38]

Mack defended his conduct on the basis that the attorney-client privilege prevented him from revealing K.G.'s false testimony.[39] Mack should have invoked his duty of confidentiality under Rule 1.6 instead of the attorney-client privilege—or at least in addition to it—but the Minnesota Supreme Court understood the argument nonetheless. The court acknowledged that while Mack generally had a duty under Minnesota Rule 1.6(a) to protect K.G.'s confidences, Rule 1.6(b) permitted him to reveal her confidences to the extent necessary to rectify her use of his services to further a fraud.[40] Moreover, Minnesota Rule 3.3(a) plainly required Mack to take

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[37] *Id.* (quoting Mack).

[38] *Id.* at 902.

[39] *Id.*

[40] *Id.*

reasonable remedial action once he learned of K.G.'s false testimony, even if that required him to reveal information otherwise protected by Rule 1.6.[41]

The *In re Mack* court concluded that Mack's silence in the face of K.G.'s perjury violated Rule 3.3(a), and further violated Rules 8.4(c) and (d) because it was deceitful and prejudicial to the administration of justice.[42] Had K.G. not broken down under cross-examination at trial, her lie might well have escaped detection. Finding Mack's failure to take remedial measures or to disclose K.G.'s perjury to be a serious violation of the rules of professional conduct, the court suspended him from practice indefinitely.

D. False Testimony and the Knowledge Element

Lawyers are prohibited from offering false testimony, and must remedy perjured or fraudulent testimony, only if they *know* of its falsity. The existence and extent of lawyers' knowledge are frequent points of dispute. For lawyers to know facts or matters in this context, as elsewhere, they must have actual knowledge of them, although knowledge may be inferred from circumstances.[43] The fact that a lawyer *should have known* about something does not equal knowledge of it.[44] Lawyers' belief, speculation or suspicion that clients or witnesses intend to testify falsely, or in fact have already done so, does not equate to knowledge of false

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[41] *Id.*

[42] *Id.*

[43] MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2009) ("A person's knowledge may be inferred from circumstances.").

[44] *In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999).

testimony.[45] Not even a lawyer's strong suspicion that a client or witness plans to testify falsely or has already done so constitutes knowledge under ethics rules.[46]

Generally speaking, lawyers should not hastily judge clients' or witnesses' truthfulness, nor should they assume that clients or witnesses are liars or are mistaken. Mere inconsistencies in evidence or in a client's or witness' version of events do not equate to knowledge of false testimony.[47] It is permissible for lawyers to give clients and witnesses the benefit of the doubt when weighing evidence and testimony.[48] Superficially dubious or unsupported accounts of events periodically prove to be true. None of this means, however, that lawyers can avoid acquiring knowledge of false testimony through creative rationalization, feigned ignorance, or willful blindness. A lawyer may be considered willfully blind where the facts indicating that evidence is false are "substantial and obvious" or "overwhelmingly clear and unambiguous."[49]

Most questions about lawyers' knowledge of false testimony surface in criminal litigation in connection with defendants' intent to commit perjury in an effort to avoid conviction. Courts have expressed a range of tests for establishing lawyers' knowledge of false testimony.[50] The

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[45] United States v. Midgett, 342 F.3d 321, 326 (4th Cir. 2003) (referring to lawyer's belief); People v. Bolton, 82 Cal. Rptr. 3d 671, 681 (Cal. Ct. App. 2008) (describing lawyer's suspicion); State v. Chambers, 994 A.2d 1248, 1260 n.13 (Conn. 2010) (stating that conjecture and speculation do not equate to knowledge); Commonwealth v. Brown, 226 S.W.3d 74, 84 (Ky. 2007) (referring to conjecture and speculation); Commonwealth v. Mitchell, 781 N.E.2d 1237, 1251 (Mass. 2003) (referring to a lawyer's conjecture and speculation).

[46] *In re* Grievance Comm. of the U.S. Dist. Ct., 847 F.2d 57, 63 (2d Cir. 1988).

[47] *Chambers,* 994 A.2d at 1260 n.13.

[48] MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 8 (2009).

[49] *In re* Driscoll, 856 N.E.2d 840, 847 (Mass. 2006).

[50] *See, e.g.,* United States v. Long, 857 F.2d 436, 444-46 (8th Cir. 1988) (requiring a "firm factual basis"); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (articulating a "firm factual basis" standard); State v. Chambers, 994 A.2d 1248, 1260 n.13

Wisconsin Supreme Court articulated the highest standard in *State v. McDowell.*[51] The court in *McDowell* was weighing whether a criminal defense lawyer provided ineffective assistance by shifting to narrative testimony when his client was on the stand, as criminal defense lawyers often do when their clients insist on testifying and the lawyer understands that the client intends to lie. The defendant had told his lawyer that if he testified, he would ''say what [he needed] [to] say to help [himself] out and if [he had] to say something untruthful [he'd] say that.'"[52] In determining that this admission did not vest the defense lawyer with knowledge of his client's intent to testify falsely, the *McDowell* court stated that absent "the most extraordinary circumstances, such knowledge must be based on the client's expressed admission of intent to testify untruthfully."[53] The intent to testify falsely "need not be phrased in 'magic words,'" the court explained, but it "must be unambiguous and directly made to the attorney."[54]

Critics of the *McDowell* opinion might argue that the defendant *did* expressly admit his intention directly to the lawyer, especially given the Wisconsin Supreme Court's observation that a person's intent to testify falsely need not be expressed in magic words. Indeed, the defendant

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(Conn. 2010) (expressing a "firm basis in objective fact" standard); Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989) (requiring knowledge "beyond a reasonable doubt"); People v. Calhoun, 815 N.E.2d 492, 499 (Ill. App. Ct. 2004) (referring to "a good faith determination" that a defendant intends to commit perjury); Hobson v. State, 675 N.E.2d 1090, 1095 (Ind. 1996) (suggesting "an absolute degree of certainty" standard); State v. Hischke, 639 N.W.2d 6, 10 (Iowa 2002) (requiring "good cause to believe" that testimony "would be deliberately untruthful"); *Brown*, 226 S.W.3d at 84 (requiring that a lawyer "in good faith have a firm basis in objective fact"); *Mitchell*, 781 N.E.2d at 1250-51 (embracing the "firm basis in objective fact" standard); State v. McDowell, 681 N.W.2d 500, 513 (Wis. 2004) (requiring an "expressed admission of intent to testify untruthfully").

[51] 681 N.W.2d 500 (Wis. 2004).

[52] *Id.* at 506 (quoting the defense lawyer).

[53] *Id.* at 513.

[54] *Id.*

could hardly have been clearer about his intent to lie on the witness stand. Whatever the merits of such criticism, it would seem that Wisconsin courts and other jurisdictions that adopt the same approach limit lawyers' knowledge of false testimony to those unusual situations in which a client or witness actually tells a lawyer, "I lied about *X*," or "I intend to testify falsely about *Y*," or something very close.

The favored standard for knowledge requires that a lawyer have a "firm basis in fact," a "firm factual basis," or a "firm basis in objective fact" that a client or witness will testify falsely.[55] The firm factual basis standard applies in civil and criminal matters alike. Even this seemingly moderate standard sets a high bar. Lawyers may rely on facts disclosed to them and have no duty to independently investigate the truthfulness of client's or witness' testimony,[56] although it obviously may be wise to do so from an advocacy perspective. There are a number of cases in which defense lawyers' supposed knowledge of clients' or witnesses' intent to testify falsely was held to be inadequate. *State v. Colson*[57] is illustrative.

The teenage defendant in *Colson,* Kendrick Colson, was arrested for robbery. He was interrogated by police and, after being read his *Miranda* rights, confessed to the crime.[58] The court appointed Robert Leas to represent him. The day before Colson's trial was to begin, leas moved to withdraw from his representation on the basis that he could no longer competently and professionally represent him. Leas reported that Colson wanted to testify on his own behalf and

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[55] *Long,* 857 F.2d at 444-46; *Johnson,* 555 F.2d at 122; *Chambers,* 994 A.2d at 1260 n.13; *Brown,* 226 S.W.3d at 84; *Mitchell,* 781 N.E.2d at 1247.

[56] *Mitchell,* 781 N.E.2d at 1251.

[57] 650 S.E.2d 656 (N.C. Ct. App. 2007).

[58] *Id.* at 657.

that in Leas' opinion that testimony would be false.[59] The trial judge explained to Colson that Leas could not knowingly present false evidence to the court and that any lawyer appointed to replace him would face the same limitation. The judge informed Colson that if he insisted on testifying on his own behalf, he could discharge Leas and proceed pro se. Colson did just that. Colson then testified at trial that he was at home on the night of the robbery and that the police tricked him into waiving his rights and signing a confession.[60] Unfortunately for Colson, the state's chief witness identified him as the robber and the jury convicted him.

Colson appealed his conviction on constitutional grounds, arguing that the trial court erred by forcing him to choose between testifying on his own behalf and proceeding to trial without the assistance of counsel. The North Carolina Court of Appeals agreed and granted Colson a new trial. In attempting to provide some guidance on remand, the court focused on Rule 3.3(a)(3) and indicated that while Leas may have reasonably believed that Colson would testify falsely, he did not *know* that he intended to do so.[61] Whether Colson was at home on the night of the robbery and was tricked into confessing by the police, or whether he was the robber as indicated by the state's principal witness, were credibility questions for the jury to decide.[62]

United States v. Midgett[63] is another illustrative case. Paul Midgett was charged with three felony counts. Count One stemmed from a robbery in which Midgett allegedly threw gasoline on a stranger, J.W. Shaw, and demanded money from him. After Shaw surrendered his

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[59] *Id.*

[60] *Id.*

[61] *See id.* at 659 (discussing a comment to North Carolina Rule 3.3 concerning testimony by criminal defendants).

[62] *See id.* (quoting State v. Hyatt, 566 S.E.2d 61, 77 (N.C. 2002)).

[63] 342 F.3d 321 (4th Cir. 2003).

wallet, an assailant set him on fire.[64] Later, Midgett and Theresa Russell allegedly employed a similar technique to rob a bank (Counts Two and Three). Russell agreed to cooperate with the government; Midgett chose to take his chances at trial.

Midgett insisted on mounting a "third person" defense to the Count One crime. Midgett repeatedly told his defense lawyer that a friend of Russell was driving around with the two of them when they encountered Shaw, and it was Russell's friend who cruelly set Shaw ablaze.[65] Midgett asserted that he was asleep in the back of their car when Shaw was attacked. He was prepared to testify to these facts at trial, but his lawyer did not want Midgett to testify because he did not believe Midgett's version of events.[66] Midgett's counsel attempted to withdraw from his representation before trial, but the district court would not permit him to do so.

Midgett's lawyer moved to withdraw again during trial on the basis that Midgett was insisting on offering evidence that the lawyer considered to be improper. The district court gave Midgett the option of proceeding pro se or continuing with counsel's representation.[67] Midgett agreed to his lawyer's continued participation under protest. The next day, Midgett's lawyer again moved to withdraw, stating his belief that Midgett was "'going to offer information when he testifie[d] that [was] not in any way truthful or in existence that [the lawyer could] determine from any source.'"[68] Rather than allowing the lawyer to withdraw, the district court offered Midgett the choice of either not testifying or representing himself without counsel's aid or

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[64] *Id.* at 322.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 323.

[68] *Id.* (quoting counsel's statement to the court).

assistance. Despite desperately wanting to take the witness stand, Midgett believed that he could not testify without counsel's assistance, and he accordingly declined to testify.

A jury convicted Midgett on all three counts. After the trial was concluded, the district court allowed Midgett's defense lawyer to withdraw. New defense counsel was soon appointed and Midgett appealed his conviction to the Fourth Circuit. Midgett argued that the district court erred in conditioning his right to counsel on his waiver of his right to testify.

The Fourth Circuit observed that the question of what lawyers should do when facing potentially perjured testimony "has long caused consternation in the legal profession, producing heated debate and little consensus."[69] In criminal cases, a defendant's right to testify on his own behalf is not limitless. A criminal defendant's constitutional right to testify clearly does not include the right to commit perjury,[70] as the Supreme Court recognized in *Nix v. Whiteside.*[71] In this case, however, Midgett never told his lawyer that he intended to lie when he testified, nor did he otherwise indicate an intent to perjure himself. Rather, Midgett consistently maintained that his third-person defense was true and that Russell could corroborate his story.[72] The question was thus whether the information known to Midgett's lawyer was sufficient to show that Midgett's testimony would be perjurious, such that the lawyer's refusal to put Midgett on the witness stand was constitutionally acceptable. The *Midgett* court concluded that it was not.[73]

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[69] *Id.* at 324.

[70] *Id.* at 325 (quoting United States v. Teague, 953 F.2d 1525, 1530 (11th Cir. 1992)).

[71] 475 U.S. 157, 173 (1986).

[72] *Midgett*, 342 F.3d at 325.

[73] *Id.* at 325-26.

To be sure, Midgett's third-person defense was shaky. Russell testified that there was no one else in the vehicle at the time of Shaw's assault and robbery, and Shaw identified Midgett in court as his assailant, even though he had earlier been unable to pick him out of a photo lineup. Nonetheless, Mitchell had consistently maintained that someone else attacked Shaw. Midgett never suggested to his lawyer that he might testify falsely in his defense. The defense lawyer's responsibility to Midgett did not pivot on whether he believed him, nor did it depend on the quantum of proof supporting or contradicting Midgett's anticipated testimony.[74] The lawyer therefore had a duty to assist Midgett in testifying to the jury on direct examination.

The defense lawyer's mere belief, though strong and supported by other evidence, was not a sufficient basis to refuse to assist Midgett in testifying on direct examination.[75] In other words, the defense lawyer did not know that Midgett's intended testimony would be false. As far-fetched as Midgett's story might have sounded to a jury, it was not his lawyer's place to decide that Midgett was lying and declare this opinion to the district court. Ultimately, the *Midgett* court determined that the district court's act of forcing Midgett to choose between two constitutionally protected rights—the right to testify on his own behalf and the right to effective assistance of counsel—constituted error requiring a new trial.

The defendant in *State v. Jones,*[76] Troy Jones, was charged with assault for allegedly hitting Kirby Sowers with a beer bottle. The court appointed T.R. Halvorson to represent him. Jones pled not guilty. Halvorson negotiated a plea agreement, but Jones rejected it. Two days before trial, Halvorson moved to withdraw from Jones' representation and requested a hearing on

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[74] *Id.* at 326.

[75] *Id.*

[76] 923 P.2d 560 (Mont. 1996).

his motion. Halvorson principally based his motion on Montana Rules of Professional Conduct 1.16(a)(1) and (b)(1).[77] Rule 1.16(a)(1) mandated that a lawyer withdraw if his representation would result in a violation of the rules of professional conduct or other law, while Rule 1.16(b)(1) permitted withdrawal where a client persisted in a course of action involving the lawyer's services that the lawyer reasonably believed to be criminal or fraudulent.[78]

At the hearing on Halvorson's motion, it was plain that Halvorson wished to withdraw based on his unhappiness with Jones' decision to reject the plea agreement and proceed to trial. Halvorson revealed that Jones had admitted hitting Sowers with a beer bottle and expressed his view both that an assault had occurred and that Jones had admitted to committing it. Halvorson said that he had no defense to offer on Jones' behalf and opined that it was repugnant to deny criminal culpability to a jury in a clear case of guilt.[79] Halvorson argued that Jones' decision to go to trial when, in Halvorson's opinion, he had virtually no chance of acquittal, was repugnant and constituted good cause for his withdrawal as counsel. Halvorson also explained to the court that Jones had told him that he intended to testify falsely and, in response, he informed Jones of the consequences of perjury and of his inability to present perjured testimony.[80] He then gave Jones a weekend to think over what he had told him. Halvorson acknowledged that he had not checked back with Jones before filing his motion to withdraw and conceded that Jones might have changed his mind and decided not to testify falsely.[81] Jones broadly disagreed with

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[77] *Id.* at 562.

[78] *Id.* at 563 (quoting the rules).

[79] *Id.* at 562.

[80] *Id.* at 563.

[81] *Id.*

Halvorson, countering that the lawyer had lied about a few things, that he had never indicated an intent to testify falsely to Halvorson, and that he did not intend to testify at his trial.[82]

Based on Jones' statement that he did not intend to testify at trial, the district court denied Halvorson's motion to withdraw. Jones was convicted and appealed to the Montana Supreme Court. He argued that the trial court erred in denying Halvorson's motion to withdraw, thereby depriving him of his constitutional rights to a fair trial and effective assistance of counsel.

The supreme court was unimpressed with Halvorson's argument that Jones' intention to commit perjury justified his withdrawal from the case. Halvorson's concession that Jones might have reconsidered and decided not to testify falsely was crucial, because it left the court with but "an alleged possible intent to commit perjury."[83] That was a far cry from Halvorson's claim that his continued representation of Jones *would* result in a violation of the rules of professional conduct or other law, and it certainly did not support his withdrawal under Rule 1.16(a)(1).[84] As for Halvorson's permissive withdrawal under Rule 1.16(b)(1), there was nothing in the record to indicate that Jones persisted in his alleged intent to testify falsely after Halvorson counseled him against it. There was thus no basis for Halvorson's withdrawal on Rule 1.16(b)(1) grounds.[85]

Jones urged the court to adopt a variety of standards for determining a criminal defense lawyer's knowledge of intended false testimony, but the court declined to do so absent findings of fact by the district court. Moreover, the court reasoned, it was unnecessary to adopt a standard

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[82] *Id.* at 562.

[83] *Id.* at 563.

[84] *Id.*

[85] *Id.*

because "it [was] clear that Halvorson did not meet any standard of knowledge prior to moving to withdraw."[86]

The state contended that Montana Rule 3.3(a)(2) required Halvorson to withdraw from Jones' representation. Montana Rule 3.3(a)(2) prohibited a lawyer from failing to disclose a material fact to a tribunal when disclosure was necessary to avoid assisting a client's criminal or fraudulent act.[87] The *Jones* court rejected the state's argument on the same basis that it rejected Halvorson's withdrawal arguments—there was no evidence that Halvorson knew that Jones intended to engage in a crime or fraud.[88]

The Montana Supreme Court eventually concluded that Halvorson had a clear conflict of interest in representing Jones and that he had abandoned his duty of loyalty to this client. It therefore vacated Jones' conviction and remanded the case to the district court for a new trial.

Although most of the cases discussing lawyers' knowledge of clients' or witnesses' false testimony are criminal matters, they are not exclusively so, and it is easy to imagine a civil case in which a lawyer's knowledge of a client's or witness' false testimony might be questioned. Assume, for example, that you are defending a grocery store in a sexual harassment case brought by a female cashier alleging that she was harassed by a male co-worker. The cashier testified in her deposition that the store manager acknowledged the co-worker's inappropriate behavior in a meeting in his office. Another employee who participated in that meeting also testified in his deposition that the manager acknowledged the co-worker's misconduct. The manager denies making any such admission and insists that he will maintain his denial when he testifies at trial.

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[86] *Id.* at 564.

[87] *Id.* at 565.

[88] *Id.* at 566.

Are you prohibited from calling the manager as a witness at trial based on the Rule 3.3(a)(3) prohibition against knowingly offering evidence that you know to be false?

The answer to this question is no. You may call the manager as a witness at trial and elicit his denial during his direct examination to refute the plaintiff's and the other employee's testimony, and to blunt any cross-examination on the subject. The fact that two witnesses dispute the manager's version of events does not mean that the manager's expected testimony will be false; all you know is that witnesses have conflicting recollections. It is possible that the manager's recall of events is correct and that the plaintiff and witness are confused or mistaken. Indeed, testimonial inconsistencies are common in litigation.

Alternatively, assume that the plaintiff's lawyer asked the manager in his deposition whether he had conducted a "formal investigation" of the plaintiff's allegations. The manager answered that he did not. Now, the plaintiff calls the manager as a witness at trial and asks whether the manager "investigated" the plaintiff's allegations. Why, yes, the manager responds. He tells the jury how he interviewed the other employees who worked with or near the plaintiff on the day in question and none of them saw the events described by the plaintiff. Flummoxed by the manager's apparent reversal and thus unable to locate the key passage in the manager's deposition transcript to use to impeach him, the plaintiff's lawyer finishes the manager's direct examination. You decide to forego any cross-examination and the court excuses the manager. The court then takes a recess. You meet with the manager privately and ask about the seeming change in his testimony. He responds that his trial testimony was truthful. He never considered his employee interviews to constitute any sort of "formal investigation"; he did only what any good manager would do in light of the plaintiff's allegations. Having recalled your instruction during trial preparation to listen carefully to any question asked, however, he decided that his

interviews were indeed an "investigation," and that he should therefore tell the plaintiff's lawyer about them. The manager's testimony was certainly material. Must you reveal to the court the discrepancy between the manager's deposition testimony and his trial testimony? Must you call the manager as a witness and have admit that he in fact conducted no investigation?

The answer to both questions is no. Rule 3.3(a)(3) imposes a corrective duty on a lawyer where the witness who testified falsely was called by the lawyer or was the lawyer's client. You did not call the manager as a witness and, if you reflect for just a minute, you will recognize that the manager is not your client. You represent the store—that organization is your client, not the manager.[89] Even if it could be argued that the manager is your client for Rule 3.3(a)(3) purposes on the basis that the store is incorporated and corporations can only act through agents, you do not have a firm basis in fact to conclude that he has testified falsely and you thus have no duty to take remedial measures.[90] At most you have information suggesting that the store manager was confused during his deposition, or that he testified differently at trial because the plaintiff's lawyer asked a different question when he inquired about an "investigation" as compared to a "formal investigation." You may suspect that the manager testified falsely, but that suspicion does not equate to knowledge under Model Rule 3.3(a)(3).

But, your opponent might argue, the manager's testimonial inconsistencies certainly relate to his credibility and you therefore cannot ignore them. Although that is true, it is also inconsequential from a professional responsibility perspective. The fact that you might be

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[89] MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2009).

[90] *See id.* R. 3.3(a)(3) (imposing a duty to remedy false testimony only if it was offered by "the lawyer's client, or a witness called by the lawyer").

concerned about the manager's credibility and the weight that the jury will afford his testimony as a result does not translate into knowledge that the manager lied.[91]

E. Knowledge Versus Reasonable Belief

Rule 3.3(a)(3) generally requires that a lawyer know that testimony be false before the rule comes into play.[92] Prospectively, the rule provides that lawyers shall not knowingly offer evidence they know to be false, and retrospectively requires lawyers to take reasonable remedial measures where they have offered material evidence and come to know of its falsity.[93] The rule further provides, however, that a lawyer may refuse to offer evidence other than the testimony of a criminal defendant that the lawyer "*reasonably believes* is false."[94] The terms "knowledge" and "reasonable belief" express different standards. The latter standard is clearly lower; a lawyer may reasonably believe testimony to be false without knowing that to be the case.[95]

Although a lawyer may reasonably believe that a witness intends to testify falsely without knowing that to be true, the reasonable belief standard is not lax. Speculation or suspicion that a witness will testify falsely does not constitute a reasonable belief of that fact. To be reasonable, a lawyer's belief must be based upon an independent analysis or investigation of the evidence, or

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[91] *See* State v. Rivera, 109 P.3d 83, 87-88 (Ariz. 2005).

[92] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009).

[93] *Id.*

[94] *Id.* (emphasis added).

[95] *See, e.g.*, State v. Chambers, 994 A.2d 1248, 1259 (Conn. 2010) (contrasting "actual knowledge" with "a 'mere reasonable belief'"); Lucas v. State, 572 S.E.2d 274, 277 n.4 (S.C. 2002) (differentiating reasonable belief from actual knowledge).

on distinct statements by the client or witness supporting that belief.[96] Mere inconsistencies in the client's or witness' stories are insufficient in and of themselves to conclude that a witness will testify falsely.

Lawyers cannot present testimony that they know is false.[97] This is generally true in both civil and criminal litigation. It is also true regardless of whether the person who would testify falsely is a client or a witness.[98] Many courts take the same approach where criminal defendants are concerned, while other jurisdictions recognize that constitutional considerations override Rule 3.3(a)(3) and accordingly follow a different path, as we will see in the next Part of this Chapter. If, however, lawyers reasonably believe that testimony is false, they may refuse to offer it without breaching their duties of competence or diligence,[99] again with the exception of criminal defendants testifying on their own behalf. In short, Rule 3.3(a)(3) allows a lawyer the discretion to offer questionable testimony when strategy and tactics dictate. At the same time, the rule generally permits the lawyer's judgment to override the client's demands or preferences in the event of a disagreement between the two over offering dubious or unreliable testimony.[100] This approach is consistent with the established principle that decisions concerning trial strategy and tactics ultimately rest with counsel.

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[96] People v. Schultheis, 638 P.2d 8, 11 (Colo. 1981); State v. DeGuzman, 701 P.2d 1287, 1291 (Haw. 1985) (quoting *Schultheis,* 638 P.2d at 11).

[97] State v. Hagen, 574 N.W.2d 585, 588 (N.D. 1998).

[98] Noel v. State, 26 S.W.3d 123, 126-27 (Ark. 2000); State v. Woodard, 9 So. 3d 112, 119 (La. 2009).

[99] Frey v. State, 509 N.W.2d 261, 264 (N.D. 1993).

[100] *See, e.g., Noel,* 26 S.W.3d at 126-27; *Schultheis,* 638 P.2d at 11-13; Lucas v. State, 572 S.E.2d 274, 275-77 (S.C. 2002).

F. Materiality

The first sentence of Model Rule 3.3(a)(3) does not contain a materiality requirement.[101] If a lawyer knows that prospective testimony will be false, the lawyer cannot offer the testimony, regardless of whether it is material. The rule is different once false testimony has been offered. If a lawyer's client or a witness called by a lawyer offers material testimony that the lawyer later comes to know was false, the second sentence of Model Rule 3.3(a)(3) provides that the lawyer must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. Lawyers' duty to remedy material false testimony applies equally to false testimony offered during their examinations and to false testimony elicited by an opponent. If false testimony was not material, however, the lawyer has no duty to effect a remedy. What, then, is the standard for determining the materiality of false testimony?

The test for materiality varies between jurisdictions, but most variations are slight. In sum, testimony should be considered material if it is significant or essential; if it could have affected the course or outcome of the proceeding;[102] if it would naturally tend to influence the decision to be made, or is capable of such influence;[103] or if it "could have influenced the hearer."[104] Regardless of how the standard is expressed, materiality is determined from the court's perspective, rather than from counsel's vantage point.[105]

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[101] MODEL RULE OF PROF'L CONDUCT R. 3.3(a)(3) (2009) (providing that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false").

[102] State v. Trull, 136 P.3d 551, 555 (Mont. 2006).

[103] United States v. Leifson, 568 F.3d 1215, 1220 (10th Cir. 2009) (quoting United States v. Durham, 139 F.3d 1325, 1329 (10th Cir. 1998)).

[104] *In re* Fisher, 202 P.3d 1186, 1202 (Colo. 2009).

[105] Holden v. Blevins, 837 A.2d 1053, 1056-57 (Md. Ct. Spec. App. 2003).

Materiality is often a function of context. Assume, for example, that you are representing the plaintiff in an insurance bad faith case. Your expert witness testified in his deposition that he earned an MBA with a concentration in insurance and risk management. You subsequently learn when reading a deposition from another case that the expert witness does not hold an MBA—the insurance company he was working for at the time of his studies transferred him out of state and he never completed his final semester of course work. Is the expert's false testimony concerning his credentials material evidence, thereby triggering your Rule 3.3(a)(3) retrospective disclosure duty? The answer is yes. The expert's MBA is intended to bolster or enhance his credibility as an expert witness; you were certainly planning on eliciting testimony regarding this credential when you called him as an expert at trial. For that matter, the expert's MBA (or lack thereof) may go to his qualifications to testify as an expert. The issue here is how you should remedy the expert's false testimony, not whether you must do so.

In contrast, assume that you are representing the plaintiff in a motor vehicle accident. You located as a witness a convenience store manager who saw the accident as she was driving to work. You produced her for her deposition and in preliminary questioning by your opponent she testified that she earned an Associate of Arts degree from a local community college. Later, gripped by remorse, the witness calls to tell you that she did not complete her A.A. degree; she left school a few credits short of completion. Must you disclose her false testimony under Rule 3.3(a)(3)? Here the answer is no, because the witness' lack of a college degree is immaterial; whether she did or did not earn an A.A. degree has no bearing on her ability to perceive events. Her possession of an A.A. degree will not bolster her credibility as a fact witness. Indeed, it is unlikely that either you or opposing counsel will question the witness about her education at trial.

Even if you do not have a duty to disclose the assistant manager's false testimony under Rule 3.3(a)(3), however, might you want to correct it anyway? The answer to this question is almost certainly yes, because if you do not and her misstatement is exposed at trial, the opposing lawyer may paint her as a liar. If jurors believe that people who lie about little things lie about big ones, they may disregard the assistant manager's testimony altogether and your client may suffer as a result. In contrast, correcting the assistant manager's misstatement, while somewhat embarrassing for her, will be simple and it will be difficult for your opponent to do much with the correction when the assistant manager testifies at trial. This is simply one more example of advocacy considerations and ethics issues overlapping.

Now, turn back time on both examples. Assume that you know before the depositions that your expert intends to falsely testify about his MBA and that the convenience store manager intends to falsely claim an A.A. degree. When it comes to prospective false testimony, Rule 3.3(a)(3) imposes no materiality requirement; the rule states simply that a lawyer shall not knowingly "offer testimony that the lawyer knows to be false."[106] Given your knowledge, you clearly cannot allow your expert to falsely testify that he has an MBA, nor can you allow the store manager to misstate her education even though it has absolutely nothing to do with the case. Again, materiality is not a factor when analyzing false testimony prospectively under Rule 3.3(a)(3). With further respect to your expert witness, if you cannot persuade him to testify truthfully before the deposition, you probably have a prospective disclosure obligation under Rule 3.3(b), since the expert's intended false testimony is material, and therefore likely constitutes criminal or fraudulent conduct related to the proceeding.[107]

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[106] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009).

[107] *Id.* R. 3.3(b).

The last aspect of the foregoing example highlights an interesting point; that is, Model Rule 3.3(b) includes no materiality requirement.[108] There is no need for one. The rule applies only to criminal or fraudulent conduct, meaning that materiality is implied.

G. The Rule 3.3 Remediation Requirement

Model Rule 3.3(a) provides in the second sentence that a lawyer must take reasonable remedial measures if "the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity."[109] Model Rule 3.3(b) requires a lawyer who is representing a client in an adjudicative proceeding to take reasonable remedial measures if the lawyer "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding."[110] For conduct to be criminal or fraudulent, a witness' false testimony must be material. Thus, a lawyer who knows that a witness offered false testimony on a material issue has a duty to take reasonable remedial measures regardless of the lawyer's relationship to the person. A lawyer cannot avoid taking reasonable remedial measures on the basis that the witness was not the lawyer's client or was not called by the lawyer. The following example illustrates this point.

Assume that you are representing a party in arbitration and examine several witnesses during the hearing. After the hearing is completed but while briefing is underway, one of the witnesses called by the other party whom you cross-examined calls you to confess that she lied

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[108] *Id.* ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

[109] *Id.* R. 3.3(a).

[110] *Id.* R. 3.3(b).

about a material issue during her direct examination. Unfortunately, her recantation will disrupt your client's case in several respects. Can you avoid taking reasonable remedial measures on the basis that you did not call the witness and have no relationship with her, as Model Rule 3.3(a)(3) would seem to permit? You cannot. Because the witness' false testimony was material, she either committed perjury or fraud or both, and you therefore must take reasonable remedial measures under Rule 3.3(b) even though she was neither your client nor your witness.

Witnesses may testify falsely outside the confines of a court or hearing room, with the most obvious example being deposition testimony. If a lawyer knows that a witness whom the lawyer called testified falsely in a deposition and the witness' false testimony was material, the Model Rules require that the lawyer do more than merely withdraw from the case to satisfy her remedial duty. The lawyer's mere withdrawal from the representation is not a reasonable remedial measure because withdrawal, without more, does not correct the false testimony.[111] Indeed, unless replacement counsel knows of the false testimony, the first lawyer's withdrawal is likely to perpetuate the falsehood. Thus, withdrawal is a reasonable remedy only where the withdrawing lawyer also communicates the problem to replacement counsel sufficiently to enable the false testimony to be corrected.[112]

III. FALSE TESTIMONY IN CRIMINAL CASES

As noted at the outset, the so-called perjury trilemma is most acute in criminal cases. A lawyer in a civil case presented with potential false testimony by a client can often avoid trouble by not calling the client as a witness. With the possible exception of some civil commitment

[111] NYCLA Formal Op. No. 741, *supra* note 22, at 4.

[112] *Id.*

proceedings, defendants in civil cases have no constitutional right to testify over their lawyers' objections.[113] Clients who want to testify in civil cases and who cannot persuade their lawyers to go along (as should be the case where false testimony is concerned) are left to discharge their lawyers. If a lawyer representing a criminal defendant knows that her client intends to commit perjury when he testifies, however, she may not be able to avoid the problem by refusing to call him as a witness. Although most criminal defendants consult with their lawyers when deciding whether to testify, and generally follow their lawyers' advice on the subject, the decision to testify is the defendant's alone to make.[114] Defendants in criminal cases have a constitutional right to testify on their own behalf.[115] Yet this right is not unbridled. Although criminal defendants have a right to testify on their own behalf, there is no constitutional right to commit perjury, nor does the Sixth Amendment right to the assistance of counsel compel a defense lawyer to assist or participate in the presentation of false testimony.[116] As the Supreme Court explained in the seminal case of *Nix v. Whiteside,*[117] whatever the scope of a criminal defendant's constitutional right to testify, "it is elementary that such a right does not extend to testifying falsely."[118]

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[113] *See, e.g.*, People v. Allen, 187 P.3d 1018, 1037 (Cal. 2008) (holding that defendants in sexually violent predator commitment proceedings have a constitutional right to testify).

[114] Branford v. State, 685 S.E.2d 731, 733-34 (Ga. Ct. App. 2009) (quoting Burton v. State, 438 S.E.2d 83 (Ga. Ct. App. 1994)): People v. Hogan, 904 N.E.2d 1036, 1042 (Ill. App. Ct. 2009); MODEL RULES OF PROF'L CONDUCT R. 1.2(a)(1) (2009).

[115] Rock v. Arkansas, 483 U.S. 44, 52 (1987).

[116] People v. DePallo, 754 N.E.2d 751, 753 (N.Y. 2001).

[117] 475 U.S. 157 (1986).

[118] *Id.* at 173 (emphasis omitted); *see also* United States v. Dunnigan, 507 U.S. 87, 96 (1993) (repeating the principle "that a defendant's right to testify does not include the right to commit perjury").

Defense lawyers' first option when presented with clients who intend to testify falsely is to attempt to dissuade them from doing so.[119] Assuming that defense lawyers share relationships of trust and confidence with their clients, it is reasonable to believe that their efforts will pay off. In fact, there is a professional consensus that criminal defense lawyers are frequently successful in dissuading clients from committing perjury. But if a lawyer is unable to persuade a client to testify truthfully or not at all, what is the next step? If the lawyer cannot prevent the defendant from testifying, how can she avoid offering evidence that she knows to be false?

Withdrawal initially seems to be an appealing option for a criminal defense lawyer with a client bent on perjury, but it is often unavailable and is an imperfect solution in any event. First, the lawyer's withdrawal may prejudice the client, especially if it occurs close to trial. Second, withdrawal typically requires leave of court and a court may not allow a lawyer to withdraw, especially if trial is reasonably near. Courts often deny defense lawyers' motions to withdraw. If a court denies a lawyer's motion to withdraw, the lawyer must remain in the case even if she has good cause for terminating the attorney-client relationship.[120] Third, allowing lawyers to withdraw to avoid aiding client perjury solves nothing because replacement counsel will confront the identical problem. Once the client reveals his intent to commit perjury to the second lawyer, the cycle will start anew. Alternatively, the client may figure out—especially if the first lawyer was clear in explaining her ethical duties during the course of her remonstrations with him—that he should be less honest with the second lawyer, so that she is unaware of his perjurious intent and puts him on the stand at trial in the mistaken belief that he will testify truthfully. In that

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[119] *Nix*, 475 U.S. at 169 ("It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.").

[120] MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2009).

case, the trial is tainted by perjury. Finally, it is unfortunately possible that the second lawyer may be willing to assist the client in testifying falsely where the first lawyer was not. Although extraordinarily rare, lawyers sometimes encourage clients to lie on the theory that the client's intended testimony will not be as persuasive as fabricated testimony.[121]

A common solution to the problem of client perjury in cases in which the defense lawyer knows that the client intends to testify falsely, cannot dissuade the client from so testifying, and cannot withdraw, is to allow the lawyer to present the client's testimony in narrative form.[122] The narrative approach allows the lawyer to put the client on the witness stand and ask him what he would like to tell the jury, or what he would like the jury to know, thus launching the client's narrative. The lawyer remains standing while the client testifies as if she were conducting a normal direct examination, but asks the client no questions. The lawyer may, both before and after the narrative, conduct a regular direct examination on subjects on which she expects the client to testify truthfully. In closing argument, the lawyer cannot rely on or discuss the client's false testimony. The lawyer cannot assist the client in preparing the narrative testimony.

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[121] *See, e.g.,* McCombs v. State, 3 So. 3d 950, 952-54 (Ala. Crim. App. 2008) (finding that lawyer's instruction to client to lie and deny stabbing a person who was intimidating him constituted ineffective assistance of counsel because it denied the client the ability to claim self-defense).

[122] *See, e.g.,* United States v. Omene, 143 F.3d 1167, 1168-72 (9th Cir. 1998); People v. Bolton, 82 Cal. Rptr. 3d 671, 682 (Cal. Ct. App. 2008); Shockley v. State, 565 A.2d 1373, 1380 (Del. 1989); Sanborn v. State, 474 So. 2d 309, 313 (Fla. Dist. Ct. App. 1985); State v. Waggoner, 864 P.2d 162, 167-68 (Idaho Ct. App. 1993); People v. Bartee, 566 N.E.2d 855, 856-57 (Ill. App. Ct. 1991); Reynolds v. State, 625 N.E.2d 1319, 1321 (Ind. Ct. App. 1993); Brown v. Commonwealth, 226 S.W.3d 74, 84 (Ky. 2007); Commonwealth v. Mitchell, 781 N.E.2d 1237, 1249-50 (Mass. 2003); Scott v. State, 8 So. 3d 855, 859 (Miss. 2008); People v. Andrades, 828 N.E.2d 599, 603 (N.Y. 2005); Commonwealth v. Jermyn, 620 A.2d 1128, 1131 (Pa. 1993); State v. Layton, 432 S.E.2d 740, 754-55 (W. Va. 1993); State v. McDowell, 681 N.W.2d 500, 513 (Wis. 2004); Conn. Eth. Op. 42, 1993 WL 13152160, at *2 (Conn. Bar Ass'n, Comm. on Prof'l Ethics 1993) [hereinafter Conn. Eth. Op. 42].

The rationale for the narrative approach is that it preserves the client's constitutional right to testify without implicating defense counsel in the client's perjury. There are glaring flaws in the narrative approach. First, there is no constitutional right to commit perjury. Whether perjury comes in narrative form or in traditional question and answer format is irrelevant—the testimony is false regardless. Second, the defense lawyer remains implicated in the client's false testimony. The fact that the lawyer asked one question that elicited false testimony rather than several is immaterial. Third, the narrative approach does not safeguard the client's confidentiality, because it clearly alerts the judge and prosecutor that perjury is imminent. As a general rule, the lawyer's shift to narrative questioning is also likely to signal to the jury that something is amiss, either instantly or upon reflection when jurors realize that the lawyer did not mention the client's exculpatory testimony in closing argument.[123] If the lawyer's shift to narrative questioning does not alert the jury to the defendant's perjury, then the trial is tainted if jurors accept as true any part of the defendant's false testimony. Fourth, and although unquestionably the defendant's fault for insisting on testifying falsely, the patent dishonesty of narrative testimony may cause the court to find that the defendant committed perjury and thus enhance any sentence ultimately imposed for the underlying crime.[124]

The ABA's Standing Committee on Ethics & Professional Responsibility rejected the narrative approach in Formal Opinion 87-353.[125] Various jurisdictions agree that defense lawyers may not present false testimony by their clients in any form, such that a defense lawyer's

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[123] *But see Reynolds*, 625 N.E.2d at 1321 (observing that rather than signaling perjury, a defendant's narrative testimony was consistent "with the jury presuming that [the defendant] wished to offer certain testimony unhampered by the traditional question and answer format").

[124] *See, e.g.*, United States v. Garza, 429 F.3d 165, 172 n.4 (5th Cir. 2005); People v. Edgett, 560 N.W.2d 360, 364 (Mich. Ct. App. 1996).

[125] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353, at 22-23 (1987).

failure to present a client's false testimony does not work a constitutional deprivation.[126] The Model Rules do not permit lawyers to employ the narrative approach. The Model Rules do, however, acknowledge that because of constitutional considerations the narrative approach remains an option for criminal defense lawyers in some jurisdictions. As a comment to Model Rule 3.3 explains:

> In some jurisdictions . . . courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.[127]

Notwithstanding the final sentence of the comment, it is generally acknowledged that the narrative approach does not relieve defense lawyers of the obligation to take reasonable remedial measures following clients' false testimony, including disclosure to the tribunal. But this view of the narrative approach and the lawyer's associated duty is questionable at best given the language of the comment and considering that the narrative approach itself discloses the client's perjury. It is redundant to require the lawyer to disclose the client's perjury to the court after the client's narrative and it is especially so if the court engaged in a colloquy with the client before the client testified. Any judge who hears narrative testimony by a criminal defendant knows full well why the defendant is testifying in that fashion. If the lawyer moved to withdraw relatively close in time to the defendant's narrative testimony, the motion to withdraw alone was probably

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[126] *See, e.g.*, United States v. Henkel, 799 F.2d 369, 370 (7th Cir. 1986); McCombs v. State, 3 So. 3d 950, 953 (Ala. Crim. App. 2008); Noel v. State, 26 S.W.3d 123, 126 (Ark. 2000); Vaughn v. State, 549 S.E.2d 86, 89 (Ga. 2001); State v. Woodard, 9 So. 3d 112, 119 (La. 2009) Utah Eth. Op. 00-06, 2000 WL 1523292, at *5 (Utah State Bar, Ethics Advisory Op. Comm. Sept. 29, 2000) [hereinafter Utah Eth. Op. 00-06].

[127] MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 7 (2009).

enough to inform the court that the defendant intended to testify falsely.[128] As for other possible remedies, post-narrative withdrawal by a defense lawyer serves no purpose. At that point the narrative testimony is in evidence. For that matter, the lawyer arguably remedied the client's perjury by not referring to the narrative testimony or not arguing those "facts" in closing argument. Thus, a compelling argument can be made that lawyers who properly employ the narrative approach have fulfilled their responsibilities under Rule 3.3(a)(3). Nothing more should be required of them.

A. Illustrative Narrative Cases

Commonwealth v. Mitchell[129] is now the leading case on the narrative approach to client perjury. The defendant, Curtis Mitchell, was accused of an extremely cruel double homicide. Mitchell allegedly made a number of incriminating statements concerning the murders and his behavior following the murders further suggested his culpability. At the same time, he had an alibi witness and his DNA did not match the DNA taken from hairs found at the crime scene. Mitchell thus contended that someone else committed the murders, specifically pointing to a local drug dealer named Julius Adams with whom both he and the victims had a relationship.

Mitchell took the stand at trial. His lawyer had him state his name and then asked, "'Mr. Mitchell, what do you wish to tell these jurors?'"[130] Mitchell then testified in narrative fashion, denying the incriminatory statements attributed to him, rationalizing his suspicious behavior, and explaining why Adams was likely the killer. Mitchell's lawyer did not refer to this testimony in

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[128] *Henkel,* 799 F.2d at 370 (citing Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978)).

[129] 781 N.E.2d 1237 (Mass. 2003).

[130] *Id.* at 1244.

closing argument.[131] Rather, he emphasized the state's burden of proof, attacked the credibility of the prosecution witnesses, offered an alternative theory of the crime, pointed to the paucity of physical evidence against Mitchell, and attacked perceived failures in the police investigation. It was a strong closing argument, but Mitchell was nonetheless convicted. He challenged his conviction on ineffective assistance of counsel grounds based on the following events.

Before putting Mitchell on the stand, defense counsel approached the bench together with the prosecutor. The defense lawyer explained that he was concerned about participating in a fraud on the court, but that he could not reveal more without violating the attorney-client privilege.[132] He therefore wanted to put Mitchell on the stand, ask him his name, and instruct him to tell his story to the jury. The judge then took a brief recess to read Massachusetts Rule of Professional Conduct 3.3(e), which provided:

> "In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty to strongly discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. . . . If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in

[131] *Id.*

[132] *Id.*

> closing argument or in any other proceedings, including appeals."[133]

When trial resumed, the defense lawyer indicated that he would remain as counsel so as not to prejudice Mitchell and assured the court that he had attempted to dissuade Mitchell from testifying falsely. The judge instructed the defense lawyer to stand during Mitchell's narrative testimony and to object to the prosecutor's cross-examination questions as appropriate, keeping in mind that he could not assist Mitchell in testifying. Mitchell's narrative testimony proceeded as the court instructed.[134] When Mitchell finished his narrative testimony, the court allowed the defense lawyer a brief recess to confer with his client. Following the recess, the defense lawyer reported to the court that he had fulfilled his responsibilities under Rule 3.3(e).[135] The prosecutor cross-examined Mitchell without incident and the defense lawyer closed as summarized above.

In a motion for new trial, Mitchell argued that his lawyer did not have an adequate basis to invoke Rule 3.3(e) because he did not know that Mitchell intended to perjure himself; that the judge unconstitutionally applied the rule by failing to conduct a colloquy with him; and that he should have been present at the sidebar conference when his lawyer raised Rule 3.3(e). The trial court rejected these arguments. The trial court found that the defense lawyer had a firm factual basis for believing that Mitchell intended to perjure himself because Mitchell admitted the murders to the defense lawyer during the course of his representation.[136] In doing so, the court obviously believed the defense lawyer and disbelieved Mitchell's statements in an affidavit

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[133] *Id.* at 1241 n.1.

[134] *Id.* at 1245.

[135] *Id.*

[136] *Id.* at 1245-46.

denying the admissions.[137] The trial court rejected Mitchell's argument concerning the lack of a colloquy on the basis that Rule 3.3(e) did not require one and, regardless, Mitchell understood his options and the possible consequences of testifying in narrative fashion. The trial judge agreed that Mitchell's exclusion from the sidebar conference was erroneous because the conference represented a critical stage of the proceedings, but found that the error was harmless beyond a reasonable doubt. Finally, the trial court rejected Mitchell's contention that requiring his defense lawyer to forego a traditional direct examination and not argue his testimony in closing deprived him of his constitutional rights. On appeal, the Massachusetts Supreme Judicial Court agreed with the trial court across the board.

With respect to Mitchell's narrative testimony, the court thought it "of no consequence" that the prosecutor was present when defense counsel informed the trial judge of his intention to invoke Rule 3.3(e).[138] The defense lawyer did not disclose what expected testimony would be perjurious. Had the defense lawyer omitted the prosecutor from his conversation with the judge, the court reasoned, the prosecutor almost certainly would have objected when Mitchell began testifying in narrative form, thus drawing the jury's attention to the procedure.[139]

The *Mitchell* court concluded that the narrative testimony was properly directed. The court rejected Mitchell's argument that his defense counsel should have conducted a standard direct examination with respect to the "non-suspect" portions of his testimony and argued the truthful portions of his testimony in closing.[140] Mitchell's position on direct examination was

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[137] *Id.* at 1246 n.5.

[138] *Id.* at 1249.

[139] *Id.*

[140] *Id.*

impractical because defense counsel would be unable to control direct examination and could not effectively prepare the client for cross-examination.[141] Mitchell's position on closing argument was also impractical, inasmuch as it would highlight that portion of a defendant's testimony that defense counsel did not mention in closing and would likely produce incoherent closing arguments.[142]

As for the missing colloquy, the court noted that although Rule 3.3(e) did not require one, the record might not always be as clear as it was in this case. Thus, if circumstances warrant, a trial judge has the discretion to conduct a colloquy in which a defendant is informed of (1) his right to testify and to counsel; (2) his lawyer's ethical obligation not to present false testimony; and (3) the consequences of his lawyer's invocation of Rule 3.3, i.e., that he must testify in narrative form and that defense counsel will not argue his testimony in closing.[143] Any colloquy should be carefully controlled and conducted to elicit simple yes or no answers from the defendant. If the defendant is confused or has doubts about the process, the court should instruct him to consult with his lawyer until he understands the ramifications of testifying.[144]

Having disposed of Mitchell's arguments concerning his narrative testimony, the court summarized its position on prospective false testimony by criminal defendants. First, to invoke Rule 3.3, a defense lawyer must be acting in good faith and have a firm basis in objective fact for believing that the defendant intends to testify falsely.[145] Second, the defense lawyer must raise

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[141] *Id.* (quoting an ABA Criminal Justice Section report).

[142] *Id.*

[143] *Id.* at 1249-50.

[144] *Id.* at 1250.

[145] *Id.* at 1250-51.

her concerns about the defendant's intended false testimony with the court.[146] In alerting the court to the issue, the lawyer will have to be cryptic, because she is required to maintain client confidentiality to the extent possible and must be prepared to zealously advocate for her client during the remainder of the trial.[147] The lawyer cannot inform the judge of the details that support the invocation of Rule 3.3.[148] Third, once the matter is called to the court's attention, and recognizing that the judge will have to rely on defense counsel's oblique representations about the nature of the issue, the judge should instruct the lawyer how to proceed.[149] The court may conduct a colloquy with the defendant before instructing the lawyer, but is not required to do so. The court is certainly not obligated to conduct an evidentiary hearing to determine whether the defense lawyer had an adequate basis to invoke Rule 3.3. Fourth, the defendant may thereafter testify by means of an open narrative. Finally, because each case is unique, a trial court has discretion to vary any of these procedures where required by the interests of justice or effective case management.[150]

The trial court in this case anticipated and followed these principles, with the exception of Mitchell's harmless omission from the sidebar conference that preceded his testimony. As a result, the *Mitchell* court found that the trial court correctly concluded that the defense lawyer's conduct fell within the range of reasonable professional responses to anticipated client perjury,

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[146] *See id.* at 1251 (assuming that the defense lawyer calls the problem of expected false testimony to the court's attention, but not listing such disclosure as a formal step).

[147] *See id.* (discussing this approach from the trial court's perspective).

[148] *Id.*

[149] *Id.*

[150] *Id.*

and thus satisfied Rule 3.3(e) and constitutional requirements.[151] After considering several additional issues, the court affirmed Mitchell's conviction.

The Mitchell approach is well-reasoned and should be appealing to other courts. Indeed, the Kentucky Supreme Court essentially adopted the *Mitchell* approach in *Brown v. Commonwealth.*[152]

B. The Problem of Surprise Perjury

In contrast to cases in which criminal defense lawyers know that their clients intend to testify falsely, defendants may surprise their lawyers with false testimony at trial. Assume, for example, that you are defending Derek James, a college fraternity member, in a rape case.[153] The victim alleges that Derek slipped a date rape drug into her drink at a party and thereafter sexually assaulted her in his room at the fraternity house. Derek maintains that he did not attend the party because he was ill and, although he was once intimate with the victim, he did not "hook up" with her that night. In fact, one of Derek's fraternity brothers took party pictures using the camera in his cell phone and Derek appears in several of the photographs. When you show the photos to Derek, he tearfully acknowledges that he attended the party, but insists that he did not have sex with the victim that evening. You are not pleased by Derek's initial lack of honesty, but nor are you bothered by his presence at the party. There are numerous large holes in the victim's story, she has given contradictory accounts of relevant events and her credibility is otherwise suspect, because the victim delayed in reporting the alleged rape to the police there is

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[151] *Id.*

[152] 226 S.W.3d 74, 80-86 (Ky. 2007).

[153] The hypothetical defendant's name is fictitious. Other details have been fictionalized or substantially modified to avoid confusion with actual cases or events.

no forensic evidence, and Derek is a stereotypical "good kid" with whom jurors should identify. In short, you strongly believe that Derek is innocent and expect to win at trial.

At trial, you call Derek as your final witness. During his direct examination, he blurts out that he was not at the party because he was ill. What do you do?

You know that Derek's testimony is false and it is plainly material; thus, you have a duty under Rules 3.3(a)(3) 3.3(b) to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[154] Your first step might be to attempt corrective questioning without disrupting the examination. For example, without breaking stride, you might lower your voice and in your fatherly or motherly best, ask, "Derek, I know that you are very nervous and that being falsely accused of rape is a terrifying thing, but you *were* at the party that night, weren't you?" Derek will presumably answer truthfully and you can then continue your direct examination as planned.

Attempting to correct Derek's false testimony during his direct examination is not your only option and it may not even be your best one. The great weight of authority indicates that you should seek a recess to privately persuade Derek to correct his testimony.[155] The manner in which you do so is a matter of judgment, but it is clear that in seeking Derek's cooperation, you must be prepared to advise him of your duty to reveal his false testimony to the court.[156] You

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[154] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) & 3.3(b) (2009).

[155] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. g (2000); Conn. Eth. Op. 42, *supra* note 122, 1993 WL 13152160, at *2; Fla. Eth. Op. 04-1, 2005 WL 3985348, at *3 (Fla. State Bar Ass'n, Comm. on Prof'l Ethics June 24, 2005) [hereinafter Fla. Eth. Op. 04-1]; Tenn. Eth. Op. 93-F-133, 1993 WL 814081, at *3 (Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn. Dec. 10, 1993) [hereinafter Tenn. Eth. Op. 93-F-133]; Utah Eth. Op. 00-06, *supra* note 126, 2000 WL 1523292, at *4.

[156] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2009) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

will certainly need to request a recess if you attempt to correct Derek's false testimony during direct examination and he will not budge from his position that he did not attend the party.

If Derek will not agree to correct his false testimony, you must move to withdraw.[157] In moving to withdraw, it is sufficient to advise the court of the general nature of the problem without going into specifics or providing details. If the court will not allow you to withdraw since your motion comes during trial, you must remain in the case. If you remain in the case, you may wish to move to strike Derek's false testimony,[158] or move for a mistrial. If you are unsuccessful in striking the false testimony or obtaining a mistrial, you must then consider how best to disclose Derek's false testimony in the court. It is probable that your motion to withdraw and motion to strike *have* disclosed Derek's false testimony, but additional disclosure may be required. How such disclosure is accomplished will depend on the situation and court. In any event, your disclosures should be limited to that information necessary to remedy the situation and, to the extent possible, should be calculated to minimize the harm to Derek's defense. As a practical matter, limiting the harm to Derek's defense will be difficult, but that is solely Derek's fault. Finally, if you remain in the case and trial continues, you cannot examine Derek in a fashion that endorses or perpetuates his false testimony and you cannot refer to the false testimony in closing argument.

As much as anything, this example illustrates the importance of avoiding surprise perjury through careful preparation. When you caught Derek in his lie about not attending the fraternity party—a lie almost certainly fueled by fear—you needed to reassuringly commit him to honesty

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[157] *Id.* R. 1.16(a)(1); Conn. Eth. Op. 42, *supra* note 122, 1993 WL 13152160, at *2; Tenn. Eth. Op. 93-F-133, *supra* note 155, 1993 WL 814081, at *3; Utah Eth. Op. 00-06, *supra* note 126, 2000 WL 1523292, at *6.

[158] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. g (2000).

and truthfulness going forward. You should have expressed your personal faith in him. You should have explained to him that his defense was quite strong notwithstanding his presence at the party. In doing so, you could have pointed out all of the facts supporting his version of events or illustrated the many serious flaws in the victim's testimony. You might have advised him that you could work with any facts presented—even unhelpful ones—so long as you knew of them. On the other side of the coin, you should have told him that his dishonesty will likely be exposed on cross-examination. Testifying falsely will cripple his case—his dishonesty will prejudice the jury against him and accordingly override all of the favorable evidence. Moreover, and assuming that his dishonesty cost him the case as you expect, the court will consider his dishonesty when sentencing him. Finally, you might have informed him of your ethical duties concerning false testimony and again of the potentially serious consequences to him were you forced to uphold your duties. There is no guarantee that Derek would have heeded your advice and testified truthfully at trial, but it is reasonable to assume that he would have. It is well-settled that lawyers are generally successful in dissuading clients from testifying falsely. In short, it is far easier to prevent perjury than it is to fix it.

C. Testimony by Witnesses

The narrative approach is exclusively limited to use with criminal defendants; it is not an option when a lawyer knows that a witness in a criminal case intends to testify falsely. Although criminal defendants have a constitutional right to testify, they have no constitutional or other right to require counsel to call particular witnesses to testify when those witnesses will testify falsely, regardless of the perceived importance of the witness to the defense effort.[159] As Rule

[159] *See* Noel v. State, 26 S.W.3d 123, 126-27 (Ark. 2000) ("Given . . . that a lawyer's duty of zealous representation extends only to legitimate, lawful conduct, we conclude that

3.3(a)(3) makes clear, lawyers cannot present testimony by witnesses in criminal cases that they know is false.[160] Short of testimony that they know to be false, criminal defense lawyers may in their discretion refuse to call witnesses whom they reasonably believe will testify falsely without violating their duties of competence or diligence. Defense lawyers may decline to call even alibi witnesses whom they reasonably believe will testify falsely without breaching duties to their clients or eroding their clients' constitutional rights.[161] Rule 3.3(a)(3) grants lawyers this discretion.[162] In addition, courts consider a lawyer's refusal to call witnesses whom the lawyer reasonably believes will testify falsely to be reasonable trial strategy.[163]

D. Summary

False testimony presents special challenges for criminal defense lawyers. Challenges are perhaps greatest when a criminal defense lawyer knows that a client intends to testify falsely and the lawyer cannot prevent the client from taking the witness stand. Lawyers seeking guidance in this situation should first examine applicable rules of professional conduct; some jurisdictions

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counsel was not ineffective for failing to present . . . false alibi testimony."); People v. Schultheis, 638 P.2d 8, 12 (Colo. 1981) ("A [lawyer's] refusal to call a particular witness because of an obedience to ethical standards which prohibit the presentation of fabricated testimony does not constitute ineffective assistance of counsel.").

[160] *Noel*, 26 S.W.3d at 126-27; Tibbs v. United States, 628 A.2d 638, 641 (D.C. 1993); State v. Woodard, 9 So. 3d 112, 118-19 (La. 2009).

[161] *See, e.g.*, Smith v. State, 931 So. 2d 790, 802 (Fla. 2006); Hill v. State, 658 S.E.2d 863, 871 (Ga. Ct. App. 2008); Grooms v. State, 583 S.E.2d 216, 219 (Ga. Ct. App. 2003); Bennett v. State, 549 S.W.2d 585, 587 (Mo. Ct. App. 1977); Lucas v. State, 572 S.E.2d 274, 275-77 (S.C. 2002).

[162] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009) ("A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.").

[163] *See, e.g., Hill*, 658 S.E.2d at 871; *Woodard*, 931 So. 2d at 120.

specifically address in their rules or comments thereto false testimony by criminal defendants, including narrative testimony. In many jurisdictions there will be no case law on-point, but there may be ethics opinions that will assist lawyers. Alternatively, lawyers may seek advice from knowledgeable colleagues or professional responsibility specialists.[164] Fortunately, exceedingly few criminal defendants insist on testifying falsely. In addition, the standard for a lawyer's knowledge of a defendant's false testimony is sufficiently high that in most cases a lawyer will be able to put a defendant on the stand and conduct a traditional direct examination without fear of violating rules of professional conduct.

IV. PREVENTION OF FALSE TESTIMONY AND REASONABLE REMEDIAL MEASURES

Most clients and witnesses testify truthfully. They strive for accuracy in their testimony because they are conscientious and appreciate their oaths. Good lawyers prevent false testimony through prudent investigations that arm them with necessary facts and frame an accurate picture of what actually transpired. When interviewing clients and witnesses, they reassuringly explain the importance of receiving complete and accurate accounts of events, and they ask open-ended questions to elicit full and frank answers. Capable lawyers also prevent false testimony through normal witness preparation, as where, for example, they refresh witnesses' recollection with documents, statements and deposition transcripts; conduct mock direct and cross-examinations; and rehearse testimony using expected exhibits. Occasionally, however, lawyers may reasonably believe that clients or their witnesses intend to testify falsely. In rare cases, clients and witnesses surprise lawyers with false testimony.

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[164] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2009) (permitting lawyers to reveal information relating to a client's representation in order to secure legal advice about the lawyer's obligations under ethics rules).

It is initially important to distinguish between false testimony that is false because it is mistaken and false testimony that is dishonest. Lawyers must take remedial measures in either instance, but false testimony that is simply mistaken is relatively easy to correct. Even in the more difficult situation where the client's or witness' mistaken testimony is a surprise, the lawyer may remedy the problem by eliciting correct testimony through further examination, or refreshing the client's or witness' recollection with a document or prior testimony. If the false testimony occurs in a deposition, the problem can be remedied through further examination or by making changes on an errata sheet, or the lawyer can reopen the deposition. If the mistaken testimony occurs at trial and for whatever reason the witness cannot be immediately refocused, the lawyer may be able to recall the witness or call other witnesses to remove any false impression that the testimony made on the court or jury.

Real trouble lurks where clients or witnesses lie. This is the form of false testimony that gives lawyers fits. What do you do in that situation?

A. Prospective False Testimony

If you either reasonably believe or know that a client intends to testify falsely, you should first caution the client against doing so. The form and content of your remonstration is a matter of judgment; you must attempt to persuade while maintaining the client's trust.[165] In most cases you will be able to dissuade a client from testifying falsely simply by explaining the detrimental effect that the false testimony will have on the matter if it is exposed. Indeed, the revelation of the false testimony will have an effect far more severe than had the client told the truth in the first place. If the client insists on testifying falsely, you must inform the client of your duty not

[165] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. g (2000).

to offer false evidence and to take reasonable remedial action if it is offered, including disclosing the intended false testimony to the court.[166] This admonition should be sufficient to suppress the client's misguided plan. Ultimately, this is a situation in which pragmatism generally prevails. Assuming that it does, you have no duty to inform the court of the controversy.[167]

The approach is essentially the same where a witness other than a client is concerned. Although Model Rule 4.3 broadly prohibits lawyers from giving legal advice to unrepresented persons,[168] that ban is irrelevant in this context because urging a witness to testify truthfully does not constitute legal advice. Advising a witness about the law and your duties as a lawyer is not the same as giving the witness legal advice.

If the issue surfaces in civil litigation and you cannot dissuade the client or witness from testifying falsely, you have at least two good options short of revealing the prospective false testimony to the court. First, you may refuse to present the false testimony. This is true even if you do not know that the client or witness will testify falsely, but only reasonably believe that they will do so.[169] Second, you may move to withdraw from the case. Realistically, withdrawal is far more likely to be a consideration where it is a client who intends to testify falsely rather than a witness. The challenge in withdrawal is doing so in a fashion that will do the least harm to the client's case. Even assuming that the client will experience adverse effects as a result of

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[166] *Id.*

[167] Brown v. Commonwealth, 226 S.W.3d 74, 79 (Ky. 2007).

[168] MODEL RULES OF PROF'L CONDUCT R. 4.3 (2009) ("The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.").

[169] *Id.* R. 3.3(a)(3).

your withdrawal, however, it is difficult for the client to complain. In *In re Sealed Case*,[170] for example, the court permitted a law firm to withdraw from a case in which it justifiably believed that its client intended to commit perjury.[171] The magistrate assigned to the case had noted that the firm's withdrawal would leave the client unrepresented, while the district judge erroneously conditioned the firm's withdrawal on its willingness to forego unpaid fees owed by the client. As the *In re Sealed Case* court colorfully explained, however, "[s]ystemic interests are best served by remitting such litigants to their own devices rather than by forcing lawyers to put both their reputations and their treasury at the disposal of reprobates."[172]

If prospective false testimony surfaces in a criminal case, you should try to dissuade the client or witness from testifying falsely as explained before. If you are unsuccessful, the solution is simple regarding witnesses: do not call them. If the client is the problem, your options vary dramatically depending on whether you reasonably believe that the client will testify falsely, or whether you know that she will do so. If you only *believe* that the client will testify falsely, you must call her if she insists on testifying. If she testifies truthfully, there is no problem. If she testifies falsely and you know that she did so, you are then put in the position of having to take reasonable remedial measures on the back end. If, on the other hand, you *know* that the client intends to testify falsely, you find yourself on the terrain mapped in Part III. There your options will depend on the jurisdiction. Keep in mind, however, that even jurisdictions that permit knowingly false testimony in the form of a narrative do so only as a last resort—typically after the lawyer has moved to withdraw or has otherwise provided the court with enough information

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[170] 890 F.2d 15 (7th Cir. 1989).

[171] *Id.* at 15-16 (explaining the bases for the firm's belief).

[172] *Id.* at 18.

to suspect perjury. You must always do that which you reasonably can to avoid offering false testimony, even in a passive role. You should not offer narrative testimony without revealing to the court your intention to do so and obtaining the court's approval of that approach.

B. False Testimony In Retrospect

Clients and witnesses may surprise lawyers with false testimony, as where they testify in a deposition, at a hearing, or at trial in a manner that the lawyer did not expect. Alternatively, a lawyer may learn that a client or witness testified falsely after the fact; for example, subsequent discovery may expose the falsity of clients' or witness' testimony,[173] or a scared or remorseful client may confess an earlier lie.[174] If the false testimony is material and was offered either by the client or a witness the lawyer called, the lawyer must take reasonable remedial measures.[175] Lawyers have discretion over which remedial measures to adopt, provided that the measures are reasonably calculated to correct the false testimony.[176]

If a witness surprisingly testifies falsely during the sponsoring lawyer's examination, the lawyer might attempt prompt corrective questioning without disrupting the examination. Most authorities, however, bypass the prospect of corrective questioning on the fly and instead suggest that lawyer's first and best option is to confer privately with the client or witness and attempt to

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[173] *See, e.g.,* Mich. Eth. Op. RI-151, 1992 WL 510842, at *1 (State Bar of Mich., Comm. on Prof'l & Judicial Ethics Dec. 21, 1992) (involving clients whose dishonesty was exposed when their son, who was to be deposed after they submitted false affidavits, revealed that he would either have to perjure himself or risk sinking his parents' case by testifying truthfully).

[174] *See, e.g., In re* Mack, 519 N.W.2d 900, 901 (Minn. 1994) (involving who lied in her deposition and confessed to her lawyer several months later).

[175] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009).

[176] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. h (2000).

persuade the person to correct the false testimony. This exercise will be awkward, especially if the client or witness springs the false testimony on the lawyer in court, but that cannot be helped. The level of difficulty is lowered where, for example, the client or witness testified falsely in a deposition or by way of an affidavit and there exists a reasonable period of time between the false testimony and trial.

If the lawyer cannot persuade the client or witness to retract the false testimony, various options remain depending on the timing of the false testimony. The lawyer might move to strike the false testimony, move for a mistrial, or move to withdraw, although withdrawal alone will rarely be sufficient if the false testimony is before the court.[177] Quite simply, the lawyer's withdrawal will not reverse the false testimony's effect. Regardless of how the lawyer discloses the false testimony to the court, she must attempt to limit her disclosure to (a) preserve as much of the client's confidentiality as possible; and (b) cause the client minimal adverse effects. Once the lawyer discloses the false testimony to the court, she must leave further steps to the court or opposing party.[178]

C. Ex Parte Disclosure of False Testimony

A recurring concern is whether a lawyer who is required to disclose false testimony to a court may do so outside the presence of the opposing party. Presumably, the likelihood that a client's confidences will be revealed or that a client's case will be seriously impaired by the disclosure of false testimony is diminished if the lawyer can make any necessary disclosure to the tribunal alone. Although there is authority for the proposition that a lawyer may disclose

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[177] *See id.* (stating flatly that withdrawal is not a reasonable remedial measure once false testimony is before a trier of fact).

[178] *Id.*

false testimony to a tribunal ex parte,[179] and courts conduct colloquies with criminal defendants with only the defendant and defense counsel present to limit sensitive disclosures and otherwise protect defendants' rights,[180] ex parte disclosure requires judicial permission.[181]

A lawyer must inform other parties of her desire to communicate ex parte with the court before attempting to do so. In most cases a request to communicate ex parte with the court will be met either by objection or with questions concerning the reasons for the lawyer's request, although in criminal cases savvy prosecutors may recognize the issue and accede to the request. How the lawyer responds to such objections or inquiries—or to the court's inquiry into the reason for the lawyer's request—requires a measure of judgment on the lawyer's part and will depend on the facts of the particular case. Even if an opposing party consents to a lawyer's ex parte communications with a court, however, the court retains the discretion to either permit or decline the invitation. A court's refusal to permit ex parte communication does not excuse a lawyer's duty to disclose false testimony.

V. CONCLUSION

False testimony by clients and witnesses is one of the thorniest professional responsibility issues that trial lawyers face. Challenges for lawyers are greatest in criminal cases, but lawyers' duty of candor creates tensions even in civil litigation. Regardless of the type of case, surprise perjury by a client is a huge advocacy nightmare in addition to posing a substantial ethics

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[179] *See, e.g.*, United States v. Litchfield, 959 F.2d 1514, 1518 (10th Cir. 1992); State v. DeGuzman, 701 P.2d 1287, 1292 (Haw. 1985); Commonwealth v. Brown, 226 S.W.3d 74, 77 (Ky. 2007); Fla. Eth. Op. 04-01, *supra* note 155, 2005 WL 3985348, at *2.

[180] *See, e.g.*, United States v. Scott, 909 F.2d 488, 494 n.10 (11th Cir. 1990); United States v. Long, 857 F.2d 436, 446 (8th Cir. 1988).

[181] MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (2009).

challenge. The reality for trial lawyers is that our professional responsibility regime generally enforces their duty of candor to the tribunal over their competing duties of confidentiality and loyalty to clients. As a result, false testimony by clients and witnesses will continue to vex conscientious lawyers well into the future.

Legislative Update

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2010 IOWA LEGISLATIVE REPORT

By

Robert M. Kreamer

The Iowa Democrat party in 2010 again had total control of the Iowa legislative process. The Senate was controlled by a margin of 32-18 and the House of Representatives by a 56-44 margin. These political margins, coupled with Governor Chet Culver serving his final 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 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. There was no further action taken by the Iowa House and House File 795 was happily killed for the session by IDCA and its allies on this issue.

   We were successful again in 2010 in opposing HF 795. Because HF 795 is one of those issues that never seems to go away, it is my expectation that we will again have to face this "choice of doctor" legislation in 2011.

2. House File 758 – This bill was introduced in 2009 and provided under Iowa's wrongful-death statute, Code Section 633.336, that damages recoverable may include damages for 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. Because House File 758 failed to pass the Iowa Senate, it was abundantly clear that the 2010 legislative session was going to be subject to intense lobbying throughout.

   Presently only five states – Alabama, Arkansas, Georgia, Hawaii and North Carolina – allowed 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.

Throughout the past two years, "Legislative Alerts" have been sent to IDCA members urging opposition to HF 758 for the following reasons:

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 and entirely new category of damages never recognized nor awarded in Iowa wrongful-death cases.

During the 2010 legislative session, "Legislative Alerts" were sent to our IDCA members to contact members of the Senate thought to be weak in their support of HF 758. These seven or eight Senators had been brought down to the Governor's private office and subjected to much pressure but, fortunately for IDCA and the people of Iowa, this tactic failed and HF 758 failed to have the necessary 26 votes.

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. One reason for opposition was that it would require insurance companies selling UM/UIM coverage to cover injuries caused by "physical contact 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 polices with UM/UIM limits at 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 refuse 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 in the 2009 session but received no further attention during the balance of the 2009 session. It remained alive, however, for the 2010 session but received no further attention in 2010.

In conclusion, while the 2010 legislative session was extremely difficult, it was also 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 concern over the identified legislation. Legislators generally respond favorably to constituent contacts and in 2010 your contacts helped make the difference – thank you!

Finally, a big thank you to Jim Pugh, 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!

Medicare Update

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Handling Personal Injury Cases Involving Medicare Beneficiaries: What Defense Lawyers Need to Know, and What They Need to Do Differently.

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Defense Lawyers Should Know a Little About the History of the Medicare Secondary Payer Rules

When Medicare came into existence in 1965, it was the primary payer for medical services provided to Medicare beneficiaries, except when workers' compensation coverage was available. (See 42 U.S.C §1395). In 1980, in an effort to shift responsibility for payment of medical expenses to private insurance plans whenever possible, Congress passed the first of a series of provisions referred to collectively as the Medicare Secondary Payer (or MSP) statutes, which established Medicare as a "secondary payer" to certain other insurance plans (identified as "primary payers"). (See 42 U.S.C. §1395y(b)(2)(A)(ii)). As a secondary payer, Medicare was only "conditionally" required to pay for medical treatment and services, with the expectation of reimbursement once the primary insurance plan paid on the Medicare beneficiary's personal injury claim.

In 2003, prompted by skyrocketing Medicare costs, Congress made additional changes designed to resolve conflicting judicial opinions interpreting the MSP provisions and to further strengthen Medicare's secondary payer status by clarifying that Medicare is *always* considered a secondary payer whenever a primary insurance plan (including self-insurance) has made or should have made a primary payment for medical services provided to a Medicare beneficiary. (See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, *Pub. L. No. 108-173, §301, 117 Stat. 2066* (2003)). In the MSP context "primary insurance plans" are defined very broadly to include group health insurers (See 42 C.F.R. §§411.20 and 411.21), workers' compensation insurers (See 42 C.F.R. §§411.20 and 411.40(a)), liability insurers and those who self-insure for liability, including auto liability

insurers, uninsured and underinsured motorist insurers, homeowners' liability insurers, malpractice insurers, product liability insurers and general casualty insurers (See 42 C.F.R. §§411.20 and 411.50(b)).

In February 2008, the federal regulations implementing the MSP statutes were amended to clarify that a primary payer's "responsibility" for payment is not limited to just those situations where the primary payer accepts liability for the injuries which required medical treatment. Instead, though a primary payer's responsibility to pay may be demonstrated by a judgment, "responsibility" may also be demonstrated by a payment conditioned on giving a waiver or release to the primary payer or its insured (whether or not there is a determination or admission of liability), and can be demonstrated by "other means" including but not limited to a settlement, award, or contractual obligation. (See 42 U.SC. §1395y(b)(2)(B)(ii) and 42 C.F.R. §411.22).

Obviously, Medicare's ability to identify and recover conditional payments depends on knowing when primary plans have issued payments to, or reached settlements with, Medicare beneficiaries. Historically there have been several laws and regulations in place requiring that Medicare be notified when it has made a primary payment for services which were, or should have been, paid by a third-party payer or primary plan. (See Omnibus Reconciliation Act of 1980 (Public Law 96-499); Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Public Law 108-173); 42 C.F.R. § 411.25; and 42 C.F.R. § 489.20(f) and (g)). However, in part because Medicare did not pursue enforcement of the existing reporting requirements, and in part because there was no penalty for failing to report information to Medicare, the reporting requirements were largely ignored and consequently Medicare lacked the information necessary to allow it to aggressively pursue recovery of conditional payments from personal injury settlements.

Inconsistent reporting, exacerbated by depletion of the Medicare Trust Fund and predictions Medicare would become insolvent, prompted the most recent amendment to the MSP statutes, aimed at getting insurance companies to report payments and settlements to Medicare so it could step up its recovery efforts. President Bush uneventfully signed Senate Bill 2499 into law on December 29, 2007, but it took awhile for the new legislation—known as the "Medicare, Medicaid, and SCHIP Extension Act of 2007" and more commonly referred to as the "**MMSEA**"—to get the attention it deserves. (See 42 U.S.C. § 1395 y(b)(8)).

Section 111 of the MMSEA requires that all Liability insurers (including self-insurers), No-fault insurers, Workers' Compensation insurers, and Group Health insurers must report detailed information directly to Medicare ***each time a settlement, judgment, award or other payment is made to a claimant who is entitled to receive Medicare benefits***. Failure to comply with the reporting requirements carries a ***civil penalty of $1,000 per claim, per day.***

The new Mandatory Insurer Reporting requirements have not only required carriers to make substantial changes to the way they investigate and manage personal injury claims

involving Medicare beneficiaries, but have prompted a paradigm shift for lawyers who bring and defend personal injury claims. Medicare's increased focus on enforcement of the MSP rules , coupled with the fact that carriers will be reporting every payment made to Medicare beneficiaries, make it imperative that lawyers become more familiar with navigating and managing the complex rules governing Medicare's Secondary Payer status.

Defense Lawyers Should Know How the MSP Rules Impact Personal Injury Cases

The MSP rules and procedures are at odds with established claim-handling practices in personal injury litigation. It is challenging enough to navigate the maze of statutes and regulations governing Medicare's sweeping rights of recovery against personal injury claimants, lawyers and insurance carriers, but it is nearly impossible to actually incorporate the MSP rules into the daily routine of handling personal injury claims without entirely disrupting the process and unnecessarily delaying resolution of the claim. Here are a few examples of the hurdles created by the existing MSP procedure, and some suggestions for how to clear them.

YOU SHOULD KNOW: Medicare does not have an ordinary "lien". You will often will hear folks refer to a "Medicare lien" when discussing Medicare's right to recover conditional payments, but the MSP statutes and regulations actually give Medicare something far more powerful than an ordinary lien. Federal law gives Medicare what is more properly referred to as a ***priority right of reimbursement*** which allows Medicare to seek recovery of its conditional payments from virtually everyone involved in a personal injury claim—the plaintiffs, the lawyers, the insurers, and even the medical providers. What's more, Medicare takes the position that its priority right of recovery takes precedence over the liens and subrogation claims asserted by any other party, including Medicaid. (See Medicare Secondary Payer (MSP) Manual, Chapter 7, 50.1).

YOU SHOULD KNOW: Any line of insurance which provides payment for personal injury or illness is considered "primary" to Medicare. Medicare defines "primary insurance plans" very broadly to include:

a. **Group Health** insurers (See 42 C.F.R. §§411.20 and 411.21);
b. **Workers' Compensation** insurers (See 42 C.F.R. §§411.20 and 411.40(a));
c. **No-fault** insurers, including medical payments coverage and personal injury protection coverage (See 42 C.F.R. §§411.20 and 411.50(b));
d. **Liability** insurers and those who **self-insure** for liability, including (but not limited to) auto liability insurers, uninsured and underinsured motorist insurers, homeowners' liability insurers, malpractice insurers, product liability insurers and general casualty insurers (See 42 C.F.R. §§411.20 and 411.50(b)).

There is virtually no line of personal injury insurance (including first-party coverage such as medical payments coverage and uninsured/underinsured motorist coverage) which is not subject to Medicare's claim for reimbursement.

YOU SHOULD KNOW: Medicare can sue plaintiffs and their lawyers directly to recover conditional payments. The MSP rules give Medicare a direct right of action to recover its conditional payments from *any person or entity who has received a primary payment* (such as payment of settlement proceeds, payment of medical payment benefits or payment of a subrogation claim). Medicare can seek recovery of its conditional payments directly from any of the following who have received primary payments:

Medicare beneficiaries
Attorneys
Physicians and medical providers
State agencies
Private insurers

(See 42 C.F.R. §411.24(g)).

REAL LIFE EXAMPLE: Paul Harris, a lawyer in West Virginia, settled his client's personal injury case for $25,000 and was sued by the federal government when he failed to timely distribute Medicare's share of the settlement proceeds ($11,367.78 plus interest) within 60 days of receiving the settlement funds. See United States of America v. Paul J. Harris, Esq., Civil Action No. 5:08CV102 (2009 WL 891931) (N.D.W.Va.). The attorney resisted Medicare's recovery demand claiming he could not be held individually liable under the MSP statutes because he had notified Medicare of the settlement and his intent to disburse the settlement funds, and he and Medicare had not yet reached any specific agreement on the amount of reimbursement to be paid. The government filed a Motion for Summary Judgment and, on March 26, 2009, the motion was granted and the attorney was ordered to pay the full amount of Medicare's recovery demand, plus interest which had been accruing since early 2006 (60 days after Medicare sent its demand letter). The Court did not allow the attorney to contest the amount of recovery being sought, noting that if the attorney had "any qualms" concerning the extent of his liability under the MSP rules he should have challenged Medicare's recovery demand through the administrative appeals process, and his failure to do so precluded him from contesting Medicare's reimbursement determination in the collection matter.

YOU SHOULD KNOW: If a plaintiff doesn't reimburse Medicare from the settlement proceeds, the settling insurance carrier can be required to reimburse Medicare even though it has already paid the plaintiff. If those who have received primary payments from an insurance carrier fail, for whatever reason, to fully reimburse Medicare as required

by federal law, Medicare can recover its conditional payments through a direct cause of action against the insurer (or self-insured entity) who issued the primary payment in the first place. Consequently, even though the insurance carrier already paid the full settlement amount to the plaintiff, the law allows Medicare to sue the carrier directly to recover conditional payments which should have been (but were not) reimbursed from the settlement. (See 42 C.F.R. §411.24 (i)). Because settling insurance carriers bear the risk of duplicative payment if a plaintiff fails to reimburse Medicare, carriers and defense counsel are changing their standard settlement protocol and are taking affirmative steps to ensure Medicare is reimbursed from settlement proceeds rather than leaving issues of reimbursement solely to the plaintiff and/or their counsel.

YOU SHOULD KNOW: Medicare can recover double damages from primary payers if it files suit to recover conditional payments. If Medicare resorts to initiating legal action to recover its conditional payments, it may recover *twice* the amount of its demand, plus interest. (See 42 U.S.C. §1395y(b)(2)(B)(iii) and 42 C.F.R. §411.24).

YOU SHOULD KNOW: Medicare has a long time to seek recovery of conditional payments. There is ongoing debate regarding whether Medicare's right of recovery is governed by the 3-year statute of limitations set out in 42 U.S.C. § 1395y(b)(2)(B)(vi), or the 6-year statute of limitations set out in 28 U.S.C. §2415(a). Either way, those who bring and defend personal injury claims should be aware Medicare may seek recovery of its conditional payments long after a settlement is completed and the file has been closed.

> **CONSIDER THIS CHANGE:** Lawyers should review their document retention policies to ensure claims information (including medical documentation, expert opinions, Releases, Indemnity Agreements and documentation of procurement costs) involving Medicare beneficiaries remains available for at least 6 years after the settlement or judgment is paid. Medicare itself suggests a standard record retention policy of 10 years on MSP-related matters.

YOU SHOULD KNOW: How to Identify Medicare beneficiaries. Medicare entitlement is not limited to citizens over age 65, but can include a citizen of any age who: 1) has been entitled to Social Security disability benefits for 24 months; 2) received a disability pension from the railroad retirement board and meets certain conditions; 3) has Lou Gehrig's disease (amyotrophic lateral sclerosis); 4) is the child or widow(er) age 50 or older, including a divorced widow(er), of someone who has worked long enough in a government job where Medicare taxes were paid and meets the requirements of the Social Security disability program; 5) has end stage renal disease. (See 42 U.S.C. §1395-1395ggg).

> **CONSIDER THIS CHANGE:** Routine initial file handling should now include specific inquiry into whether the plaintiff is a Medicare beneficiary, so the practical impact of Medicare's reimbursement rights can be considered and managed from the inception of the claim. The claimant's full name, SSN, HICN

and date of birth information should be requested early in a claim so the insurance carrier can: 1) run the information through Medicare's COBC Query process to assist in determining whether a claimant is a Medicare beneficiary; and 2) have the Medicare information available once the time comes to report a payment under the new Mandatory Insurer Reporting Requirements. See Section 111 of the MMSEA, 42 U.S.C. § 1395 y(b)(8)). **Remember also that a claimant's Medicare status can change during the pendency of a claim,** so even if a claimant is not a Medicare beneficiary at the time of the accident or when suit is filed, their status may change by the time a settlement or judgment is reached. Consequently, expect carriers and defense counsel to revisit the claimant's Medicare status before settling a claim or paying a judgment, to ensure they are in compliance with Mandatory Insurer Reporting Requirements and avoid incurring hefty penalties for failing to report payments made to Medicare beneficiaries.

YOU SHOULD KNOW: Medicare doesn't need to provide any formal notice of its recovery rights. Unlike traditional liens and subrogations, Medicare's right to reimbursement is not dependent on, or triggered by, providing notice of any sort. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.2.2).

YOU SHOULD KNOW: Medicare won't participate in settlement negotiations and won't conclusively determine the amount it is owed until after a settlement or a judgment. Although Medicare's right to reimbursement is often a significant obstacle to settlement, Medicare will not participate in parties' settlement negotiations or attend mediations. In fact, the CMS Manual actually *prohibits* the MSPRC from entering into settlement negotiations (either pre- or post-settlement) with beneficiaries, their attorneys, or insurance carriers. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.2 and 50.4.3) Making matters worse, Medicare will not finally determine the amount it is owed until *after* it is notified the personal injury claim has been settled and is provided documentation of the amount of such settlement. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.1 and 42 C.F.R §411.24(b)).

KEEP AN EYE OUT FOR FUTURE CHANGES: There are efforts underway to revise the MSP recovery system to allow parties quicker access to more reliable information on the amount Medicare will demand from a settlement, but for the time being lawyers bringing and defending personal injury claims must accept that Medicare will not participate in settlement discussions.

CONSIDER THIS CHANGE: To facilitate and inform settlement discussions, counsel should obtain a conditional payment summary from the MSPRC *early* in a claim, and should *update* the conditional payment information regularly throughout the pendency of the claim, *and especially before participating in any settlement negotiation, mediation, or trial.* In October of 2009 the MSPRC changed the procedure for obtaining conditional

payment information, and a tutorial on the new process is available at www.msprc.info. Having access to current conditional payment information will enable counsel to make an educated estimate of the probable amount of Medicare's eventual recovery demand using the recovery formula contained in 42 C.F.R. § 411.37, and also will allow defense counsel an opportunity to identify the inevitable unrelated charges which Medicare often sweeps into the conditional payment summary. Once the unrelated charges are identified, defense counsel should work with plaintiff's counsel to challenge the unrelated charges *before* settlement negotiations begin, thereby decreasing the likelihood that settlement negotiations will be derailed by over-inflated conditional payments.

YOU SHOULD KNOW: There is no quick easy way for defense counsel to obtain conditional payment information. Current Medicare rules do not allow insurers or defense counsel to request conditional payment information directly from Medicare without first getting the written consent of the Medicare beneficiary. The written consent of the Medicare beneficiary is obtained by having them sign a "Consent to Release" form. A copy of the CMS "Consent to Release" form can be obtained from http://www.msprc.info/forms/ConsenttoRelease.pdf. Once a signed "Consent to Release" form is obtained from the claimant and sent into the MSPRC along with a written request for a conditional payment investigation, long response times have been the norm, and occasionally no response is received from the MSPRC at all. Adding to the frustration, it is not uncommon for claimants to refuse to provide defense counsel with a signed "Consent to Release" form, or refuse to share updated conditional payment information with the defense, contending (incorrectly) that only the beneficiary has responsibility for reimbursing Medicare.

CONSIDER THIS CHANGE: Due to the potential liability the MSP rules impose on primary payers, and the risk of paying twice if the claimant does not reimburse Medicare, recourse to the Court may be necessary if a claimant is being uncooperative and refuses to sign a "Consent to Release" form to enable defense counsel to obtain, and update, conditional payment information. While the traditional way of obtaining conditional payment information (by providing a signed "Consent to Release" form to the MSPRC and waiting for a Conditional Payment Letter to arrive) is still an option, now Medicare beneficiaries and their representatives have quicker access to current conditional payment summaries via www.MyMedicare.gov, a site which Medicare intends to update weekly. Consequently, it may make sense to ask (either through a discovery request or otherwise) that the claimant produce print-outs of the most current conditional payment information directly off the MyMedicare website.

YOU SHOULD KNOW: When seeking reimbursement of conditional payments Medicare will not recognize efforts to allocate settlement proceeds to damages other than medical expenses (such as pain and suffering or consortium damages) *unless the allocation is based on a court order issued on the merits of the case.* (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.4). Current Medicare policy allows Medicare's recovery to be calculated using the full amount of the liability award or settlement without regard to whether, or how, the parties agreed to allocate amounts to damages other than medical expenses. The CMS Manual provides:

> "The only situation in which Medicare recognizes allocations of liability payments to nonmedical losses is when payment is based on a court order on the merits of the case. If the court order or other adjudicator of the merits specifically designate amounts that are for payment of pain and suffering or other amounts not related to medical services, Medicare will accept the court's designation. Medicare does not seek recovery from portions of court awards that are designated as payment for losses other than medical services."

(See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.4). It is important to understand that under the current MSP scheme, Medicare will use the entire settlement or judgment amount to calculate its recovery, and Medicare will not recognize that portions of the settlement or judgment were intended by the parties to compensate the plaintiff for non-medical losses, *unless there is a court order on the merits which designates amounts not related to medical expenses.*

REAL LIFE EXAMPLE: Vernon Hadden was a pedestrian in Kentucky who was struck and severely injured by a public utility vehicle which was swerving to avoid an unidentified motorist who ran a stop sign. The plaintiff and the utility company agreed the unidentified driver was 90% responsible for the accident, the utility company driver was 10% responsible, and the plaintiff was without fault in the accident. The plaintiff eventually settled his claim against the utility company and its driver for $125,000, and received another $10,000 in Kentucky basic reparation benefits. After the settlement sums were paid to the plaintiff, Medicare demanded recovery of $62,338.07 in past conditional payments. The plaintiff requested a waiver of Medicare's claim for reimbursement, arguing essentially two points: 1) Medicare should reduce its recovery under comparative fault theories; and 2) Medicare should waive recovery because the plaintiff was not "made whole" by the settlement with the utility company. CMS denied the plaintiff's request, and the plaintiff appealed the denial to a Medicare Qualified Independent Contractor (or "QIC) who returned a decision in favor of CMS. The plaintiff appealed the QIC's decision to an Administrative Law Judge and a hearing was held, after which the ALJ also found in favor of CMS. The plaintiff' appealed the ALJ's

decision to the Medicare Appeals Council which affirmed the ALJ's decision. The plaintiff then filed an action in federal court petitioning for review of the administrative determinations. The federal district court, in an opinion released on August 6, 2009, upheld the administrative decisions and dismissed the plaintiff's petition. The Court's analysis, and particularly the Court's admonition that "had Plaintiff wanted equitable allocation and subrogation principles to apply to this case, then he should have proceeded to trial on the merits of his tort claim in state court" demonstrates the futility of requesting a compromise of Medicare's recovery on comparative fault theories following a settlement, and highlights the need for legislative reform in this area. See Vernon Hadden v. United States of America, (2009 U.S. Dist. LEXIS 69383)(August 6, 2009).

CONSIDER THIS CHANGE: When a case proceeds to trial there are opportunities for managing (and potentially limiting) Medicare's right to reimbursement which should not be overlooked. Because Medicare will recognize allocations which are based on a court Order on the merits of the case, (see Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.4), counsel should consider requesting special interrogatories and/or special verdict forms which ask the jury to specify the portion of the judgment or award which is designated as payment for medical expenses.

YOU SHOULD KNOW: When seeking reimbursement of conditional payments, Medicare does not take into account preexisting conditions which the parties considered unrelated to the accident. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.5). In other words, even though parties may agree for purposes of settlement that certain post-accident care was due to a pre-existing condition and not related to the accident, Medicare takes the position that when a plaintiff files suit seeking recovery for accident-related medical expenses (including expenses related to exacerbation of an underlying or pre-existing condition), the total amount of Medicare's conditional payments should be used to calculate the amount of Medicare's recovery. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.5).

CONSIDER THIS CHANGE: If a case is proceeding to trial, a general verdict form (with a single line for the full amount the plaintiff is to recover) will allow Medicare to seek reimbursement from the entire amount of the verdict. Instead of using a general verdict form, consider requesting special interrogatories and/or special verdict forms which ask the jury to specify the portion of the judgment or award which is designated as payment for medical expenses. In cases where some of the medical expenses were covered and paid by Medicare and others were not, consider requesting a jury form which more precisely

identifies or lists which of the medical expenses the jury found to be proximately caused by the accident.

YOU SHOULD KNOW: Medicare can seek recovery of the entire settlement or judgment even if the plaintiff was not "made whole" by the settlement. When Medicare's conditional payments *equal or exceed* the amount of the personal injury settlement or judgment, *Medicare can recover the total amount of the settlement or judgment, less "procurement costs."* (See 42 C.F.R. §411.37 (d)). When Medicare's conditional payments are *less than* the amount of the personal injury settlement or judgment, Medicare's recovery will be computed by determining the ratio of the procurement costs to the total judgment or settlement, and applying that ratio to Medicare's reimbursement claim to determine Medicare's share of the procurement costs, then subtracting Medicare's share of the procurement costs from Medicare's reimbursement claim to determine the amount of Medicare's recovery. (See 42 C.F.R. §411.37(c)).

CONSIDER THIS CHANGE: Be aware that in the liability and no-fault context, the CMS Manual provides that conditional payments will be reduced by procurement costs *only in those cases where "the claim was in dispute."* (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4). As such, plaintiff's counsel should not automatically assume procurement costs will be considered by Medicare when calculating its final recovery amount, but instead should make an effort to document and demonstrate to Medicare that the claim was disputed to ensure procurement costs are used to reduce the amount of Medicare's recovery.

YOU SHOULD KNOW: Medicare can seek reimbursement even in those cases where the settlement or judgment doesn't purport to compensate the plaintiff for medical expenses. One cannot avoid Medicare's right to reimbursement in a personal injury claim merely by re-characterizing damages in the context of the settlement agreement, nor can one preclude Medicare's recovery simply by omitting a claim for medical expenses from the Complaint if medical expenses are recoverable under the applicable law. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.1, 50.4.4 and 50.5.4.1.1). Be aware that whenever a claimant signs a release with language broad enough to release any claim they may have for medical expenses or personal injury related to an accident, Medicare can take the position that the settling insurer is a primary payer under existing federal law. Recall that a primary payer's responsibility may be demonstrated by, among other things, a claimant giving a waiver or release to the primary payer or its insured (whether or not there is a determination or admission of liability). See 42 U.SC. §1395y(b)(2)(B)(ii) and 42 C.F.R. §411.22.

Real Life Example: The Eighth Circuit has ruled that Medicare has a right of reimbursement from settlement proceeds received in a wrongful death case despite the next of kin's claim that the settlement

did not include compensation for any medical expenses. See Mathis v. Leavitt, United States Court of Appeals for the Eighth Circuit, No. 08-1983 (January 30, 2009). In that case Medicare had paid $77,403.67 for the decedent's final medical expenses, and claimed a right to reimbursement in that amount from the wrongful death settlement proceeds. The next of kin admitted the medical expenses would have been recoverable in a personal injury case had the decedent survived, but claimed the medical expenses were not "damages" recoverable in a wrongful death lawsuit under Missouri law. The Eighth Circuit disagreed, noting among other things that Missouri had a combined wrongful death and survival statute and, because the next of kin had claimed all damages available under the Missouri wrongful death statute, the settlement necessarily resolved any claim for medical expenses and consequently Medicare had a right to be reimbursed from the settlement proceeds.

PRACTICAL IMPLICATION:

- If state law permits recovery of medical expenses in wrongful death/survival actions, then Medicare has a right to recover from the settlement even if medical expenses were not specifically requested in the Complaint. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4.1.1).
- However, if state wrongful death law limits the amount of past medical expenses which can be recovered from a tortfeasor (and responsible insurer) Medicare can recovery only up to that amount (or the amount of the settlement, if the settlement is less than or equal to Medicare's claim.) (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4.1.1).

CONSIDER THIS CHANGE: If a wrongful death case is proceeding to trial, a general verdict form (with a single line for the full amount the personal representative is to recover) will allow Medicare to seek reimbursement from the entire amount of the verdict. Instead of using a general verdict form, consider requesting special interrogatories and/or special verdict forms which ask the jury to specify the portion of the judgment or award which is designated as payment for medical expenses. In cases where some of the medical expenses were covered and paid by Medicare and others were not, consider requesting a jury form which more precisely identifies or lists which of the medical expenses the jury finds were proximately caused by the accident.

YOU SHOULD KNOW: There is no low dollar threshold for Medicare reimbursement. Although there are waiver provisions and "financial hardship" provisions which Medicare can utilize to accept less than the full amount of its claim (see, e.g., 42 U.S.C §404(b); 42 C.F.R. § 411.28; and Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.6 and 50.7), Medicare's right to recover conditional payments is not qualified by a low-dollar threshold of any sort. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.0).

PRACTICAL IMPLICATION: Even when Medicare's claim for conditional payment reimbursement is small, failure to protect it carries the risk of paying double damages plus interest if the government files suit. Don't be persuaded by suggestions that a certain settlement amount is too low for Medicare to bother with. In today's economy, it must be assumed there is no such thing as an MSP claim too small to get Medicare's attention.

YOU SHOULD KNOW: Medicare isn't bound by the terms of a Release between the parties. A release signed by the parties is not binding on Medicare, so even if the parties may have agreed the claimant would assume full responsibility for repaying Medicare's demand, the release agreement will not prevent Medicare from seeking reimbursement from *any* of the parties and entities responsible under federal law for protecting Medicare's right to reimbursement. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.3). Moreover, although most releases contain indemnification language requiring the plaintiff to indemnify the primary payer for any sums paid to Medicare as a result of Medicare's reimbursement claim, such indemnification provisions offer incomplete protection because: 1) Medicare is not bound by the indemnification agreement; and 2) a plaintiff who lacks the funds to repay Medicare initially is unlikely to have funds available to indemnify the primary payer later.

CONSIDER THIS CHANGE: You should discuss and agree upon the procedure for reimbursing Medicare when settling a personal injury claim, but at the same time you should recognize Medicare will not be bound by the parties' agreement on things like a timeline for reimbursing Medicare, responsibility for reimbursing Medicare, or the manner in which Medicare will be paid. Additionally, you should include an indemnification agreement in any settlement involving a Medicare beneficiary, but you should recognize Medicare is not bound by the indemnification agreement and, if Medicare's final demand is not fully repaid by the beneficiary, Medicare can seek recovery directly from the insurer without regard to the parties' indemnification agreement. Also keep in mind there may be enforceability problems in certain jurisdictions to the extent indemnity is sought for penalties and fines related to failing to reimburse Medicare.

YOU SHOULD KNOW: Unlike ordinary liens and subrogations, protecting Medicare's recovery rights is not as simple as putting Medicare's name on the settlement check and letting the plaintiff's attorney handle the details. Including Medicare as one of several payees on a single settlement check may be common practice, but it will not necessarily protect the primary payer from the possibility of duplicative payments and legal action to recover double damages. Here's why.

- The regulations require MSP reimbursement to be made by issuing payment directly to Medicare, or by issuing payment in the manner Medicare directs in its recovery demand letter. (See 42 C.F.R. §411.22(c)(1) and (2)). It is Medicare's practice *not* to endorse multi-party settlement checks until all other payees have endorsed the check, after which Medicare deposits the settlement funds into an interest bearing account. (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4.3 (B)).
- If all other payees are willing to endorse the multi-party check and allow Medicare to deposit the entire check, the process works smoothly.
- However, if the dollar amount of the multi-party check is insufficient to reimburse Medicare for the full amount of its claim, or if one of several payees refuses to endorse the check or allow Medicare to deposit the check into its own interest bearing account, Medicare will refer the matter for legal action to recover its conditional payments, (See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4.3 (B)) thereby exposing the primary payer to the possibility of double damages plus interest. (See 42 C.F.R. §411.24(c)(2)).

    - **CONSIDER THIS CHANGE**: If a settling insurer wants to be confident it has protected itself against the possibility it may be called upon to reimburse Medicare even after it has paid the full settlement amount to the claimant, the *safest* practice is to wait for the MSPRC Demand Letter to arrive, and then prepare a separate check made payable to Medicare for the full amount indicated in the Demand Letter and pay any remainder out in accordance with the settlement agreement. Of course, there are many other approaches which also offer protection against duplicative payments. For instance, the parties can agree the insurer will pay the settlement proceeds out in two steps, holding back from the first payment a sum equal to the full amount of the most recent Conditional Payment Summary and then, once the MSPRC Demand letter arrives, issuing a check directly to Medicare for the full amount of its final demand and pay any remaining sums to the plaintiff. Another popular approach is to agree to pay the full settlement amount so long as plaintiff's counsel agrees in writing to hold a portion of the settlement proceeds (usually equal to entire amount of most recent Conditional Payment Summary) in their client trust account until the MSPRC Demand Letter arrives, after which plaintiff's counsel agrees to pay the final demand to Medicare in full before distributing any remaining settlement proceeds.

YOU SHOULD KNOW: Ordinary releases offer insufficient protection in cases involving Medicare beneficiaries. Much to the disappointment of many defense attorneys and insurance carriers, there is no magic "Medicare paragraph" which can be dropped into a standard release to address all possible scenarios, and there is no single "form" release which will work effectively for every Medicare beneficiary. Instead, consider the following suggestions when preparing releases in cases involving Medicare beneficiaries:

- **If the claimant/releasor DENIES being a Medicare beneficiary**:
  - ✓ Language should be included in the Release warranting that the claimant/releasor is not entitled to Medicare and that Medicare has not paid for or been asked to pay for any accident-related treatment;
    - Be aware that including such language in the Release will *not prevent* Medicare from seeking reimbursement for past conditional payments should it later be determined the claimant *was* in fact a Medicare beneficiary;
    - Likewise, be aware that including such language in a Release will not protect the insurer from fines under §111 of the MMSEA if the insurer fails to report a settlement with a Medicare beneficiary;
- **If the claimant/releasor IS a Medicare beneficiary:**
  - ✓ The Release should recite that the claimant/releasor is a Medicare beneficiary and should reflect what the parties have done to consider and protect Medicare's interests;
  - ✓ The Release should recite the parties agreed-upon method for paying out the settlement proceeds and for reimbursing Medicare;
  - ✓ The Release should include an express waiver of any private cause of action under 42 U.S.C. 1295y(b)(3)(A);
  - ✓ The Release should include acknowledgment that the claimant/releasor understands there is a possibility the settlement may impact, limit or preclude their right/ability to receive future Medicare benefits related to the injuries alleged in the lawsuit, and they nevertheless desire to proceed with the settlement;
  - ✓ The Release should acknowledge that the claimant/releasor understands they have the right to seek a waiver, partial waiver, or pursue an appeal of the amount of the recovery sought by Medicare, and should recite that if they choose to request a waiver, partial waiver or pursue an appeal they nevertheless will (pending the outcome of such waiver request or appeal) repay Medicare's final demand within 60 days of receiving the Final Demand Letter from the MSPRC;
  - ✓ The Release should include a cooperation clause (including an agreement to share all correspondence to/from Medicare regarding the claim) to ensure the insurer remains in the loop concerning Medicare's reimbursement, and to secure the claimant/releasor's cooperation /assistance in the event the insurer is pursued by the United States for reimbursement following settlement of a personal injury claim;

- ✓ The Release should include indemnification/hold harmless language which specifically mentions (but is not limited to) claims by or on behalf of Medicare;
- ✓ If the claimant/releasor is finished treating for the accident the Release should reflect the fact that no future accident-related treatment is expected;
- ✓ If the claimant/releasor is reasonably expected to require future accident-related treatment, and if the settlement includes compensation for such future accident-related treatment (even if disputed), the parties may want the Release to reflect the estimated cost of future accident-related care and the steps the parties have taken to avoid shifting responsibility for future accident-related care to Medicare;

YOU SHOULD KNOW: There is ongoing debate about whether Medicare Set-Aside arrangements are advisable when settling liability cases which include compensation for future medical expenses. The use of Medicare Set-Asides (or "MSAs") in the workers' compensation context, and the resulting savings to the Medicare Trust Fund, has prompted heated debate over whether Medicare might formally expand the use of MSAs to liability settlements. A review of the literature reveals a continuum of positions on the subject, with some erroneously suggesting Medicare is already "requiring" MSAs in liability cases, others predicting Medicare is on the cusp of recommending MSAs in liability settlements, and still others arguing there is no need to even consider MSAs outside the workers' compensation context. Some have predicted that Medicare is likely to move toward formalizing a procedure for establishing MSAs in liability settlements, and there are indications Medicare is preparing to do precisely that. For instance, effective July 6, 2009, Medicare added a definition of "Set-Aside Arrangement" to its Medicare Secondary Payer Manual which, for the first time, defined MSAs in a way which did not limit them to only the workers' compensation context:

> Set-aside Arrangement - An administrative mechanism used to allocate a portion of a settlement, judgment or award for future medical and/or future prescription drug expenses. **A set-aside arrangement may be in the form of a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA), No-Fault Liability Medicare Set-Aside Arrangement (NFSA) or Liability Medicare Set-Aside Arrangement (LMSA).**

See Medicare Secondary Payer (MSP) Manual – Chapter 1 – Background and Overview, section 20 – Definitions. (Emphasis added). While the federal statutory basis for establishing Medicare as a secondary payer is no different for workers' compensation plans than for no-fault or general liability plans, Medicare has declined to formally address or establish uniform procedures for utilizing MSAs in liability cases. As a result, some of Medicare's Regional Offices will agree to review and approve MSAs in liability cases, while others Regional Offices refuse to do so. To further complicate the debate, Medicare's own manual currently states: "There should be no recovery of benefits paid for services rendered

after the date of a liability settlement" which suggests a fundamental shift in Medicare policy would be necessary before it could be said that MSAs are recommended in liability and no-fault settlements. (See Medicare Secondary Payer (MSP) Manual, Chapter 7 – Contractor MSP Recovery Rules, section 50.5). As the debate continues regarding whether MSAs are advisable in liability settlements, those who defend personal injury claims are left to grapple with how to adequately protect their client's interests (and protect Medicare's interests) when settling claims involving future medical expenses. For a summary of the arguments for and against using MSAs in personal injury settlements, and practical strategies for deciding whether and when an MSA may be appropriate, see "Medicare Matters: Part III" in the September 2009 issue of THE NEBRASKA LAWYER.

Making Your Case at Trial with a Better Memory

Paul Mellor
Success Links
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Richmond, VA 23236
Ph: (804) 276-4139
greatmemory@comcast.net

Making Your Case with a Better Memory

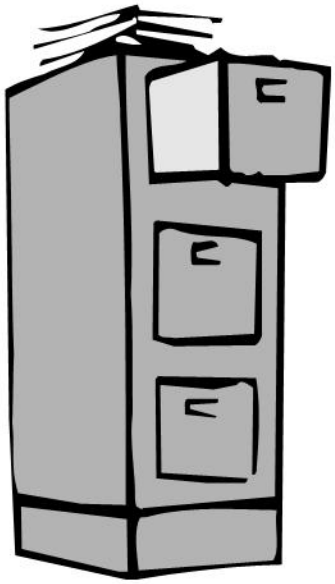
Iowa Defense Counsel Association

Wednesday, September 15, 2010
West Des Moines, Iowa

Presenter

Paul Mellor

8:14 am



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8:14 am

4:27 pm

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WHICH REMINDS ME ...

EGG

EGG SHELL ⇢ SHELL MACARONI

MACARONI & CHEESE

CHEESE PIZZA ⇢ PIZZA HUT

HUT 1, HUT 2, HUT 3

3 MUSKETEERS BAR ⇢ BARMAID

MADE MY BED

BED POST ⇢ POSTAGE STAMP

STAMP OUT FIRES

FIRE FLY ⇢ FLYBALL

BALLROOM DANCING

DANCING GIRLS ⇢ GIRLS & BOYS

BOYSENBERRY PIE

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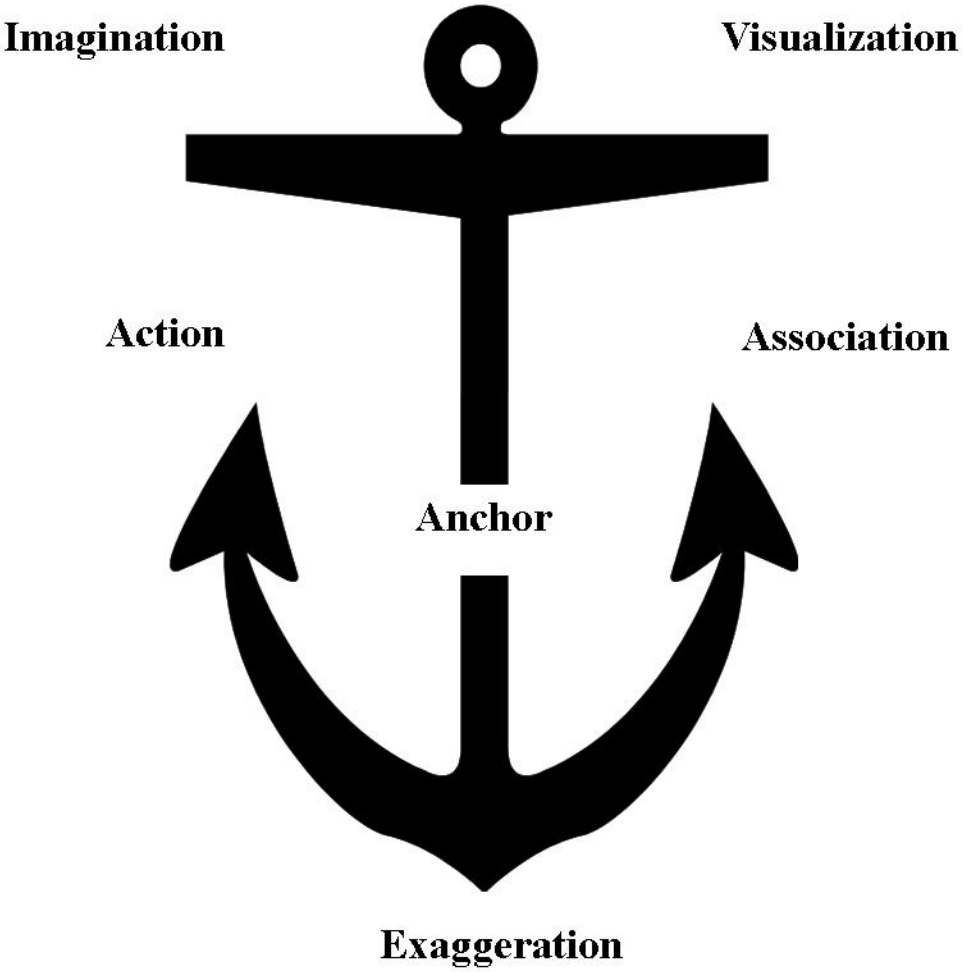
Components
to a
Mental Filing System



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IRVING YOUNGER'S 10 COMMANDMENTS OF CROSS EXAMINATION

1. Be Brief

Be brief, short and succinct. Why? Reason 1: chances are you are screwing up. The shorter the time spent, the less you will screw up. Reason 2: A simple cross that restates the important part of the story in your terms is more easily absorbed and understood by the jury. You should never try to make more than 3 points on cross-examination. Two points are better than three and one point is better than two.

2. Use Plain Words

The jury can understand short questions and plain words. Drop the 50 dollar word in favor of the 2 dollar word. "Drive you car" instead of "operate your vehicle."

3. Use Only Leading Questions

The law forbids questions on direct examination that suggest the answer. The lawyer is not competent to testify. On cross-examination the law permits questions that suggest the answer and allows the attorney to put his words in the witnesses' mouth. Cross-examination, therefore, specifically permits you to take control of the witness, take him where you want to go, and tell your important point to the jury through the witness.

Not asking controlled leading questions leaves too much wiggle room. What happened next? I would like to clear up a couple of points you made on direct? These questions are the antithesis of an effective cross-examination. Any questions which permit the witness to restate, explain or clarify the direct examination is a mistake.

You should put the witness on autopilot so that all of the answers are series of yes, yes, yes!

4. Be Prepared

Never ask a question that you do not know the answer to. Cross is not a fishing expedition in which you uncover new facts or new surprises at the trial.

5. Listen

Listen to the answer. For some, cross-examination of an important witness causes stage fright; it confuses the mind and panic sets in. You have a hard time just getting the first question out, and you're generally thinking about the next question and not listening to the answer.

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6. Do Not Quarrel
Do not quarrel with the witness on cross-examination. When the answer to your question is absurd, false, irrational contradictory or the like; Stop, sit down. Resist the temptation to respond with "how can you say that, or how dare you make such an outrageous claim?" The answer to the question often elicits a response, which explains away the absurdity and rehabilitates the witness.

7. Avoid Repetition
Never allow a witness to repeat on cross-examination what he said on direct examination. Why? The more times it is repeated, the more likely the jury is to believe it. Cross-examination should involve questions that have nothing to do with the direct examination. The examination should not follow the script of the direct examination.

8. Disallow Witness Explanation
Never permit the witness to explain anything on cross-examination. That is for your adversary to do.

9. Limit Questioning
Don't ask the one question too many. Stop when you have made your point. Leave the argument for the jury.

10. Save for Summation
Save the ultimate point for summation. A prepared, clear and simple leading cross-examination that does not argue the case can best be brought together in final summation.

Summarized from The Art of Cross-Examination by Irving Younger. The Section of Litigation Monograph Series, No. 1, published by the American Bar Association Section on Litigation, from a speech given by Irving Younger at the ABA Annual Meeting in Montreal Canada in August of 1975.

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Body Anchor

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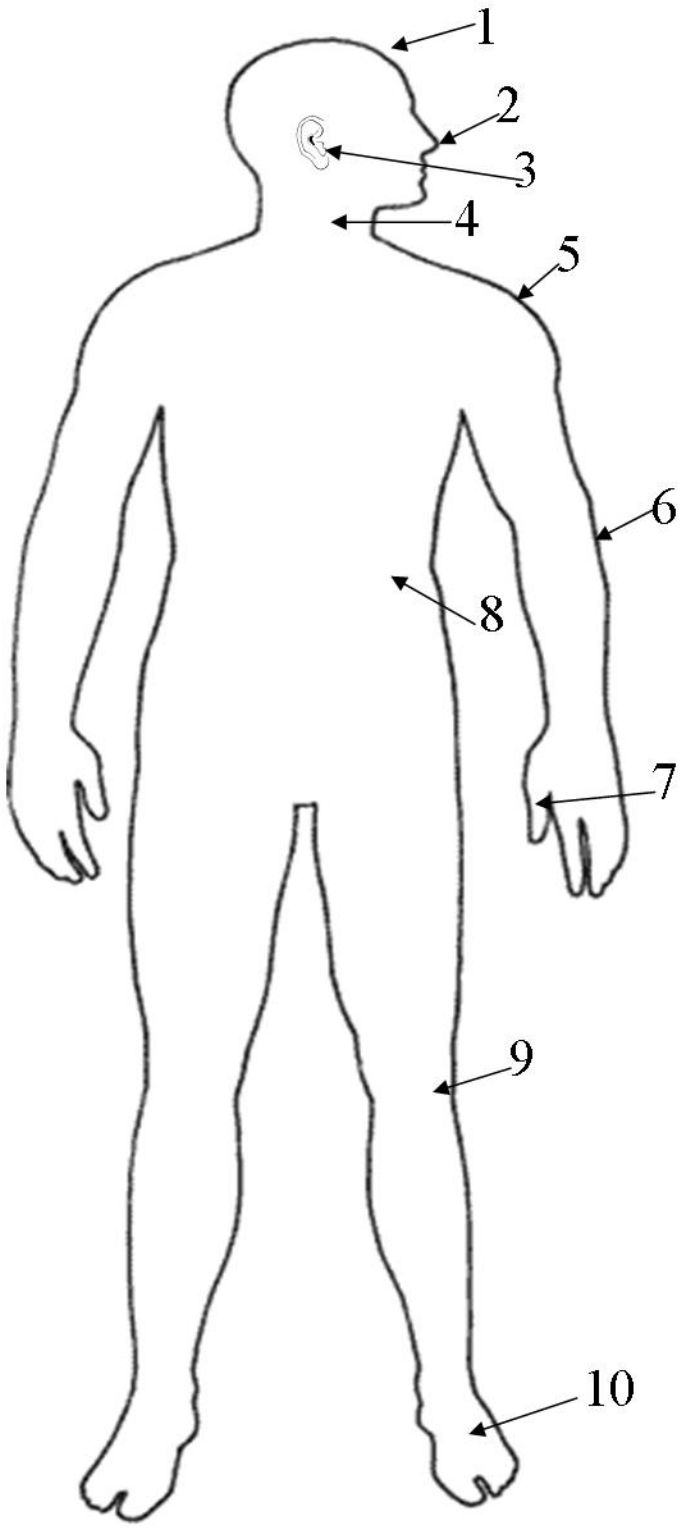

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The Name Game

- Get ready, here it comes

- "Hey, look at me when I'm talking."

- "Hi, I'm Fptuith Mitwljht."

- Throw it back

- "I'm Rose, like the flower."

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What's in a Name?

Walter _____

Roxanne _____

Julie _____

Tony _____

John _____

Sophie _____

Bill _____

Barbara _____

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	Names of family or friends ↘	Another person with the same name ↘	Name translates to object (visualization) ↘
1.	*Ben*	*Ben Franklin*	*Ben = Bean*
2.			
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Picturesque Names

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GETTING TO THE SURFACE

- Color = Robert *Red*ford,
- Brand Name = Burt *Reynolds* (Wrap),
- Place = Joan *Rivers*,
- Occupation = James *Taylor*,
- Object = Bill *Gates*,
- Animal = Michael J. *Fox*,
- Sounds Like = Henry *Aaron* (Iron),

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Recap …

Please, I beg you ...

Never ever,
attempt, try, strive, undertake,
make an effort, or take a crack at
to remember more than two (2)
things at a time.

Thank You

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BOOKLETS to a BETTER MEMORY

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Memory Matters

Answers to 100 common memory lapses. Advice on how to rid your poor memory of misplaced glasses, lost keys and *"I know it's here somewhere"* statements, to a memory that's efficient and reliable. Techniques you can use TODAY.

_____ @ $15 ea. _____

How to Remember Names

Learn the *FACIAL* formula in remembering the name of any person, techniques on remembering groups of people and a list on recalling over 500 common names. You'll know unusual names and find easy solutions to remembering anyone.

_____ @ $15 ea. _____

Memory Magic

An information packed booklet explaining how to remember anything. You'll learn building blocks on time tested techniques on how to increase your memory. *"Memory Magic"* is a valuable and memorable resource.

_____ @ $15 ea. _____

Spell It Right

Stop reaching for the dictionary when you can reach for *"Spell it Right."* It's a handy guide listing memorable ways in remembering 1001 frequently misspelled words. Once you check the spelling of one word you'll retain it - always.

_____ @ $10 ea. _____

How to Remember Numbers

Phone numbers, social security numbers, accounts, and combinations are things we never can remember - until now. This ultimate number book proves that remembering any number is fast, fascinating and fun.

_____ @ $15 ea. _____

Anniversaries Remembered

Clients and co-workers, neighbors and nephews will be impressed when you sing *Happy Birthday* on a day others had forgotten. You'll put memorable meanings to every day of the year. Now, there's no excuse to say, *"Oops, I forgot."*

_____ @ $10 ea. _____

How to Remember Facts About the USA

A guidebook on how to remember state capitals, state flowers, highest elevations and admittance dates. From Delaware (the 1st state) to Hawaii (the 50th), you'll learn important facts and techniques on how to retain information on our 50 states.

_____ @ $15 ea. _____

How to Remember Playing Cards

You're not sure if the 7 of Diamonds or the 6 of Spades was played? Wouldn't it be nice if you remembered? This booklet is a 'must' for anyone who enjoys playing cards and enjoys winning. But please, don't tell anyone you have it.

_____ @ $10 ea. _____

How to Remember Bible Verses

Remember any verse with this great Bible companion. Easy and effective techniques to locate any passage and to remember more of what you read. You'll quickly be able to recall all the books of the Bible within minutes. Think you have a bad memory? Miracles do happen.

_____ @ $15 ea. _____

Menu Memory

Who ordered tea? Who wanted their steak medium well? More importantly, who wants a bigger tip? Serve up memorable service by remembering what your customers ordered. In turn, they'll remember you - $ $ $.

_____ @ $10 ea. _____

Better Living from A - Z

26 memorable quotes to help keep you motivated throughout the day. Small enough to carry in your pocket or purse, yet powerful enough to keep you striving for a better life. A quick read helping you get off to a fast start.

_____ @ $ 10 ea. _____

How to Remember the Multiplication Table

An excellent resource for children to quickly remember the multiplication table. Fun stories and helpful hints provide your child with a magical system that works. There is no better way to learn math. Your child will thank you.

_____ @ $ 15 ea. _____

Presidential Recall

From George to George, memorable clues to remember the names and the order of U.S. Presidents. A fun, fast and fool proof system that makes learning exciting. A must for every student.

_____ @ $ 15 ea. _____

Case Law Update II:

Negligence and Torts

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Des Moines, IA 50309
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IDCA CIVIL CASE UPDATE OUTLINE OCTOBER 2009 -- JULY 2010
NEGLIGENCE AND TORTS

SUPREME COURT DECISIONS

Spreitzer v. Hawkeye Bank, 779 N.W.2d 726 (Iowa 2009). Oct. 30, 2009

FACTS: Plaintiff businessman entered into business arrangement with bank for $1.5 million dollar loan for his business. Along with Plaintiff, another signed a $1.5M personal guarantee for the loan, with the allegation that the bank and its president promised each would be "equally" liable for $750K of the $1.5M. After default, Plaintiff paid $750,000 of his personal guarantee, and the bank then sold assets of Plaintiff's business for the other half. Plaintiff's co-worker paid nothing personally. Plaintiff sued ex-partner, bank, and bank president for fraud, misrepresentation, and breach of fiduciary duty. The jury returned a verdict for Plaintiff against ex-partner for $175,000, bank president for $838,000, and the bank was found vicariously liable. The District court refused to submit punitive damages to the jury. On appeal, the Court of Appeals reversed the decision, finding no reasonable reliance on the bank president's promises, and affirmed the decision not to send punitive damages to the jury.

HOLDING: The Supreme Court VACATED the Court of Appeals, and REVERSED the District Court and REMANDED for a new trial.

ANALYSIS: The Court looked at the elements for fraud, and found there was enough evidence for a false representation. It then examined justifiable reliance, listed elements that supported a finding of justifiable reliance, and found evidence was sufficient. On the causation element, however, the Court found that the $838,000 in damages were not caused by the false statements, because Plaintiff would have lost money in the business anyway, and was still liable for $750,000 personally. The Court remanded the case back for proper determination of actual damages. The Court also found that the bank president's actions were worthy of submission to the jury for punitive damages.

Deboom v. Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009). Aug. 28, 2009.

FACTS: Plaintiff was fired from job shortly after returning from maternity leave. Plaintiff sued, alleging sexual discrimination and discrimination due to pregnancy. After a verdict for the defense, Plaintiff challenged the jury instruction deficiencies.

HOLDING: Finding that jury instructions were erroneous and prejudicial, the Supreme Court REMANDED the case for a new trial.

ANALYSIS: Plaintiff alleged four jury instruction errors. First, the district court refused a pretext instruction. Second, an instruction on inconsistent testimony was refused. Third, there were unnecessary elements added to the discrimination instruction, and finally, the definition of "determining factor" were inconsistent and increased Plaintiff's burden of proof.
In analyzing the case, the Court first found that a case could be brought for discrimination for pregnancy, even if the plaintiff was not pregnant, because interpretation was broad and included those affected by pregnancy or childbirth. The Court then looked at whether the pretext instruction was required, and determined it was and it was prejudicial to Plaintiff to not have it.

The Court then found that the proffered instruction on the elements of the claim added an extra element of damages AND proximate cause, because damages besides money are available under Iowa's Civil Rights Act. The Court did not address the inconsistent testimony instruction, but also concluded that the definition of "determining factor" was confusing and prejudicial. Because these instructions were incorrect, the case was remanded.

Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009). Oct. 9, 2009

FACTS: The federal district court certified two questions of law in product liability actions with regard to product liability, enhanced injury, and Iowa's Comparative Fault Act. An airbag failed to deploy in a vehicle accident, leading to a suit against the manufacturer for an enhanced injury.

HOLDING: The Supreme Court adopted the Third Restatement of Torts in reference to defining proof and rules of joint and several liability. The Court also allowed a released party whose negligence was a cause of the underlying accident to be compared on an enhanced injury claim against a product defendant.

ANALYSIS: The Supreme Court went through a history of the concept of enhanced injury, the Third Restatement, and Iowa's application of enhanced injury law, and found the Third Restatement should be adopted and interpreted the legislature's intent in Chapter 668 to allow the fault of the released party to be included for enhanced injury cases, resulting in the Court overruling *Reed v. Chrysler Corp*, 494 N.W.2d 224 (Iowa 1992).

Thomson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009). Nov. 13, 2009

FACTS: This case involved a claim of negligence by plaintiff against a defendant homeowner. The plaintiff was driving on a gravel road and was injured when defendant's trampoline had made its way on to the road from their property (about 40 feet away) during a thunderstorm. Defendants filed for summary judgment, alleging they did not have a duty to the plaintiff because the trampoline being in the road was not foreseeable. The District Court granted the motion, adding that the damages of plaintiff were not the proximate cause by any negligence of the defendants. The Court of Appeals AFFIRMED the District Court ruling.

HOLDING: The Supreme Court of Iowa VACATED the Court of Appeals decision, and AFFIRMED the District Court's ruling as to section 318, REVERSED the common law ruling, and REMANDED, finding that a fact finder could find the damages were within the "scope of the risks" of the defendants.

ANALYSIS: First, the court looked at section 318 of the Iowa Code dealing with obstruction of roadways, and found it didn't apply due to the fact that section covered intentional obstructions, and not negligent or unintentional obstructions.
The Court also looked at duty, and adopted the Third Restatement of Torts: Liability for Physical Harm, section 7(a). Specifically, in no duty determinations, the Third Restatement no longer allows for a foreseeability analysis and instead limits no-duty rulings to "articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as a factfinder." *Id.* at 835. The Court found no policy or principle existed allowing plaintiffs to not have a duty to defendants to keep property

owners from obstructing roadways. In fact, case law said there is a duty to keep roadways clear, and it was error to conclude plaintiffs had no common law duty to defendants.

The Court then addressed causation, and noted the inconsistency in applying proximate causation in the past. The Court again adopts the Third Restatement's term "scope of liability" in replacement of proximate causation. Whether the act was a "substantial factor" in bringing the harm is now a part of the factual cause analysis, and the "scope of liability" involves the "risk standard", which states that "an actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious." ***Id***. at 838. In other words, it confines scope to the reasons the actor should be liable in the first place. Gun/Hunter example. Foreseeability is still an issue, however, and prior incidents or other facts evidencing certain risks can change the slope of liability. Because motorist injury was not so clearly out of the range of harms from plaintiff's alleged negligent conduct, the Court reversed and remanded the case.

Van Fossen v. MIdAmerican Energy, 777 N.W.2d 689 (Iowa 2009) Nov. 13, 2009

FACTS: Deceased employee's spouse sued defendant for wrongful death due to exposure from asbestos. Because the deceased was an independent contractor, defendants moved for and received summary judgment, successfully arguing that Defendants had no duty to warn an independent contract's spouse. Plaintiff appealed and the Court of Appeals affirmed.

HOLDING: The Supreme Court AFFIRMED the District Court's granting of summary judgment.

ANALYSIS: Plaintiff argued that exceptions to the general rule that an employee is not under a duty to warn an independent contractor applied. Specifically, that sections 413, 416 and 427 of the Second Restatement applied for work that created a peculiar unreasonable risk of physical harm. IN regards to 413 and 416, the Court found that the risk claimed by the Plaintiff was not inherent to the construction and maintenance work performed. In regards to 427, the Court stated that grave risk of injury, standing alone, is insufficient under section 427, and the asbestos exposure wasn't inherent to the work. Finally, the Court also refused to expand the common duty of care to encompass the relationship between Plaintiff and Defendants.

Ranes v. Adams Labaratories, 778 N.W.2d 677 (Iowa 2010). Feb. 5, 2010.

FACTS: Plaintiff brought a toxic tort claim against Defendants after health problems allegedly resulted from the ingestion of a certain chemical. The District court found that Plaintiff's only expert witness on causation should be excluded as unqualified to testify as to a diagnosis, and granted summary judgment to all Defendants. Plaintiff appealed.

HOLDING: The Supreme Court AFFIRMED the decision of the District Court regarding plaintiff's expert on causation.

ANALYSIS: The Court stated that the ***Daubert*** expert analysis was appropriate in determining the expert's qualifications. It then stated that an expert should be qualified to testify about general and specific causation—in other words, that the product could not only generally cause the damage, but actually did cause Plaintiff's damage. Plaintiff's expert relied on no clinical trials, and only one inapplicable case-control study for his opinion. Most of the opinion was

case reports that lacked experimental controls and were less reliable. In addition, because Plaintiff's expert was not Plaintiff's treating physician, nor a qualified neurologist that could make a proper diagnosis, he was not an expert in specific causation.
THIS ANALYSIS IS VERY COMPLEX>> A THOROUGH READING OF THE CASE IS RECOMMENDED IF YOU DEAL WITH TOXIC TORTS OR COMPLEX EXPERT TESTIMONY

Schneider v. State, ___ N.W.2d ___, 2010 WL 2010810 (Iowa May 21, 2010).

FACTS: Landowners filed a class action against the state of Iowa alleging negligent design and construction of a bridge and bypass that resulted in floods and increased floodwater. The District Court granted summary judgment to the State based on immunity. Plaintiffs appealed and the Court of Appeals affirmed.

HOLDING: The Supreme Court VACATED the Court of Appeals, and AFFIRMED in part, REVERSED in part, and REMANDED the case to the District Court.

ANALYSIS: The Supreme Court looked at the immunities alleged by the State. First, it found that section 669.14(1) of the Iowa Code did not apply, because discretionary function immunity does not apply where statutory or regulatory rules are in place. Because Chapter 455B of the Iowa Code addressed issues in the case, discretionary immunity was not available. The Supreme Court did find immunity, however, in section 669.14(8), finding that the State used state of the art equipment and materials in its design and construction at the time the building of the bridge and bypass took place. The Supreme Court found a fact issue as to whether the State violated section 314.7 of the Iowa Code in regards to diverting water, but stated in dicta that on remand the same immunity would most likely apply to grant summary judgment there as well.

Ballalatak v. All Iowa Ag. Assoc., 781 N.W.2d 272 (Iowa 2010). Apr. 16, 2010.

FACTS: Plaintiff manager was fired for allegedly getting involved in a workers compensation dispute between Defendants and one of Plaintiff's employees. Plaintiff sued, alleging wrongful discharge in violation of public policy. Defendant was granted summary judgment, and Plaintiff appealed.

HOLDING: The Supreme Court AFFIRMED the District Court's finding of summary judgment for Defendants.

ANALYSIS: The Court found that no public policy protects an at-will employee in regards to advocating another's workers compensation claim. Plaintiff advocated that the workers compensation statute should extend to supervisors who advocate on behalf of employees they supervise. Although the Court allows protection for those who protect their own statutory rights, it does not protect others, and there are no "whistle-blower" protections or illegal activities that necessitated public policy protection for Plaintiff.

Beganovic v. Muxfeldt, 775 N.W.2d 313 (Iowa 2009) November 20, 2009.

FACTS: Plaintiffs injured in an automobile accident brought personal injury claims against the driver and co-owner of the vehicle involved. Co-owner was an individual only on the title to assist the owner in obtaining financing and to obtain certain tax incentives from the purchase of the vehicle, and claimed he was not liable under Iowa's owner responsibility law, code section 321.493. The District Court found the co-owner liable, and the Court of Appeals affirmed.

HOLDING: The Supreme Court AFFIRMED the District Court and Court of Appeals, holding the co-owner is liable as a matter of law.

ANALYSIS: The Court outlined the transaction, and found Defendant co-owner was a co-buyer, but had no control over the vehicle, and never drove the vehicle. Co-owner Defendant eventually got an offer of proof hearing outside the jury's presence to determine if the transaction was a bona fide transfer to exclude him as a liable owner under the statute. Although the District Court excluded evidence of the transaction for purchase, it found co-owner was liable under the statute as a matter of law. The Supreme Court looked at the rationale and background of the statute, including amendments that broadened the scope of section 321,493. The Supreme Court found that being on the title is prima facie evidence of ownership, and co-owner was not excluded from being an owner under the statute.

Van Sickle Construction Co. v. Wachovia Commercial Mortgage, Inc., 783 N.W.2d 684 (Iowa 2010) June 25, 2010.

FACTS: Plaintiff bought two tractors at public auction from Defendants. After not receiving title to the vehicles for several months and being unable to obtain duplicates from the county treasurer, Plaintiff brought claims for negligent misrepresentation and fraudulent misrepresentation against the bank, seeking compensatory and punitive damages. The jury found for the Plaintiffs for $27,000 compensatory and $250,000 punitive, and, after Defendants appealed, the Court of Appeals reversed.

HOLDING: The Supreme Court VACATED the Court of Appeals ruling, and AFFIRMED in part and REVERSED in part the District Court, allowing the negligent misrepresentation damages to stand, but eliminating the punitive damages and the fraudulent misrepresentation verdict.

ANALYSIS: Because the Defendants gained ownership of the tractors through proceedings subsequent to a foreclosure, they had a difficult time getting the previous owner to sign over title, and, in fact, had to get a court order transferring title. The Supreme Court found that no false statement was made, and that Defendants had no knowledge of a false statement, no reckless statements were made, and there was no intent to defraud Plaintiff. As a result, the fraudulent misrepresentation claim failed. Likewise, the punitive damages claim failed because there was no clear and convincing evidence of willful and wanton conduct.
As for the negligent misrepresentation claim, the Court reviewed Defendants' argument that the economic loss doctrine prevented damages. The Court concluded that economic damages have always been allowed in negligent misrepresentation claims, and allowing the economic loss doctrine would essentially end the tort. In upheld the jury verdict for damages from negligent misrepresentation.

COURT OF APPEALS DECISIONS

Renader v. Aamodt, Case 9-626/08-1321, November 12, 2009

***FACTS*:** Plaintiffs and Defendant were in a real estate transaction, and, after a withdrawal by Plaintiff and subsequent failure of the deal, Plaintiffs sued for fraudulent misrepresentations. Following trial, a judge dismissed the action in district court, and Plaintiffs appealed.

***HOLDING*:** The Court of Appeals AFFIRMED the dismissal, finding no materiality in the first alleged misrepresentation and no false representation in the second.

ANALYSIS: Plaintiff claimed two different statements as being fraudulent. The first was the source of the $340,000 down payment from the Defendant. Because the payment was made, whether or not the payment came from the place Defendant said it came from was immaterial, and, as such, not fraudulent. The Court then examined the second alleged claim, and found there to be evidence supporting the opposite conclusion, so there was no false statement. The dismissal was upheld.

Middleton v. Myers, No. 9-800/ 09-0087, November 25, 2009

FACTS: Plaintiffs were in a motorcycle accident. Linda compained of injury at the hospital but was released. Gregory had some soreness as well and was released. Gregory was later diagnosed with a back and neck sprain, and eventually a mild degenerative joint disease in his neck that resulted in herniation surgery. Linda was later diagnosed with whiplash, and a doctor found and opined a degenerative condition found in her neck preexisted the accident. After Plaintiffs sued, a jury awarded Gregory $8,000 and Linda $35,360. Plaintiffs appealed.

HOLDING: The Court of Appeals AFFIRMED the jury verdict but REMANDED the case for proper determination of damages in Gregory's case.

***ANALYSIS*:** Linda argued an aggravation instruction should not have been given, and an eggshell instruction should have. The Court disagreed, and found evidence in the record supporting the rulings on both. The Court also found damages to be adequate for Linda. Gregory also argued an aggravation instruction should not have been given. The Court agreed, finding an instruction for aggravation is proper when person has a prior condition. The evidence for this instruction has to be substantial, and in this case there was not enough evidence for it to rise to that level. The Court found that this was prejudicial, and that a new trial was warranted for damages to Gregory only**.**

White v. Kilby, et al., No. 9-707/ 09-0076, November 25, 2009

***FACTS*:** Plaintiff was a passenger in his co-worker Kilby's vehicle driving to a job site when Plaintiff was injured. Plaintiff alleged Kilby was driving negligently and liable for damages as owner of the vehicle. Kilby filed a summary judgment motion alleging that WC was the exclusive remedy. The District Court refused to grant summary judgment to Kilby.

HOLDING: The Court of Appeals REVERSED and REMANDED, finding workers compensation is exclusive remedy due to fact that Plaintiff was Kilby's co-worker.

***ANALYSIS*:** The Court looked at 85.20 of the Iowa Code and found the plain language of the statute establishes a sole remedy in the workers compensation arena. The Court applied *Smith v. CRST International, Inc*., 553 N.W.2d 890 (Iowa 1996), and differentiated that case because the owner of the vehicle was not a co-worker or employer of the injured plaintiff

Stevens v. Racing Assoc. of Central Iowa d/b/a Prairie Meadows, No. 9-693/ 08-1899, November 25, 2009.

FACTS: Plaintiff was terminated from Prairie Meadows ("PM") for violating its mutual respect and conduct policies by spreading rumors and making false statements concerning a promotion of a co-worker. Plaintiff brought a claim for wrongful termination in violation of public policy—she was attempting to maintain the integrity of the gaming industry. PM received a summary judgment, and Plaintiff appealed.

***HOLDING*:** The Court of Appeals AFFIRMED the summary judgment ruling of the District Court.

ANALYSIS: The Court noted that employees cannot be fired for a reason contrary to public policy, but are cautious in recognizing applicable policies. Here, the Iowa Adm. Code covers the gaming industry, and does not provide sanctions for failure to report wrongdoing or irregularities in the gaming industry. As a result, the District Court found Plaintiff could not establish a clearly defined public policy that protected her activities, and the Court found no errors at law with that conclusion.

Carter v. Racing Assoc. of Central Iowa d/b/a Prairie Meadows, No. 9-694/ 08-1900, November 25, 2009.

***FACTS*:** Plaintiff, a surveillance agent for PM, faked a fall one day in an elevator, then watched the fall with co-workers. He was fired for engaging in horseplay, and sued for wrongful discharge in violation of public policy. Plaintiff also had some statements on his reviews alleging corruption at PM. PM filed for summary judgment and the District Court granted it.

***HOLDING*:** The Court of Appeals AFFIRMED the District Court's grant of summary judgment.

***ANALYSIS*:** Similar to Stevens: no first element, no clearly defined public policy to protect the reporting of corruption. Also, the record here shows termination for horseplay, not the information concerning corruption in his performance evaluations.

Gavin v. Tyler Johnson et al., No. 9-644/ 08-1994, November 25, 2009

***FACTS*:** Plaintiff, who had prior neck injuries, was in two car accidents two years apart, and brought negligence claims against each. Upon returning a verdict, the jury found for plaintiff, and awarded past medical expenses and an additional $1 for past pain and suffering on each.

Plaintiff appealed, alleging he should receive a new trial due to a jury instruction that was refused concerning prior infirm conditions, and the pain and suffering award was inadequate and inconsistent.

HOLDING: The Court of Appeals AFFIRMED the District Court entry of judgment on damages and refusal to grant a new trial.

ANALYSIS: The requested infirm condition instruction is an exception to the general rule that a defendant is only responsible for pain associated with his negligence, not pain that predated the accident. Because plaintiff was unable to show the accident worsened his condition, the refusal to give an instruction on an infirm condition was not an error of law. As for the damages claims, the C of At stated that the District Court had explained the decision well, and they would not find an abuse of discretion absent circumstances that shock the conscience or presume prejudice (Cowan factors). The Supreme Court then differentiated this case from Cowan, finding the circumstances and evidence in the record supported the damage award of $1.

Snook v. Snook, No. 9-630/ 08-1407, November 25, 2009

FACTS: Brother sued brother alleging fraudulent misrepresentation, breach of confidential relation, and failure to account for farm finances. Plaintiff's family owned a 120 acre farm, and Plaintiff wanted 30 acres for his own family. Plaintiff and defendant executed the proper deeds, and Plaintiff understood that his 2 sisters would also get 30 acres. When the Defendant ended up with 90 acres, Plaintiff sued. The District Court dismissed all claims, and Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the District Court's dismissal, finding there was no agreement or contract between Plaintiff and Defendant regarding the sisters' 30 acre shares.

ANALYSIS: The District Court found there was not sufficient evidence to show a misrepresentation or that there was an intention for Defendant to deceive Plaintiff, since Plaintiff knew the status of the deed when he signed over 90 acres to Defendant (the sisters were already off the deed to the farm). As for the breach of confidential relation claim, the Court found there was not enough evidence to meet the clear and convincing proof needed of a dominant influence by Defendant because Plaintiff could have discussed the matter with his sisters. Likewise, the Court agreed there was not sufficient evidence of misappropriation of funds on the record either.

Estate of Wilson v. Iowa Clinic, P.C., No. 9-622/ 07-2102, November 25, 2009

FACTS: Plaintiff sued Iowa Clinic and a doctor alleging postoperative negligence caused the death of Tamara Wilson following a gastric bypass surgery. The jury found negligence, but did not find the negligence was a proximate cause of the death. Plaintiffs then filed a motion for new trial which was denied. Plaintiffs appealed, alleging that stricken jury members should not have been rehabilitated by the court, evidence of the deceased husband's remarriage should not have been allowed in voir dire, and expert testimony the defense submitted should not have been allowed.

HOLDING: The Court of Appeals AFFIRMED the District Court's ruling.

ANALYSIS: The Court of Appeals found that because the two jury members at issue that were rehabilitated were stricken, there could be no claim for prejudice or bias, even though Plaintiff argued it prevented them from striking two other jurors who did hear the case. The Court found the jury to be impartial.
The Court also found that the remarriage information only came up in voir dire, and jurors were instructed to not apply it to the trial or damages, and stated that because the jury found for the defense, it never reached the issue of damages. Finally, the Court addressed Plaintiff's claim that defense experts should not have been able to "speculate" on the reasons for death. Because the opinions were based on medical knowledge and expertise, there was not an abuse of discretion in admitting them because opinions do not have to be expressed with absolute certainty.

Quick v. EMCO Enterprises, Inc., No. 9-920/ 09-0311, December 30, 2009

FACTS: Plaintiff worked for Defendant, and in 2004 filed a complaint with the Des Moines Human Rights Commission alleging discrimination based on his sexual orientation. In 2005, he filed another complaint alleging harassment and retaliation from his previous complaint. After requesting and receiving right to sue letters in both, Plaintiff filed suit alleging discrimination based on his sex. Defendants filed for summary judgment, claiming the Iowa Civil Rights Act didn't cover sexual orientation, and the court didn't have jurisdiction over the Municipal Code claims (the municipal code does prohibit sexual orientation discrimination). The District Court granted the summary judgment motion.

HOLDING: The Court of Appeals AFFIRMED the District Court's dismissal of Plaintiff's discrimination action, but the majority of the opinion was on the timeliness of the appeal.

ANALYSIS: Timelines are necessary here. On January 15, the District Court issued an order denying summary judgment. On January 16, it then granted summary judgment. On January 23, the Court then issued an order explaining the Jan. 15 order was an error, and the Jan. 16 Order governs. Plaintiff filed his notice of appeal on February 20, less than 30 days after the Jan. 23rd Order, but more than 30 after the actual summary judgment ruling. The Court found that due to the confusion with the dual orders, the date to appeal was 30 days from Jan. 23, so the appeal was timely. It then stated the District Court's summary judgment ruling was correct.

Rossiter v.Evans, No. 9-835/ 08-1815, December 30, 2009.

FACTS: Plaintiff and Defendant were in a sexual relationship, and Plaintiff ended up getting an STD. She sued for negligent transfer of an STD, battery, assault and fraudulent misrepresentation and received a 1.5 M jury verdict, of which 800K were punitive. The Defendant appealed, alleging insufficient evidence to find he knew or should have known he had an STD creating a duty to warn. Defendant also claimed that punitive damages should not have been assessed since he prevailed on the assault, battery and fraud claims. Finally, Defendant said the damages were excessive.

HOLDING: The Court of Appeals AFFIRMED the verdict in all respects.

ANALYSIS: The Court reviewed the record and found sufficient evidence supporting the jury's findings that Defendant knew or should have known he had an STD. The Court referenced

Thompson v. Kaczinski in its foreseeability discussion. The Court then moved to the punitive damages argument, and ruled that because Defendant failed to challenge the propriety of punitive damages in his directed verdict motion, the claim was not preserved for appeal. The Court then found sufficient evidence for the damage verdict, including a de novo analysis of the punitive damage amount, and found no abuse of discretion.

Burke v. Lauz & Med. Assoc. of Clinton, Iowa, No. 9-643/ 08-1959, December 30, 2009.

FACTS: Plaintiff's son was killed when a shunt malfunction caused complications. Plaintiff had taken her son to the Defendant five times in a two month period prior to the complications that caused his death. Plaintiff's mother sued for malpractice, and received a $2.5M verdict. The Defendants appealed.

HOLDING: The Court of Appeals AFFIRMED the verdict in all respects.

ANALYSIS: Defendants claimed their motion to strike Plaintiff's expert should have been granted due to the fact the expert had never dealt with a patient with a malfunctioning shunt. The District Court and Court of Appeals rejected that argument because the expert was a family practitioner with experience diagnosing patients with shunts. Because Plaintiff's expert testimony was allowed, medical literature admitted into evidence was similarly allowed. The Court also found that the verdict form did not prejudice the Defendants, the jury instructions adequately stated the law, and damages awarded were not excessive.

Ash v. Aliu, No. 9-910/ 09-0114, January 22, 2010.

FACTS: Plaintiff was not allowed to work at the defendant's restaurant (RFR) after she was six-months pregnant. She attempted to collect unemployment benefits, but was denied because the hearing officer concluded she was unable to work due to the pregnancy. She was not hired upon plaintiff's inquiry after birth of the child. She brought suit for pregnancy discrimination. The district court dismissed her claim. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the dismissal of the complaint for pregnancy discrimination.

ANALYSIS: She argued that she established a prima facie claim for employment discrimination based on pregnancy. The Court found that a prima facie claim was made under the circumstances, giving rise to an inference of discrimination. However, the Court agreed with the District Court that RFR offered a legitimate non-discriminatory purpose for Ash's leaving, concluding that Ash quit and her employment was not terminated. The Court also agreed that Ash failed to show that the reasons offered by RFR were pretextual.

Koeppel v. Speirs, No. 9-902/ 08-1927, January 22, 2010.

FACTS: Koeppel and Deanna Miller were the only two employees for Speirs. Koeppel discovered a digital surveillance camera hidden in the office bathroom. The police searched the premises and Speirs produced the receiver and monitor for the camera from a locked drawer in

his desk. Speirs claims that the camera was set up because he believed on of his employees was abusing drugs. The surveillance system was not set up when police arrived and all videotapes located in the officer were blank. Koeppel brought suit for sexual harassment and invasion of privacy. The District Court granted summary judgment against both claims. Plaintiff appeals.

HOLDING: The Court of Appeals AFFIRMED in part and REVERSED in part and REMANDED for further proceedings.

ANALYSIS: Koeppel argues that the act of placing the camera in the bathroom with the intent to view is sufficient to support an invasion of privacy claim. The District Court found that no actual intrusion occurred. The Court found that for a successful claim Koeppel must show that the camera was capable of functioning while in the bathroom. There was some evidence that suggested that the camera could function while in the bathroom; therefore, the Court reversed the grant of summary judgment for the invasion of privacy claim. The Court affirmed the dismissal of the sexual harassment claim finding that an employer of less than four individuals cannot be sued as a supervisor under chapter 216 of the Code.

Miller v. Speirs, No. 9-904/ 08-1957, January 22, 2010.

FACTS: Plaintiff appealed the District Court's granting of summary judgment in favor of Speirs regarding her claims for invasion of privacy and sexual harassment.

HOLDING: The Court of Appeals REVERSED and REMANDED the District Court's granting of summary judgment in favor of Speirs.

ANALYSIS: Miller argues that enough facts were established to show an intrusion on the seclusion of another. The same issue was addressed in *Koeppel v. Speirs* that day and the Court adopted the same reasoning.

Van Dyne v. Tysdal, No. 0-030/ 09-0601, February 10, 2010.

FACTS: Van Dyne sued her former landlords after alleging falling down a flight of stairs. An interior staircase in the building had been modified by Randy Tysdal. The Tysdals claim that this staircase was only to be used in case of an emergency. Van Dyne tripped on a two by four that was propping a trap door open at the top of the stairs. As a result of the fall the plaintiff had a cervical fusion. She had a history of back and neck pain and had surgery on her lower back on two previous occasions. A jury returned a verdict in favor of the Tysdals, finding Van Dyne 51% at fault. Plaintiff appeals.

HOLDING: The Court of Appeals AFFIRMED judgment entered in favor of Tysdals.

ANALYSIS: The plaintiff argues that it was error for the District Court to instruct the jury on pre-*Koenig* law and that the jury should have been instructed about the "reasonable standard of care" as provided in *Koenig.* The Court found that Van Dyne failed to preserve error because she did not make object to the instruction at that time. There was no abuse of discretion in admitting expert testimony about precipitation. The Court agreed with the District Court's refusal

in allow evidence of Van Dyne's eviction from the premises because it was a suit for negligence, not wrongful eviction.

Cedar v. Cherokee Community School Dist., No. 0-053/ 08-1792, February 10, 2010.

FACTS: Plaintiffs' allege their daughter sustained injuries when she slipped and fell on ice located on school property. The petition was filed nearly two and a half years after the incident. The school district moved to dismiss because the claim was not timely filed within the two-year statute of limitations. The District Court dismissed the suit. Plaintiffs appealed.

HOLDING: The Court of Appeals AFFIRMED the dismissal.

ANALYSIS: Plaintiff argues that section 614.8 is applicable to their case and should have tolled the statute of limitations for their minor child. The District Court concluded that the section was not applicable to toll the statute of limitations for suits against municipalities. The Court of Appeals agreed.

In re Merriam, No. 9-911/ 09-0117, February 10, 2010.

FACTS: In 2005, plaintiff Timothy Merriam was seriously injured while operating a used dump truck he had purchased from the defendants approximately seven or eight years earlier. He and his family subsequently sued the defendants on theories of failure to warn and breach of implied warranty. The District Court granted summary judgment in favor of the defendants. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the granting of summary judgment.

ANALYSIS: The Court found that the plaintiffs failed to produce sufficient evidence that the defendants knew or had reason to know of the truck's dangerous condition. Thus, the District Court properly granted summary judgment on the failure to warn claim. The Court also found that the claim for implied warranty of fitness for a particular purpose was barred by the statute of limitations and that equitable estoppel did not apply to toll the limitations period. Therefore, dismissal of the implied warranty claim on summary judgment was proper.

DeArmond v. Griffieon, No. 9-917/ 09-0274, February 10, 2010.

FACTS: Plaintiff's claims against the defendants center around the handling of her grandparents' estates. She had previously filed an attempt to reopen her grandmother's estate and was denied. Summary judgment was granted in favor of defendant for claims of fraud, breach of fiduciary duty, and tortious interference. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the grant of summary judgment.

ANALYSIS: The District Court concluded that the claims had either been settled or barred by claim preclusion. The Court of Appeals agreed and affirmed.

Baur v. Baur Farms, Inc., No. 9-931/ 09-0480, February 10, 2010.

FACTS: Plaintiff wanted Bob to buy his shares of the family farm, but a price could never be agreed upon. Plaintiff brought claims seeking judicial dissolution of BFI for oppressive conduct, as well as claims for violating fiduciary duties. It was alleged that Bob completely controlled the corporations assets and the plaintiff was not receiving any return on investment. The District Court entered summary judgment in favor of the defendants based on statute of limitations grounds. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED in part, REVERSED in part and REMANDED.

ANALYSIS: The sum and substance of John's claims of oppressive conduct relate to his inability to receive any return on his interest in the corporation and his inability to sell his stock other than at a low price determined by Bob. Thus, any insistence by Bob that a minority discount be imposed after 1996 and after July 1, 2002, may be found to be oppressive and a continuing wrong when coupled with other evidence. Summary judgment was improperly granted because genuine issues of material fact remained concerning whether the statute of limitations barred the claim. The Court agreed that the defendants' motion for sanctions should be dismissed.

Injection Tech. Diesel Serv., Inc. v. Spherion Corp., No. 9-943/ 09-0714, February 10, 2010.

FACTS: InjectTech used Spherion as a staffing agency. A temporary employee was recommend by Spherion and hired by the plaintiff. The employee had misrepresented her educational and criminal history on the application. She had been convicted of a felony for fraud. She was ultimately hired on a full-time basis by plaintiff, but no verification of the criminal history was conducted. Plaintiffs sued on grounds of negligence. The District Court found that there was insufficient evidence to show a breach of the duty of care. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the judgment entered in favor of defendants.

ANALYSIS: The District Court determined that the duty of care was not violated because Spherion did not have a company policy of verifying criminal history and educational information, nor is there an industrial standard. Spherion did not assert that such procedures had been conducted. The majority of the fraudulent behavior by the employee took place after plaintiff hired her on a full-time basis. The Court concluded that the District Court's ruling was supported by substantial evidence.

Taylor v. Farm Bureau Mut. Ins. Co., No. 0-012/ 09-0695, February 24, 2010.

FACTS: Taylor's house had flooded. Taylor did some work cleaning the house, although she did not live in after the flood. She developed a cough and headaches. She went to the doctor who performed tests and concluded that her allergic reaction was to pollen and dust mites, not mold. None of the medical providers concluded that mold caused her headaches and irritation. The District Court denied her personal injury claim. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the ruling denying personal injury claim.

ANALYSIS: Taylor was not able to show causation as a matter of law on appeal. The only evidence suggesting causation was provided by an expert witness who the District Court did not find credible during the bench trial. The expert witness testimony offered by the defendants was proper.

Huffman v. AADG, Inc., No. 0-093/ 09-1007, February 24, 2010.

FACTS: Huffman worked for AADG and over the course of his employment suffered a back and wrist injury. Plaintiff claimed due to his filing of two worker's compensation claims, the employer retaliated and subjected him to a hostile work environment.

HOLDING: The Court of Appeals AFFIRMED the summary judgment ruling.

ANALYSIS: The Court concluded that no reasonable juror could conclude that Huffman was constructively discharged. Summary judgment was upheld because the plaintiff still worked for the defendant and had not been demoted. The employer was not required to create new positions for plaintiff instead of paying temporary disability benefits. Allowing such a remedy would create new cause of action, require the rewriting of workers' compensation statutes, and put employers in a tight spot. Plaintiff's harassment claims were also properly dismissed because the conduct was by other employees, not the employer.

Pomeroy v. Turkle-Clark Environ. Consulting, L.C., No. 9-769/ 09-0560, February 24, 2010.

FACTS: Pomeroy was supervised by Turkle. Disagreement arose about billing practices and "dirty politics." The plaintiff was placed on probation from work after receiving a poor evaluation from Turkle. Eventually, Pomeroy was discharged from his employment and he brought suit. The District Court granted summary judgment for claims of wrongful termination, defamation, intentional infliction of emotional distress, and improper interference with an employment contract. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the granting of summary judgment.

ANALYSIS: The Court agreed with the District Court that the plaintiff failed to provide any evidence of his claims and thus dismissal was proper.

Cooper v. Iowa Realty Co., Inc., No. 9-1009/ 09-0549, February 24, 2010.

FACTS: The home seller sued the buyer's real estate agent alleging that the agent had a duty to disclose to her the buyer's previous financial difficulties. At the close of evidence, the District Court granted a directed verdict for the defendant. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the District Court's granting of a directed verdict.

ANALYSIS: Cooper argued that the agent owed her a fiduciary duty because of her representation of the buyer and the fact that she previously represented Cooper and obtained confidential information. There was no evidence that the agent breached the duty of confidentiality toward Cooper and no conflict of interest existed in the representation. The Court was not persuaded that statements made by the agent generated a duty to disclose the financial condition of the buyer and did not constitute a fraudulent misrepresentation. Cooper also did not come forth with sufficient proof of damages.

Sweers v. Westfall, No. 0-091/ 09-0912, March 10, 2010.

FACTS: The defendant was involved in car accident with the plaintiff. The doctor notes indicated that Sweer's insurance agent recommend that he "go in for a check-up." Sweers complained of shoulder and neck pain. Sweers had previous shoulder injuries, involving a broken collarbone and dislocation years earlier. Months later his shoulder "popped" when reaching for detergent and caused excruciating pain. He then underwent arthroscopic surgery. Plaintiff brought suit for his injuries. The defendants admitted negligence and the case proceeded to trial on the issue of damages. Sweers filed a motion in limine seeking to prohibit evidence about prior history and the doctor's notes about the insurance agent's recommendation. The District Court denied both requests and at trial the jury awarded him $5,206 in damages.

HOLDING: The Court of Appeals AFFIRMED the jury verdict of $5,206 in personal injury action.

ANALYSIS: The Court found that it was proper to introduce evidence of the prior conditions because he self-reported those conditions to his chiropractor. The jury was entitled to hear this evidence and give it as much weight as it deserved. Admitting this evidence was also proper because Sweers could not provide the hospital information where his previous injuries were treated; therefore, the defendants could not access his medical records. The recommendation of the insurance agent was properly admitted because it was probative on the severity of Sweers' injury after the accident. It was also used properly to impeach Sweers' credibility.

Christenson v. First Nat'l Bank Of Sioux Center, Iowa, No. 0-028/ 9-0562, March 10, 2010.

FACTS: Plaintiff filed suit alleging claims of fraud. A motion to compel was ordered against the plaintiff. The District Court granted the bank's motion for sanctions because the plaintiff took more than 100 days to comply with discovery requests. A supplemental motion to compel was granted against the plaintiff. There were further delays regarding the designation of experts. The District Court dismissed the suit with prejudice because of the delays. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the dismissal.

ANALYSIS: The Court agreed with the District Court and found that there was substantial evidence supporting dismissal because of the delays and appearance that the delays were done with the intent to hinder the judicial process.

Daniel v. New Cooperative, Inc., No. 0-100/ 09-1325, April 8, 2010.

FACTS: Daniel sued New Cooperative for spraying the wrong herbicide on his crops, which resulted in their destruction. New Cooperative conceded negligence. The only issue before the court was the per-bushel price of corn lost. New Cooperative filed a motion for summary judgment stating that Daniel was entitled to $3.83 a bushel, which was the market price that harvest. Daniel filed a cross-motion arguing he was entitled to $7.18 a bushel, which he characterized as the contract price for lost bushels. The District Court granted summary judgment for the defendant concluding that the proper award was $3.83 per bushel. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the granting of summary judgment.

ANALYSIS: The Court of Appeals found that the contract calling for $7.18 per bushel was fulfilled. Therefore, the appropriate damage calculation was for the market price at $3.83.

Douglas Indus. v. Sandstrom Prod. Co., No. 0-077/ 08-1808, April 8, 2010.

FACTS: In April of 2005 Sandstrom filed suit against Douglas for unpaid purchase orders. In November of 2005, Douglas paid $70,000 to settle the suit. A Consent Order was then issued dismissing the claim with prejudice. In 2006, Douglas filed the current suit. Sandstrom filed a motion for summary judgment arguing that the claim was barred through res judicata. The District Court dismissed the case. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the granting of summary judgment.

ANALYSIS: The District Court concluded that the claim was barred because it was based on the business conduct involved in the previous suit and rejected Douglas' argument that it just learned of the wrongful conduct. The Court of Appeals found that the settlement constituted adjudication on the merits, the parties to the suits were identical, and that the claims arose out of the same course of business as the previous suit.

Six v. Des Moines Cold Storage Co., Inc., No. 0-113/ 09-0539, April 21, 2010.

FACTS: Six filed suit against his former employer for wrongful termination in retaliation for filing workers' compensations claims. The employer claimed that Six was terminated for taking too much time off of work, not for his injury. The District Court granted summary judgment in favor of the employer. Plaintiff appealed.

HOLDING: The Court of Appeals AFFIRMED the granting of summary judgment.

ANALYSIS: The Court concluded that while it is unlawful to terminate an employee for seeking workers compensation benefits, it is lawful to terminate an employee for excessive absences, even if it is a result of an injury. The Court of Appeals agreed with the District Court that Six was relying on speculation and conjecture to support his wrongful termination claim.

Nelson v. Case, No. 0-026/ 09-0404, May 12, 2010.

FACTS: Nelson was married to Jesse Case and their marriage was dissolved in 2005. Jesse died in 2008. At that point he had not begun receiving his IPERS benefits, $10,000 of which was provided to Nelson in the divorce decree. Rita Case, the second wife, was provided with all of Case's IPERS benefits. Nelson filed suit claiming that Rita was unjustly enriched. Rita filed a motion to dismiss. The District Court dismissed Nelson's unjust enrichment claim. Plaintiff appealed.

HOLDING: The Court of Appeals REVERSED and REMANDED the dismissal of the unjust enrichment claim.

ANALYSIS: The Court concluded that whether the benefits Rita received were IPERS benefits subject to the decree and whether Nelson was entitled to a portion of them is a question of fact that cannot be properly addressed on a motion to dismiss for failure to state a claim. Nelson made the requisite showing at the pleading stage to state a claim upon which relief can be granted.

Dillon v. Ruperto, No. 0-234/ 09-0600, June 16, 2010.

FACTS: Plaintiff entered information into a computer spreadsheet at her job. After learning of the incident, her supervisor, a Defendant, made an investigation into the incident, and Plaintiff was terminated. Following the termination, Plaintiff sued Defendant for interference with a contract and defamation. Later Plaintiff added a co-worker as a second Defendant. Defendants eventually were granted a summary judgment on Plaintiffs claims. Plaintiff appealed, alleging the District Court abused its discretion by not allowing the discovery deadline to be extended and genuine issues of fact precluded summary judgment.

HOLDING: The Court of Appeals AFFIRMED the judgment of the District Court.

ANALYSIS: The Court ruled that Plaintiff had ample time for discovery and did not file an affidavit requesting more discovery pursuant to 1.981(6) of the Iowa Rules of Civil Procedure. As a result, there was no abuse of discretion in failing to extend discovery.
When analyzing the tortious interference claim, the Court found that Defendants had a legitimate purpose for their conduct—company policy, and any interference was proper due to the right or duty to act under company policy. The Court also found that any statements were true or pure opinion, and Plaintiff could not prove the letter was published with malice, so Plaintiff's defamation claim also failed.

Sterner v. Smith, No 0-181/ 09-1258, June 16, 2010.

FACTS: Plaintiff was injured when Defendants rear-ended her on a roadway. Following a jury verdict of $13,420 for Plaintiff, including a $420 award for past medical expenses, Plaintiff moved for a new trial and then appealed, alleging the damages were inadequate, and that her attorney fees request should have been granted due to the request for admissions that were served on Defendants. The District Court denied the new trial motion and all requests.

HOLDING: The Court of Appeals REMANDED to the District Court for a damages trial.

ANALYSIS: The Court first looked at the past medical expenses award of $420, and found that award was not supported by the record. Because this was the case, the Court ordered a new trial for damages alone, since causation and liability were determined.
The Court found that all of Defendants' admissions and denials were reasonable, and rejected Plaintiff's demand for attorney fees.

Stutsman, Inc. v. Rogers, No 0-274/ 09-0835, June 30, 2010.

FACTS: Plaintiff and Farmer Defendant had a contract for the sale of chemical treatments to prevent weeds. After Defendant defaulted, Plaintiff sued to foreclose the secured property. Defendant farmer counterclaimed under theories of negligence, breach of contract, and breach of express and implied warranty. The District Court found for Plaintiff on the main claims and dismissed Defendant's counterclaims. Defendant appealed, alleging the court erred in finding he failed to meet his burden of proof in causation and damages.

HOLDING: The Court of Appeals AFFIRMED the District Court's ruling.

ANALYSIS: The Court looked at the incident at issue, and found that Plaintiff may not have sprayed the field at the correct time to control weeds, so they were responsible for some form of damages. However, because Defendant had not farmed the land before, there was no baseline for damages, and no evidence presented on specific damages. The Court found that Defendant failed to meet his burden in proving damages.

Gummert v. Paglia, No. 0-281/ 09-1196, July 28, 2010.

FACTS: Plaintiff was injured at a party at the home of the Defendant when he was struck by guests not invited to the party. Plaintiff sued for personal injuries sustained, and Defendant was awarded summary judgment. Plaintiff appealed, arguing that foreseeability and reasonableness of a landowner's behavior are jury questions.

HOLDING: The Court of Appeals AFFIRMED the District Court's summary judgment.

ANALYSIS: The Court analyzed the Second Restatement of Torts, section 318, and found no jury issues were generated under the undisputed facts as to (1) whether Defendant knew or should have known he had the ability to control the party that assaulted Plaintiff, (2) whether Defendant knew of the necessity or opportunity to exercise such control, and (3) whether the third party was on the property with consent. As such, the summary judgment was appropriate.

Jury Selection

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JURY SELECTION

IOWA DEFENSE COUNSEL ASSOCIATION ANNUAL MEETING
September 15-16, 2010

Jennifer E. Rinden
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Cedar Rapids, IA

I. JURY SELECTION BEGINS LONG BEFORE THE FIRST DAY OF TRIAL

Preparation for jury selection is KEY

- Identify case themes and weave them in to your voir dire questions

  Example: *The Monday morning quarterback*

- Identify the "hard" facts/issues and make a game plan for jury selection

  For example:

  Are there topics you would like the Court to question the panel about?

  Do you need to ask the Court for in camera questioning on a particular topic?

  Make a plan to prevent inadvertent contamination of the entire panel

- Review your jury selection outline – are your questions crafted to elicit yes/no answers or are they open-ended?

- On a related note – Jennifer, why are you asking that? Prepare to make it count!

- How are you going to handle Plaintiff's counsel's talk about big $$$s?

  McDonald's verdict and the dreaded "is any amount too high?"

- Know your potential audience – venue and jury questionnaires

  Learn what you can about the venue in advance

  Are questionnaires available before the first day of trial?

  If so, get help in evaluating the pool – your client, your partners, local attorneys are all good resources

- Prepare your client for the process

- In the right case, consider using a jury consultant to help identify a favorable juror profile

II. WHEN THE BIG DAY ARRIVES . . .

Housekeeping matter: do you want voir dire reported? (you may not have a choice)

IOWA R. CIV. P. 1.903(2)(b)

Tip: If voir dire is going to be reported have a plan for identifying jurors

Making it easy on the court reporter = MAKING IT EASY ON YOURSELF!

Jury selection is a process – ideas to get the most out of every minute!

- Pay attention to the pool as they enter the courtroom and pay particularly close attention as they are called to be questioned

- *Listen carefully* to Plaintiff's counsel's voir dire (questions and answers)

  Take notes – let potential jurors know you are paying attention

  Are there questions that can be removed from your list?

  Are there areas of follow-up that were not pursued?

  Do new areas of inquiry come to mind?

- Avoid the temptation to rely on stereotypes – keep evaluating!!!

- If you have not previously been able to do so, take the time to review the questionnaires. Remember – questionnaires may reveal important information!

  The case of X marks the spot . . .

- Avoid the temptation to feel rushed – going second is the defense lawyer's lot in life!

  After 2 days of questioning . . . WHAT IS LEFT TO ASK???

  Dealing with "after lunch" and "it's hot in here" syndromes

- Embrace opportunities to put the jurors at ease – a little humor is FINE!
- Take the time to ask "WHY?"
- Engage your client in the process – the good, the bad, and the "hairy eyeball"

III. DENIED CHALLENGES– HOBSON'S CHOICE or MORTON'S FORK?

The Scenario. Plaintiffs challenge prospective jurors for cause but the trial court denies the challenge. Plaintiffs elect to use peremptory challenges for the jurors and the jurors do not serve.

The law and the appeal issue. Under Iowa law, there is no presumption of prejudice or automatic reversal for this scenario, and Plaintiffs must establish prejudice based upon the jury that actually served. If Plaintiff cannot do so, they seek to overturn *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1993). In addition to Plaintiff's burden to overturn existing Iowa law, they must also establish that the district court abused its discretion in denying thefor cause challenges.

S**tandard of Review.**

The district court's denial of Plaintiffs' for cause challenges is reviewed for an abuse of discretion. *See Nichols v. Schweitzer*, 472 N.W.2d 266, 273 (Iowa 1991) ("We have held many times that a trial court is vested with broad discretionary power in acting on challenges for cause.").

"To the extent the appeal concerns issues of constitutional magnitude, [this Court] review[s] the record de novo." *Immaculate Conception Corp. v. Iowa Dept. of Transp.,* 656 N.W.2d 513, 515 (Iowa 2003), *cert denied* 123 S. Ct. 2097.

***State v. Neuendorf*.**

Prior to *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1993), Iowa followed the automatic reversal rule stated in *State v. Beckwith*, 46 N.W.2d 20 (1951) that "prejudice

will be presumed" if a trial court denies a "proper challenge for cause, so that defendant must either use one of his peremptory challenges or permit the juror to sit." *Beckwith*, 46 N.W.2d at 23.

The *Neuendorf* Court abandoned the rule in *Beckwith*, holding*:*

> [A]n improper ruling on a challenge for cause with respect to a particular juror is not automatically a ground for reversal when the juror in question has been removed through the use of a peremptory challenge. Absent a specific showing of prejudice on the part of the remaining jurors, no prejudice is shown sufficient to warrant reversal.

Neuendorf, 509 N.W.2d at 744-45 (finding challenge to juror should have been sustained but affirming verdict based on no prejudice).

The *Neuendorf* Court fully explained the reason for its ruling and the prejudice that Plaintiffs, here, must show:

> Whatever [the Jurors'] prejudices were, [they] did not serve on [Plaintiffs'] jury. The search for legal prejudice must therefore focus on the potential for prejudice that flowed from forcing [Plaintiffs] to use peremptory challenge on [the Jurors] that might have been used to remove another juror. In the absence of some factual showing that this circumstance resulted in a juror being seated who was not impartial, the existence of prejudice is entirely speculative. We believe it is too speculative to justify overturning the verdict of the jury on that basis alone.

Id. at 746 (continuing to explain why abandonment of *Beckwith* did not violate the federal Constitution, citing *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273, 2277, 101 L.Ed.2d 80, 88 (1988) for proposition that the focus should be limited to those jurors who actually served).

The *Neuendorf* Court not only cited *Ross* but noted the trend in other states since *Ross*: "Since the *Ross* decision disposed of the constitutional aspects of this issue, at least nineteen states have refused to apply an automatic reversal rule of the type that we

previously recognized in *Beckwith*. [citing cases] We now choose to follow the pattern established in this very substantial number of jurisdictions." *Id.* at 747.[1]

The *Neuendorf* rule has been explained and applied again in Iowa, including in 2005 where this Court declined to revisit and overturn *Neuendorf. See State v. Wilkins*, 693 N.W.2d 348, 351 (Iowa 2005). The *Wilkins* Court stated it had "no inclination to retreat from our declaration in *Neuendorf*." *Id.* at 351 (affirming *murder* conviction as there was nothing "on which to question the impartiality of the jury that heard defendant's case."); *Wilson v. Myrie*, 2009 WL 4114166 (Iowa Ct. App. 2009)("We are obligated to follow supreme court precedent and therefore must apply the *Neuendorf* standard.").

Support for the *Neuendorf* rule has only grown since 1993 with focus on the rationale that a party's election to use a peremptory challenge to cure a trial court's alleged error on a for cause challenge is completely consistent with the very purpose of peremptory challenges and deprives the party of nothing.[2] The *Neuendorf* analysis was based, at least in part, on the U.S. Supreme Court decision, *Ross v. Oklahoma*, 487

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[1] *See also Klahn v. State*, 96 P.3d 472, 481 (Wy 2004) ("Recently, there has been a movement away from an automatic reversal standard towards a requirement that there be a showing of prejudice before an otherwise valid conviction will be reversed."); *State v. Hickman*, 68 P.3d 418, 420 (Ariz. 2003) ("After *Ross,* most jurisdictions that considered the issue either rejected the automatic reversal rule or reaffirmed their jurisdiction's prior opinions that the curative use of preemptory challenge was not reversible error, absent prejudice to the defendant.")(collecting cases); *id.* at 422 ("a majority of state courts, both before and after *Martinez-Salazar*, hold that the curative use of a preemptory challenge violates neither a constitutional right, nor a rule-based or statute-based right. These courts require a showing of prejudice before a case will be reversed when a defendant uses a preemptory challenge to remove a juror the trial court should have excused for cause.").

[2] *See State v. Fire*, 34 P.3d 1218, 1220 (Wash. 2001) ("Fire did not lose a peremptory challenge, but exercised it. Therefore, he has not demonstrated prejudice and has not been deprived of any constitutional right."); *State v. Lindell*, 629 N.W.2d 223, 250 (Wis. 2001)("The substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error."); *see also Klahn v. State*, 96 P.3d 472, 483 (Wy 2004); *State v. Hickman*, 68 P.3d 418, 424 (Ariz. 2003); *State v. Manning*, 19 P.3d 84, 99 (Kan. 2001); *State v. Verhoef*, 627 N.W.2d 437, 441-42 (S.D. 2001); *State v. Entzi*, 615 N.W.2d 145, 149 (N.D. 2000).

U.S. 81, 108 S.Ct. 2273 (1988).[3] *Ross* involved Oklahoma law that was interpreted as *requiring* a defendant to use peremptory strikes to cure a trial court's for cause error. 487 U.S. at 90, 108 S. Ct. at 2279. Twelve years later, in *U.S. v. Martinez-Salazar*, 528 U.S. 304, 317, 120 S. Ct 774, 782 (2000), the Court essentially reaffirmed and extended *Ross* in the context of a defendant's *election* to cure a trial court's for cause error.[4]

The *Martinez-Salazar* Court held that when a party "elects to cure [a trial court's alleged erroneous refusal to dismiss a juror for cause] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." 528 U.S. at 307, 120 St. Ct. at 777. The Court held that the trial court's error did not compel the defendant to exercise a preemptory challenge to strike the challenged juror and he could have left the juror and pursued an appeal if necessary on the trial court's denial of his for cause challenge: "A hard choice is not the same as no choice." 528 U.S. at 315, 120 St. Ct. at 781 (finding defendant received the number of strikes allowed by the applicable rule).

Justice Ginsburg, writing for the Court, further found that:

> In choosing to remove [the juror] rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury.

528 U.S. at 315-16, 120 S. Ct. 781-82.[5]

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[3] *Ross* involved a criminal defendant sentenced to death. 487 U.S. at 83, 108 S.Ct. at 2275. Unlike this case, there was no dispute in *Ross* that the trial court should have excused a juror for cause. 487 U.S. at 85, 108 S.Ct. at 2276-77. Still, the U.S. Supreme Court found that just because the defendant was required to use one of his peremptory challenges to remove the juror did not require reversal under the Sixth and Fourteenth Amendments. 487 U.S. at 88-89, 208 S.Ct. at 2278.

[4] *See State v. Morehead*, 2001 WL 983160 *1 (Iowa Ct. App. 2001)(applying the *Neuendorf* rule and citing *Martinez-Salazar* and *Ross*).

[5] *See also Lindell*, 629 N.W.2d at 243-45, note 12 (discussing *Ross* and *Martinez-*

The practical problems with the automatic reversal rule should not go unnoticed.[6] *See State v. Lindell*, 629 N.W.2d 223, 247 (Wis. 2001) (discussing the "systemic problems" of the automatic reversal rule given that the "multitude of fact-intensive [for cause juror] challenges involving shades of gray are bound to produce some trial court error."); *Martinez-Salazar*, 528 U.S. at 316, 120 S.Ct. at 782 (the choice "to effect an instantaneous cure of the error-comports with the reality of the jury selection process" as counsel and the trial court must decide jury challenges "on the spot and under pressure."). Further, the automatic reversal rule "requires a new trial in cases where the trial was nearly perfect and the verdict is unquestionably sound." *Lindell*, 629 N.W.2d at 249; *see also Klahn v. State*, 96 P.3d 472, 483 (Wy 2004).

A constitutional argument about the right to a fair trial does not change the result.[7] "The right to a fair trial . . . does not guarantee a trial before the decisionmaker of the respondent's choosing; it simply guarantees a trial before an impartial decisionmaker." *In re Detention of Hennings*, 744 N.W.2d 333, 337 (Iowa 2008)(citations

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Salazar, noting that "all nine members of the [*Martinez-Salazar]* Court expressed the notion that one of the reasons for peremptory challenges is to correct errors in failing to strike for cause."); *In re Detention of Hennings*, 744 N.W.2d 333, 338 (Iowa 2008)(describing procedural protections to "help ensure the empanelling of an impartial jury," including peremptory challenges).

[6] Not all states follow *Ross* and *Martinez-Salazar*. See *State v. Good*, 43 P.3d 948 (Mont. 2002) and *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky 2007). However, as a concurring opinion notes in *Good,* that case draws heavily on prior Montana criminal law and the concurring Justice would even limit the *Good* holding to criminal cases. 43 P.3d at 961. In *Shane*, the Kentucky Supreme Court essentially found *Ross* and *Martinez-Salazar* could not be squared with Kentucky law. *See* 243 S.W.3d at 340-41.

[7]"[T]he statement that any error which affects the composition of the jury must result in reversal defies literal application." *Ross*, 487 U.S. at 88 n.2, 108 S.Ct at 2278 n. 2; *see also Summy v. City of Des Moines*, 708 N.W.2d 333, 339 (Iowa 2006) ("Prejudice from the erroneous exclusion of a juror will not be presumed . . . Rather, a party claiming prejudice must establish the resulting jury was not impartial and competent.") (citations omitted); *State v. Harris*, 741 N.W.2d 1, 10 (Iowa 2007)("Most federal constitutional errors, . . . do not require reversal if the error is harmless.").

omitted); *see also U.S. v. Johnson*, 495 F.3d 951, 965 (8th Cir. 2007), *cert denied,* 129 S.Ct. 32 (2008) (Iowa) ("The constitutional touchstone, we believe, is the right to a fair trial, and we are not persuaded that Johnson has been deprived of this right.").

Moreover, the *Neuendorf* Court considered the constitutionality of the rule it adopted and held that the rule "does not run afoul of [a party's] right to an impartial jury under the Sixth and Fourteenth Amendments of the federal Constitution." 509 N.W.2d at 746. The *Ross* Court rejected the "notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that preemptory challenges are not of constitutional dimension." 487 U.S. at 88, 108 S.Ct. at 2278. "So long as the jury that sits is impartial, the fact that [a party] had to use a preemptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.*

The *Ross* Court also specifically held that a federal due process challenge failed as the right to preemptory challenges, being a "creature of statute," was impaired "only if the defendant does not receive that which state law provides." 487 U.S. at 89, 108 S.Ct. at 2278-79; *see also Martinez-Salazar*, 528 U.S. at 317, 120 S. Ct. at 782 (holding defendant "received precisely what federal law provided [and] he cannot tenably assert any violation of his Fifth Amendment right to due process."). See also Iowa Rule of Civil Procedure 1.915(7).

The test under *Neuendorf.*

In *State v. Tillman*, 514 N.W.2d 105 (Iowa 1994), the Court set forth what Plaintiffs must establish:

> After *Neuendorf*, the presumption of prejudice no longer applies; the defendant must show:
>
> (1) an error in the court's ruling on the challenge for cause; *and*
> (2) either
> (a) the challenged juror served on the jury, *or*

(b) the remaining jury was biased as a result of the defendant's use of all of the peremptory challenges.

Tillman, 514 N.W. 2d at 108 (emphasis and formatting added) ("A lack of apparent prejudice is suggested by the fact that Tillman did not even challenge the members of the panel that were actually seated as jurors.").

The *entire* record and the "whole examination of the juror is to be considered." *See State v. Anderson*, 33 N.W.2d 1, 5 (Iowa 1948)("'The fact that [the juror] had an opinion which would require evidence to remove does not, in light of the entire examination of the juror [which included that he "repeatedly testified that he could and would lay aside his opinion and decide the case solely on the evidence and the instructions"], establish that he had formed an opinion as to [the merits].'") (citations omitted).

"'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *State v. Walters*, 426 N.W.2d 136, 139 (Iowa 1988)(venue issue)(citation omitted); *see also State v. Siemer*, 454 N.W.2d 857, 861 (Iowa 1990)(no abuse of discretion in denying change of venue motion when jurors who "initially held negative impressions" stated "that those views could be set aside."); *State v. McClain,* 125 N.W.2d 764, 768 (Iowa 1964) (no abuse in denying challenges for cause for former police officer who "was 'on the side of the law'"; "His statement expressed a belief in law enforcement and not a preconceived notion as to the guilt or innocence of the defendant.").[8]

[8] In fact, "the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually

Rehabilitative questioning of a juror can dispel grounds for a challenge for cause and multiple Iowa cases have so held. *See McClain,* 125 N.W.2d at 768; *State v. Houston,* 206 N.W.2d 687, 689 (Iowa 1973); *Dale v. Colfax Consol. Coal Co.*, 107 N.W. 1096, 1098 (Iowa 1906). Iowa Rule of Civil Procedure 1.915(2) specifically provides that "The court may conduct such examination as it deems proper." This Court has stated that it "strongly approve[s] of the trial court's participation in voir dire examination in a manner that will aid counsel and also avoid embarrassing individual prospective jurors." *State v. Bessenecker*, 404 N.W.2d 134, 137 (Iowa 1987).

Additionally, "[t]he court's inquiry here was not aimed at persuading a juror to compromise a valid concern about disqualification for cause. The judge here was obviously bent only on learning the jurors' state of mind." *State v. Barrett*, 445 N.W.2d 749, 753 (Iowa 1989), *subsequent history on other issues omitted*.

The *Siemer* Court noted "[v]oir dire testimony that appears ambivalent or contradictory on a cold record is known to be more accurately assessed by the trial court who hears the jurors firsthand and who understands that the testimony is often the product of leading questions and cross-examination tactics employed by counsel against jurors who, unlike witnesses, have no briefing by lawyers prior to taking the stand." 454 N.W.2d at 861 (citation omitted) (noting the U.S. Supreme Court "has reaffirmed the importance of deferring to the trial court's sound judgment in such matters since the determination is 'essentially one of credibility, and therefore largely one of demeanor.'"); *see also U.S. v. Johnson*, 495 F.3d 951, 964 (8th Cir. 2007) (trial court's denial of for cause challenge was not an abuse of discretion when juror had equivocal answers but

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represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.'" *Ross*, 487 U.S. at 86, 108 S.Ct. at 2277 (citation omitted).

statements "reflected the 'reasonable self doubts' of a conscientious and reflective person.").

An Insider's View of Witness Preparation

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An Insider's View of Effective Witness Preparation

INTRODUCTION

TRADITIONAL WITNESS PREP MODEL ANXIETY PROVOKING

A. How some witnesses testify
B. The witness acts as the student; the lawyer acts as the teacher
C. As the teacher, the responsibility of testimony lies with the lawyer
D. The witness comes to see the role of testimony as memorizing questions and answers
E. The traditional model of witness preparation focuses too much time on "cosmetic" issues – appearance and behavior – and not enough time on giving witnesses tools to extricate themselves from difficult situations
F. The remedy for witness anxiety is to learn your testimony and to know your audience

PSYCHOLOGY 101 – BASIC PRINCIPLES OF PSYCHOLOGY CAN HELP US UNDERSTAND WITNESS BEHAVIOR

A. Causes of witness fear and anxiety
    1. Witnesses experience evaluation apprehension – how will I be perceived?

B. The definition of credibility is a combination of expertise and trust

    1. Jurors evaluate the credentials and experience of a witness
    2. Jurors also evaluate the honesty of witness testimony
    3. Jurors consider whether the witness testimony is biased or unbiased

C. Psychological processes acting on witnesses and jurors
    1. Impression formation – how are impressions formed?
    2. Impression management – how do we want others to view us, and how can we manage the impression we are projecting?
       Self-monitoring – the ability to focus on our own actions
       Attitude change – recognizing attempts to influence impressions
       Attributional inferences – assigning reasons to the behaviors of others
    3. In-group/out-group biases – identifying with or differentiating ourselves from others

THE BUILDING BLOCKS OF JUROR EXPECTATIONS

A. Jurors come from diverse backgrounds
B. Jurors want to do the right thing and take their job very seriously
C. Jurors perceive the witness as a vessel of information
D. Jurors expect the witness to have a willingness to answer questions
E. Jurors look for candor and honesty from witnesses

KEYS TO MANAGING WITNESS RISK AND FEAR

A. The witness must know the message
B. The witness must know when he or she is off the course of the message
C. The witness must practice the message

PERCEPTION IS REALITY

A. Seeing is believing in what you see
    1. All stimuli (visual or otherwise) are filtered through our perceptual framework
    2. We see and hear what we want to see and hear
        a. This applies to witness testimony
        b. This applies to juror perception
        c. Perception can be influenced by priming

WITNESS COMMUNICATION

A. Strategic communication model
B. Any communication requires three components
    1. A source (the witness)
    2. A message (the message)
    3. A receiver (the juror/trier of fact)
C. Current statistics show that jurors evaluate how a witness behaves on the witness stand when making a decision on impeachment of testimony
D. Routes of persuasion
    1. The central route of persuasion is *objective*: the facts of the case, witness testimony, evidence presented
    2. The peripheral route of persuasion is *subjective*: nonverbal cues, such as attire, facial expressions, body language, as well as intonations and inflections of voice (not what you say but how you say it), and *hesitation in answering questions*
    3. Our research shows that jurors make more use of the peripheral route of persuasion when processing damages
E. How jurors filter information
    1. Case information is filtered through the attitudes and preconceptions jurors have *prior* to hearing any information about the case; these attitudes and preconceptions determine the jurors' view of the case
F. Case themes – weaving the story and consistent themes through all witnesses

EXPERT TESTIMONY AND THE USE OF VISUALS

A. Use of persuasive visuals
B. Expert witnesses and their credibility are evaluated using both verbal and nonverbal cues
C. Making testimony memorable
    1. Outlining your testimony for jurors helps them know where you are going
    2. Using persuasive visuals to drives key points and themes home to jurors
    3. Repetition of key points during testimony boosts memory
    4. Summation arms jurors with key points to argue during deliberation
D. Four ways a witness can lose credibility
    1. Defensiveness
    2. Anger
    3. Anxiety
    4. Arrogance

WITNESS PERFORMANCE

A. Witness performance matrix for a good communicator
    1. The goal for an effective witness is to have an appropriate level of assertiveness while testifying and not over-personalizing information shared in testimony
B. 3 C's for an effective communicator
    1. Conviction: You must demonstrate conviction or a belief in what you are saying
    2. Clarity: You must be clear in your message, in order of thoughts and voice
    3. Connection: You must connect with your audience through both language appropriate for the audience, as well as an appropriate level of emotion
C. Three levels of expectations of witnesses – juror, witness and attorney
D. Checklist for the witness preparation session
    1. Ask the witness about his or her questions as it pertains to the case and testifying
    2. Communicate the big picture or overall case themes and their role in the case
    3. Review prior testimony with the witness
    4. Practice a mock cross and direct with the witness, with an emphasis on cross-examination
    5. Be sure to practice mock testimony with any exhibits you plan to use during testimony
    6. Videotape practice sessions as a way to see areas that need improvement, both thematically as well as with witness testimony
    7. Review issues of the case
    8. Compare notes
    9. Give the witness an opportunity to ask more questions about testifying
    10. Plan your schedule so that if necessary, there is time for another session
E. Common mistakes in witness preparation

STEPS TO EFFECTIVE WITNESS PREPARATION

A. Equipping the witness for cross-examination
    1. Tagging: Equip your witness with the key themes to reiterate during testimony
    2. Admit-deny: As your witness is comfortable with her testimony role, she focuses on what she can and cannot answer while still injecting the case themes into her answer
    3. Sort through the junk mail: Through witness preparation, a witness learns to listen to the question asked, thereby being able to find a way to return to home base and regain control of the examination
    4. Stand your ground: Teach witnesses to be firm and have a modicum of righteous indignation when getting questions from opposing counsel attempting to get the witness to weaken or retract the key theme
    5. Tug-of-war: Teach the witnesses to recognize that agreement with certain questions is often more powerful than arguing against them

WHEN A DEPOSITION GOES AWRY

CLOSING THOUGHTS/QUESTIONS AND ANSWERS

What the Mediator Knows that You Should Know

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INTRODUCTION

Mediation is successful because parties bring a neutral third person to the settlement table to help resolve their differences. This article discusses the peacemaker approach to mediation and the qualities such a mediator brings to the mediation process. The mediator should not only help resolve the dispute, but, whenever possible, help the parties find peace of mind. We also deal with the techniques and tools which are available to the mediator in helping the parties find resolution.

Lawyers and mediators have been given a unique opportunity to contribute to the betterment of society through the process of peacemaking. Abraham Lincoln once said that as peacemakers, lawyers have their greatest opportunity.

MEDIATORS – UNIQUE IN "JUDICIAL" PROCESS

Two factors make the mediator truly unique in the judicial process. First, he comes to the table, not as an advocate, bent on winning the case, but as a peacemaker trained to settle the case. Until recent times, only advocates participated in settlement conferences, seeking to "win" for their clients through the negotiation process. Their strategy was to make the other side believe they intended, and were prepared, to go to trial unless the other side capitulated. On the other hand, the mediator's training and focus is not on getting a win, but on finding compromise that will make both parties winners. The skills employed by an effective mediator seek compromise rather than submission, cooperation rather than confrontation, creativity rather than rhetoric.

Second, the mediator, unlike the judge, jury or arbitrator, has unique access to the facts never before made available in the American judicial system. Unique accessibility to the truth is created by the private caucuses which the mediator can hold with each side. In confidence, he can question each about the concerns they have in their own case. He can also inquire as to counsel’s evaluation of the case; best case-worst case scenario before the jury. The cloak of confidentiality encourages advocates to discuss these factors more candidly. This is an important factor in the settlement process. With this knowledge, the mediator is positioned to help the parties to realistically evaluate their respective cases and guide them to a meaningful and fair settlement.

NECESSITY OF HAVING A LEGAL BACKGROUND

Although laypersons can be mediators, it is helpful if the mediator is a lawyer, particularly if the dispute is in or is likely to go into litigation. This is true for several reasons: First, a mediator should be familiar with the complexities and risks of the litigation process so that he can help the parties and counsel evaluate possible outcomes before a judge or jury. Second, a mediator with litigation experience is more likely to have the respect and confidence of the attorneys and parties and will probably be more persuasive in influencing compromise. Finally, a lawyer is better able to help the parties focus on the real issues in their cases. Sometimes he will even recognize significant issues of fact or law that the parties and counsel may have overlooked. These factors usually require the skills of an experienced litigator.

However, a legal background alone will not assure the effective management of a mediation. Of primary importance is the mediator's training in and understanding of mediation techniques.

NECESSITY OF BEING AN EXPERT IN THE PARTICULAR FIELD OF LAW

Although the mediator does not have to be an expert in the area of law being mediated, he must be able to grasp the legal concepts involved. It is the authors' position that an experienced personal injury, securities, or family law practitioner, for example, acting as mediator, can have a decided advantage in such cases. Often, the parties and their lawyers desire and subtly request guidance in evaluating and settling their cases. Furthermore, knowledge concerning the subject matter in question, will help the mediator gain the respect and confidence of counsel and the parties.

Also, there may be times, because of the technical nature of the subject matter, where expertise is required. For example, in patent litigation, an engineering background may be necessary to understand the parties' positions. This is not to suggest, however, that a patent lawyer should be selected who has no mediation training. Rather, the competent mediator might request the assistance of a co-mediator who has the technical expertise required.

In any event, the mediator should be sufficiently prepared, concerning the legal and factual questions at issue, so that counsel are not unreasonably burdened with the need to educate the mediator. This can be an irritant to counsel and the parties who are paying for wasted time.

BE A PEACEMAKER

Perhaps the single most important quality or skill a mediator must possess is the ability to still the turbulent waters and bring peace to the settlement process. Generally, parties are willing to consider settlement because they want to resolve their differences. However, many times bias, prejudice, anger, animosity, frustration or pride prevent them from realistically looking at their cases, making settlement impossible. The mere presence of the mediator as a peacemaker should help calm these emotions and help the parties focus on resolution.

The moment the mediator enters the room he needs to take control of the process and introduce a spirit on civility and consideration for all. He must help the parties focus on issues and settlement and not personalities or past animosities. He should have a calming influence so that the purpose of the mediation, viz. the resolution of the conflict, can be properly addressed.

The mediator, therefore, must not only be prepared concerning the facts and law of the case, but he should try to enter into the process with a positive and uplifting attitude gently and compassionately guiding them towards resolution. This is particularly true in mediations where there are deep-seated emotionally charged issues such as in matrimonial, child custody, family and partnership disputes.

Parties come into the fray often seeking to hurt and even brutalize each other. Attorneys add to the mix by dragging the parties through difficult discovery and demeaning courtroom battles. Parties, who may have been communicating before the legal action commenced, often develop

an intense hatred for each other and opposing counsel. Especially in this setting, the mediator must demonstrate the qualities of a peacemaker.

TECHNIQUES AND TOOLS OF THE PEACEMAKER

The primary purpose of the techniques and tools used by the peacemaker is to help develop trust and rapport with the parties and counsel. Thereby, the mediator is better positioned to guide the parties to meaningful resolution. Trust in the mediator will encourage the parties to make or accept that final compromise needed for settlement.

The techniques or tools of the peacemaker are the antithesis of the trial lawyer's. The latter relies on highly confrontational techniques which are designed to impeach, discredit, and undermine. They are designed to put the opponent on the defensive. Their purpose is to win by defeating the party-opponent. On the other hand, the peacemaker's tools are in no way confrontational. They are designed to be supportive, to establish peace, to bring the parties together. They are designed to make both parties winners rather than just one party.

Possible confrontational questions or statements need to be rephrased, a brusque manner softened, a feeling of frustration replaced with patience and affirmation. Eliminating confrontation and taking a softer more gentle approach, will ultimately break the barriers of intransigence. There are a number of techniques to accomplish this goal.

The Art Of Agreeing

Whenever possible, the mediator should find positions, arguments and points with which she can agree. The more supportive she can be in this regard the more rapport she will build.

The art of agreeing, however, is more than a theoretical concept. It is a practical effective peacemaker tool to defuse potential arguments. If the mediator finds herself locked in an adversarial battle with a party or counsel, she needs to find a way to neutralize the exchange as quickly as possible. Engaging in an argument can only undermine the primary goal of establishing rapport and trust.

A most effective way of avoiding the "argument pitfall" is, whenever possible, to say "I agree with you." These disarming words will defuse any adversarial encounter. By agreeing, there is no basis for further contentious exchanges and or emotional confrontation.

In agreeing, the mediator is really signaling his intent to be supportive and work with and not against the party. The message is that the mediator understands and cares, is not judging, but is motivated by the desire to work hand in hand with the party. It affirms that confrontation is not part of the settlement equation.

If the mediator cannot agree with a party's position, he might, depending on the circumstances, use the words, "I don't disagree." This softer form can be just as disarming, although the message is slightly different. The mediator is saying, he chooses not to argue although he may

or may not be in agreement. He wishes to make clear that differences are not what matter; rather, it is working together for a common end which is paramount.

Agreement can also include even softer expressions such as, "I hear what you are saying," "I understand," "help me understand." These words also signal a desire to work together, to avoid wasteful confrontation. They also show support and not opposition.

The Art of "Disagreeing"

Successful motivators traditionally emphasize the importance of "disagreeing without being disagreeable." This time-honored principle of positive human behavior is nowhere more essential than in the mediation process.

There are times when a mediator, in the best interest of a party, may have to disagree with their position. The party may be traversing a path which, in the opinion of the mediator, will lead to serious disappointment at trial. Not to disagree could be a disservice. If the mediator must take this tact, it still can be done in an inoffensive and non-adversarial manner. It can be done in a way that the party and counsel understand that the mediator only seeks to protect the party's interest and welfare.

The real goal is to encourage a party realistically to recognize problems and to reevaluate their cases. Generally, a mediator should not unequivocally say, "I disagree with you," or, "you are wrong and will lose at trial." This confrontational approach invites disagreement and may force the party into a defensive posture.

There are a number of better ways to "disagree" and encourage re-evaluation without being confrontational. The mediator might say, for example, "help me better understand your position, for I am struggling to grasp it." Or, she might say, "the other side has made an argument for which I don't have an answer. Is there an answer?" The mediator might point out that, "I am deeply concerned about a certain issue, which, if lost at trial, may cost you the verdict." She might add, "should that risk be taken?"

Timing can be important. To raise concerns in a party's case too early might suggest, in the eyes of the party, a lack of objectivity and perhaps bias. To raise these same concerns after the mediator has worked the case and sought answers, will seem less threatening. The party must understand that the mediator "disagrees" out of sincere concern and not merely to be critical or because she favors the opponent.

Be Actively Supportive

Another tool of the peacemaker is to be actively supportive of the parties and counsel. This can be done in several ways: First, the mediator can show support for a party by asking about the strengths and favorable aspects of his case even though the mediator is fully cognizant of those strengths. The purpose is not necessarily information gathering, but to show interest.

Second, the mediator can show support by inquiring about the party's best case scenario before a jury. This gives counsel an opportunity to discuss his evaluation of the case and the potential for recovery. Counsel appreciate this opportunity to discuss the positive aspects of the case.

Third, even when the mediator disagrees with counsel or inquires about the weaknesses in or the concerns a party has or should have about his case, the mediator can still be supportive. Negative considerations can be discussed for the purpose of exploring possible responses to positions presented by their opponent.

Show An Interest In The Party And Counsel

The mediator can build rapport and trust by showing an interest in the party, her welfare and future well-being. Sincere inquiries about family and activities demonstrate interest in the party as a person, and not just from the standpoint of the settlement value of her case.

Likewise, showing interest in the attorneys, their practices, their successes, their outside activities, their families, demonstrates that the scope of a mediation covers more than just closure of a single file. It is not just another judicial nicety, but a process that transcends the mere conclusion to the case. It can help build the foundation for a more satisfying and rewarding practice.

Help Develop Strategies

Another technique of the peacemaker is to help the parties develop a strategy to maximize the benefits of any settlement. This can be done without straining the neutrality of the mediator so long as his efforts are equal on both sides.

The veil of confidentiality permits counsel to use the mediator as a sounding board, knowing that whatever is discussed will remain confidential. In discussing strategy, counsel and the mediator can consider whether a major move should be made in the offer or demand. It might include a decision to present new evidence or a new document not yet disclosed

There are times in a mediation when counsel may seek the assistance of the mediator as to how to respond. For example, plaintiff's counsel may reach the conclusion that liability is wanting, or damages are considerably less than originally anticipated. A frank and open discussion with the mediator may develop a strategy for salvaging some aspect of the case.

There are even times when counsel may ask the mediator to assist him in handling a difficult client. A willingness of the mediator to assist in this way may require a strategy designed to avoid offending the party. Again, by working with the parties and counsel to develop a strategy builds rapport and trust and furthers the mediation process.

Build A "Team" Concept With Each Side

As the mediator works with counsel in developing the case, he really becomes a part of the "team." He does not lose his neutrality in doing this so long as he works equally with both sides.

In this setting, the mediator can use the "we," "our," "us" technique. Instead of asking, "how are you going to answer this point?" it is more effective to ask, "how are we going to answer this point?" And instead of asking, "what are your risks on this issue?" the mediator might ask, "what are our risks?" This personal "team" approach might seem artificial for some mediators, so it should be used only if the mediator is comfortable doing so. Obviously, when using the "we," "our," and "us" approach, the mediator must be referring to the party with whom he is caucusing and not to the other side.

Use Nonconfrontational Language

The surest way for the mediator to create conflict and intransigence is to use confrontational language. To tell a lawyer he is wrong and will lose his case at trial, places him on the defensive and generally evokes a response which is argumentative. Confrontational language undermines the mediator's effort to build rapport and should be avoided whenever possible.

There are many words and phrases commonly used which may unnecessarily signal confrontation. Such expressions as, "that's an insult," "are you serious?" "get realistic," "your playing games," "your nickel and diming," "that does not deserve a response," "read my lips," "your not listening," all signal conflict. Even softer expressions may convey a negative message we do not intend. Often, when a mediator says, "I am just playing devil's advocate," he is signaling he will be asking difficult questions which the other will be challenged to answer. Or when he says, "with all due respect," "with all deference," "I beg to differ with you," he may be signaling possible conflict.

Even the inflection in a mediator's voice can signal confrontation. Asking questions in a brusque or assertive manner, speaking rapidly, raising the pitch of one's voice, speaking in a demeaning, sarcastic, or frustrated manner signal challenge to the listener.

Inquiries by a peacemaker should not challenge the listener in a manner that puts her on the defensive. Instead, they should be supportive and show interest. Questions should be asked with gentleness and compassion. They should demonstrate that the mediator truly seeks to find a just resolution, fair to all concerned, which can lead to peace.

Again, when caucusing with a party, the mediator should first develop the positive aspects of the case. The party will then be far less reluctant to discuss its negative aspects. In asking about the weaknesses, it can be done in a nonconfrontational way. Rather than asking, "what are the weaknesses in the case?" the mediator might ask, "are there any concerns or weaknesses in the case of which I should be aware?" Or, the mediator might state, "the other side raised several points I could not answer; can you help me?"

Negative aspects can be raised as strengths developed by the other side and not as concerns of the mediator. In other words, the mediator avoids being confrontational by not being the source of the concern. Perhaps the mediator might hypothecate about how a jury might see the issue.

Likewise, if the mediator wishes to learn counsel's evaluation of the case before a jury, he will first ask what is the party's best case scenario. Having established this, he can then ask the more important question, what is the worst case scenario.

The more supportive the mediator's questions and words are, the greater is the opportunity to build rapport.

Calming The Waters Of Anger And Frustration

The true peacemaker is always calming the waters of anger and frustration, from the opening session throughout. For example, when a party makes an adverse statement about the other side, the mediator should, whenever possible, rephrase it so that the anger is removed yet the point still made.

As progress is made, the mediator might note that the other side seems more cooperative now, or they are making a greater effort to find resolution, or the signals he is receiving are more positive, if this be the case. Anything the mediator can reasonably say about the other side which is positive, should be conveyed. This approach is not only encouraging, but also has a calming effect. Contrariwise, if the other side appears to be uncooperative or acting in bad faith, the mediator should try to avoid commenting on this. He should not add fuel to the fire. If the mediator cannot say something positive about the other side, he should say nothing.

BE DILIGENT-RESPONSIBLE

The mediator must be diligent when preparing for a mediation. She must carefully review and understand all of the material submitted by the parties whether it relates to the facts, law or the surrounding circumstances involved in the case. If appropriate, she should do her own investigation and research to better prepare herself. This may include, with the permission of the parties, requesting the assistance of experts in a particular field of law or technology.

The mediator should respond immediately to phone calls or correspondence from involved individuals and attend the mediation hearings on time. Success as a professional mediator requires industry as well as a sincere commitment to the principles of mediation.

BE PATIENT

A peacemaker must be prepared to exhibit extraordinary patience throughout the process. If the mediator loses his temper or, in frustration, makes a sarcastic comment or "observation," the mediation may end.

Patience means that the mediator does not push too hard or too fast for compromise. Patience requires that at the end of the day, when the parties are frustrated and want to terminate the process, the mediator gently encourages them to keep trying even if it means continuing the mediation to another day.

The more difficult and complex the mediation, the more patient the mediator must be. If a plaintiff is making an unrealistic claim for damages, the mediator must slowly, deliberately and at the appropriate time bring the plaintiff's expectations down. The same problem arises when a defendant underevaluates the case. An immediate confrontation will usually spell failure. A patient timely effort to help the defendant understand its problems and risks will provide greater opportunity for success.

Many times lawyers for one side or the other will create obstacles to settlement. Attorneys might even question the value of the mediation process or consume a lot of time boasting about their personal successes in court. There may be a strong temptation in such cases for the mediator to react with sarcasm, impatience, or belittlement. However, any negative reaction or response may be fatal to the process. The mediator must patiently help them to focus on making the settlement process succeed.

There are times when the "show" the attorney is putting on is for the benefit of a difficult client. In such a situation the mediator needs to be patient and reinforce the attorney's position. Appropriate, positive statements to the client about an attorney's reputation and ability may be helpful because it is usually the attorney who will get his client to close the gap and reach settlement.

The mediator must proceed through the mediation step by step and not try to cut corners. Even when the parties are quite far apart, he must take as much time as is reasonably necessary to bring them together.

The mediator should approach the case in a manner that reflects an appreciation of the importance of the case to all parties, and a willingness to give it the focused attention it deserves. By taking each required step deliberately and thoroughly, the mediator will gain the respect and confidence of the parties and their attorneys and be in a strong position to effectuate a settlement.

BE POSITIVE

The mediator should adopt and maintain a positive attitude at all times. From the opening statement to ultimate resolution, the mediator must constantly reaffirm that settlement is a strong probability. Approximately, eighty percent of all mediations are successful. Some mediators experience a high nineties percent success rate. This success ratio should be emphasized at the outset of the mediation. It tells the parties and their attorneys that they have every reason to expect to reach a settlement. Also, it suggests that if there is a problem, perhaps it is their own intransigence and not the process. This knowledge may encourage them to compromise more than they initially anticipated doing.

The mediator should constantly encourage the parties, even when the process seems to be breaking down. At no time should she show discouragement or indicate there is doubt as to the outcome. Negative signs are contagious and will make settlement more difficult.

Most mediations run through cycles. At the opening session everyone is fresh and hope that the case will resolve on terms favorable to them. As the mediator works through the first private

caucus with each side, and initial offers and demands are placed on the table, discouragement and disillusionment often set in. Many times a lawyer or party will say that the last offer or demand is an insult and not worthy of reply. The mediator, however, must point out that any movement is a positive sign, and as long as the parties keep moving settlement is within reach and likely.

Frequently, the parties and their attorneys become so frustrated and discouraged, they threaten to terminate the process. It is important at this point that the mediator remain upbeat and positive. He should explain that these feelings are very normal and that, "We can work through this." He should keep reinforcing the point that the progress being made follows the pattern of most successful mediations. This positive attitude is particularly critical in the darkest hour when the parties are far apart, even after hours of effort, and the mediator is having difficulty keeping the parties at the table. The mediator's positive attitude can be infectious and sustain the mediation when it otherwise might fail.

BE PERSISTENT

Many times mediations fail because the mediator gives up too soon. A frequent complaint of lawyers is that their mediator terminated the process although a settlement was still possible. Generally, a mediator should never terminate a mediation until she is "fired." In essence, until the parties refuse to pay future mediation costs, the mediation should continue. That is, the termination of a mediation should be clear and unequivocal.

There are times when a party or counsel may inform the mediator that he is "inclined to terminate the process" or that he "sees no purpose in continuing to mediate." This is not necessarily a signal for the mediator to do so in fact. It may merely be intended as a bargaining ploy for the benefit of the opposing side.

Persistence means that if one avenue of settlement closes, the mediator must look for another to keep the process going. The primary task of the mediator is to keep the parties at the "negotiating table," talking and thinking settlement. She must consider and encourage fresh creative ideas and suggestions and constantly inject them into the process.

BE PERCEPTIVE

A good peacemaker must be perceptive. He should be capable of identifying, understanding, and exercising good judgment concerning the relevant factual and legal issues.

The mediator has ready access to the strengths and weaknesses of each side through the private caucuses. Therefore, he is in a unique position to identify issues, both factual and legal, which the parties may have overlooked, or do not sufficiently appreciate. Many times such issues, once identified, understood, and evaluated can lead to settlement. For this reason, the mediator should constantly question and not be hesitant to raise relevant issues. If a legal question does arise which the mediator feels should be examined further, he might ask one of the attorneys to research it or research it himself.

There is one caveat to the mediator identifying legal or factual issues which counsel have overlooked. He should disclose them only to the side whose position is weakened by the disclosure. Thus, disclosure will enhance the possibility of a settlement rather than strengthen the resolve of the party who may benefit by the disclosure.

BE SENSITIVE

A mediator must be sensitive to and accommodate the physical and comfort needs of the parties and counsel. Also, a peacemaker mediator should be sensitive to the feelings and motivations of the parties and their attorneys. At the commencement of any mediation, the mediator should determine whether the attorney controls the client, or whether she is having difficulties. Sometimes the attorney will simply tell the mediator or at least "signal" that there are problems, such as the client's unreasonable expectations. Other times, problems may be “revealed” by the manner in which the lawyer is working with the client, particularly in caucus. The mediator must determine how he can best assist in resolving any attorney-client "conflicts." In some instances, merely affirming what counsel is saying is enough to satisfy the client. In other situations, the attorney may want the mediator to take a more active role and emphatically point out the negative aspects of the case. Often when the client hears the views of a neutral party who is an "expert," the case settles.

The mediator must also determine whether the attorneys will be cooperative or whether they are going to obstruct the process with unreasonable demands. Sometimes attorneys will disclose their approach and attitude during opening statements. Usually, a sign of obstructionism is when, in private caucus, an attorney declines to identify any “concerns” or weaknesses in his case. This approach usually indicates that he is not willing to moderate his client's expectations, a requirement of any settlement. Although such lack of cooperation is not fatal, it does create obstacles to establishing rapport and confidence. Dealing with an attorney who is obstructing progress, for whatever reason, requires decidedly different techniques than when dealing with a lawyer who is cooperating and sincerely seeking settlement.

A sensitive mediator will recognize when parties want to get the matter resolved "at any price." Generally, this attitude is difficult to determine during the early stages of a mediation. Often, counsel will conceal such a mindset because he feels it weakens the party's negotiating position. It is important to note that if a mediator determines that a party wants to settle "at all costs," his commitment to confidentiality prohibits him from disclosing this to the other side. In fact, most laypersons find a lawsuit to be a very unpleasant experience, particularly when they have been “unmercifully” deposed and the prospect of trial is looming before them.

When discussing possible verdict ranges, offers or demands, the mediator should carefully observe the party’s reaction. The eyes, or a subtle shake of the head, will often disclose the party’s true feelings. Many times an attorney’s "no" is for show only to demonstrate to the client how hard she is working for him.

BE FRIENDLY AND PERSONABLE

The mediator should work sincerely towards establishing rapport with all parties and their representatives. Mediators should be aware that parties are often cynical, suspicious and fearful of the judicial process and lawyers.

An effective mediator should be friendly, personable, pleasant and polite at all times. This is sometimes easier said than done particularly towards the end of a difficult mediation. As noted above, mediations cycle from hope to despair, from encouragement to frustration. Throughout the process, the mediator must remain, not only positive, but pleasant and accommodating.

Even if the process deteriorates the mediator should remain congenial. If he can remain pleasant and find positive signs in spite of problems, the parties likewise may keep trying for an amicable resolution.

A mediator should freely express appreciation for the contributions of the parties and counsel. Everybody appreciates recognition, especially for their positive accomplishments. Appropriate and sincere acknowledgement of someone's contribution and efforts during the mediation process will certainly enhance the chances of a successful conclusion.

Sometimes, a mediator will use humor to relieve the tension. Of course, when humor is used it must be selective, in good taste, and not offensive to anyone.

A personable, caring, concerned, friendly, and sincere manner will create a relationship with the parties and counsel which will assure the best chance for a successful outcome.

BE PROFESSIONAL

A peacemaker at all times must be professional; that is, he must be absolutely neutral, nonjudgmental, and never reveal matters disclosed to him in strict confidence.

Maintain Neutrality

Neutrality is maintained when the mediator deals with and treats both sides equally. What she does for one side she must do for the other. There must be symmetry in dealing with the parties and counsel. The mediator must also be concerned with the appearance of neutrality as much as the fact of neutrality.

Neutrality must be demonstrated at the very commencement of the mediation process. When the mediator is retained, one or both of the parties or counsel may wish to speak to him about premediation submissions or the format of the process. If one side makes contact, symmetry requires that the mediator contact the other and inquire whether they have any questions. The mediator might even suggest that a conference call be set up to answer questions. In these initial contacts, the mediator can explain that ex-parte communications at any time are perfectly proper and, indeed, invited.

Even when traveling to the mediation site, certain guidelines concerning neutrality should be considered. We recommend that the mediator not travel with one of the parties or attorneys to the mediation. Although ex-parte communications are proper, and in theory traveling together would permit the mediator to caucus with one side, the appearance that the mediator and party are strategizing against the other, could raise concerns. This is particularly true for a party unfamiliar with the mediation process.

Once the mediator has arrived at the mediation site, guidelines are recommended to affirm the neutrality of the mediator. If one side has not yet arrived, the mediator should avoid engaging in what appears to be an upbeat social conversation with the party already present. This can be disconcerting for an unsophisticated party. It is recommended that the mediator sit in the reception area until all have arrived. This is appreciated by the latecomer and by the party already there, for it demonstrates the professionalism of the mediator in maintaining absolute neutrality.

At the commencement of the mediation, the mediator should sit at a neutral place at the table. In his opening remarks, the mediator should carefully explain his neutrality in the matter, and his pledge to maintain that neutrality at all times. Neutrality also extends to the way he addresses the parties. He should, in giving his opening remarks, speak to both sides equally. He should not look at only one side or one person and ignore the others. Mediators are often tempted to speak only to those persons unfamiliar with the process to explain it to them. Symmetry, however, requires the mediator to speak to all. This can be accomplished on the basis of familiarizing everybody with his particular approach to the mediation process.

Over the lunch hour, the mediator maintains his neutrality by eating alone unless it is understood by all that the time is to be used to caucus and there is no objection. The mediator might in fact wish to eat with one party or the other just to develop better rapport. However, this should be done with the specific approval of the other side. The mediator should insist on paying for his own meal.

Neutrality and symmetry should be maintained even concerning speaking alone with counsel outside the presence of the client. He should tell the client that on occasion he confers with attorneys for <u>both</u> sides concerning “lawyer matters” and that this is part of the process. Otherwise, a client might wonder whether there is a problem or that they are conjuring something she might not like.

The mediator must work equally hard for both. He cannot push one side and favor the other. Many settlements have been accomplished by experienced mediators because both sides felt the mediator was working to obtain maximum concessions from both. When the mediator is in caucus with one side, he will of course be "arguing" the other side's case. It is important that he occasionally remind the party that he is only presenting the case as instructed by opposing counsel. The mediator should emphasize that when he is caucusing with their opponent he will be arguing their position with equal vigor. Mentioning his neutrality on occasion reinforces the participants' belief that he is working equally for <u>all</u> concerned to settle the matter.

It is important that a mediator not become known as a "plaintiff's" mediator, or a "defendant's" mediator; that is, one who is chosen because a party expects him to work disproportionately in their favor. When a mediator is so "labeled," his neutrality is lost as well as his effectiveness.

The mediator's neutrality must also be maintained as between the client and his attorney. If an attorney is becoming impatient with the client, the mediator should not be too quick to side with the attorney. The mediator should avoid the appearance that he and the attorney are "ganging up" on the client and that they are favoring the other side. Some settlements have been salvaged despite the disruption of the client-attorney relationship, because the client believed the mediator was neutral and would continue to make every effort to obtain a fair resolution.

Remain Nonjudgmental

Sometimes, the mediator is asked to place a value on a case. Although, this evaluation is nonbinding and intended only to give the parties some guidance, unless, a mediator is specifically retained to be evaluative he should remain nonjudgmental. This is especially true early in the process. Whatever value he gives to a case, will most likely be unsatisfactory to at least one of the parties and possibly to both. Sometimes early in the process a mediator is asked his evaluation to “test” his leanings. Responding with an evaluation can undermine the entire process.

Also, experienced mediators recognize that it is difficult to predict what a jury will do. The mediator should not make such a judgment call and risk being proven wrong. He should allow the parties to take the settlement range wherever they wish. His principle function is to get closure. When the mediator performs this nonjudgmental task he may be surprised by the settlement figure, but he will never be criticized for improperly evaluating the case. There is another important consideration. Many times a settlement figure reflects considerations other than its dollar amount. It is not for the mediator to judge the motivation of the parties.

The mediator should even avoid, when asked, to give an opinion as to how much a party should move with a new demand or offer. However, often a mediator will be engaged because the parties want the benefit of his expertise in a particular field. Such a mediator, under some circumstances may suggest specific movement by the parties or even a settlement figure. This must be done cautiously because of the above described pitfalls. He should do so only after he has become totally familiar with the parties’ positions concerning the issues in the case. It is also critical that the recommended movement or the settlement figure be one that will never embarrass the mediator. That is, his suggestion should be a responsible one and have a reasonable basis. Also, it should be done only when it appears that the parties are unable to make meaningful progress on their own and that they are inviting the mediator’s assistance. Further, the figure should not be presented as a “judgment” by the mediator that his suggestion reflects the actual value of the case but rather as one being within an area reasonable to all for settlement purposes.

Being nonjudgmental requires that the mediator not judge the merits of the case or the worthiness of the parties. He need only find a way for both to end their dispute and part in peace. This is the essence of being nonjudgmental.

Maintain Confidentiality

The mediator must adhere strictly to the bounds of confidentiality, which are an essential part of the process. One of the primary reasons mediations are successful is because they are conducted in confidence. In fact, the mediation agreement should contain a confidentiality clause which provides that should the mediation fail none of the discussions at the mediation can be disclosed by the parties, their counsel or the mediator.

However, there is a more important aspect of confidentiality which is critical to the process. Unless released from the obligation, the mediator is bound to hold in confidence all information disclosed to him in private caucus. It is this ability to discuss and disclose a party's weakness or a final settlement figure in confidence to a neutral third party that distinguishes mediation from ordinary negotiation. Confidentiality allows the mediator to freely probe both sides to determine if further compromise is possible.

BE PRINCIPLED

Mediators must operate under the highest ethical standards in the profession. They must be principled, trustworthy, and act with integrity. Their primary consideration should always be the interests of the parties they assist, and not their own financial gain. Service to others must be their highest motivation. The mediator should not directly communicate by telephone or otherwise with the client without counsel’s consent or knowledge.

DEVELOP NEGOTIATION AND COMMUNICATION SKILLS

An effective mediator should develop time-honored negotiation and communication skills. He will therefore be in a better position to guide the parties to an ultimate resolution of the dispute.

The mediator is constantly "negotiating" and communicating during the joint sessions and private caucuses. When he receives and transmits offers, demands and positions of the parties, he is not only communicating, but in a very real sense, he is involved in the negotiation process.

A mediator well versed in the skills of an effective "receiver" and "sender" of messages is better able to serve the process for many reasons. He will listen, receive and transmit data and positions accurately and effectively. He will also be able to evaluate the information he is being exposed to more accurately.

Be An Active Listener

He must develop effective listening skills which requires "active" participation. He needs to "work" at being an effective listener. He should assume a physical posture and attitude that reflects his undivided attention and interest in what the attorneys or their clients are saying.

A good listener will maintain eye contact with the speaker, acknowledge points being made, ask pertinent questions, and always demonstrate by appropriate feedback an interest in the speaker's

message. The listener's feedback should be of a type and quality that will be encouraging to the speaker.

Be An Effective Speaker

The effective mediator needs to remember effective communication is “receiver” oriented. Therefore, as an effective speaker, his voice and manner must always be respectful and never condescending or demeaning. The mediator must be aware of the fact that every attorney, party and representative is unique. An alert and sensitive mediator will always be prepared to modify his approach to accommodate the level of experience and knowledge, as well as the needs and values of the people involved.

When making comments of general interest, whether during a joint session or private caucus, the mediator should direct his remarks, eye contact and attention in such a manner so that no individual feels excluded. If he inappropriately ignores persons who are present by failing to make adequate eye contact or by his manner, he is being rude and offensive. Such "slights" may have a disastrous impact on a mediation. Often a spouse, siblings, an insurance adjuster or a family member, although sitting in silence, will be a very important player in the ultimate resolution of the case.

Feedback

Feedback is a two-way street. The mediator needs to give the person who is speaking appropriate feedback. Also, when the mediator "has the floor" he should watch and listen to his audience carefully for the purpose of evaluating its response to his presentation.

Whether speaking or listening, the mediator should be sensitive to the significant nonverbal communication clues that are being sent or that he is observing. Appearance, body language, gestures, facial expression and eye behavior should be consistent with the expressed message. If there is an inconsistency, the nonverbal or body language usually reflects the true feelings more accurately then the spoken words.

CREDIBILITY OF MEDIATOR IS CRITICAL – BE PERSUASIVE

Open and honest communication between the parties and the mediator is essential. Therefore, it is critical to the success of a mediation that the parties and counsel have total confidence in the credibility of the mediator. This is especially true when the mediator is functioning in an "evaluator" mode and must to a greater extent be "persuasive." It helps to come to the mediation table with an impeccable reputation for integrity and competence in the particular field involved. However, he should always make every effort to reinforce and enhance his credibility during the hearing.

The mediator's credibility will be further enhanced by carefully preparing for the mediation and demonstrating fairness and even handedness at all times.

He should be considerate of everybody involved by starting the mediation on time. He must review and organize, for immediate access, all of the material submitted to him prior to the hearing. He should do everything possible to understand the facts, the law and the issues in the case. If there are technical aspects involved, he should go to some authoritative work to acquire some general knowledge so that he can intelligently follow and contribute to the proceedings. If a mediator appears to be competent, well organized, ethical, fair, respectful and knowledgeable, he will appear credible and his "suggestions" will be persuasive and will be given serious consideration.

FUNCTION AS A PSYCHOLOGIST

Experienced mediators realize, that to a certain extent, they have to function as psychologists when dealing with the parties, attorneys, representatives of parties or anybody else involved in the mediation. There are accepted rules of human nature and principles of psychology that should be considered. Those rules and principles are especially important when dealing with the needs of the parties, their counsel, adjusters or claims representatives. Also, the communication and persuasion techniques discussed above should be applied whenever appropriate.

The mediator should allow the parties to "have" their grievances and to be heard concerning them. The therapeutic value of "venting" is beyond dispute. Consequently, mediators should consistently demonstrate impeccable listening skills and should encourage others to do likewise during the course of the mediation.

Parties have to be conditioned to accept something less than "everything" they feel they are entitled to. The mediator has to help them to adjust or modify their "human nature" or tendency to insist that any resolution must be on their terms.

A primary need of human beings is to "survive." A degree of financial security is necessary for "survival." Financial security and "survival" may take the form of a litigant knowing that a settlement may provide sufficient funds to insure that he and his family will never want. Financial security can mean the survival of a business which might otherwise fail if a conflict is litigated through the courts. Litigants must be made aware of the risks and possible dire consequences of a trial. Only then can they make an informed decision when considering the demands and offers made by the parties.

The mediator must also be sensitive to the needs of the attorneys. Naturally, attorneys are concerned about future business. Therefore, they appreciate any positive comments a mediator may make to their clients about the effectiveness of their representation. Of course, the mediator’s comments must be sincere in this regard.

If an attorney is being unreasonably difficult, the effective mediator should try to determine and deal with the reason for his conduct. Under no circumstance should the mediator openly criticize or otherwise embarrass the attorney in front of his client.

Dealing with adjusters also requires a certain degree of psychology. All adjusters, especially inexperienced ones, are concerned that the settlement reached will not be criticized by their

superiors. Often they are reluctant to even call and request additional authority. The mediator must do everything he can to support the adjuster and demonstrate the good job he or she is doing.

BE FLEXIBLE AND PRACTICAL

Finally, mediation is not a formal trial bound by rules of evidence and procedure. Therefore, the mediator can and should remain flexible when conducting the mediation. He must be responsive and able to adjust the process to meet the needs of a particular case. For example, a factual witness or an expert might be called and questioned informally on the phone by the attorneys. It might be necessary for the mediator to meet with an adjuster's supervisor or meet with the board of directors of a plaintiff or defendant corporation. Various types of legal or factual questions may arise that can be researched informally. The possibilities are endless and the potential for the success of a well structured mediation process is enormous.

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
2009-2010

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Civil Procedure

Recent important amendments to be aware of: On August 3, 2010, the Iowa Supreme Court made amendments to the Iowa Rules of Civil Procedure 1.1007 and 1.1008 which relate to the time to file certain post-ruling motions. These amendments increased the amount of time that a party has to file certain post-ruling motions. The court increased the time to file such motions from ten days after the filing of a verdict to fifteen days after the filing of a verdict. This additional time is intended to address case processing delays that cut into the time parties have to file such motions. These delays are the on-going consequence of the severe cuts in the judicial branch budget over the past decade. These amendments became effective on August 9, 2010. These amendments thus also affect rules 1.1003, and 1.1004.

Motion for Judgment Notwithstanding the Verdict/Preservation of Error

Royal Indemnity Co. v. Factory Mut. Ins. Co., 2010 WL 2331052, (Iowa, 2010) (filed June 11, 2010).

Facts: This case involves a subrogated primary insurer (Royal) and an excess insurer (FM). Deere & Company's (Deere) subrogated primary insurer Royal brought action against Deere's excess insurer (FM) following a February 20, 2001 warehouse fire that destroyed property stored in the warehouse by Deere. FM is a commercial insurance provider, and from the 1950's through 1997, was Deere's sole property insurance provider. In the mid-90s, Deere sought to broaden its insurance coverage. FM was unwilling to provide the expanded coverage Deere sought, so beginning in 1997, Deere purchased its primary insurance coverage from Royal and the Chubb Group of Insurance Companies. These carriers provided coverage up to $200 million, and FM provided Deere excess coverage above $200 million. In 1998, the amount at which FM's excess coverage attached rose to $400 million.

In 2000, Deere began the process of consolidating its storage facilities from seven Quad Cities warehouses to one centralized facility. Deere ultimately focused on a facility owned by Petersen Properties, LC (Petersen). Mark Dold, Deere's manager of implements and attachments, was in charge of coordinating the evaluation of the facility. As part of the

evaluation process, Dold advised FM that Deere required a first-inspection-site-risk evaluation to determine whether the fire protection system was appropriate for Deere's storage needs. FM agreed to do an evaluation and assigned Tim Geiger, an experienced engineer, to perform the evaluation of the proposed facility. This proposed evaluation would be provided by FM under the separate payment-for-services contract entered into between Deere and FM. For the year 2000, Deere budgeted $498,000 for FM's loss prevention services. Deere and FM had agreed that this fee would provide Deere with 3200 to 3350 hours of loss prevention services, subject to an adjustment if the hours worked went beyond 3350.

After reviewing the facility, the engineer assigned by FM prepared a COPE report, which contained specifics of the sprinkler system as well as recommendations for altering the system. FM also provided Deere with a list outlining recommendations, pursuant to Deere’s request, to bring the fire system up to FM standards. Deere used the list in negotiating with the facility.

FM's contract with Deere to provide loss-prevention services expired on December 31, 2000. On that date, the FM/Deere insurance relationship ended, and Royal then became responsible for loss-prevention inspections at all Deere locations. On February 20, 2001, a fire broke out in the warehouse. Firefighters arrived thirteen minutes after the fire was discovered and attached their hoses to the warehouse hydrants but found the water pressure insufficient to put out the fire. The firefighters attempted to put out the fire for several hours, but eventually could no longer control the fire and retreated. The fire burned for several days, and all of Deere's products were destroyed. The fire chief testified he believed they could have extinguished the fire if there had been sufficient water pressure. No cause of the fire was determined. Royal paid in excess of $70 million under its policy to Deere for property loss and other expenses associated with the fire and thereby became subrogated to Deere's claim. An action was brought against several defendants, including FM.

FM made a motion for a directed verdict at the close of plaintiff's case, alleging Royal did not prove FM's conduct was the cause of Deere's damages and did not prove FM could be held liable for a “general impairment” to the fire protection system. In the body of the motion, FM argued the causation element of Royal’s negligence claim had not been proven, but did not argue lack of causation on Royal’s breach of contract claim.

The court took the motion under advisement and reserved judgment. At the close of FM's case, FM once again renewed its motion for a directed verdict. This time, however, FM argued lack of causation in relation to both Royal’s negligence claim and the contract claim. With respect to the contract claim, Royal asserted FM's motion was untimely unless made at the close of plaintiff's case. The court agreed, denying FM's contract causation motion as untimely, but granting a directed verdict on the negligence claim. The court also stated that in the event the motion was timely, it also denied the motion regarding the contract claim on the merits.

The jury returned a verdict for Royal in the amount of $39.5 million in damages. FM filed a motion for judgment notwithstanding the verdict contending there was insufficient evidence that it breached any contract with Deere, and, alternatively, that the damages were not within the contemplation of the parties. FM also filed a motion to apply the *pro tanto* credit rule.

The court denied FM's motion for judgment notwithstanding the verdict, but granted FM's motion for application of *pro tanto* credit in part. Royal cross-appealed the district court's reduction of the jury's $39.5 million damage award by a *pro tanto* credit for amounts received in pretrial settlements with other defendants.

Holdings: 1. FM’s failure to raise claim in motion for directed verdict at the close of Royal’s case did not waive argument; 2. Evidence supported finding that excess insurer breached its contract with farm equipment manufacturer by failing to inspect warehouse facility; 3. $39.5 million inventory loss was

not within contemplation of the parties at the time of contract; and 4. Loss to manufacturer's inventory in warehouse fire of unknown cause was outside the scope of liability for excess insurer's failure to properly conduct fire inspection. There was no evidence that FM's inspection was a cause of Deere's fire loss and FM could not have contemplated that it would be liable for such a loss. Affirmed in part, reversed in part, and remanded with directions.

Analysis: (only with regard to motion for directed verdict) The question that arises in this case for the civil procedure end was basically when should a motion for directed verdict be made? The Court held that a motion for directed verdict need not be made at the close of plaintiff's case in order to preserve error and in fact the rules completely allow this. There is nothing in the rules however that requires a motion for directed verdict to occur at the close of Plaintiff's case. Rule 1.945 is the rule that governs motions for directed verdict. This rule allows the motion to be made at some point after a party has rested. Additionally Rule 1.1003(2) is expressly premised on entitlement to a directed verdict at the close of all the evidence, not only at the close of the plaintiff's evidence. The Court stated that it believes that waiting until the end of the presentation of all evidence is the best course of action because "even the weakest cases may gain strength during the defendant's presentation of the case." Accordingly, FM's failure to argue a lack of causation on Royal's contract claim in its motion for a directed verdict made at the completion of Royal's evidence did not operate as a waiver of that argument.

Pavone v. Kirke, 778 N.W.2d 66, (Iowa Ct. App. 2009) (filed Nov. 25, 2009)

Facts: Plaintiff Pavone and Signature Management Group (collectively SMG) were awarded a ten million dollar special verdict in suit involving breach of a consulting agreement with defendants Kirk and Wild Rose Entertainment (collectively Wild Rose). SMG and Wild Rose had entered into the consulting agreement in order to further pursuits by Wild Rose to develop and operate new casinos within Iowa. Two key sections of the consulting agreement provided that Wild Rose would enter into an

exclusive management agreement with Pavone regarding a potential casino in Ottumwa, as well as a provision whereby Wild Rose and SMG would enter into good faith negotiations for the management of future casinos. In addition to the project in Ottumwa, a project in Emmetsburg developed under the same conditions. While projects were pending, SMG and Wild Rose began negotiations regarding management agreements for the casinos. Those negotiations deteriorated, resulting in an eventual suit by SMG against Wild Rose for breach of contract. At trial, the Court denied Wild Rose's motion for judgment notwithstanding the verdict to which Wild Rose appealed.

Holding: The trial court erred in denying SMG's motion for judgment notwithstanding the verdict and in submitting the claim to the jury. The trial court's ruling is reversed and the case is remanded for entry of judgment in favor of Wild Rose.

Analysis: The trial court found that the consulting agreement contained sufficiently definite terms regarding any future management agreement, such that the "management agreement could be enforced by SMG." The court of appeals found that the consulting agreement failed to address several key terms which would be necessary for the binding management contract, including "terms related to the hiring and firing of key personnel, duration of the contract, or scope of the services to be provided." The court notes that there were several negotiations between the parties concerning a final management agreement, and that SMG had to direct correspondents to the Iowa Racing & Gaming Commission "admitting the parties had failed to reach a management agreement." The court found that the consulting agreement constituted merely an "agreement to agree" and not an enforceable contract.

SMG's second claim was based upon the consulting agreement provision which provided that Wild Rose and SMG would enter into good faith negotiations on future projects. Here, the court of appeals found undisputed facts sufficient to show that Wild Rose had negotiated in

good faith with SMG, and that it was not until the issue of hiring and firing of key personnel brought the parties to impasse that negotiations ended.

New Trial

Gavin v. Johnson, 778 N.W.2d 66, (Iowa Ct .App 2009) (filed Nov. 25, 2009).

Facts: Trial was held based on Plaintiff's claims arising out of two separate motor vehicle accidents involving different Defendants . Plaintiff had pre-existing neck problems and had surgery on his neck, but made claims that he had been asymptomatic for one year prior to the first motor vehicle accident. The first accident occurred in September 2004, while the second occurred in December 2006. At trial, Plaintiff was awarded medical expenses in both cases, but only one dollar for pain and suffering in each. Plaintiff appealed his denial of a motion for a new trial on the grounds that the district court failed to give jury instruction on a "previous infirm condition" and that the damages awarded were inadequate.

Holding: The Court of Appeals affirmed the District Court's ruling on Motion for New Trial.

Analysis: The infirm condition instruction is one given when "pain or disability arguably caused by another condition arises after the injury caused by the defendant's negligence has exacerbated the prior condition. In that case, it is the injury caused by the defendant, not the prior condition that is deemed to be the proximate cause of the injury." The Court of Appeals found that the trial court properly gave an aggravation of a pre-existing condition instruction instead of the infirm condition instruction. In making this conclusion, the Court of Appeals points to the medical evidence that no new acute changes occurred to the Plaintiff's condition following the first accident, and found that the Plaintiff was unable to recall whether he had had trouble with his neck and back prior to that accident. Further, the Plaintiff was clearly not asymptomatic subsequent to the second accident.

Regarding the issue of inadequate damages, the Court of Appeals notes that the district court has considerable discretion regarding whether the verdict is inadequate. Further, the Court notes that determination of damages is an issue within the province jury, and should only be overturned in a case where the award is (1) flagrantly excessive or inadequate, (2) so out of reason as to shock the conscience or sense of justice, (3) raises a presumption it is the result of passion, prejudice or other ulterior motives, or (4) is lacking in evidential support. The Court finds that the jury was presented with conflicting evidence as to the extent of damage caused by each accident, and it was reasonable for the jury to award nominal damages for pain and suffering.

Gudenkauf v. Carlyle, 2010 WL 3155046, (Iowa App. 2010) (filed August 11, 2010).

Facts: Plaintiff was a substitute postal carrier who fell on a set of stairs that were covered with leaves as he was leaving the Defendants' property after delivering their mail. The jury found that the Carlyle's were negligent, but that their negligence was not a proximate cause of the Plaintiff's injuries in rendering a verdict in favor of the Defendants. The Plaintiff appealed the trial court's denial of a motion for new trial and denial of a motion for judgment notwithstanding the verdict.

Holding: The trial court's holdings were affirmed.

Analysis: The Court of Appeals affirmed the trial court's decision regarding denial of motion for judgment notwithstanding the verdict, as the Plaintiff had failed to move for a directed verdict at the close of evidence. The Plaintiff argued that his objections to the Statement of the Issues and to jury instructions regarding the Defendants' affirmative defenses to the negligence claim was essentially a motion for directed verdict; the Court did not agree.

The Defendants' second claimed error was denial of a motion for a new trial on the grounds that there was not sufficient evidence to sustain the verdict and that it was contrary to law. The jury had assigned fault to the Defendants, but found that the Defendants' actions did not constitute the proximate cause of Plaintiff's injuries. The trial court found that there was sufficient evidence for the jury to have concluded that there was an alternative safe route off of the Defendants' property, therefore the jury could conclude that the Defendants were negligent in failing to remove the leaves, but that the leaves were not a substantial factor in producing the Plaintiff's injuries. Therefore, the negligence of the Defendants was not the proximate cause of the injuries. The Court of Appeals concurs with the trial court's findings.

Notice

War Eagle Village Apartments v. Plummer, 775 N.W.2d 714 (Iowa 2009) (Filed Nov. 20, 2009).

Facts: The Plaintiff rented an apartment from War Eagle Village commencing February 1, 2006. In July 2006, the Plaintiff became delinquent on her rent and was subsequently given three days notice to cure the delinquency. The Plaintiff claims that she did not receive the notice. The delinquency was not corrected, and an FED Action under Iowa Code Ch. 648 was instituted. Plaintiff did not participate in the hearing, and default judgment was entered against her. Personal service was made by certified mail pursuant to Iowa Code §562A.29A(2), but Plaintiff did not receive the notice until two days after the hearing, when she obtained the certified letter from the Post Office. The Plaintiff appealed the default judgment, and the writ of removal was stayed pending a different appeal in the district court with the same constitutional issues regarding service by certified mail. That case was decided shortly thereafter against the tenant, and the stay in this case was lifted. The Plaintiff subsequently requested an evidentiary hearing on appeal which was granted. Following the hearing, the court found that Iowa Code §562A.29A(2) did not violate the due process clause of the United States and Iowa Constitution, nor

did it violate Iowa's equal protection clause. A request for discretionary review was granted by the Iowa Supreme Court.

Holding: The Supreme Court held that Iowa Code §562A.29A(2)was violative of Iowa's due process clause, and was unconstitutional on its face.

Analysis: The court found that certified mail did not provide notice which is reasonably calculated to give the interested party an opportunity to meaningfully participate in the action. Given the seven day hearing timeframe as provided for in Iowa Code §648.5, the use of certified mail would be unlikely to provide sufficient notice to meaningfully participate in the hearing, if notice was received in time to participate at all. The court found there was no set of circumstances under which service by this method might be considered reasonable, thus the statute was unconstitutional on its face.

Standing/Real Party in Interest

Frontier Leasing Corp. v. Treynor Recreation Area, 780 N.W.2d 745, (Iowa 2010) (March 19, 2010).

Facts: Frontier Leasing Corporation (Frontier), sought to recover for the default of Treynor Recreation Area (Treynor), under an equipment lease between Treynor and C and J Leasing Corporation for a beverage cart to be used on a golf course. Frontier alleged it had been assigned the lease through a series of assignments involving various entities. At issue was not only the validity of these assignments, but also the identity of the real party in interest holding the right to seek recovery for the default. The case went to trial and the district court dismissed the petition on the grounds that, because of errors in the chain of assignment, Frontier was not the real party in interest. Frontier appealed, and the court of appeals affirmed the district court's judgment. In so doing, the court of appeals stated: "[Because of errors in the chain of assignment, Frontier has no enforceable interest in the lease and is not the real party in interest. On remand, the district court shall allow a reasonable period of time for

substitution of the real party in interest. Iowa R. Civ. P. 1.201.] Frontier sought further review.

Holding: The Court did not decide this case on the merits of whether the real party in interest should be substituted under Iowa Rule of Civil Procedure 1.201, but rather held that Treynor should have an opportunity to show prejudice by any substitution. The Court vacated the portion of the court of appeals' decision instructing the district court to allow for a reasonable period of time for substitution of the real party in interest. On remand, the court held that the district court should determine whether substitution of the real party in interest is appropriate, and, if so, the reasonable timing of such substitution. If the district court determines substitution is warranted, then the court should consider the case on its merits. If, however, the district court determines substitution is not appropriate, the judgment shall stand. Decision of Court of Appeals vacated in part; district court judgment conditionally affirmed, and case remanded.

Analysis: The Court, per curiam, cited the case of *Estate of Kuhns v. Marco,* 620 N.W.2d 488, 495 (Iowa 2000) (discussing Iowa Rules of Civil Procedure 2 and 69(c), now rules 1.201 and 1.402(5), which stated that “the defendant should be given an opportunity to show prejudice in the event that notice of the misnamed party adversely impacted the policy considerations of the statute of limitations”) and also cited the case of *Richardson v. Clark Bros.,* 202 Iowa 1371, 1372, 212 N.W. 133, 134 (1927) (holding that substitution of the plaintiff should be allowed, unless defendant is thereby prejudiced). Thus, a substitution of the real party in interest is *not* automatic. Rule 1.201 provides that an action cannot be dismissed "on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection" for joinder or substitution. However, the Court clarified that the defendant "should have an opportunity to show prejudice by any substitution."

Writ of Certiorari

Everly v. Knoxville Community School Dist., 774 N.W.2d 488 (Iowa 2009) (filed October, 16 2009).

Facts: Disappointed tax payer filed petition seeking writ of certiorari to stay the beginning of a school district project, naming district, successful bidder, and successful bidder's supplier as parties. School district desired to have new lights installed at the football stadium and hired KJWW Engineering Consultants to provide structural and electrical services and oversee the bidding process. Contract was awarded to ABC Electrical Contractors using Musco Sports Lighting as the supplier. District Court properly dismissed the plaintiff's cause of action seeking injunctive relief to stop the project and sanctioned Everly's attorney for the filing of the certiorari petition. Musco then filed motion to be removed claiming it was a supplier to the successful bidder. The Court of Appeals affirmed and Plaintiff's appeal.

Holding: There is no authority for the proposition that a disappointed taxpayer can bring a certiorari action solely against a supplier (Musco) to a successful bidder who allegedly improperly procured government contract without naming a government entity. Musco was not a tribunal, board, or officer subject to Iowa Rule of Civil Procedure 1.1401. *See* Iowa R. Civ. P. 1.1401 (stating, "[a] writ of certiorari shall only be granted ... where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally"). Sanctions were not warranted for joining supplier, but sanctions were warranted for pursuing certiorari claim against supplier after dismissal of school district. Court of Appeals affirmed in part and vacated in part; district court judgment affirmed in part; remanded.

Analysis: Taxpayers, in contrast to disappointed bidders, have standing to challenge a purchasing decision by a governmental entity, ordinarily through a certiorari action. Rules of civil procedure do allow joinder of parties to a certiorari action whose rights may be affected by adjudication of the action. Since plaintiff Everly dismissed the school district from the suit prior to the final resolution, whether or not they can be joined is not at issue since a reasonable competent attorney could argue that that such a party may be joined under existing law or good faith because of Musco's financial interest in the contract.

Evidence

Admissible Evidence

Burke v. Lauz, 779 N.W.2d 79, (Iowa 2009) (filed Dec. 30, 2009).

Facts: Burke died as a result of complications of a shunt malfunction that prevented the drainage of excess fluid from his brain. Burke brought medical malpractice action against Dr. Lauz and Medical Associates of Clinton, Iowa. Claims against other parties were dismissed or settled and case proceeded to trial. Burke moved in limine to exclude defendants proposed exhibit, the University of Iowa Hospitals and Clinics home care instructions to patients, contending it was not relevant to a physician's standard of care. Court ruled that because the exhibit was not relied upon on by physicians, it was not admissible. Defendant moved in limine to exclude medical literature that plaintiffs expert intended to rely upon concerning signs of shunt malfunction and doctors standard of care. Motion denied. Defendants appealed.

Holding: If the standard of care is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the persons medical qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case. Defendants cannot establish they were prejudiced by the ruling and thus no abuse of discretion.

Analysis: The purpose of the rule limiting evidence is to avoid surprises. The admission of expert testimony rests with the discretion of the trial court and will not be over turned absent an abuse of discretion. Iowa Rule of Evidence 5.803(18) states that the following is not excluded by the hearsay rule:

Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by that witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art,

established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Sweers v. Westfall, 781 N.W.2d 302, (Iowa App. 2010) (filed March 10, 2010).

Facts: Sweers was injured in a car accident by Westfall who admitted negligence for accident. Case proceeded to trial on questions of causation and damages. Sweers said he was okay at the time of the low impact accident but then later that night went seeking treatment on advice of his insurance agent telling him to get checked out. He complained of neck and shoulder pain at hospital. Months later he saw a chiropractor and admitted a prior shoulder injury. Now complaining of popping and clicking sound he saw a physician and subsequently underwent surgery. Prior to trial the District Court denied a motion by Swear to prevent Westfall from introducing evidence of preexisting conditions and to prevent the use of emergency room notes indicating he sought medical treatment on advice of insurance agent. The court denied both requests and Sweer's appeals those rulings after jury awarded him $5206.00.

Holding: In reviewing standard claims of error in admission of evidence for an abuse of discretion, error may not be predicated on a ruling which admits or excludes evidence unless a substantial right of the party is affected. The district court did not abuse its discretion in admitting the challenged evidence. Affirmed.

Analysis: The Court reviews standard claims of error in admission of evidence for an abuse of discretion. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *see* Iowa R. Evid. 5.103. The case law presented to support Sweer's position did not bar the defendant from introducing evidence of the plaintiffs' prior conditions. Evidence of prior injuries would clearly be admissible to show the extent, if any, to which they contribute to the plaintiffs' present complaints. Typically, evidence that a person was or

was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. However, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or *prejudice of a witness*.

Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, (Iowa 2010) (filed February 5, 2010).

Facts: This case involves a prescription drug consumer (Ranes) who brought action against drug manufacturer, pharmacies, and pharmacists based on multiple legal claims, including negligence, strict liability, fraudulent non-disclosure, breach of fiduciary duty, battery, and infliction of emotional distress, based upon allegation that drug manufactured and supplied by defendants (phenylpropanolamine (PPA) was cause of a brain injury or a stroke-like event that resulted in myriad of ailments. Ranes had been prescribed with this drug after he went to the doctor with complaints of a sore throat, congestion, and a stuffy nose.

Phenylpropanolamine (PPA) is a drug that was used over the course of three decades as an ingredient in many cough and cold products, as well as in appetite-suppressant products. It was approved by the Food and Drug Administration (FDA) in the 1970s as safe and effective. In November 2000, the FDA notified manufacturers and distributors of drug products containing PPA that a recent study, had found a low risk of hemorrhagic stroke among women who used weight-loss products containing PPA. The FDA did not initiate a drug recall in response to the study, but recommended drug companies discontinue marketing products containing PPA. The study found no increased risk of hemorrhagic stroke among men who used products with PPA.

Plaintiff was assessed by at least 10 medical professionals, including physicians, neurologists, and neurosurgeons. None of the medical professionals issued a possible connection between Plaintiff's condition

and the ingestion of PPA. Plaintiff retained an expert, however, who would testify at trial in support of Plaintiff's claim that his ailments resulted from a brain stroke or a "stroke-like event" caused by the ingestion of PPA. Plaintiff's expert was a specialist in toxicology and primarily practiced medicine as a pediatrician. Additionally, the expert was not a neurologist and had not authored any reports or articles on the effects of PPA nor was he one of Ranes' treating physicians.

Defendants moved for summary judgment on a variety of grounds, including the claim that the expert was not qualified to render an opinion that the ingestion of PPA caused Ranes' alleged injuries, and such an opinion failed to satisfy the standard of reliability. The defendants claimed summary judgment was proper because Ranes could not establish the causation element of any of his claims without expert opinion evidence. The motion for summary judgment was preceded by a motion to exclude the opinion testimony of the alleged expert from trial.

The district court granted Defendants' motion to exclude Plaintiff's expert testimony and granted Defendants summary judgment. Plaintiff appealed.

Holding: The district court did not abuse its discretion by finding that the expert did not practice a reliable methodology in reaching his opinion that the ingestion of PPA was the cause of Plaintiff's alleged injuries. Consequently, the Plaintiff failed to offer sufficient evidence to generate a factual question for the jury on the issue of causation to support his cause of action, and the district court properly granted summary judgment. Affirmed.

Analysis: The Court scrutinized the standard for admissibility of expert testimony which has been a liberal view on the admissibility of this testimony as confirmed in *Leaf v. Goodyear Tire & Rubber Co.,* 590 N.W.2d 525, 532 (1999) (citing court's history of maintaining liberal view on admissibility).

In reviewing the district court's decision to exclude Plaintiff's expert, the

Court set forth the broad two-part inquiry as to whether an expert's testimony meets the minimal requirements for admissibility: 1) whether the expert is qualified and 2) whether the expert's testimony will assist the trier of fact. *See* Iowa R. Evid. 5.702.

The Court found that Plaintiff's expert *was* qualified because the expert was a board-certified medical toxicologist and had read literature on the effects PPA potentially has on the human brain. However, the Court ruled that the expert's testimony would not assist the trier of fact because it was unreliable. Here, the expert's testimony was deemed unreliable as it was not based on established scientific evidence, but rather on a case control study that analyzed the effects of PPA ingestion in women. The Court also noted that the Plaintiff's expert extrapolated from the findings of the case control study. The case control study referenced a "stroke". Plaintiff's expert's opinion was premised on the false notion the study also encompassed a "stroke-like event."

Without the case control study, Plaintiff merely relied on case reports to support his position. The Court stated that "case reports are merely accounts of medical events. They reflect only reported data, not scientific methodology." "[T]he methodology used by the expert becomes suspect when it is only supported by case reports of limited use to the medical field." Thus the Court held that case reports are generally insufficient to ground the expert's opinion in reliable scientific data.

Insurance

Stoneking v. Federated Mut. Ins. Co., 776 N.W.2d 302, (Iowa App. 2009) (filed October 7, 2009).

Facts: This appeal arises out of an action initiated by Stoneking seeking payment of underinsured motorist (UIM) benefits from Federated after she was seriously injured in an automobile collision while a passenger in a vehicle operated by T.C. Ryan Lee Simon. Plaintiff had previously settled with Simon's insurance carrier, as well as other carriers. Plaintiff's

father had a Federated motor vehicle insurance policy for his company (ITDS) with a $500,000 UIM coverage limit. Upon initial receipt of the UIM claim, Federated mistakenly informed Plaintiff that she was "eligible for underinsured motorist benefits under the policy issued to ITDS." The parties were unable to reach a settlement agreement and suit followed. It was not until Federated's initial Answer that they realized they had made an error with regard to eligibility. Federated subsequently amended it's Answer and filed a Motion for Summary Judgment. The district court entered summary judgment and Plaintiff appealed contending the court erred in concluding 1) she was not an insured person under the Federated policy, 2) Federated's withdrawn pleading admitting she was an insured person under the policy was not an evidentiary admission creating a jury issue on coverage, and 3) no triable issue existed on her bad faith or equitable estoppel claims. Plaintiff further argued the court erred in granting summary judgment under the reasonable expectations doctrine.

Holding: Plaintiff, as a passenger in Simon's car, was not covered under the Federated policy purchased by Plaintiff's father for ITDS, and she is therefore not entitled to receive UIM benefits. Further, the record did not contain any evidence creating a factual dispute as to whether a representative of Federated represented to Plaintiff's father that his family members would have UIM coverage as passengers in non-ITDS vehicles being driven by non-employees. Additionally, the court held that any mistaken representations made by Federated to the Plaintiff after the accident was factually inapplicable in this case. Affirmed.

Analysis: Due to the nature of an insurance policy, the benefit of the doubt in the drafting is interpreted against the insurance company, and limits in coverage are construed strictly against the insurer. Construction and interpretation of an insurance policy is a question of law for the court unless the parties offer extrinsic evidence on the meaning of policy language. In this case the Court agreed with the trial court's decision in this case as they concluded that there was no genuine issue of material fact. The Plaintiff as a passenger in Simon's car, was not covered under the Federated policy and she was therefore not entitled to receive UIM

benefits. Even though Plaintiff's father testified that when he purchased the Federated policy, he believed he had obtained UIM motorist coverage for his family members there was no evidence that created a factual dispute that his family members would have UIM coverage as passengers in non-ITDS vehicles being driven by non-employees. Simon's vehicle was not on the schedule of covered ITDS automobiles, Simon was not an ITDS employee, and the Plaintiff was not otherwise an "insured" pursuant to the language in the ITDS policy and therefore there was no coverage for the Plaintiff.

Insurance/Bad Faith

Van Gelder v. Adams Mut. Ins. Assoc., 2009 WL 5126109 (Iowa App., Dec. 30, 2009) (filed Dec. 30, 2009).

Facts: Paul and Leesa Van Gelder purchased a farm, including a house, on contract from Paul's parents. Paul or his parents have continually lived in the two-story home since 1975. The home was built in the 1920's. The home was moved to its current location in the 1960's, and placed on a new foundation. Richard had anchored the basement walls during the time he owned the home. On April 15, 2006, there was a fierce windstorm. The Van Gelder's had an insurance policy with Adams Mutual Insurance Association, which covered damages to insured property caused by windstorm or hail. The Van Gelders submitted claims for damages to a machine shed, grain bin, cattle shed, farm equipment and personal property, and received $70,141.52 from Adams Mutual. The Van Gelders also asserted they had damages to three other grain bins and their home caused by the windstorm, and these additional claims are the subject of this suit. They claimed damages of $36,000 to three grain bins. They also claimed substantial structural damage to the home, including cracks in the walls, that they believed was caused by the windstorm. The Van Gelders obtained an estimate of $123,350 from a contractor for repairs to the home. The claim reps for Adams did not see anything wrong with the grain bins and subsequently contacted an investigator to take a look at the damage to the home to determine if it

was caused by the windstorm. The investigator did not feel as though the wind damage caused the damage to either the bins or the home and Adams then offered $5,067.54 for the cosmetic repairs. The Van Gelders refused the offer and subsequently filed this suit alleging breach of contract and bad faith failure to pay. Adams filed a motion for partial summary judgment on the bad faith claim which the court granted. The case proceeded to a jury trial on the issue of breach of contract. The jury found that Adams Mutual breached the contract and the breach was the proximate cause of plaintiffs' damages. The jury awarded damages of $35,000 for damages to the house, and $8000 for damages to the grain bins.

Plaintiffs filed a conditional motion for new trial and for additur. They claimed the cost to repair the home would be $106,860 to $127,000, and the jury's award of damages was inadequate. In the alternative, plaintiffs asked the court to amend the verdict by additur to increase the damages to $127,000 for the house and $16,000 for the grain bins. Adams resisted the motion.

The district court ruled that a finding that damage to the home was caused by the windstorm was not the same as a finding that *all* of the repairs were for damages resulting from the windstorm. The court noted, "[t]he evidence established that the home had preexisting need for repairs prior to the windstorm." The court concluded the jury was free to determine, based on the evidence, which repairs were necessitated by the windstorm. The court was unable to find the verdict bore no reasonable relationship to the loss suffered. The court denied the motion for conditional new trial and additur. The Plaintiffs then appealed.

Holding: Substantial evidence existed to support the jury's verdict. Because there was evidence the house had structural damage prior to the windstorm, the evidence supported a finding that not all of the damages claimed by plaintiffs were caused by the windstorm. The district court did not abuse its discretion by denying the motion for new trial based on a claim the

jury's verdict was not supported by sufficient evidence. As far as the motion for summary judgment the Court concluded that the district court did not err in determining that as a matter of law plaintiffs were unable to prove their bad faith claim against the insurer as their claim was fairly debatable. Affirmed.

Analysis: In Iowa there is a common-law cause of action against an insurer for bad-faith denial of insurance benefits. A plaintiff must show: (1) the insurer had no reasonable basis for denying the plaintiff's claim; and (2) the insurer knew or had reason to know that its denial was without a reasonable basis. In determining whether an insurer's actions had a reasonable basis, the Court considers whether the insured's claim is fairly debatable, either in law or fact. A claim is fairly debatable' when it is open to dispute on any logical basis and may generally be determined by the court as a matter of law. At the time Adams offered $2094 for the repairs to the home an insurance investigator had inspected the home and gave the opinion the structural damage to the home had not been caused by the windstorm, and this gave Adams a reasonable basis for its action. Further, substantial evidence supported a jury's verdict than an insurer was required to pay $35,000 for damage to a house, and $8000 for damage to the grain bins caused by windstorm. Evidence on the record indicated that the house had structural damage prior to the windstorm which supported the jury's finding and determination of damages.

Insurance/Duty to Defend

McNeilus Hog Farms v. Farm Bureau Mut. Ins. Co., 781 N.W.2d 101 (Iowa App. 2009) (filed Feb. 24, 2010).

Facts: In this case, the plaintiffs entered into a contract feeding agreement with a hog supplier and a feed producer. The plaintiffs agreed to provide the hogs owned by the hog supplier with feed purchased from the feed producer, and they agreed to lease a building to the hog supplier for housing the hogs. The hog building was equipped with a ventilation

system to allow gases from the manure pits to escape when the pits were pumped, however this system malfunctioned and approximately 808 hogs suffocated and died. The hog supplier sued the Plaintiffs among others for losses sustained due to the death of the hogs. The plaintiffs then properly notified its liability insurance provider, Farm Bureau, of the loss. Farm Bureau declined to provide coverage for the lawsuit against the Plaintiffs. The Plaintiffs consequently sued Farm Bureau claiming it owed a duty to defend and indemnify them for their legal costs in the lawsuit against them. Both parties filed motions for summary judgment. Following a hearing, the district court considered and rejected several exclusions to coverage raised by Farm Bureau, but ultimately agreed that a "pollution" exclusion in the insurance policy applied. Based on that exclusion, the court concluded that Farm Bureau did not have a duty to defend and indemnify the plaintiffs in the underlying litigation. This appeal followed.

Holding: Insurer was not obligated to defend custom farmers from a suit for the death of hogs because the "business pursuits" exception in the insurance policy applied. The policy excepted from its definition of "business" custom farming grossing less than $3,000, and included custom farming grossing more than $3,000. While "farming" was excluded from the definition of "business," "custom farming" was separately defined and included in the definition of "business."

Analysis: The law governing an insurer's duty to defend and indemnify is well established: An insurer's duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case. "The insurer has no duty to defend if after construing both the policy in question, the pleadings of the injured party and any other admissible and relevant facts in the record, it appears the claim made is not covered by the indemnity insurance contract." The Court examined the "business pursuits" exclusion in the policy and did not address the applicability of the pollution exclusion clause which gave rise to summary judgment in favor of the Defendant. Farm Bureau argued that since the custom hog

farming operation grossed more than $3,000 annually, the operation was a commercial business pursuit and not a farming enterprise. That position was based on language in the policy that said a "business" does not include "custom farming, including garden plowing, performed by an insured where the gross annual receipts for all such activities do not exceed $3,000" and where "custom farming" was defined as "any farming operation performed by you for others for a charge under any contract or agreement, written or oral." The policy defined "farming" as "the process of investment, management or labor to produce agricultural products." Based on that policy language, the appellate court agreed that Farm Bureau was not obligated to defend and indemnify the plaintiff.

Insurance/Breach of Fiduciary Duty

Farm Bureau Life Ins. Co. v. Chubb Custom Ins. Co, 780 N.W.2d 735, (Iowa 2010) (filed April 9, 2010).

Facts: In October 1999, John and Mary Smith applied for life insurance through Farm Bureau Life Insurance Co. Both Smiths were discovered to be infected with the HIV virus, and Farm Bureau denied their applications "due to the blood profile results" and requested authorization to disclose the results to the applicants' physicians. The Smiths did not grant Farm Bureau a requested authorization to disclose the results to their physician, and as a result did not learn of their HIV status until two years later. The Smiths later sued Farm Bureau alleging negligence in failing to report their HIV status either to the state of Wyoming or to themselves, and in failing to inform them that Farm Bureau would not tell them during the application process whether their blood test results tested positive for HIV. The claim was ultimately settled. Farm Bureau subsequently sought coverage and reimbursement for costs incurred in the underlying settlement from its liability insurers, Chubb Custom Insurance Co., Federal Insurance Co. and Great Northern Insurance Co. The liability insurers denied coverage, and Farm Bureau sued them alleging breach of contract. The insurers filed a motion for summary judgment. A trial court concluded that Farm Bureau failed to give Chubb or Federal timely notice

of the Smiths' claims, and that no coverage was owed by Great Northern or Federal based on policy exclusions thus granting the motion for summary judgment. Farm Bureau appealed.

Holding: The life insurer failed to give timely notice of the underlying claims as was required in the company professional liability (ICPL) policies; insurer did not waive right to timely notice; and that coverage was barred under the plain language exclusions for insurance-related activities. Affirmed.

Analysis: The Court concluded that Farm Bureau failed to give notice to Federal within 90 days after the termination of the policy period as required to trigger a coverage obligation. Additionally, exclusions contained in the Federal and Great Northern policies clearly and unambiguously excluded coverage for acts arising as a consequence of an insurer-applicant relationship. Given the clarity of the exclusions and the fact they were not unconscionable, a reasonable person could not have understood that coverage would exist for the Smiths' claims.

Nationwide Agri-Business Ins. Co. v. Goodwin, 782 N.W.2d 465, (Iowa 2010) (filed May 21, 2010).

Facts: Automobile insurer brought declaratory judgment action against insured, seeking judgment that it had no duty to defend insured in litigation brought by pedestrians who were involved in accident with rental car that insured had lent to his uncle. Uncle killed one pedestrian and seriously injured other when Goodwin let uncle drive rental car that he admitted he was excluded from doing under the rental agreement. District Court granted insured summary judgment indicating his insurance company needed to defend him.

Holding: Insurer owes no duty to defend insured due to policy's reasonable belief exclusion. District court's judgment reversed and remanded.

Analysis: The Court concluded that, assuming Goodwin's loaning of the vehicle to his uncle constituted use within the meaning of the policy definition of "insured," the policy exclusion applied because, as a matter of law, Goodwin could not have had a reasonable belief he was entitled to use the vehicle in this manner.

The Court also held that Nationwide was entitled to summary judgment on Goodwin's claim based on the doctrine of reasonable expectations. Goodwin's abstract understanding that any use of the rental car by him would be covered by his automobile policy did not give rise to reasonable expectation of coverage.

Judgment and Limitation of Action

Van Sloun v. Agans Bros., Inc., 778 N.W.2d 174, (Iowa 2010) (filed February 5, 2010).

Facts: Former commercial tenant brought declaratory judgment action against landlord, seeking a determination that its obligations under the lease were discharged because landlord had unreasonably withheld its consent to a sublease. Landlord counterclaimed, seeking contract damages for former tenants failure to pay rent and for attorney fees. Van Sloun's prospective tenant was to be an Indian grocery store preparing some snacks. This would have required altering the leased premises to include kitchen facilities and would have affected other tenants in the building with odors and interference with delivery schedules of other tenants. After a bench trial, the District Court found that landlord (Agans Bros.) reasonably withheld consent to sublease and awarded attorney fees. Tennant appealed. Affirmed in part and reversed in part as to the fee question.

Holding: As a matter of first impression, if a lease provides that the landlord's consent to assignment of the lease or subletting shall not be reasonably withheld, the landlord may withhold consent only if a prudent person in the landlord's position, exercising reasonable commercial responsibility, would have a good faith and reasonable objection to assignment of the

lease or subletting. Landlord reasonably withheld consent to tenant's proposed sublease. Former tenant failed to preserve for appellate review a claim that attorney fees should not have been taxed as costs because landlord had not filed an affidavit declaring that there was no fee sharing agreement.

Analysis: Action in which former commercial tenant sought declaratory judgment that its obligations under the lease were discharged because landlord had unreasonably withheld its consent to a sublease, and in which landlord counterclaimed for contract damages for former tenant's failure to pay rent and for attorney fees, was legal rather than equitable. Generally an action on contract is treated as one at law. Where the basic rights of the parties derive from the non-performance of a contract, where the remedy is monetary, and where the damages are full and certain, remedies are usually provided by actions at law, and equity has no jurisdiction. If, both legal relief and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue. The controlling issue was which party breached the lease, trial court ruled on objections, and trial court issued a ruling and judgment entry, not a decree. Because leases are contracts as well as conveyances of property, ordinary contract principles apply. If the court finds that no ambiguity exists, contract interpretation and its legal effect are questions of law for the court. There is a general balancing test in determining the reasonableness of withholding to right to sublet. This determination, if supported by substantial evidence will be binding on the reviewing court. Factors were (1) the financial responsibility of the proposed assignees, (2) the original tenants failure to comply with lease conditions, (3) the original tenant's failure to indicate a willingness to remain obligated on the lease, (4) the legality of the proposed use and need for alteration of the premises, and (5) the nature of the existing use and proposed use by the tenant.

Statute of Limitations

Dillenburg v. Campbell, 781 N.W.2d 303, (Iowa App. 2010) (filed March 10, 2010).

Facts: Campbell entered into a 10 year lease of farm land with Dillenburg with option to buy within two years of expiration of lease. Dillenburg moves to Wisconsin and daughter takes over financial affairs. Daughter received and cashed multiple checks from Campbell with word option in the memo line. Dillenburg dies and daughter/executor does not send notice to Campbell as an interested party. Estate closes and Dillenburg receives title to property. Campbell notifies Dillenburg he wants to exercise his option to buy. Dillenburg claimed to have no knowledge of the option and that Campbell was barred from making such claim because the estate had closed and the statute of limitations governing claims had lapsed. Campbell then sued seeking specific performance. District Court granted Campbell request for specific performance. Affirmed.

Holding: District Court found that Dillenburg had sufficient knowledge required to give notice to Campbell. Because the executors of Dillenburg's estate had not given the required notice to a reasonably ascertainable claimant then Campbell's claim was not barred. Specific performance ordered to allow Campbell to exercise option to buy.

Analysis: Review is de novo because this was an equity action. At any time during the pendency of administration that the executor has knowledge of the name and address of a person believed to own or possess a claim which will not or may not be paid or otherwise satisfied during administration, provide notice to claimant at last known address. Iowa Code section 633.410(1) provides for a statute of limitation on claims:

All claims against a decedent's estate, other than charges, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, are forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within the later to occur of four months after the date of the

second publication of the notice to creditors or, as to each claimant whose identity is reasonably ascertainable, one month after service of notice by ordinary mail to the claimant's last known address. However, if an executor fails to give notice to a reasonably ascertainable claimant, section 633.410(1) does not bar the claimant's claim. *Stewart v. DeMoss,* 590 N.W.2d 545, 548 (Iowa 1999) ("[I]f the identity of a claimant is reasonably ascertainable, the claimant's claim is not barred until one month after service of notice by ordinary mail to the claimant's last known address.").

Jurisdiction/Pretrial orders

Reis v. Iowa Dist. Court for Polk County, 2010 WL 1816246 (Iowa, 2009) (filed May 7, 2010).

Facts: Reis and her attorney husband were held in contempt in the district court for violation of a protective order prohibiting disclosure of confidential documents obtained through discovery in subsequently dismissed employment discrimination litigation. The Court of Appeals reversed. Decision of Court of Appeals vacated; writ sustained in part and annulled in part and case remanded.

Holdings: (1) Trial Court had jurisdiction to enforce protective order through contempt proceedings. (2) Trial court did not have jurisdiction to enforce settlement agreement through contempt proceedings (3) Evidence supported finding that employee's husband "used" confidential documents in violation of protective order. (4) Evidence did not support findings that employee used or disclosed confidential documents. (5) Award of fees was within the remedies available for violation of protective order. Thus, the contempt finding for an attorney whose "enthusiastic use" of documents covered by a protective order which included a suggestion that he would make the documents or their content public if defendant had not "cleaned house" was appropriate. If the attorney believed that documents had been deemed confidential improperly, he should have sought such a determination from the court.

Analysis: Courts do retain jurisdiction to enforce orders that remain in effect. The power of a court to enforce its orders, in the absence of a stay, is essential to the discharge of its duties. As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed. This is especially true of discovery related protective orders. If the parties were free to disclose confidential information upon dismissal of a case, protective orders would cease to fulfill their intended purpose which is to encourage full disclosure of all relevant information.

Christenson v. First Nat. Bank Of Sioux Center, 781 N.W.2d 302, (Iowa App. 2010) (filed March 10, 2010).

Facts: Christenson appeals from the district court dismissal of his suit as sanction for failing to comply with discovery orders. Christenson filed suit against defendants in Sept 07. In Feb of 08 district court granted Banks motion to compel discovery. In March 08, district court granted Banks order for sanctions after Christenson took 100 days to provide discovery requested. In May 08, district court granted Banks supplemental motion to compel after responses to interrogatories determined to be inadequate. In July 08, the district court entered an order for attorneys fees following a hearing. Christenson continued to fail to comply with court orders and to discovery demands. In March of 2009 the court dismissed.

Holding: Trial court did not abuse its discretion in dismissing the debtor's suit for fraud as a discovery sanction since the debtor repeatedly failed to timely respond to discovery. Court found Christenson's actions of failing to timely respond to discovery and his actions in failing to give credible evidence to be willful and for the sole purpose of interfering with the judicial process. Fed. Rules Civ.Proc.Rule 37, 28 U.S.C.A

Analysis: In order to justify the sanction of dismissal, a party's noncompliance with a courts discovery orders must be the result of willfulness, fault or bad faith. The reviewing court must be satisfied that substantial evidence

supports any factual findings necessary to the courts exercise of its discretion. The district court noted that dismissal of an action for a party's noncompliance with court orders was a drastic sanction. It considered Plaintiff's course of conduct throughout the proceedings, noted the prior sanctions imposed, and Plaintiff's failure to comply with court orders and sanctions. The district court concluded Plaintiff's "actions in failing to timely respond to discovery and his actions in failing to give credible evidence to be willful and done for the sole purpose of interfering with the judicial process which was appropriate.

Civil Procedure

Recent important amendments to be aware of: On August 3, 2010, the Iowa Supreme Court made amendments to the Iowa Rules of Civil Procedure 1.1007 and 1.1008 which relate to the time to file certain post-ruling motions. These amendments increased the amount of time that a party has to file certain post-ruling motions. The court increased the time to file such motions from ten days after the filing of a verdict to fifteen days after the filing of a verdict. This additional time is intended to address case processing delays that cut into the time parties have to file such motions. These delays are the on-going consequence of the severe cuts in the judicial branch budget over the past decade. These amendments became effective on August 9, 2010. These amendments thus also affect rules 1.1003, and 1.1004.

Motion for Judgment Notwithstanding the Verdict/Preservation of Error

Royal Indemnity Co. v. Factory Mut. Ins. Co., 2010 WL 2331052, (Iowa, 2010) (filed June 11, 2010).

Facts: This case involves a subrogated primary insurer (Royal) and an excess insurer (FM). Deere & Company's (Deere) subrogated primary insurer Royal brought action against Deere's excess insurer (FM) following a February 20, 2001 warehouse fire that destroyed property stored in the warehouse by Deere. FM is a commercial insurance provider, and from the 1950's through 1997, was Deere's sole property insurance provider. In the mid-90s, Deere sought to broaden its insurance coverage. FM was unwilling to provide the expanded coverage Deere sought, so beginning in 1997, Deere purchased its primary insurance coverage from Royal and the Chubb Group of Insurance Companies. These carriers provided coverage up to $200 million, and FM provided Deere excess coverage above $200 million. In 1998, the amount at which FM's excess coverage attached rose to $400 million.

In 2000, Deere began the process of consolidating its storage facilities from seven Quad Cities warehouses to one centralized facility. Deere ultimately focused on a facility owned by Petersen Properties, LC (Petersen). Mark Dold, Deere's manager of implements and attachments,

was in charge of coordinating the evaluation of the facility. As part of the evaluation process, Dold advised FM that Deere required a first-inspection-site-risk evaluation to determine whether the fire protection system was appropriate for Deere's storage needs. FM agreed to do an evaluation and assigned Tim Geiger, an experienced engineer, to perform the evaluation of the proposed facility. This proposed evaluation would be provided by FM under the separate payment-for-services contract entered into between Deere and FM. For the year 2000, Deere budgeted $498,000 for FM's loss prevention services. Deere and FM had agreed that this fee would provide Deere with 3200 to 3350 hours of loss prevention services, subject to an adjustment if the hours worked went beyond 3350.

After reviewing the facility, the engineer assigned by FM prepared a COPE report, which contained specifics of the sprinkler system as well as recommendations for altering the system. FM also provided Deere with a list outlining recommendations, pursuant to Deere's request, to bring the fire system up to FM standards. Deere used the list in negotiating with the facility.

FM's contract with Deere to provide loss-prevention services expired on December 31, 2000. On that date, the FM/Deere insurance relationship ended, and Royal then became responsible for loss-prevention inspections at all Deere locations. On February 20, 2001, a fire broke out in the warehouse. Firefighters arrived thirteen minutes after the fire was discovered and attached their hoses to the warehouse hydrants but found the water pressure insufficient to put out the fire. The firefighters attempted to put out the fire for several hours, but eventually could no longer control the fire and retreated. The fire burned for several days, and all of Deere's products were destroyed. The fire chief testified he believed they could have extinguished the fire if there had been sufficient water pressure. No cause of the fire was determined. Royal paid in excess of $70 million under its policy to Deere for property loss and other expenses associated with the fire and thereby became subrogated to Deere's claim. An action was brought against several defendants, including FM.

FM made a motion for a directed verdict at the close of plaintiff's case, alleging Royal did not prove FM's conduct was the cause of Deere's damages and did not prove FM could be held liable for a “general impairment” to the fire protection system. In the body of the motion, FM argued the causation element of Royal’s negligence claim had not been proven, but did not argue lack of causation on Royal’s breach of contract claim.

The court took the motion under advisement and reserved judgment. At the close of FM's case, FM once again renewed its motion for a directed verdict. This time, however, FM argued lack of causation in relation to both Royal’s negligence claim and the contract claim. With respect to the contract claim, Royal asserted FM's motion was untimely unless made at the close of plaintiff's case. The court agreed, denying FM's contract causation motion as untimely, but granting a directed verdict on the negligence claim. The court also stated that in the event the motion was timely, it also denied the motion regarding the contract claim on the merits.

The jury returned a verdict for Royal in the amount of $39.5 million in damages. FM filed a motion for judgment notwithstanding the verdict contending there was insufficient evidence that it breached any contract with Deere, and, alternatively, that the damages were not within the contemplation of the parties. FM also filed a motion to apply the *pro tanto* credit rule.

The court denied FM's motion for judgment notwithstanding the verdict, but granted FM's motion for application of *pro tanto* credit in part. Royal cross-appealed the district court's reduction of the jury's $39.5 million damage award by a *pro tanto* credit for amounts received in pretrial settlements with other defendants.

Holdings: 1. FM’s failure to raise claim in motion for directed verdict at the close of Royal’s case did not waive argument; 2. Evidence supported finding that excess insurer breached its contract with farm equipment manufacturer

by failing to inspect warehouse facility; 3. $39.5 million inventory loss was not within contemplation of the parties at the time of contract; and 4. Loss to manufacturer's inventory in warehouse fire of unknown cause was outside the scope of liability for excess insurer's failure to properly conduct fire inspection. There was no evidence that FM's inspection was a cause of Deere's fire loss and FM could not have contemplated that it would be liable for such a loss. Affirmed in part, reversed in part, and remanded with directions.

Analysis: (only with regard to motion for directed verdict) The question that arises in this case for the civil procedure end was basically when should a motion for directed verdict be made? The Court held that a motion for directed verdict need not be made at the close of plaintiff's case in order to preserve error and in fact the rules completely allow this. There is nothing in the rules however that requires a motion for directed verdict to occur at the close of Plaintiff's case. Rule 1.945 is the rule that governs motions for directed verdict. This rule allows the motion to be made at some point after a party has rested. Additionally Rule 1.1003(2) is expressly premised on entitlement to a directed verdict at the close of all the evidence, not only at the close of the plaintiff's evidence. The Court stated that it believes that waiting until the end of the presentation of all evidence is the best course of action because "even the weakest cases may gain strength during the defendant's presentation of the case." Accordingly, FM's failure to argue a lack of causation on Royal's contract claim in its motion for a directed verdict made at the completion of Royal's evidence did not operate as a waiver of that argument.

Pavone v. Kirke, 778 N.W.2d 66, (Iowa Ct. App. 2009) (filed Nov. 25, 2009)

Facts: Plaintiff Pavone and Signature Management Group (collectively SMG) were awarded a ten million dollar special verdict in suit involving breach of a consulting agreement with defendants Kirk and Wild Rose Entertainment (collectively Wild Rose). SMG and Wild Rose had entered into the consulting agreement in order to further pursuits by Wild Rose to develop and operate new casinos within Iowa. Two key sections of the

consulting agreement provided that Wild Rose would enter into an exclusive management agreement with Pavone regarding a potential casino in Ottumwa, as well as a provision whereby Wild Rose and SMG would enter into good faith negotiations for the management of future casinos. In addition to the project in Ottumwa, a project in Emmetsburg developed under the same conditions. While projects were pending, SMG and Wild Rose began negotiations regarding management agreements for the casinos. Those negotiations deteriorated, resulting in an eventual suit by SMG against Wild Rose for breach of contract. At trial, the Court denied Wild Rose's motion for judgment notwithstanding the verdict to which Wild Rose appealed.

Holding: The trial court erred in denying SMG's motion for judgment notwithstanding the verdict and in submitting the claim to the jury. The trial court's ruling is reversed and the case is remanded for entry of judgment in favor of Wild Rose.

Analysis: The trial court found that the consulting agreement contained sufficiently definite terms regarding any future management agreement, such that the "management agreement could be enforced by SMG." The court of appeals found that the consulting agreement failed to address several key terms which would be necessary for the binding management contract, including "terms related to the hiring and firing of key personnel, duration of the contract, or scope of the services to be provided." The court notes that there were several negotiations between the parties concerning a final management agreement, and that SMG had to direct correspondents to the Iowa Racing & Gaming Commission "admitting the parties had failed to reach a management agreement." The court found that the consulting agreement constituted merely an "agreement to agree" and not an enforceable contract.

SMG's second claim was based upon the consulting agreement provision which provided that Wild Rose and SMG would enter into good faith negotiations on future projects. Here, the court of appeals found undisputed facts sufficient to show that Wild Rose had negotiated in

good faith with SMG, and that it was not until the issue of hiring and firing of key personnel brought the parties to impasse that negotiations ended.

New Trial

Gavin v. Johnson, 778 N.W.2d 66, (Iowa Ct .App 2009) (filed Nov. 25, 2009).

Facts: Trial was held based on Plaintiff's claims arising out of two separate motor vehicle accidents involving different Defendants . Plaintiff had pre-existing neck problems and had surgery on his neck, but made claims that he had been asymptomatic for one year prior to the first motor vehicle accident. The first accident occurred in September 2004, while the second occurred in December 2006. At trial, Plaintiff was awarded medical expenses in both cases, but only one dollar for pain and suffering in each. Plaintiff appealed his denial of a motion for a new trial on the grounds that the district court failed to give jury instruction on a "previous infirm condition" and that the damages awarded were inadequate.

Holding: The Court of Appeals affirmed the District Court's ruling on Motion for New Trial.

Analysis: The infirm condition instruction is one given when "pain or disability arguably caused by another condition arises after the injury caused by the defendant's negligence has exacerbated the prior condition. In that case, it is the injury caused by the defendant, not the prior condition that is deemed to be the proximate cause of the injury." The Court of Appeals found that the trial court properly gave an aggravation of a pre-existing condition instruction instead of the infirm condition instruction. In making this conclusion, the Court of Appeals points to the medical evidence that no new acute changes occurred to the Plaintiff's condition following the first accident, and found that the Plaintiff was unable to recall whether he had had trouble with his neck and back prior to that accident. Further, the Plaintiff was clearly not asymptomatic subsequent to the second accident.

Regarding the issue of inadequate damages, the Court of Appeals notes that the district court has considerable discretion regarding whether the verdict is inadequate. Further, the Court notes that determination of damages is an issue within the province jury, and should only be overturned in a case where the award is (1) flagrantly excessive or inadequate, (2) so out of reason as to shock the conscience or sense of justice, (3) raises a presumption it is the result of passion, prejudice or other ulterior motives, or (4) is lacking in evidential support. The Court finds that the jury was presented with conflicting evidence as to the extent of damage caused by each accident, and it was reasonable for the jury to award nominal damages for pain and suffering.

Gudenkauf v. Carlyle, 2010 WL 3155046, (Iowa App. 2010) (filed August 11, 2010).

Facts: Plaintiff was a substitute postal carrier who fell on a set of stairs that were covered with leaves as he was leaving the Defendants' property after delivering their mail. The jury found that the Carlyle's were negligent, but that their negligence was not a proximate cause of the Plaintiff's injuries in rendering a verdict in favor of the Defendants. The Plaintiff appealed the trial court's denial of a motion for new trial and denial of a motion for judgment notwithstanding the verdict.

Holding: The trial court's holdings were affirmed.

Analysis: The Court of Appeals affirmed the trial court's decision regarding denial of motion for judgment notwithstanding the verdict, as the Plaintiff had failed to move for a directed verdict at the close of evidence. The Plaintiff argued that his objections to the Statement of the Issues and to jury instructions regarding the Defendants' affirmative defenses to the negligence claim was essentially a motion for directed verdict; the Court did not agree.

The Defendants' second claimed error was denial of a motion for a new trial on the grounds that there was not sufficient evidence to sustain the verdict and that it was contrary to law. The jury had assigned fault to the Defendants, but found that the Defendants' actions did not constitute the proximate cause of Plaintiff's injuries. The trial court found that there was sufficient evidence for the jury to have concluded that there was an alternative safe route off of the Defendants' property, therefore the jury could conclude that the Defendants were negligent in failing to remove the leaves, but that the leaves were not a substantial factor in producing the Plaintiff's injuries. Therefore, the negligence of the Defendants was not the proximate cause of the injuries. The Court of Appeals concurs with the trial court's findings.

Notice

War Eagle Village Apartments v. Plummer, 775 N.W.2d 714 (Iowa 2009) (Filed Nov. 20, 2009).

Facts: The Plaintiff rented an apartment from War Eagle Village commencing February 1, 2006. In July 2006, the Plaintiff became delinquent on her rent and was subsequently given three days notice to cure the delinquency. The Plaintiff claims that she did not receive the notice. The delinquency was not corrected, and an FED Action under Iowa Code Ch. 648 was instituted. Plaintiff did not participate in the hearing, and default judgment was entered against her. Personal service was made by certified mail pursuant to Iowa Code §562A.29A(2), but Plaintiff did not receive the notice until two days after the hearing, when she obtained the certified letter from the Post Office. The Plaintiff appealed the default judgment, and the writ of removal was stayed pending a different appeal in the district court with the same constitutional issues regarding service by certified mail. That case was decided shortly thereafter against the tenant, and the stay in this case was lifted. The Plaintiff subsequently requested an evidentiary hearing on appeal which was granted. Following

the hearing, the court found that Iowa Code §562A.29A(2) did not violate the due process clause of the United States and Iowa Constitution, nor did it violate Iowa's equal protection clause. A request for discretionary review was granted by the Iowa Supreme Court.

Holding: The Supreme Court held that Iowa Code §562A.29A(2)was violative of Iowa's due process clause, and was unconstitutional on its face.

Analysis: The court found that certified mail did not provide notice which is reasonably calculated to give the interested party an opportunity to meaningfully participate in the action. Given the seven day hearing timeframe as provided for in Iowa Code §648.5, the use of certified mail would be unlikely to provide sufficient notice to meaningfully participate in the hearing, if notice was received in time to participate at all. The court found there was no set of circumstances under which service by this method might be considered reasonable, thus the statute was unconstitutional on its face.

Standing/Real Party in Interest

Frontier Leasing Corp. v. Treynor Recreation Area, 780 N.W.2d 745, (Iowa 2010) (March 19, 2010).

Facts: Frontier Leasing Corporation (Frontier), sought to recover for the default of Treynor Recreation Area (Treynor), under an equipment lease between Treynor and C and J Leasing Corporation for a beverage cart to be used on a golf course. Frontier alleged it had been assigned the lease through a series of assignments involving various entities. At issue was not only the validity of these assignments, but also the identity of the real party in interest holding the right to seek recovery for the default. The case went to trial and the district court dismissed the petition on the grounds that, because of errors in the chain of assignment, Frontier was not the real party in interest. Frontier appealed, and the court of appeals affirmed the district court's judgment. In so doing, the court of appeals stated: "[Because of errors in the chain of assignment, Frontier has no

enforceable interest in the lease and is not the real party in interest. On remand, the district court shall allow a reasonable period of time for substitution of the real party in interest. Iowa R. Civ. P. 1.201.] Frontier sought further review.

Holding: The Court did not decide this case on the merits of whether the real party in interest should be substituted under Iowa Rule of Civil Procedure 1.201, but rather held that Treynor should have an opportunity to show prejudice by any substitution. The Court vacated the portion of the court of appeals' decision instructing the district court to allow for a reasonable period of time for substitution of the real party in interest. On remand, the court held that the district court should determine whether substitution of the real party in interest is appropriate, and, if so, the reasonable timing of such substitution. If the district court determines substitution is warranted, then the court should consider the case on its merits. If, however, the district court determines substitution is not appropriate, the judgment shall stand. Decision of Court of Appeals vacated in part; district court judgment conditionally affirmed, and case remanded.

Analysis: The Court, per curiam, cited the case of *Estate of Kuhns v. Marco,* 620 N.W.2d 488, 495 (Iowa 2000) (discussing Iowa Rules of Civil Procedure 2 and 69(c), now rules 1.201 and 1.402(5), which stated that “the defendant should be given an opportunity to show prejudice in the event that notice of the misnamed party adversely impacted the policy considerations of the statute of limitations”) and also cited the case of *Richardson v. Clark Bros.,* 202 Iowa 1371, 1372, 212 N.W. 133, 134 (1927) (holding that substitution of the plaintiff should be allowed, unless defendant is thereby prejudiced). Thus, a substitution of the real party in interest is *not* automatic. Rule 1.201 provides that an action cannot be dismissed "on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection" for joinder or substitution. However, the Court clarified that the defendant "should have an opportunity to show prejudice by any substitution."

Writ of Certiorari

Everly v. Knoxville Community School Dist., 774 N.W.2d 488 (Iowa 2009) (filed October, 16 2009).

Facts: Disappointed tax payer filed petition seeking writ of certiorari to stay the beginning of a school district project, naming district, successful bidder, and successful bidder's supplier as parties. School district desired to have new lights installed at the football stadium and hired KJWW Engineering Consultants to provide structural and electrical services and oversee the bidding process. Contract was awarded to ABC Electrical Contractors using Musco Sports Lighting as the supplier. District Court properly dismissed the plaintiff's cause of action seeking injunctive relief to stop the project and sanctioned Everly's attorney for the filing of the certiorari petition. Musco then filed motion to be removed claiming it was a supplier to the successful bidder. The Court of Appeals affirmed and Plaintiff's appeal.

Holding: There is no authority for the proposition that a disappointed taxpayer can bring a certiorari action solely against a supplier (Musco) to a successful bidder who allegedly improperly procured government contract without naming a government entity. Musco was not a tribunal, board, or officer subject to Iowa Rule of Civil Procedure 1.1401. *See* Iowa R. Civ. P. 1.1401 (stating, "[a] writ of certiorari shall only be granted ... where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally"). Sanctions were not warranted for joining supplier, but sanctions were warranted for pursuing certiorari claim against supplier after dismissal of school district. Court of Appeals affirmed in part and vacated in part; district court judgment affirmed in part; remanded.

Analysis: Taxpayers, in contrast to disappointed bidders, have standing to challenge a purchasing decision by a governmental entity, ordinarily through a certiorari action. Rules of civil procedure do allow joinder of parties to a certiorari action whose rights may be affected by adjudication of the action. Since plaintiff Everly dismissed the school district from the

suit prior to the final resolution, whether or not they can be joined is not at issue since a reasonable competent attorney could argue that that such a party may be joined under existing law or good faith because of Musco's financial interest in the contract.

Evidence

Admissible Evidence

Burke v. Lauz, 779 N.W.2d 79, (Iowa 2009) (filed Dec. 30, 2009).

Facts: Burke died as a result of complications of a shunt malfunction that prevented the drainage of excess fluid from his brain. Burke brought medical malpractice action against Dr. Lauz and Medical Associates of Clinton, Iowa. Claims against other parties were dismissed or settled and case proceeded to trial. Burke moved in limine to exclude defendants proposed exhibit, the University of Iowa Hospitals and Clinics home care instructions to patients, contending it was not relevant to a physician's standard of care. Court ruled that because the exhibit was not relied upon on by physicians, it was not admissible. Defendant moved in limine to exclude medical literature that plaintiffs expert intended to rely upon concerning signs of shunt malfunction and doctors standard of care. Motion denied. Defendants appealed.

Holding: If the standard of care is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the persons medical qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case. Defendants cannot establish they were prejudiced by the ruling and thus no abuse of discretion.

Analysis: The purpose of the rule limiting evidence is to avoid surprises. The admission of expert testimony rests with the discretion of the trial court and will not be over turned absent an abuse of discretion. Iowa Rule of Evidence 5.803(18) states that the following is not excluded by the hearsay rule:

Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by that witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Sweers v. Westfall, 781 N.W.2d 302, (Iowa App. 2010) (filed March 10, 2010).

Facts: Sweers was injured in a car accident by Westfall who admitted negligence for accident. Case proceeded to trial on questions of causation and damages. Sweers said he was okay at the time of the low impact accident but then later that night went seeking treatment on advice of his insurance agent telling him to get checked out. He complained of neck and shoulder pain at hospital. Months later he saw a chiropractor and admitted a prior shoulder injury. Now complaining of popping and clicking sound he saw a physician and subsequently underwent surgery. Prior to trial the District Court denied a motion by Swear to prevent Westfall from introducing evidence of preexisting conditions and to prevent the use of emergency room notes indicating he sought medical treatment on advice of insurance agent. The court denied both requests and Sweer's appeals those rulings after jury awarded him $5206.00.

Holding: In reviewing standard claims of error in admission of evidence for an abuse of discretion, error may not be predicated on a ruling which admits or excludes evidence unless a substantial right of the party is affected. The district court did not abuse its discretion in admitting the challenged evidence. Affirmed.

Analysis: The Court reviews standard claims of error in admission of evidence for an abuse of discretion. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *see* Iowa R. Evid. 5.103. The case law presented to support

Sweer's position did not bar the defendant from introducing evidence of the plaintiffs' prior conditions. Evidence of prior injuries would clearly be admissible to show the extent, if any, to which they contribute to the plaintiffs' present complaints. Typically, evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. However, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or *prejudice of a witness*.

Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, (Iowa 2010) (filed February 5, 2010).

Facts: This case involves a prescription drug consumer (Ranes) who brought action against drug manufacturer, pharmacies, and pharmacists based on multiple legal claims, including negligence, strict liability, fraudulent non-disclosure, breach of fiduciary duty, battery, and infliction of emotional distress, based upon allegation that drug manufactured and supplied by defendants (phenylpropanolamine (PPA) was cause of a brain injury or a stroke-like event that resulted in myriad of ailments. Ranes had been prescribed with this drug after he went to the doctor with complaints of a sore throat, congestion, and a stuffy nose.

Phenylpropanolamine (PPA) is a drug that was used over the course of three decades as an ingredient in many cough and cold products, as well as in appetite-suppressant products. It was approved by the Food and Drug Administration (FDA) in the 1970s as safe and effective. In November 2000, the FDA notified manufacturers and distributors of drug products containing PPA that a recent study, had found a low risk of hemorrhagic stroke among women who used weight-loss products containing PPA. The FDA did not initiate a drug recall in response to the study, but recommended drug companies discontinue marketing products containing PPA. The study found no increased risk of hemorrhagic stroke among men who used products with PPA.

Plaintiff was assessed by at least 10 medical professionals, including physicians, neurologists, and neurosurgeons. None of the medical professionals issued a possible connection between Plaintiff's condition and the ingestion of PPA. Plaintiff retained an expert, however, who would testify at trial in support of Plaintiff's claim that his ailments resulted from a brain stroke or a "stroke-like event" caused by the ingestion of PPA. Plaintiff's expert was a specialist in toxicology and primarily practiced medicine as a pediatrician. Additionally, the expert was not a neurologist and had not authored any reports or articles on the effects of PPA nor was he one of Ranes' treating physicians.

Defendants moved for summary judgment on a variety of grounds, including the claim that the expert was not qualified to render an opinion that the ingestion of PPA caused Ranes' alleged injuries, and such an opinion failed to satisfy the standard of reliability. The defendants claimed summary judgment was proper because Ranes could not establish the causation element of any of his claims without expert opinion evidence. The motion for summary judgment was preceded by a motion to exclude the opinion testimony of the alleged expert from trial.

The district court granted Defendants' motion to exclude Plaintiff's expert testimony and granted Defendants summary judgment. Plaintiff appealed.

Holding: The district court did not abuse its discretion by finding that the expert did not practice a reliable methodology in reaching his opinion that the ingestion of PPA was the cause of Plaintiff's alleged injuries. Consequently, the Plaintiff failed to offer sufficient evidence to generate a factual question for the jury on the issue of causation to support his cause of action, and the district court properly granted summary judgment. Affirmed.

Analysis: The Court scrutinized the standard for admissibility of expert testimony which has been a liberal view on the admissibility of this testimony as confirmed in *Leaf v. Goodyear Tire & Rubber Co.,* 590 N.W.2d 525, 532

(1999) (citing court's history of maintaining liberal view on admissibility).

In reviewing the district court's decision to exclude Plaintiff's expert, the Court set forth the broad two-part inquiry as to whether an expert's testimony meets the minimal requirements for admissibility: 1) whether the expert is qualified and 2) whether the expert's testimony will assist the trier of fact. *See* Iowa R. Evid. 5.702.

The Court found that Plaintiff's expert *was* qualified because the expert was a board-certified medical toxicologist and had read literature on the effects PPA potentially has on the human brain. However, the Court ruled that the expert's testimony would not assist the trier of fact because it was unreliable. Here, the expert's testimony was deemed unreliable as it was not based on established scientific evidence, but rather on a case control study that analyzed the effects of PPA ingestion in women. The Court also noted that the Plaintiff's expert extrapolated from the findings of the case control study. The case control study referenced a "stroke". Plaintiff's expert's opinion was premised on the false notion the study also encompassed a "stroke-like event."

Without the case control study, Plaintiff merely relied on case reports to support his position. The Court stated that "case reports are merely accounts of medical events. They reflect only reported data, not scientific methodology." "[T]he methodology used by the expert becomes suspect when it is only supported by case reports of limited use to the medical field." Thus the Court held that case reports are generally insufficient to ground the expert's opinion in reliable scientific data.

Insurance

Stoneking v. Federated Mut. Ins. Co., 776 N.W.2d 302, (Iowa App. 2009) (filed October 7, 2009).

Facts: This appeal arises out of an action initiated by Stoneking seeking payment of underinsured motorist (UIM) benefits from Federated after she was seriously injured in an automobile collision while a passenger in

a vehicle operated by T.C. Ryan Lee Simon. Plaintiff had previously settled with Simon's insurance carrier, as well as other carriers. Plaintiff's father had a Federated motor vehicle insurance policy for his company (ITDS) with a $500,000 UIM coverage limit. Upon initial receipt of the UIM claim, Federated mistakenly informed Plaintiff that she was "eligible for underinsured motorist benefits under the policy issued to ITDS." The parties were unable to reach a settlement agreement and suit followed. It was not until Federated's initial Answer that they realized they had made an error with regard to eligibility. Federated subsequently amended it's Answer and filed a Motion for Summary Judgment. The district court entered summary judgment and Plaintiff appealed contending the court erred in concluding 1) she was not an insured person under the Federated policy, 2) Federated's withdrawn pleading admitting she was an insured person under the policy was not an evidentiary admission creating a jury issue on coverage, and 3) no triable issue existed on her bad faith or equitable estoppel claims. Plaintiff further argued the court erred in granting summary judgment under the reasonable expectations doctrine.

Holding: Plaintiff, as a passenger in Simon's car, was not covered under the Federated policy purchased by Plaintiff's father for ITDS, and she is therefore not entitled to receive UIM benefits. Further, the record did not contain any evidence creating a factual dispute as to whether a representative of Federated represented to Plaintiff's father that his family members would have UIM coverage as passengers in non-ITDS vehicles being driven by non-employees. Additionally, the court held that any mistaken representations made by Federated to the Plaintiff after the accident was factually inapplicable in this case. Affirmed.

Analysis: Due to the nature of an insurance policy, the benefit of the doubt in the drafting is interpreted against the insurance company, and limits in coverage are construed strictly against the insurer. Construction and interpretation of an insurance policy is a question of law for the court unless the parties offer extrinsic evidence on the meaning of policy language. In this case the Court agreed with the trial court's decision in this case as they concluded that there was no genuine issue of material

fact. The Plaintiff as a passenger in Simon's car, was not covered under the Federated policy and she was therefore not entitled to receive UIM benefits. Even though Plaintiff's father testified that when he purchased the Federated policy, he believed he had obtained UIM motorist coverage for his family members there was no evidence that created a factual dispute that his family members would have UIM coverage as passengers in non-ITDS vehicles being driven by non-employees. Simon's vehicle was not on the schedule of covered ITDS automobiles, Simon was not an ITDS employee, and the Plaintiff was not otherwise an "insured" pursuant to the language in the ITDS policy and therefore there was no coverage for the Plaintiff.

Insurance/Bad Faith

Van Gelder v. Adams Mut. Ins. Assoc., 2009 WL 5126109 (Iowa App., Dec. 30, 2009) (filed Dec. 30, 2009).

Facts: Paul and Leesa Van Gelder purchased a farm, including a house, on contract from Paul's parents. Paul or his parents have continually lived in the two-story home since 1975. The home was built in the 1920's. The home was moved to its current location in the 1960's, and placed on a new foundation. Richard had anchored the basement walls during the time he owned the home. On April 15, 2006, there was a fierce windstorm. The Van Gelder's had an insurance policy with Adams Mutual Insurance Association, which covered damages to insured property caused by windstorm or hail. The Van Gelders submitted claims for damages to a machine shed, grain bin, cattle shed, farm equipment and personal property, and received $70,141.52 from Adams Mutual. The Van Gelders also asserted they had damages to three other grain bins and their home caused by the windstorm, and these additional claims are the subject of this suit. They claimed damages of $36,000 to three grain bins. They also claimed substantial structural damage to the home, including cracks in the walls, that they believed was caused by the windstorm. The Van Gelders obtained an estimate of $123,350 from a contractor for repairs to the home. The claim reps for Adams did not see

anything wrong with the grain bins and subsequently contacted an investigator to take a look at the damage to the home to determine if it was caused by the windstorm. The investigator did not feel as though the wind damage caused the damage to either the bins or the home and Adams then offered $5,067.54 for the cosmetic repairs. The Van Gelders refused the offer and subsequently filed this suit alleging breach of contract and bad faith failure to pay. Adams filed a motion for partial summary judgment on the bad faith claim which the court granted. The case proceeded to a jury trial on the issue of breach of contract. The jury found that Adams Mutual breached the contract and the breach was the proximate cause of plaintiffs' damages. The jury awarded damages of $35,000 for damages to the house, and $8000 for damages to the grain bins.

Plaintiffs filed a conditional motion for new trial and for additur. They claimed the cost to repair the home would be $106,860 to $127,000, and the jury's award of damages was inadequate. In the alternative, plaintiffs asked the court to amend the verdict by additur to increase the damages to $127,000 for the house and $16,000 for the grain bins. Adams resisted the motion.

The district court ruled that a finding that damage to the home was caused by the windstorm was not the same as a finding that *all* of the repairs were for damages resulting from the windstorm. The court noted, “[t]he evidence established that the home had preexisting need for repairs prior to the windstorm.” The court concluded the jury was free to determine, based on the evidence, which repairs were necessitated by the windstorm. The court was unable to find the verdict bore no reasonable relationship to the loss suffered. The court denied the motion for conditional new trial and additur. The Plaintiffs then appealed.

Holding: Substantial evidence existed to support the jury's verdict. Because there was evidence the house had structural damage prior to the windstorm, the evidence supported a finding that not all of the damages claimed by

plaintiffs were caused by the windstorm. The district court did not abuse its discretion by denying the motion for new trial based on a claim the jury's verdict was not supported by sufficient evidence. As far as the motion for summary judgment the Court concluded that the district court did not err in determining that as a matter of law plaintiffs were unable to prove their bad faith claim against the insurer as their claim was fairly debatable. Affirmed.

Analysis: In Iowa there is a common-law cause of action against an insurer for bad-faith denial of insurance benefits. A plaintiff must show: (1) the insurer had no reasonable basis for denying the plaintiff's claim; and (2) the insurer knew or had reason to know that its denial was without a reasonable basis. In determining whether an insurer's actions had a reasonable basis, the Court considers whether the insured's claim is fairly debatable, either in law or fact. A claim is fairly debatable' when it is open to dispute on any logical basis and may generally be determined by the court as a matter of law. At the time Adams offered $2094 for the repairs to the home an insurance investigator had inspected the home and gave the opinion the structural damage to the home had not been caused by the windstorm, and this gave Adams a reasonable basis for its action. Further, substantial evidence supported a jury's verdict than an insurer was required to pay $35,000 for damage to a house, and $8000 for damage to the grain bins caused by windstorm. Evidence on the record indicated that the house had structural damage prior to the windstorm which supported the jury's finding and determination of damages.

Insurance/Duty to Defend

McNeilus Hog Farms v. Farm Bureau Mut. Ins. Co., 781 N.W.2d 101 (Iowa App. 2009) (filed Feb. 24, 2010).

Facts: In this case, the plaintiffs entered into a contract feeding agreement with a hog supplier and a feed producer. The plaintiffs agreed to provide the hogs owned by the hog supplier with feed purchased from the feed

producer, and they agreed to lease a building to the hog supplier for housing the hogs. The hog building was equipped with a ventilation system to allow gases from the manure pits to escape when the pits were pumped, however this system malfunctioned and approximately 808 hogs suffocated and died. The hog supplier sued the Plaintiffs among others for losses sustained due to the death of the hogs. The plaintiffs then properly notified its liability insurance provider, Farm Bureau, of the loss. Farm Bureau declined to provide coverage for the lawsuit against the Plaintiffs. The Plaintiffs consequently sued Farm Bureau claiming it owed a duty to defend and indemnify them for their legal costs in the lawsuit against them. Both parties filed motions for summary judgment. Following a hearing, the district court considered and rejected several exclusions to coverage raised by Farm Bureau, but ultimately agreed that a "pollution" exclusion in the insurance policy applied. Based on that exclusion, the court concluded that Farm Bureau did not have a duty to defend and indemnify the plaintiffs in the underlying litigation. This appeal followed.

Holding: Insurer was not obligated to defend custom farmers from a suit for the death of hogs because the "business pursuits" exception in the insurance policy applied. The policy excepted from its definition of "business" custom farming grossing less than $3,000, and included custom farming grossing more than $3,000. While "farming" was excluded from the definition of "business," "custom farming" was separately defined and included in the definition of "business."

Analysis: The law governing an insurer's duty to defend and indemnify is well established: An insurer's duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case. "The insurer has no duty to defend if after construing both the policy in question, the pleadings of the injured party and any other admissible and relevant facts in the record, it appears the claim made is not covered by the indemnity insurance contract." The Court examined the "business pursuits" exclusion in the policy and did not address the applicability of

the pollution exclusion clause which gave rise to summary judgment in favor of the Defendant. Farm Bureau argued that since the custom hog farming operation grossed more than $3,000 annually, the operation was a commercial business pursuit and not a farming enterprise. That position was based on language in the policy that said a "business" does not include "custom farming, including garden plowing, performed by an insured where the gross annual receipts for all such activities do not exceed $3,000" and where "custom farming" was defined as "any farming operation performed by you for others for a charge under any contract or agreement, written or oral." The policy defined "farming" as "the process of investment, management or labor to produce agricultural products." Based on that policy language, the appellate court agreed that Farm Bureau was not obligated to defend and indemnify the plaintiff.

Insurance/Breach of Fiduciary Duty

Farm Bureau Life Ins. Co. v. Chubb Custom Ins. Co, 780 N.W.2d 735, (Iowa 2010) (filed April 9, 2010).

Facts: In October 1999, John and Mary Smith applied for life insurance through Farm Bureau Life Insurance Co. Both Smiths were discovered to be infected with the HIV virus, and Farm Bureau denied their applications "due to the blood profile results" and requested authorization to disclose the results to the applicants' physicians. The Smiths did not grant Farm Bureau a requested authorization to disclose the results to their physician, and as a result did not learn of their HIV status until two years later. The Smiths later sued Farm Bureau alleging negligence in failing to report their HIV status either to the state of Wyoming or to themselves, and in failing to inform them that Farm Bureau would not tell them during the application process whether their blood test results tested positive for HIV. The claim was ultimately settled. Farm Bureau subsequently sought coverage and reimbursement for costs incurred in the underlying settlement from its liability insurers, Chubb Custom Insurance Co., Federal Insurance Co. and Great Northern Insurance Co. The liability

insurers denied coverage, and Farm Bureau sued them alleging breach of contract. The insurers filed a motion for summary judgment. A trial court concluded that Farm Bureau failed to give Chubb or Federal timely notice of the Smiths' claims, and that no coverage was owed by Great Northern or Federal based on policy exclusions thus granting the motion for summary judgment. Farm Bureau appealed.

Holding: The life insurer failed to give timely notice of the underlying claims as was required in the company professional liability (ICPL) policies; insurer did not waive right to timely notice; and that coverage was barred under the plain language exclusions for insurance-related activities. Affirmed.

Analysis: The Court concluded that Farm Bureau failed to give notice to Federal within 90 days after the termination of the policy period as required to trigger a coverage obligation. Additionally, exclusions contained in the Federal and Great Northern policies clearly and unambiguously excluded coverage for acts arising as a consequence of an insurer-applicant relationship. Given the clarity of the exclusions and the fact they were not unconscionable, a reasonable person could not have understood that coverage would exist for the Smiths' claims.

Nationwide Agri-Business Ins. Co. v. Goodwin, 782 N.W.2d 465, (Iowa 2010) (filed May 21, 2010).

Facts: Automobile insurer brought declaratory judgment action against insured, seeking judgment that it had no duty to defend insured in litigation brought by pedestrians who were involved in accident with rental car that insured had lent to his uncle. Uncle killed one pedestrian and seriously injured other when Goodwin let uncle drive rental car that he admitted he was excluded from doing under the rental agreement. District Court granted insured summary judgment indicating his insurance company needed to defend him.

Holding: Insurer owes no duty to defend insured due to policy's reasonable belief exclusion. District court's judgment reversed and remanded.

Analysis: The Court concluded that, assuming Goodwin's loaning of the vehicle to his uncle constituted use within the meaning of the policy definition of "insured," the policy exclusion applied because, as a matter of law, Goodwin could not have had a reasonable belief he was entitled to use the vehicle in this manner.

The Court also held that Nationwide was entitled to summary judgment on Goodwin's claim based on the doctrine of reasonable expectations. Goodwin's abstract understanding that any use of the rental car by him would be covered by his automobile policy did not give rise to reasonable expectation of coverage.

Judgment and Limitation of Action

Van Sloun v. Agans Bros., Inc., 778 N.W.2d 174, (Iowa 2010) (filed February 5, 2010).

Facts: Former commercial tenant brought declaratory judgment action against landlord, seeking a determination that its obligations under the lease were discharged because landlord had unreasonably withheld its consent to a sublease. Landlord counterclaimed, seeking contract damages for former tenants failure to pay rent and for attorney fees. Van Sloun's prospective tenant was to be an Indian grocery store preparing some snacks. This would have required altering the leased premises to include kitchen facilities and would have affected other tenants in the building with odors and interference with delivery schedules of other tenants. After a bench trial, the District Court found that landlord (Agans Bros.) reasonably withheld consent to sublease and awarded attorney fees. Tennant appealed. Affirmed in part and reversed in part as to the fee question.

Holding: As a matter of first impression, if a lease provides that the landlord's consent to assignment of the lease or subletting shall not be reasonably

withheld, the landlord may withhold consent only if a prudent person in the landlord's position, exercising reasonable commercial responsibility, would have a good faith and reasonable objection to assignment of the lease or subletting. Landlord reasonably withheld consent to tenant's proposed sublease. Former tenant failed to preserve for appellate review a claim that attorney fees should not have been taxed as costs because landlord had not filed an affidavit declaring that there was no fee sharing agreement.

Analysis: Action in which former commercial tenant sought declaratory judgment that its obligations under the lease were discharged because landlord had unreasonably withheld its consent to a sublease, and in which landlord counterclaimed for contract damages for former tenant's failure to pay rent and for attorney fees, was legal rather than equitable. Generally an action on contract is treated as one at law. Where the basic rights of the parties derive from the non-performance of a contract, where the remedy is monetary, and where the damages are full and certain, remedies are usually provided by actions at law, and equity has no jurisdiction. If, both legal relief and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue. The controlling issue was which party breached the lease, trial court ruled on objections, and trial court issued a ruling and judgment entry, not a decree. Because leases are contracts as well as conveyances of property, ordinary contract principles apply. If the court finds that no ambiguity exists, contract interpretation and its legal effect are questions of law for the court. There is a general balancing test in determining the reasonableness of withholding to right to sublet. This determination, if supported by substantial evidence will be binding on the reviewing court. Factors were (1) the financial responsibility of the proposed assignees, (2) the original tenants failure to comply with lease conditions, (3) the original tenant's failure to indicate a willingness to remain obligated on the lease, (4) the legality of the proposed use and need for alteration of the premises, and (5) the nature of the existing use and proposed use by the tenant.

Statute of Limitations

Dillenburg v. Campbell, 781 N.W.2d 303, (Iowa App. 2010) (filed March 10, 2010).

Facts: Campbell entered into a 10 year lease of farm land with Dillenburg with option to buy within two years of expiration of lease. Dillenburg moves to Wisconsin and daughter takes over financial affairs. Daughter received and cashed multiple checks from Campbell with word option in the memo line. Dillenburg dies and daughter/executor does not send notice to Campbell as an interested party. Estate closes and Dillenburg receives title to property. Campbell notifies Dillenburg he wants to exercise his option to buy. Dillenburg claimed to have no knowledge of the option and that Campbell was barred from making such claim because the estate had closed and the statute of limitations governing claims had lapsed. Campbell then sued seeking specific performance. District Court granted Campbell request for specific performance. Affirmed.

Holding: District Court found that Dillenburg had sufficient knowledge required to give notice to Campbell. Because the executors of Dillenburg's estate had not given the required notice to a reasonably ascertainable claimant then Campbell's claim was not barred. Specific performance ordered to allow Campbell to exercise option to buy.

Analysis: Review is de novo because this was an equity action. At any time during the pendency of administration that the executor has knowledge of the name and address of a person believed to own or possess a claim which will not or may not be paid or otherwise satisfied during administration, provide notice to claimant at last known address. Iowa Code section 633.410(1) provides for a statute of limitation on claims:

All claims against a decedent's estate, other than charges, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, are forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within the later to occur of four months after the date of the

second publication of the notice to creditors or, as to each claimant whose identity is reasonably ascertainable, one month after service of notice by ordinary mail to the claimant's last known address. However, if an executor fails to give notice to a reasonably ascertainable claimant, section 633.410(1) does not bar the claimant's claim. *Stewart v. DeMoss,* 590 N.W.2d 545, 548 (Iowa 1999) ("[I]f the identity of a claimant is reasonably ascertainable, the claimant's claim is not barred until one month after service of notice by ordinary mail to the claimant's last known address.").

Jurisdiction/Pretrial orders

Reis v. Iowa Dist. Court for Polk County, 2010 WL 1816246 (Iowa, 2009) (filed May 7, 2010).

Facts: Reis and her attorney husband were held in contempt in the district court for violation of a protective order prohibiting disclosure of confidential documents obtained through discovery in subsequently dismissed employment discrimination litigation. The Court of Appeals reversed. Decision of Court of Appeals vacated; writ sustained in part and annulled in part and case remanded.

Holdings: (1) Trial Court had jurisdiction to enforce protective order through contempt proceedings. (2) Trial court did not have jurisdiction to enforce settlement agreement through contempt proceedings (3) Evidence supported finding that employee's husband "used" confidential documents in violation of protective order. (4) Evidence did not support findings that employee used or disclosed confidential documents. (5) Award of fees was within the remedies available for violation of protective order. Thus, the contempt finding for an attorney whose "enthusiastic use" of documents covered by a protective order which included a suggestion that he would make the documents or their content public if defendant had not "cleaned house" was appropriate. If the attorney believed that documents had been deemed confidential improperly, he should have sought such a determination from the court.

Analysis: Courts do retain jurisdiction to enforce orders that remain in effect. The power of a court to enforce its orders, in the absence of a stay, is essential to the discharge of its duties. As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed. This is especially true of discovery related protective orders. If the parties were free to disclose confidential information upon dismissal of a case, protective orders would cease to fulfill their intended purpose which is to encourage full disclosure of all relevant information.

Christenson v. First Nat. Bank Of Sioux Center, 781 N.W.2d 302, (Iowa App. 2010) (filed March 10, 2010).

Facts: Christenson appeals from the district court dismissal of his suit as sanction for failing to comply with discovery orders. Christenson filed suit against defendants in Sept 07. In Feb of 08 district court granted Banks motion to compel discovery. In March 08, district court granted Banks order for sanctions after Christenson took 100 days to provide discovery requested. In May 08, district court granted Banks supplemental motion to compel after responses to interrogatories determined to be inadequate. In July 08, the district court entered an order for attorneys fees following a hearing. Christenson continued to fail to comply with court orders and to discovery demands. In March of 2009 the court dismissed.

Holding: Trial court did not abuse its discretion in dismissing the debtor's suit for fraud as a discovery sanction since the debtor repeatedly failed to timely respond to discovery. Court found Christenson's actions of failing to timely respond to discovery and his actions in failing to give credible evidence to be willful and for the sole purpose of interfering with the judicial process. Fed. Rules Civ.Proc.Rule 37, 28 U.S.C.A

Analysis: In order to justify the sanction of dismissal, a party's noncompliance with a courts discovery orders must be the result of willfulness, fault or bad faith. The reviewing court must be satisfied that substantial evidence

supports any factual findings necessary to the courts exercise of its discretion. The district court noted that dismissal of an action for a party's noncompliance with court orders was a drastic sanction. It considered Plaintiff's course of conduct throughout the proceedings, noted the prior sanctions imposed, and Plaintiff's failure to comply with court orders and sanctions. The district court concluded Plaintiff's "actions in failing to timely respond to discovery and his actions in failing to give credible evidence to be willful and done for the sole purpose of interfering with the judicial process which was appropriate.

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Copies of specific presentations may be obtained by contacting:

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